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Retail Price Ceilings and the Rule of Reason

by Jay Conison*
Chicago, Illinois

A "retail price ceiling," as the term is used here, is a maximum price that (1) a manufacturer, franchisor or supplier¹ (2) allows a retailer with whom he is in a distributional relationship (3) to charge consumers (4) for products or services in which the manufacturer has an interest. Since retail price ceilings keep prices low and thereby benefit consumers, there would seem, at first glance, to be nothing wrong or improper with them. Yet, under present antitrust law, retail price ceilings are unlawful *per se*: they are always unlawful under section 1 of the Sherman Act,² and the trier of fact will not listen to justifications.

A well-known trend in recent years has been to construe and apply the antitrust laws exclusively by reference to economic principles.³ Advocates of an exclusively economic approach to the antitrust laws argue, on theoretical grounds alone, that retail price ceilings should always be lawful or, at least, that the lawfulness of the practice should be subject to a rule of reason.⁴ To be sure, economic analysis has long been viewed as a helpful and legitimate method for construing and applying the antitrust laws. However, primary reliance on it has been rejected by Congress⁵ and has been heavily and repeatedly criticized by legal scholars.⁶ Moreover, as will be seen below, the prohibition of retail price ceilings rests almost entirely on a libertarian, rather than an economic, rationale. Thus, even if the present standard of *per se* unlawfulness is unjustified and retail price ceilings indeed are sometimes reasonable and desirable, theoretical economic arguments are not likely to be the most compelling ones to effect a change in the law.

There are, however, practical business arguments for softening the ban on retail price ceilings. What is curious about



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the present state of the law is that retail price ceilings are of antitrust concern only when they are used in a distributional relationship. Where there is no distributional relationship—where, for example, the party attempting to place a ceiling on a dealer's retail price can be viewed as a consumer, rather than as a manufacturer—there is no *per se* violation of section 1.⁷ Yet, in a distributional relationship, the manufacturer inevitably has some interest—often a legally recognized and protected one—in the product or service sold by the dealer and in the manner of its sale. Such interest may be by virtue of the manufacturer's role, for example, as a trademark licensor or as a party potentially subject to liability for defects. Yet that business interest, which is a precondition of the manufacturer's vulnerability to antitrust liability, may be an interest which, when examined more closely, justifies some form of manufacturer involvement in the retailer's pricing.

The following discussion shows some of the business interests recognized as permitting manufacturer involvement in retail pricing, the scope of their present acceptance by
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retail price ceilings

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courts, and their potential for further application. First, though, one must understand how the prohibition of retail price ceilings developed.

I. The Rationale and Effect of the Present Prohibition

In its 1940 decision, *United States v. Socony-Vacuum Oil Co.*,⁸ the U.S. Supreme Court explained its finding of the illegality of a cartel by stating that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."⁹ The reference to "depressing" prices was dictum, but it was the first suggestion by the Court that maximum price fixing, at least by competitors, might be *per se* illegal. The suggestion was made into a rule ten years later in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*¹⁰ There the Court, relying solely on the unelaborated dictum in *Socony*, held that agreements between competitors to fix maximum prices for the resale

Price ceilings are illegal mainly because they "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

of their products are *per se* illegal. In the Court's view, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."¹¹

Kiefer-Stewart, since it involved an agreement to fix resale prices, and because its rationale was protection of the freedom of traders, suggested a further rule: that a retail price ceiling imposed by a single manufacturer, even on a single dealer, might be *per se* illegal.¹² In 1968, the Supreme Court, in *Albrecht v. Herald Co.*,¹³ held such a rule to be the law.

Albrecht was a newspaper case. The Herald Company granted exclusive territories to independent carriers. To prevent abuse of the local monopolies it had created, the newspaper advertised suggested retail prices and provided in the distributorship agreement that the agreement would be terminated if prices exceeded the advertised maximum.¹⁴ Plaintiff, a carrier, raised his prices and, after the paper's

efforts to bring his prices in line failed, his distributorship was terminated.

With little ado and less analysis, the Court held that a retail price ceiling automatically violates section 1 of the Sherman Act. Echoing the language of *Kiefer-Stewart*, it stated that:

Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market.¹⁵

The Court rejected the defense, which had been accepted by the court of appeals, that a price ceiling was necessary to protect the public from "price gouging" by the carriers.

The important result of *Albrecht*, beyond its mere holding unlawful of retail price ceilings, was to help make protection of the pricing independence of retailers the preeminent concern of the Sherman Act. So important was this concern that the Court held interference with the pricing activity of a single retailer, irrespective of effect on market conditions, to violate section 1.

Albrecht should be contrasted with *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,¹⁶ the case holding minimum retail price maintenance to be unreasonable. The Court there, unlike in *Albrecht*, reached its conclusion through examination of market impact. In that case, a vast number of retailers were part of the price maintenance system, and, as a consequence, the system had the market effect of a retailer cartel.¹⁷ The Court had already held that retailer cartels violate the Sherman Act.¹⁸

Consistent with its concern for market effect, the *Miles* Court, in dictum, suggested that a "single transaction, conceivably unrelated to the public interest," might be upheld.¹⁹ But the price-fixing combination in *Albrecht* was not marketwide: it arose only between the newspaper and the plaintiff and only when the plaintiff had violated the suggested prices and the newspaper then sought to compel adherence. As a result, in holding that this combination violated the Sherman Act, the Court discarded the "single transaction" exception and held illegal *per se* isolated restraints on the pricing discretion of an individual retailer.²⁰

II. Unacceptability of the *Albrecht* Rule to Lower Courts

The rule of *Albrecht* is that any coercive or contractual restriction by a manufacturer on a dealer's discretion to charge as much as he wants violates the Sherman Act.²¹ The Supreme Court has not had occasion explicitly to reconsider the holding, but in *Arizona v. Maricopa County Medical Society*,²² it reaffirmed, in strong dictum, that price ceilings are illegal, mainly because they "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."²³

Notwithstanding the dictum in *Maricopa County*, the holding in *Albrecht* is vulnerable to judicial limitation. Its weakness is not that it represents bad economic theory. Rather, the problem is that the decision is based on an untenable view of the nature of marketing and distribution.

Lower federal courts have been uncomfortable with *Albrecht's per se* prohibition and have groped for reasons that might justify a manufacturer's restricting the discretion of

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dealers to charge as much as they want. In this way, courts have recognized certain interests of a manufacturer to be so compelling as to justify interference in a retailer's pricing.

One approach to escaping the *per se* prohibition was taken in *Consortium, Inc. v. Knoxville International Energy Exposition*.²⁴ There, the defendant was the owner of certain trademarks. It licensed one of the plaintiffs to sell products not manufactured by the defendant but marked with the defendant's trademarks. The licensing agreement provided that the licensee would, at the outset, obtain the defendant's approval of a list of maximum prices for goods so marked and would increase those prices only with the written approval of defendant. The licensee challenged the license as a contract to fix maximum prices. The court not only disagreed, but it granted summary judgment for the defendant, reasoning that the parties did not enter into a resale arrangement, but instead "merely entered into a joint venture or 'partnership' by which the trademark owner shared its goodwill with the licensee in exchange for a share of profits."²⁵ A partnership, which by its nature requires parties to agree on price, does not violate the Sherman Act.²⁶ Thus, on the court's analogical reasoning, the licensor-"partner" was privileged to participate in the resale pricing of the goods. The court thus held the rule of reason to apply to the arrangement and then held the arrangement legal.

The approach of the court in *Consortium* may easily be generalized. In particular, the reasoning applies to any business format franchising relationship—one in which the franchisor licenses the franchisee to use its trademarks and business format.²⁷ Consequently, retail price ceilings, when used in this very common form of distribution relationship, would virtually be immune from antitrust attack. But it is doubtful that courts at present would allow the rationale of *Consortium* to be extended so far.

A more restrained approach has been taken by the Seventh Circuit Court of Appeals. There, the court did not analogize the manufacturer-dealer relationship to some other legal or economic relationship and did not discover an essentially unlimited privilege of the manufacturer to participate in retail pricing. Instead, the court took the manufacturer-dealer relationship for what it was and found a limited domain in which the manufacturer's control of maximum price was sufficiently justified as not to be barred *per se*. In *Jack Walters & Son Corp. v. Morton Building, Inc.*,²⁸ a manufacturer of prefabricated farm buildings often would advertise special deals, involving reduced prices, directly to consumers. Dealers were given a discount; they were also threatened with termination if they went above the advertised price, and they were monitored for compliance. The court held the practice to be permissible. In the court's view, in the context of price promotions, the manufacturer's interest in assuring the truthfulness of the promotions could legitimate substantial control of the dealers' prices:

If it is lawful to advertise a retail price [as the parties agreed it was], it should be lawful to take at least the minimum steps necessary to make that advertising beneficial. It would be pretty embarrassing for a manufacturer who had advertised a special retail price to be bombarded by complaints from consumers that dealers were refusing to sell them at that price. Such refusals would make the advertising misleading and might even expose the manufacturer to legal sanctions under the Federal Trade Commission Act or counterpart state regulations. So if retail price advertising by manufacturers is to be feasible the manufacturer must be allowed to take reasonable measures to make sure the advertised price is not exceeded. These measures include trying to persuade dealers to adhere to the advertised price and checking around to make sure they are adhering. These are the respects in which Morton is alleged to have gone beyond the simple announcement of policy and refusal to deal with noncompliers that would be permissible even if it were trying to get its dealers to adhere to its suggested retail prices across the board. They are the minimum steps that Morton had to take if its advertised price was to have any value at all, and they are therefore lawful.²⁹

Thus, a manufacturer has the right to involve itself substantially in dealer pricing during an advertised promotion where the manufacturer's involvement is reasonably necessary to make the price promotion effective. Unlike the result in *Consortium*, the result in *Walters* is plausible, precisely because it is based on a realistic view of the manufacturer's interest in the retail stage of distribution.

III. The Propriety of Cooperation in the Distribution Process

Albrecht, like the cases just discussed, is susceptible to a manufacturer's-interest analysis. In the view of the *Albrecht* Court, manufacturers are merely sellers and dealers are merely buyers, their relationship not differing essentially from that of a retailer and its customers. Under *Albrecht*, a manufacturer-seller has no more legitimate interest in what its buyer-dealer does with goods he buys for resale than a

retailer has in what a consumer does with goods he buys for use. As the Supreme Court explained in a contemporaneous opinion, "[i]f the manufacturer parts with dominion over his product . . . he may not reserve control over its destiny."³⁰ Such a view of the distribution process leads inexorably to the further view that manufacturers and dealers naturally tend to become adversaries, because of manufacturers' constant, and presumptively unjustified, attempts to involve themselves in dealers' decisions as to marketing and price. In the *Albrecht* view, manufacturers are meddlers.

But the reasoning in *Albrecht* simply begs the question. The Court assumes that, upon sale to a dealer, a manufacturer "parts with dominion over his product." In particular the Court presumes that, upon sale to a dealer, the manufacturer

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abdicates all interest in the sale of the good to consumers. But the world is not as *Albrecht* presumes. Distribution is a process in which the dealer, as well as the manufacturer, might reasonably wish, and even request, that the manufacturer become involved at the retail stage. Cooperation may be helpful, if not essential, for the orderly, efficient, and profitable marketing of the goods and services. For example, in order to stimulate or improve a retailer's performance, a manufacturer, with the agreement of a retailer, might provide training of retail personnel, cooperative advertising programs, in-store promotions, incentive programs for sales personnel, selling aids, and representatives who assist and advise.³¹ Contrary to the view of *Albrecht*, it is cooperation, rather than conflict, that is the norm in the distribution process.

The Supreme Court, in *Monsanto Co. v. Spray-Rite Service Corp.*,³² has recognized the importance of manufacturer-dealer cooperation, recognized that it is normal, and recognized that such cooperation must be accounted for in the antitrust analysis of vertical restraints. As the Court explained, in upholding the propriety of cooperation through exchanges of information:

[D]istributors 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.³³

The Court then held that antitrust rules should be carefully drawn so as not to inhibit this proper and important form

of cooperation.³⁴ But if manufacturer-dealer cooperation is natural, and if legitimate manufacturer-dealer cooperation should not be prohibited, or even inhibited, by the Sherman Act, the basis for the sweeping prohibition of *Albrecht* is undermined. For as lower court decisions have come to recognize, resale price ceilings may well reflect legitimate coordination of activities between a manufacturer and its dealer.

The best example of this is promotional price advertising. It is widely recognized that price advertising, especially in connection with promotions, is a legitimate area of cooperation between a manufacturer and its dealers. Cooperative advertising of price by a group of franchisees has long been recognized as a practice subject to the rule of reason.³⁵ Furthermore, courts have held that a manufacturer's funding of promotional discounts to dealers is also subject to the rule of reason.³⁶ As *Walters* recognized, such legitimate cooperation may have the necessary effect of temporarily limiting a dealer's pricing discretion. But the temporary restriction is not illegitimate meddling by the manufacturer; it is an integral part of the manufacturer's and dealers' legitimate coordination of promotional activity.

Another example of legitimate coordination arises where a manufacturer, through superior resources, has better knowledge than the local dealer of how to price and market goods effectively. The law of resale price maintenance protects the pricing discretion of the local merchant in part (but not exclusively) because he is presumed to have better information about market conditions and to be able to respond efficiently to changes in competitive conditions.³⁷ But where that assumption is unsound, or where the manufacturer may at least usefully contribute to the pricing decision, there may be greater scope for it to participate with the dealer in setting maximum prices.³⁸ Greater freedom to become involved in retail pricing has long been recognized to be the case in consignment relationships where manufacturers are privileged to dictate prices.³⁹ Arguably, greater freedom should be allowed in many franchise relationships as well.

A third example is that of distribution systems where ongoing, close cooperation between the manufacturer and dealers is required because of factors inherent in the product or service delivered. Newspapers, for example, may require price ceilings to ensure the circulation penetration needed for the newspaper to be successfully marketed to advertisers, and thereby financially viable.⁴⁰ A nationwide restaurant franchisor may require price ceilings to ensure the maintenance of a moderate or low-price image essential to consumer appeal.⁴¹ Even a proponent of the strict prohibition of resale price maintenance observes that

[A] firm, such as a fast food franchisor, which licenses a trade name and which may sell products to be resold under this trade name . . . has a considerable interest in the resale activities of franchisees and might be given a right to participate with franchisees in price making, at least to the extent of suggesting a price and advertising it.⁴²

In cases such as these, retail price ceilings may be justified as a prerequisite to the system's operation and success.⁴³

IV. Should the Present *Per Se* Prohibition Be Modified?

If one were to put aside the history of Supreme Court decisions on the subject of retail price ceilings and determine the standard of legality simply in light of contemporary antitrust jurisprudence, then the rule of reason surely would apply. *Albrecht's* reasoning to a conclusion of *per se* illegality is unconvincing. It is true that a retail price ceiling—like any other business practice—has some potential for anticompetitive harm. But the principal harm of retail price ceilings that the Supreme Court identified in *Albrecht* is the preemption of dealers' independent judgment, which may force them to price the affected product at a level that they believe is too low. Yet preemption of dealer judgment, as a principal potential harm, for most trade practices justifies only a rule of reason standard,⁴⁴ and for others has been held to justify *per se* condemnation only where the manufacturer has substantial market power and where a significant amount of commerce is affected by the practice.⁴⁵ Indeed, in *Jefferson Parish Hospital District No. 2 v. Hyde*,⁴⁶ the Supreme Court reaffirmed that a single transaction cannot be the basis of a tying violation:

If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law.⁴⁷

Moreover, the premises which led the *Albrecht* Court to its conclusion are unconvincing as well. Contrary to the Court's presupposition that a manufacturer's involvement in a dealer's pricing must be officious meddling, retail price

Contrary to the Court's presupposition that a manufacturer's involvement in a dealer's pricing must be officious meddling, retail price ceilings may well be an expression of the manufacturer's legitimate interest in cooperating with dealers in order to facilitate distribution of the service or goods.

ceilings may well be an expression of the manufacturer's legitimate interest in cooperating with dealers in order to facilitate distribution of the service or good. As *Monsanto* recognized, such cooperation may be an activity to be protected rather than condemned by section 1 of the Sherman Act.

Even antitrust scholars who advocate a strict prohibition of retail price floors agree that retail price ceilings should

be treated more leniently.⁴⁸ Institutional inertia, however, may be an obstacle to a complete overruling of *Albrecht*. The Supreme Court has stated that well-established *per se* prohibitions, in particular those relating to price restraints, should not be abolished, except by Congress.⁴⁹ Yet the prohibition of retail price ceilings, unlike the prohibitions of cartels and of retail price floors, is arguably a recent innovation. In addition, unlike those other prohibitions, it is one that has been almost unanimously criticized by scholars and one that is troublesome to the lower courts. Its status is like that of the prohibition of manufacturer-imposed customer and territorial restrictions in 1977. At that time, the Supreme Court overruled a decision that it had rendered only ten years prior, which held such restrictions to be *per se* illegal.⁵⁰ Overrule of *Albrecht* thus has some institutional precedent.

But even if *Albrecht* is not overruled, its holding should be cut back. The decision rests on a faulty notion of distribution, in supposing that a manufacturer never has a legitimate interest in how a product or service is priced for sale to consumers and in supposing that cooperation between a manufacturer and its dealers regarding price ceilings is never legitimate. The premise is wrong in the case of price promotions and wrong in the case of many franchise relationships. In the cases where manufacturer involvement in retail pricing reflects normal, desirable activity to facilitate distribution, a rule of reason standard for liability should be applied.

Footnotes

1. Henceforth, any of the three will indifferently be referred to as a "manufacturer."

2. 15 U.S.C. § 1 (1982).

3. See, e.g., R. BORK, *THE ANTITRUST PARADOX* (1978); Easterbrook, *Vertical Arrangements and the Antitrust Laws*, 53 *ANTITRUST L.J.* 135 (1984).

4. E.g., Easterbrook, *Maximum Price Fixing*, 48 *U. CHI. L. REV.* 886 (1981); Blair & Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 *U. FLA. L. REV.* 461 (1981); Halligan, *GTE Sylvania: The Case for Overruling Albrecht v. Herald Co.*, 39 *OHIO ST. L.J.* 496 (1978). Under a rule of reason analysis, effects of and justifications for a practice are examined to determine whether the practice is competitively reasonable. See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

5. See, e.g., Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1986, Pub. L. No. 99-180, § 605, 99 Stat. 1136, 1169 (1985).

6. See, e.g., Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 *GEO. L.J.* 1511 (1984); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *CORNELL L. REV.* 1140 (1981).

7. See, e.g., *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985) (plaintiff seller of services to defendant; attempt to control price of services not *per se* violation of section 1).

In *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984), cert. denied, 471 U.S. 1029 (1985), defendant health insurer entered into agreements with physicians, whereby the physicians agreed to accept as full payment for their treatment of insured patients an amount determined by defendant. They further agreed not to charge any additional sum to the patient. *Id.* at 923. The practice could have been viewed either as (1) an

agreement setting a maximum price that physician-sellers could charge patient-buyers, which presumably would be *per se* unlawful, or (2) an agreement whereby the insurer-buyer itself purchases services from physician-sellers for the benefit of patients., *Id.* at 930. In the latter case, the arrangement, since nothing more than a contract to buy services for others, in the court's view would not be retail price maintenance and thus would be governed by the rule of reason. The court chose to view the practice in the latter fashion and so rejected a *per se* analysis. *Id.*

8. 310 U.S. 150 (1940).

9. *Id.* at 223.

10. 340 U.S. 211 (1950).

11. *Id.* at 213. The evolution of the prohibition of price fixing through *Kiefer-Stewart* is analyzed in Comment, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose or Effect*, 19 U. CHI. L. REV. 837 (1952).

12. *But see* 340 U.S. at 214 (each defendant "acting individually perhaps might have refused to deal with petitioner") (dictum).

13. 390 U.S. 145 (1968).

14. *Id.* at 147.

15. *Id.* at 152. The Court further reasoned that:

[C]ompetition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.

Id. at 152-53 (footnote omitted). This analysis is criticized by Justice Harlan, in dissent:

The question in this case is not whether dictation of maximum prices is ever illegal, but whether it is *always* illegal. . . . The best the Court can do is to list certain unfortunate consequences that maximum price dictation might have in other cases but was not shown to have here.

390 U.S. at 165 (emphasis in original). *See also* Easterbrook, *supra* note 4, at 888-90; Elman, "Petrified Opinions" and Competitive Realities, 66 COLUM. L. REV. 625, 633 (1966).

16. 220 U.S. 373 (1911).

17. *Id.* at 408.

18. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 244-45 (1899).

19. 220 U.S. at 407. Contemporary understanding of the case was that it did not extend it to isolated contacts "unrelated to the public interest." Dunn, *Resale Price Maintenance*, 32 YALE L.J. 676, 677 n.8, 679 n.15 (1923).

20. *See* 390 U.S. at 162 (Harlan, J., dissenting).

21. However, a manufacturer may suggest retail prices and noncoercively try to persuade a dealer to follow them. *See, e.g., Gray v. Shell Oil Co.*, 469 F.2d 742, 748 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

22. 457 U.S. 332 (1982).

23. *Id.* at 346 (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)).

24. 563 F. Supp. 56 (E.D. Tenn. 1983).

25. *Id.* at 60. *Cf. Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1192-93 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) (K-Mart and grocery concession that operated in same building under "K-Mart" name were akin to partners; K-Mart thus could impose contractual restrictions to keep concessionaire's prices low).

26. *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 567 (1898).

27. For a general discussion of this type of business relationship, see 15 GLICKMAN, FRANCHISING § 2.02[2], at 2-11 (1987).

28. 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

29. *Id.* at 708 (citation omitted).

30. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 379 (1967). This case was subsequently overruled by the Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

31. J. ENGEL, M. WARSHAW & T. KINNEAR, PROMOTIONAL STRATEGY: MANAGING THE MARKETING COMMUNICATIONS PROCESS 555-75 (4th ed. 1979).

32. 465 U.S. 752 (1984).

33. *Id.* at 763-64.

34. *Id.* at 764.

35. *See In re Nissan Antitrust Litigation*, 577 F.2d 910, 916 (5th Cir. 1978), *cert. denied sub. nom. P.D.Q. Inc. v. Nissan Motor Corp.*, 439 U.S. 1072 (1979); *Nelligan v. Ford Motor Co.*, 262 F.2d 556, 558 (4th Cir. 1959).

36. *Lewis Serv. Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845 (8th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1207-08 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983).

37. *See supra* note 15 and accompanying text.

38. *See* A. Silberman, *Monsanto, Jack Walters and Beyond—Expanding Notions of Legitimate Franchisor Conduct in Price Related Activity* (ABA Forum Comm. on Franchising, Materials from 9th Annual Meeting (1986)).

39. *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1438 (7th Cir. 1986).

40. *See Fair Trade Laws: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

41. Elman, *supra* note 15, at 633.

42. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 398 (1976).

43. *See NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (rule of reason applied to horizontal restraint because "horizontal restraints on competition are essential if the product is to be available at all").

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

45. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-13, 15-19 (1984) (tying arrangements).

46. *Id.* at 2.

47. *Id.* at 16.

48. *E.g., Elman, supra* note 15; Scherer, *Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 705-06 (1983); Pitofsky, *In Defense of Discounters: A No Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1490 n.17 (1983).

49. *E.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 354-55 (1982).

50. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *Continental T.V.* overruled the Court's decision reached in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

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