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CALENDAR MARKETING AGREEMENTS: HOW MUCH LONGER TILL THE SODA SPILLS?

As far back as the seventeenth century courts expressed an interest in protecting free trade among the members of society.¹ With the onset of the nineteenth century and the advancement of industrialization, Congress deemed it necessary to protect this interest through the enactment of a law² that preserved free and unfettered competition: The Sherman Antitrust Act (the Act).³

¹ See *Darcy v. Allen*, 77 Eng. Rep. 1260 (K.B. 1602); *Colgate v. Bacher*, 78 Eng. Rep. 1097 (K.B. 1601); *Davenant v. Hurdis*, 72 Eng. Rep. 769 (K.B. 1599). See also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898) (Judge Taft stated that from early times it was England's policy to discourage unreasonable restraints of trade), *modified and aff'd*, 175 U.S. 211 (1899); 1 E. KINTNER, FEDERAL ANTITRUST LAW § 1.3, at 8-9 (1980) (summary of non-intervention or "laissez faire" economics).

² See 1 H. TOULMIN, JR., A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES § 4.1, at 93 (1949 & Supp. 1980). Following the Civil War, competitors began to enter into combinations and agreements which were highly profitable but stifling to economic competition. *Id.* Over-production and rapid deflation impelled some worried merchants to enter into combinations to restrict production. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 207, 213-19 (1926). These combinations and agreements arose in the form of trusts, thereby creating the phrase "antitrust". See Best, *The Antitrust Controversy—A Survey*, 17 BUS. LAW. 859, 860 (1962). Trusts were organized by retaining shareholders from rival companies who would transfer their shares to trustees who acquired the authority to regulate them. 1 H. TOULMIN JR., *supra*, § 4.4, at 95. This authority, granted to trustees, empowered them to control and manipulate the participating companies. *Id.* These trusts and other anticompetitive arrangements were negatively viewed due to their enormous size and economic power. See 1 E. KINTNER, *supra* note 1, § 4.2, at 129 (1980).

An example of such an anticompetitive agreement was the Standard Oil Company trust. See *Standard Oil Co. v. United States*, 221 U.S. 1, 34 (1911). The trust, developed by the Standard Oil Company, was an agreement which detailed the procedure for controlling and administering jointly held property. *Id.* at 35-36. The purpose of this trust agreement was to fix oil prices, restrict oil production and govern the transportation of all manufactured oil. *Id.* at 32. "In effect, the oil industry in the United States became concentrated in the hands of nine trustees." *Id.*

³ 15 U.S.C. §§ 1-7 (1982).

Section one of the Sherman Act states in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *Id.* § 1 (West Supp. 1988). Furthermore, section two of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." *Id.* § 2.

Fueled by the economic depression of the 1870's and 1880's, there was a great public

The purpose of the Act was to protect free competition and promote economic efficiency.⁴ As stated in *Northern Pac. Ry. Co. v. United States*:⁵ "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition, . . . the [resulting] unrestrained interaction of competitive forces . . . yielding the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress"⁶ Since passage of the Act in 1890, courts have held various arrangements and agreements devoid of competitive value. Several forms of conduct found to be illegal under the Act include horizontal price fixing,⁷ horizontal

outray for a federal statute to demolish the power of trusts. See C. ANDERSON HILLS, *ANTI-TRUST ADVISER* 4 (3d ed. 1985). The passage of the Sherman Act was viewed as a "good-faith effort" to restrain the "uncontrolled power of the trusts." See M. HOFFMANN & A. WINARD, 1 *HOFFMANN'S ANTITRUST LAW AND TECHNIQUES* 5 (1963). See also Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 235 (1956) (trusts blamed for almost everything from bribed civil servants to unemployment). See generally 1 H. TOULMIN, JR., *supra* note 2, § 1.17-18, at 21-22 (discussing legislative history of Sherman Act).

⁴ See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (purpose of Sherman Act was to maintain "free and unfettered competition"); *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951) ("Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." (quoting *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 455 (7th Cir. 1943))); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) (aim of Sherman Act to "prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor"); *Standard Oil Co.*, 221 U.S. at 50. The Court stated that the primary impetus for passage of the Sherman Act was to prevent "the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, . . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." *Id.*; see also D. ARMENTANO, *ANTITRUST POLICY* 9 (1986) (competition permits most efficient firms to survive, thereby allowing consumer opportunity to purchase a better product); L. SULLIVAN, *ANTITRUST* 20 (1977) (purpose of antitrust laws is to preserve competition); 1 H. TOULMIN, JR., *supra* note 2, § 4.4, at 96 (preserving freedom of competition purpose of Sherman Act). See Best, *supra* note 2, at 860. Uninhibited competition will result in the most beneficial allotment of economic assets while maintaining "democratic, political and social institutions." *Id.* Another function related to the preservation of free competition is the promotion of consumer welfare. See generally R. BORK, *THE ANTITRUST PARADOX - A POLICY AT WAR WITH ITSELF* 61-69 (1978) (competition permits consumer to reap benefits of paying lower prices for products and allows flexibility in choosing suppliers).

⁵ 356 U.S. 1 (1958)

⁶ *Id.* at 4.

⁷ See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (even if price fixed is reasonable, it is illegal); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (held any combination which interferes with or alters market price illegal); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897) (pricing agreement among members of railroad combination held illegal); see also R. GIVENS, *ANTITRUST: AN ECONOMIC AP-*

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division of territories,⁸ group boycotts,⁹ monopolization and attempts to monopolize.¹⁰ In recent years, courts have had to assess the validity of arrangements both novel in form and spanning a broad spectrum of commercial activity.¹¹ In the soft drink industry, one type of agreement which is of questionable validity is the Calendar Marketing Agreement (CMA).¹²

PROACH § 7.01, at 7-1 to 7-12 (1983 & Supp. 1988). See generally Hay & Kelly, *An Empirical Study of Price Fixing Conspiracies*, 17 J.L. ECON. 13 (1974) (analysis of price fixing violations); Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CALIF. L. REV. 667 (1970) (same).

⁸ See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 608-09 (1972) (arrangement between parties to protect territories from competitors held illegal), *aff'd*, 414 U.S. 801 (1973); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) (territorial division of market is only one of an "aggregation of trade restraints"); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 291-92 (6th Cir. 1898) (court condemned arrangement by which defendants divided territory among themselves), *modified and aff'd*, 175 U.S. 211 (1899); cf. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 575 (2d Cir. 1961) (horizontal division of customers among competitors held per se illegal).

⁹ See *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966) (economic motivation for concerted action to deprive competitors access to market is unimportant); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 614 (1914) (held boycott by retailers of their wholesalers violated antitrust laws); *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 492 n.6 (5th Cir. 1982) (distributors refusal to deal with theatre held group boycott). But see generally Note, *Barry v. St. Paul Fire & Marine Insurance Co.: A Reinterpretation of the Boycott Exception to the McCarran Act*, 1977 DUKE L.J. 1069 (certain group refusals to deal are outside the meaning of boycott based upon non-coercive form of activity).

¹⁰ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (monopolization includes both ability to form monopoly and intent to form monopoly); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1965) (attempt to monopolize requires three factors: specific intent, overt act, dangerous probability of successful monopolization). See also 3 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 831-36 (1978); L. SULLIVAN *Supra* note 4, at 134-40 (1977).

¹¹ See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356-57 (1982) (medical society's agreement setting maximum claim fees held illegal); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (beverage wholesalers' agreement to eliminate credit provided to retailers held illegal); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940) (petroleum corporation's agreement to set prices found illegal).

¹² A sample "letter of agreement" and pertinent sections contain:

[X Corp.] agrees to participate in the 19[] Business Program, . . . at a level of 26 weeks (per attached calendar) for payment of []. Promotional calendar payment to be made on . . . quarterly dates . . . [X Corp.] in consideration of the above . . . agrees to the following program elements:

- (1) Specific ad calendar.
- (2) Promotion shall be exclusive 7-day ad feature.
- (3) Price shall be reduced to feature retail level.
- (4) Price shall be communicated to the consumer with ad feature in regular method of advertisement, shelf talkers, and display sheets.
- (5) Promotional package(s) shall be supported with display in main traffic pattern, including all promoted brands and racks do not qualify as displays.

I. FORM OF THE AGREEMENT

A Calendar Marketing Agreement is a contract between a manufacturer — in this case a soft drink bottler — and a retailer, in which the soft drink bottler pays the retailer a substantial amount of money in exchange for preferential treatment.¹³ The compensation paid to retailers has ranged from a low of several thousand dollars to nearly three-quarters of a million dollars.¹⁴ Preferential treatment afforded the soft drink bottler's product includes exclusive advertising,¹⁵ prime shelf space,¹⁶ and a retail price below

(6) Package exclusivity on primary ad feature.

(7) Program elements will be communicated by chain headquarters to store level management and individual store non-performance will reduce the total payments. .

¹³ See Scott, *RC Doubles Budget Behind New Spots*, ADWEEK, Nov. 16, 1987, at 22 (eastern ed.).

Bottlers are critical in the beverage arena because they manufacture and package the products and thereafter determine to which retail stores they will sell. See E. MCCARTHY, J. GRASHOF & A. BROGOWICZ, READINGS AND CASES IN BASIC MARKETING 220 (4th ed. 1984). Therefore, the success of a product in sales, as well as profits, is dependent on the bottler who arbitrates "what goes on in the trenches, at the point of sale." See *What's Brewing for Soft Drinks in 1987*, BEVERAGE WORLD, Jan. 1987, at 22, 25 (quoting Emanuel Goldman, partner in California securities firm). Furthermore, the bottler has the power to set prices, and unless the retailer has a deal or allowance, he must absorb the loss. See Blair, *Adapt or Perish?*, BEVERAGE WORLD, Oct. 1987, at 54, 60 (quoting William J. Vitulli, Vice President of Government and Community Relations for the Great Atlantic and Pacific Tea Company). See also *Beverage Management, Inc. v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1152-53 (S.D. Ohio 1986) (CMA provides retailer with opportunity to earn bonus based on sales volume).

Although there is a federal antitrust statute concerning the soft drink industry, Pub. L. No. 96-308, 94 Stat. 939 (1986), the "Soft Drink Interbrand Competition Act" clarifies the legality of licensing provisions but does not encompass the use of CMAs. See generally Note, *The Real Thing: Special Antitrust Treatment for the Soft Drink Industry*, 30 CATH. U.L. REV. 131 (1980) (discusses history and purpose of "Soft Drink Interbrand Competition Act").

¹⁴ See *60 Minutes: Cola Payola* (CBS Television Broadcast, Oct. 25, 1987) (Coca-Cola agreed to pay a total of \$310,000 for full year CMA) [hereinafter *60 Minutes*]; Waldon, *Sharpening the Edge*, ARKANSAS BUS., Mar. 14, 1988, at 18 (CMA payments vary depending upon whether brand is advertised during holiday weekend, payday week, consecutive weeks and percentage increase in sales over past year); Bronson, *The Soda Wars-A Report from the Battlefield*, U.S. NEWS & WORLD REPORT, July 8, 1985, at 58-59 (small soft drink bottler charged that a local food chain was offered over \$700,000 by Coca-Cola Bottling Corp. for marketing plan which included provision for exclusive advertising).

¹⁵ See *Beverage Management*, 653 F. Supp. at 1146. In order to receive bonus money pursuant to a CMA, Coca-Cola must be the exclusive feature ad among directly competing national brands. *Id.* The retailer was required to run a specific number of promotions. *Id.* Plaintiff sued the soft drink distributor for loss in sales because of an inability to obtain feature advertising. *Id.* at 1147. But see Waldon, *supra* note 14, at 18 (some CMAs do not contain exclusivity provisions, leaving other brands free to feature advertise).

¹⁶ Lawrence, *Cola Wars Move In Stores*, ADVERTISING AGE, Nov. 9, 1987, at 4. CMAs re-

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other soft drinks being offered.¹⁷ Typically, a CMA ranges from one to fifty-two weeks. However, most are for a twenty-six week period with the remaining twenty-six weeks being reserved for a competing bottler.¹⁸ Although retailers may accept or reject these agreements,¹⁹ in most cases they have been persuaded to accept due to extraneous economic pressure, i.e., lucrative monetary payments.²⁰ For the manufacturer, CMAs result in its product retaining the lowest price in that specific market, maintaining high visibility, and achieving an increase in sales volume with a potential for increased market share.²¹

quire a specific amount of preferential shelf space be given to the major brands. *Id.* See Waldon, *supra* note 14, at 16. The CMA required that Coca-Cola be the exclusively advertised soft drink and have at least 60% of all natural soft drink space. *Id.* See also Dennis, *Coke and Pepsi Stomp on the Little Guys*, *FORTUNE*, Jan. 7, 1985, at 67-68 (shelf space is divided by market share: "Pretty soon Coke & Pepsi are going to squeeze everyone else out . . .").

In recent years, some small distributors have been afraid to sue the large distributors because of possible ramifications with respect to their shelf space. *Id.* The small distributor is afraid the retailer may get upset and "wipe him out by slowly reallocating shelf space to other brands." *Id.* See generally *60 Minutes*, *supra* note 14 (discussing application and trade-offs of CMAs).

¹⁷ See *Sun-Drop Bottling v. Coca-Cola Bottling Co.*, 604 F. Supp. 1197, 1199 (W.D.N.C. 1985) (CMA required Coca-Cola's product to be only soft drink with reduced price); see also Mason, *The World's Oldest War? Try Colas Coke v. Pepsi*, *THE BUS. J. CHARLOTTE*, Apr. 11, 1988, at 3 (Pepsi must lower its price to retailers with CMAs in order to compete with Coke; Waldon, *supra* note 14, at 14 (cash incentive payment in CMA is in exchange for lowest price guarantee); cf. *Beverage Management*, 653 F. Supp. at 1146-47 (bottlers offer volume incentive rebates that often decrease cost to consumers).

¹⁸ See, e.g., *Beverage Management, Inc. v. Coca Cola Bottling Corp.*, 653 F. Supp. 1144, 1146 (S.D. Ohio 1986) (CMA was for 52-week period); *60 Minutes*, *supra* note 14 (Coke gets a 26 week CMA, Pepsi gets other 26 weeks). See also Lawrence, *supra* note 16, at 4. "CMAs determine during a given period — from 12 to 26, and even 52, weeks — which of the two soft drinks will be promoted in retailer newspaper ads." *Id.*

¹⁹ See *Beverage Management*, 653 F. Supp. at 1466. The retailer was "free to take advantage of the promotional offer or to not do so as it chooses." *Id.*; Waldon, *supra* note 14, at 17. "A CMA doesn't make you participate . . . you have a choice." *Id.* (quoting Tom Jameison, promotional analyst for Safeway Stores).

²⁰ See *Beverage Management*, 653 F. Supp. at 1153 (lucrative terms of CMAs bring improper pressure on retailers to accept); *60 Minutes*, *supra* note 14 (large monetary payments used to promote feature ad price); Waldon, *supra* note 14, at 17. Because of the large sums of money given, if you're offered a CMA, you take it. *Id.*

²¹ See Defendant's Opening Brief at 1, *Sun-Drop Bottling Co. v. Coca-Cola Botting Co.*, 604 F. Supp. 1197 (W.D.N.C. 1985) (No. C-C-84-513-M) [*hereinafter* Defendant's Sun-Drop Brief]. Interbrand competition between bottlers who use CMAs will provide high output and low prices. *Id.* See, e.g. Kelly & Ticer, *The Uncola Company Gives Bottlers A Friendly Pepper - Upper*, *Bus. Wk.*, Feb. 8, 1988, at 94 (year after year, sales volume and market share of major bottlers increases); Farlander & Oman, *Tuning in the Retail Channel*, *BEVERAGE WORLD*, Oct. 1987 (promotional pricing provides lower prices for consumers, almost 80% of soda beverages are discounted); Landphair, *Soft-Drink Firms in Bloody Fight For Shelf*

In recent years, various bottling subsidiaries of the Coca-Cola Corporation and PepsiCo, the makers of "Coke" and "Pepsi" respectively, have initiated CMAs in various geographic regions throughout the country.²² Most often these agreements exist back to back thereby leaving little, if any, calendar space for smaller bottlers to achieve the various benefits of CMAs.

Due to their increasing economic power, coupled with a combined market share of over seventy percent, these soft drink giants remain the only two corporations with the structural and economic power capable of enticing retailers into CMAs.²³ Although the next largest soft drink bottler (Dr. Pepper) could attempt to establish an effective CMA, it is unlikely that a company with a market share only slightly exceeding five percent would be even

Space, NEW ORLEANS BUS., Feb. 24, 1986, at 15 (with coupons a 99 cent item costs only 39 cents in soda industry). *But see* *United States v. Allegheny Bottling*, No. 87-123-N (E.D. Va. Sept. 9, 1988) (LEXIS, Genfed Library, Dist. file) (although promotional price was lowest in market, defendants still fixed price above free market gauge in violation of Sherman Act).

²² *See Beverage Management*, 653 F. Supp. at 1153 (S.D. Ohio 1986) (lawsuit based on CMA's possible violation of antitrust law); *Sun-Drop Bottling Co. v. Coca-Cola Bottling Co.*, 604 F. Supp. 1197, 1199 (W.D.N.C. 1985) (same). *See also 60 Minutes*, *supra* note 14 (discussing increase in number of CMAs in soda industry); Lawrence, *supra* note 16, at 4 (hot topic in beverage industry is increase in CMAs); Waldon, *supra* note 14, at 17 (decade ago CMAs numbered ten, today almost ninety).

²³ *See Kelly & Ticer*, *supra* note 21, at 94. Coca-Cola maintained 39.9% of the market share in 1986 and increased its market share to 40.3% in 1987. *Id.* Pepsi had 29.8% of the market share in 1986 and increased its market share to 30.2% in 1987. *Id.* Dr. Pepper, in 1986, had only 5.3% of the market share with an increase of only .1% in 1987. *Id.* Seven-Up also had a slight increase in market share in 1987 from 5.1% to 5.3%. *Id.* Royal Crown, however, lost .2% of the market share from 3.1% to 2.9%. *Id.* *See also Soft Drinks*, BEVERAGE WORLD, Apr. 1987, at 16 (financial status of Coke and Pepsi); Williams, *Soft Drink Wars: The Next Battle*, FORTUNE, June 24, 1985, at 70-71 "[One percent] of the market is worth \$300 million in retail sales . . ." *Id.*; *see* E. McCARTHY, J. GRASHOF & A. BROGOWICZ, *supra* note 13, at 219-27. "Companies without the financial resources of Coke and Pepsi will find themselves off the bottlers' minds and off retailers' shelves." *Id.* at 220; Bronson, *supra* note 14, at 59. (Coke and Pepsi pay for supermarket "shelf space - a cost that few bottlers of smaller brands can bear."); Powell, Shannon & Underwood, *Cola Mergers Lose Some Fizz*, NEWSWEEK, June 30, 1986, at 48 (smaller bottlers cannot compete with intense marketing power that Coke and Pepsi possess); Stevenson, *Other Sodas Caught in Coke-Pepsi War*, N.Y. Times, Feb. 24, 1986, at D1, col. 2 (according to prediction of analysts and industry executives, smaller companies will find it difficult to offer expensive price promotions and image building advertising which Pepsi and Coke offer).

The fact that major bottlers have significant market control does not give them the right to use their position "as leverage to deprive competitors of access to customers, to force customers to maintain . . . prices . . ." *See Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 712 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978).

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moderately successful.²⁴ At first blush, this type of activity may appear to be anticompetitive, but both sides of the issue must be examined.

A. Procompetitive Aspects

The purpose of antitrust law is to promote the unrestrained interaction of competitive forces in order to achieve the lowest price with the highest quality product.²⁵ Thus, it has been contended that CMAs are justified by virtue of the following: CMAs permit consumers to obtain both the lowest priced and highest quality product, thereby increasing consumer demand while keeping supply at an abundant level.²⁶ Additionally, they allow the retailer to reap financial benefit through increased sales and the establishment of goodwill.²⁷ Furthermore, manufacturers advocate the sur-

²⁴ See Mason, *supra* note 17, at 3. "The cola giant can afford to spend money on calendar marketing agreements. Smaller bottlers can't. We don't have that kind of money." *Id.* (quoting Joseph Serio, President of Allbev Inc., bottlers of Royal Crown Cola and Seven-Up products); Waldon, *supra* note 14, at 15. CMAs are preventing companies such as Seven-Up from reaching the consumer equally with Coke & Pepsi. *Id.*; Lawrence, *supra* note 16, at 5. "We can't compete against CMAs, and we don't try to." *Id.* (quoting Bob O'Brien, Vice President of Big Red Co., a regional soda distributor).

²⁵ See *supra* notes 1-6 and accompanying text. See also *Sun-Drop Bottling Co.*, 604 F. Supp. at 1200. "The public has an interest in preventing and punishing such violations of the anti-trust laws as restrictive market practices . . . [h]owever, this must be balanced against the public interest in non-interference with legitimate market activities." *Id.*

²⁶ See Defendant's Sun-Drop Brief, *supra* note 21, at 10. CMAs are procompetitive in nature due to their aggressive character and therefore further the purpose of antitrust law. *Id.* CMAs afford consumers lower prices because all bottlers are induced to sell at the same low price to retain a market share. *Id.* This type of competition allows the retailer freedom as to whose CMA he will accept and for what price he will ultimately sell the product. *Id.* at 25. "[T]he great intensity of the interbrand competition between bottlers of Coca-Cola and bottlers of Pepsi ensures that output will continue to be high and that prices will continue to be low." *Id.* at 38. See also R. ENRICO, *THE OTHER GUY BLINKED* (1986). The author, President of Pepsi-Cola, stated that "the battles between Pepsi and Coke have been very good . . . for consumers; the retail price per ounce of our soft drinks is as low today as it was ten years ago." *Id.* at 268. See also FARLANDER & OMAN, *supra* note 21, at 32 (due to promotions, consumers can still buy Coke at five-cents-a-glass); Worthy, *Coke and Pepsi Stomp on the Little Guys*, *FORTUNE*, Jan. 7, 1985 at 68 (competition between bottlers yields lower prices for consumer).

²⁷ See *Beverage Management, Inc. v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1152-53 (S.D. Ohio 1986) (as sales increase retailers earn more income thereby increasing profit); Defendant's Sun-Drop Brief, *supra* note 21, at 41. Retailers benefit from CMAs because they "draw[] shoppers into participating retail stores, thereby enhancing the retailer's ability to compete for the consumer's overall grocery needs." *Id.* Furthermore, "[r]etailers prefer [Coke]'s products . . . for promotional activity because [their] products attract customers to the store while [others] do not." *Id.* at 40.

vival of the fittest theory in claiming that CMAs promote the long-run benefit of an optimal efficiency market wherein beverages with the strongest consumer preference will survive.²⁸

B. *Anticompetitive Aspects*

However, CMAs may not provide the most efficient, least harmful mechanism for achieving the benefits previously stated. Although they can provide a financial benefit to consumers,²⁹ CMAs do not cause consumers to purchase according to brand loyalty or quality of product.³⁰ Rather, they merely encourage the consumer to purchase the product most readily visible;³¹ such visibility being the product of an expensive advertising arrangement into which only the largest of bottlers can afford to enter.

Thus, despite the benefits that CMAs might afford, their legality under the antitrust laws requires examination.³² This article will set forth an analysis of Calendar Marketing Agreements under several antitrust theories including horizontal price fixing, vertical price fixing, group boycotts, and the essential facilities

²⁸ See Defendant's Motion to Dismiss Count I at 16, Beverage Management (No. C-1-84-1300) [*hereinafter* Defendant Beverage Motion]. Coke argued that other soft drink bottlers who were unsuccessful in their usage of CMAs are trying to prevent their use by those who are successful with them. *Id.* at 15. The purpose of a competitive market is to reward the best product. *Id.* at 16. See also Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 429 (1966) (anticompetitive activities such as price fixing or market division "may create efficiencies valuable to consumers").

²⁹ See *supra* note 17.

³⁰ See Williams, *The No-Win Game of Price Promotion*, FORTUNE, July 11, 1983, at 92, 102 (author suggests that trade promotions influence consumers to buy for price and not brand). Responding to criticism of CMAs, Coke argues that "there is no conspiracy alleged . . . no illegal agreement alleged . . . [and] no allegations of improper pressure brought to bear upon the retailers by the defendant." *Id.* See also Defendant Beverage Motion, *supra* note 28, at 17. Coke further contends that without these factors there can be no "illegal antitrust activity." *Id.* at 17-18. See generally R. ENRICO, *supra* note 26, at 267 (President of Pepsi emphasizes the characteristic competitiveness of soft drink industry).

³¹ See FARLANDER & OMAN, *supra* note 21, at 32. "Consumer brand loyalty has reached an all-time low as shoppers have become pre-conditioned to purchase the best weekly soft drink value." *Id.*

³² See generally Beverage Management Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144 (S.D. Ohio 1986) (soft drink bottler brought action alleging that competitor's CMA violated antitrust law, preliminary injunction for bottler was denied); Sun-Drop Bottling Co. v. Coca-Cola Bottling Co., 604 F. Supp. 1197 (W.D.N.C. 1985) (preliminary injunction restraining defendants CMA denied, question of validity of CMA remained unanswered); Scott, *Harralson Bubbles With Optimism; Royal Crown's Chief Vows to Double Ad Spending*, AD-WEEK (southeast ed.) Nov. 23, 1987 (CMAs are beneficial to extent they are legal).

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doctrine. In order to provide a better background for analysis of the substantive principles of antitrust law, it first becomes necessary to discuss the goals of the Sherman Act.

II. BACKGROUND GOALS OF THE SHERMAN ANTITRUST ACT

As Robert Bork aptly notes, "antitrust is a cornucopia of social values, all of them rather vague and undefined but infinitely attractive."³³ The Sherman Act has an adaptability comparable to that of constitutional provisions, yet its purpose to promote free and unfettered competition remains the standard against which all activity is examined. Although the words are simple, the complexity of its interpretation has stirred much debate over the course of its history.

A. Sections One & Two

To establish a violation of section one of the Sherman Act³⁴ a plaintiff is required to prove that two separate entities engaged in a "contract, combination . . . or conspiracy, in restraint of trade or commerce" and that such restraint was unreasonable.³⁵ The phrase "contract, combination, . . . or conspiracy" has been succinctly stated as a "concerted action."³⁶ A concerted action is es-

³³ See R. BORK, *supra* note 4, at 50.

³⁴ Sherman Act, 15 U.S.C. § 1. See *supra* notes 3-4.

³⁵ See *Terry's Floor Fashions, Inc. v. Burlington Indus., Inc.*, 763 F.2d 604, 610 n.10 (4th Cir. 1985) (court stated plaintiff must show conspiracy, and (1) that conspiracy created negative effects; (2) that it was illegal; and (3) that injury resulted.). If competitors agree to comply with a plan which will result in a restraint of trade, that behavior is adequate to verify an unlawful conspiracy under the Sherman Act. See *Ball v. Paramount Pictures*, 169 F.2d 317, 319 (3d Cir. 1948). See also *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195-96 (6th Cir. 1982) (defining plaintiff's burden to prove section one violation), *cert. denied*, 466 U.S. 931 (1984); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 147 (3d Cir. 1981) (court enumerated requirements for plaintiff to sustain section one violation), *cert. denied*, 455 U.S. 1019 (1982).

³⁶ *United States v. Container Corp. of America*, 393 U.S. 333, 335 (1969). See *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445-46 (3d Cir. 1977) (language of Sherman Act section one described as single concept regarding common action; "'contract . . . combination or conspiracy' becomes an alliterative compound noun, roughly translated to mean 'concerted action.'" (quoting L. SULLIVAN, *LAW OF ANTITRUST* 312 (1977))), *cert. denied*, 434 U.S. 1086 (1978); *Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980) (same), *cert. denied*, 451 U.S. 911 (1981).

In order to establish the existence of a conspiracy, the Supreme Court stressed the necessity of action involving more than one party. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) ("Independent action is not proscribed."); *Tripoli Co. v. Wella*

established upon the showing of proof that a defendant engaged or attempted to engage in this form of anticompetitive behavior.³⁷ Furthermore, this concerted activity must impose a restraint on trade "in" or "in the flow of" interstate commerce.³⁸ Section two of the Act³⁹ was intended to supplement section one so as to safe-

Corp., 286 F. Supp. 264, 268 (E.D. Pa. 1968) (unilateral action cannot violate section one), *aff'd*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970).

The classic definition of conspiracy is a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement . . ." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). *See* Contractor Util. Sales Co. v. Certain-Teed Prods. Corp., 638 F.2d 1061, 1074 (7th Cir. 1981) (it is unlawful conduct where parties consciously participate in a common scheme or design via express or implied agreement), *cert. denied*, 470 U.S. 1029 (1985); William Goldman Theatres, Inc. v. Loew's Inc., 150 F.2d 738, 743 (3d Cir. 1945) (unlawful conspiracy does not require conspirators to act simultaneously or via agreement (quoting Interstate Circuit Inc. v. United States, 306 U.S. 208, 225, 227 (1939))).

³⁷ *See* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 596-97 (1986) (dicta) (if parties had "no rational economic motive to conspire, and if their conduct is consistent with other equally plausible explanations, the conduct does not give rise to an inference of conspiracy."); *Monsanto*, 465 U.S. at 764 (plaintiff should proffer evidence showing defendant "had a conscious commitment to a common scheme designed to achieve an unlawful objective" (quoting *Sweeney & Sons Inc.*, 637 F.2d at 111.)); *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948) (specific intent may be sufficient to find unlawful activity); *National Marine Elec. Distrib. v. Raytheon Co.*, 778 F.2d 190, 192 (4th Cir. 1985) (evidence deemed insufficient to amount to conspiracy without common scheme between dealers).

In order to determine if there is "concerted action" the evidence must be evaluated as a whole. *See* *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 699 (1962) (cannot judge conspiracy by "dismembering [evidence] and viewing its separate parts . . .") (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913)); *Aikens v. Wisconsin*, 195 U.S. 194, 206 (1904) (acts may be lawful in themselves but result in unlawful conspiracy); *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616, 625 (4th Cir. 1979) (individual aspects of proof are insignificant if viewed as whole do not establish conspiracy), *cert. denied*, 444 U.S. 1074 (1980).

³⁸ *See* *Burke v. Ford*, 389 U.S. 320, 321-22 (1967) (activity substantially affected commerce); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940) (price fixing conspiracy is per se violative of Sherman Act); *see, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-84 (1975) (title examination held to be an integral part of an interstate transaction); *see also* *Thomas v. Petro-Wash, Inc.*, 429 F. Supp. 808, 814 (M.D.N.C. 1977) (to plead valid cause of action plaintiff must show conduct in question has adverse effect on interstate market (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 202 (1974))); *United States v. Wilshire Oil Co. of Tex.*, 427 F.2d 969, 974 (10th Cir.) ("indictment need only charge that a combination was formed to fix prices on goods traveling interstate and that it had that effect or contributed to that end") (footnote omitted), *cert. denied*, 400 U.S. 829 (1970). *Cf.* *United States v. Yellow Cab Co.*, 332 U.S. 218, 230 (1947) ("essentially local" nature of legal services are beyond Sherman Act). Furthermore, the interstate commerce requirement must be established in some substantial interaction and not by trivial contact. *See* *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 739-40 (1976).

³⁹ 15 U.S.C. § 2 (West Supp. 1988).

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guard that by no possible guise could the intention of section one be frustrated.⁴⁰ Further, section two sought to promote competition in the markets by preventing large aggregations of economic might from being formed or administered unfairly.⁴¹ Section two of the Act provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony"⁴² Thus, section two prohibits three distinct offenses: actual monopolization, attempts to monopolize, and combinations and conspiracies to monopolize.⁴³ To establish monopolization there must be shown a conscious effort on behalf of an entity to obtain an exclusive right of monopoly power in a "relevant market."⁴⁴ Therefore, the attainment of monopoly

⁴⁰ See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). "A consideration of the text of the 2d section serves to establish that it was intended to supplement the 1st and to make sure that by no possible guise could the public policy embodied in the 1st section be frustrated or evaded." *Id.* This does not mean that a defendant cannot be convicted of violating more than one section of the Sherman Act. See *American Tobacco Co. v. United States*, 328 U.S. 781, 787-88 (1976) (defendants convicted of both section one and section two violations of Sherman Act).

⁴¹ *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 386 (1956). See *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250-52 (1968) (willful maintenance of monopoly power should be diffused by power of injunction).

⁴² 15 U.S.C. § 2 (West Supp. 1988).

⁴³ See *E.I. duPont de Nemours & Co.*, 351 U.S. at 391 (monopoly power will foreclose competition); *Shoppin' Bag of Pueblo, Inc. v. Dillion Cos.*, 783 F.2d 159, 164 (10th Cir. 1986) (monopoly power is "ability to control prices and exclude competition") (emphasis in original); *Betaseed Inc. v. U and I, Inc.*, 681 F.2d 1203, 1231 (9th Cir. 1982) (monopoly power is that which "control[s] prices or exclude[s] competition . . ."). Areeda, *Symposium: Anticipating Antitrust's Centennial: Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CALIF. L. REV. 959, 960 (1987) ("definition of monopoly power has proved elusive" but state cases define it as "power to exclude competition or to control price"). See generally R. BLAIR & D. KASSERMAN, *ANTITRUST ECONOMICS* 25-68 (1985) (economic analysis of monopoly and legislative response to such activities); Spivack, *Monopolization Under the Sherman Act, Section Two*, 50 ANTITRUST L.J. 285 (1982) (overview of monopolies).

⁴⁴ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Supreme Court recognized the two elements of a section two offense: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* See Ladd, *The Efficiency Defense: Section Two Limits on Monopolistic Conduct After Aspen*, 86 COLUM. L. REV. 1712, 1713 (1986) (elements of section two violations are "possession of monopoly power in the relevant market" and the maintenance thereof). The relevant market is the "area of effective competition" where the defendant governs his business. See *Standard Oil Co. v. United States*, 337 U.S. 293, 300 n. 5 (1949). See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962) (must take realistic, factual formulation to define relevant market rather than "formal, legalistic

through aggressive merchandising and vigorous but honest economic maneuvers is not by these facts condemned.⁴⁵ What is condemned is the designed growth of the business for the purpose of impeding a new company's entry, or excluding established companies whose presence is already precarious.⁴⁶

IV. CALANDAR MARKETING AGREEMENTS AS SUBSTANTIVE VIOLATIONS OF THE SHERMAN ACT

A. *Horizontal Price Fixing*

No area of antitrust law has encountered as much litigation as that of price fixing under section one of the Sherman Act.⁴⁷ Horizontal price fixing exists where there are agreements between two or more independent entities which engage in competition on the same plane of product or service distribution, and who agree on a price or price range to be charged.⁴⁸ In *United States v. Socony-*

one"); *Smithkline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1117-18 (E.D. Pa. 1976) (relevant market determined in light of present facts and realities), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

Generally, relevant market is defined in terms of product market. *See E.I. duPont de Nemours & Co.*, 351 U.S. at 404 (relevant market defined according to particular commodity being evaluated); *See also Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1277 (8th Cir. 1981) (relevant market composed of items "reasonably interchangeable" by purchasers for same application (quoting *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1955))); *cf. Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (to determine relevant market fact finder must determine where seller operates as well as availability of other like products in that area); *Standard Oil Co.*, 337 U.S. at 299 (look to geographical market in determining effect on competition). For an analysis of what constitutes the "product market" and "geographic market" see generally H. Hovencamp & Silver-Westrick, *Predatory Pricing and the Ninth Circuit*, 1983 ARIZ. ST. L. J. 443.

⁴⁵ *See Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 718 (D. Haw. 1964), *cert. denied*, 393 U.S. 1086 (1969). "The Sherman Act does not make mere size nor continued exercise of . . . lawful power an offense, when that size and power have been obtained by lawful means and developed by natural growth - absent the *manifest* purpose or intent to exclude competition." *Id.* (emphasis in original).

⁴⁶ *Id.* "The indicia of continued monopolization are the existence of either the power or the intent to exclude competition or fix prices." *Id.*

⁴⁷ *See Rahl, Price Competition and the Price Fixing Rule — Preface and Perspective*, 57 NW. U.L. REV. 137 (1962) (price fixing is most frequent antitrust violation). *See generally* L. SULLIVAN, *supra* note 4, at 10-25 (discussing price fixing from inception to modern times).

⁴⁸ *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (per curiam) (agreement among wholesalers to eliminate credit terms held per se illegal). *See also* 1 R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 4.35, at 221 (L. Altman 4th ed. 1981) (horizontal pricing agreements serve only to stop competition); Note, *Motion Picture Split Agreements: An Antitrust Analysis*, 52 FORDHAM L. REV. 159, 175

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Vacuum Oil Co.,⁴⁹ the Supreme Court provided a broad definition of price fixing: "Under the Sherman Act 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*."⁵⁰

The *per se* standard developed by the judiciary holds that certain restraints on trade are so pernicious as to be inherently anticompetitive, needing no inquiry into their detrimental economic impact.⁵¹ Thus, the *per se* standard is evidentiary in nature, and

(1983) (defining horizontal price fixing).

Conduct which constitutes this type of price fixing is determined by looking to agreements between competitors aimed at controlling market prices. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356-57 (1982) (agreement by members of medical society that set maximum claim fees for services held illegal *per se*); *Catalano*, 446 U.S. at 650 (1980) (beer wholesalers' agreements to eliminate short-term credit given to retailers held illegal *per se*); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 154 (1948) (formula agreements which reduce potential to bid for films and which acquire all purchasing power are illegal restraints of trade).

⁴⁹ 310 U.S. 150 (1940).

⁵⁰ *Id.* at 233.

⁵¹ *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (seminal case declaring anticompetitive agreement unreasonable and unlawful). *See also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of [changing] . . . the price of a commodity in interstate or foreign commerce is illegal *per se*"); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911). Without employing the term *per se* the Court held that "agreements . . . having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." *Id.*; *cf. Beschle, "What Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471, 477-96 (1987) (discussing creation and development of *per se* rules); Comment, *Spray-Rite Service Corp. v. Monsanto Co.: The Justice Department Challenges the Per Se Rule Against Resale Price Maintenance*, 46 U. PITT. L. REV. 171, 172-75 (1984) (analyzing historical background of *per se* rule).

Per se violations are deemed illegal without consideration of their effect or justification. *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

See Socony-Vacuum, 310 U.S. at 224-26 n.59 (results of conspiracy whether positive or negative are irrelevant). *See also National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (where necessary effect of arrangement is plainly anticompetitive "no elaborate industry analysis is required to demonstrate anticompetitive character of . . . agreement").

The *per se* approach is the most suitable because price fixing invariably has easily observable anticompetitive effects. *See Note, Fixing the Price Fixing Confusion: A Rule of Reason Approach*, 92 YALE L.J. 706, 709 (1983) [hereinafter Note, *Fixing*]. Furthermore, it is more judicially economical to apply the *per se* rule. *But see Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (weight of scholarly opinion along with dissention in courts led Court to reexamine *per se* rule); Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537 (1975) (*per se* approach is "an exercise in barren formalism" that is "artificial and unresponsive to the competitive needs of the real world.").

upon the showing of a particular class of business relationship, the plaintiff need merely show that a conspiracy existed and that the defendant was a participant.⁵² Restraints falling within this category include horizontal price fixing, group boycotts, and tying arrangements.⁵³ However, many activities that can be classified as restraints are not so clearly devoid of economic utility as to be per se illegal.⁵⁴ These activities must be decided under the rule of reason, which requires the trier of fact to examine all the surrounding circumstances of a particular arrangement and determine if the conduct inspired by the agreement has a legitimate business purpose that outweighs its *de minimis* effect on competition.⁵⁵ Un-

The per se rule has eroded and presently the rule of reason is the major approach of the courts. See Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term-1977*, 77 COLUM. L. REV. 979, 982 (1977) (rule of reason approach is the rule and per se approach is merely an exception).

⁵² See A. NEALE, *ANTITRUST LAWS OF THE UNITED STATES* 27-28 (2d ed. 1970); see also Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 796-97 n.100 (1987) (per se rule is rule of evidence designed to ease plaintiffs burden of proof); Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1, 9 (1982) (per se rule was designed for legal efficiency through establishing conclusive presumptions).

⁵³ See *supra* notes 7-10 and accompanying text.

⁵⁴ See Cavanagh, *supra* note 52, at 798. In describing the rule of reason, the author states "a large number of business practices are not so clearly devoid of competitive merit and, hence, are not so readily susceptible to facile condemnation." *Id.* See also *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). In determining whether a restraint is reasonable, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Id.* See generally *National Soc'y of Professional Eng'rs*, 435 U.S. at 687-92 (discussing rule of reason and historical development in antitrust law).

⁵⁵ See *Sylvania*, 433 U.S. at 49 (trier of fact must weigh all relevant factors of case to determine if restraint is unlawful); *Hayden Publishing Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 69 (2d Cir. 1984) (under rule of reason approach, fact finder balances all circumstances, especially "competitive characteristics of the relevant market" in determining status of legality); *Broadcast Music, Inc. v. Moor-Law Inc.*, 527 F. Supp. 758, 765 (D. Del. 1981) (must examine all the evidence to determine negative effects of restraint), *aff'd*, 691 F.2d 490 (3d Cir. 1982); see also HANDLER, *supra* note 51, at 983 (must balance between benefits and detriments of the questioned practice); *cf.* *Cowley v. Braden Indus. Inc.*, 613 F.2d 751, 754-55 (9th Cir.) (plaintiff has burden of showing agreement is reasonable), *cert. denied*, 446 U.S. 965 (1980). The rule of reason approach to price fixing has been praised due to its ability to retain per se advantages such as judicial consistency in analysis, consistent treatment of activities, and economic efficiency, while promoting "gains from efficient activities and bringing greater consistency to the law." See Note, *Fixing*, *supra* note 51, at 706.

The original standards for the courts to consider in determining the legality of agreements were set forth by Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is as may sup-

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like the evidentiary per se rule, the rule of reason is a rule of construction under which the “anticompetitive evils of a restrictive practice must be balanced against any procompetitive benefits or justifications within the confines of the relevant market.”⁵⁶ Thus, it is unlikely that CMAs are illegal per se, due to their diversity in drafting and questionable provisions. However, even if they are not inherently illegal, a rule of reason analysis may disclose significant anticompetitive effects.

While direct horizontal price fixing⁵⁷ can be established by memoranda showing agreements or arrangements among competitors,⁵⁸ some courts have held that noncoercive suggestions regarding prices, or informal agreements influencing prices, are also illegal.⁵⁹ Absent direct evidence of a price fixing agreement, an inference of collusion to form an express price fixing agreement can be established from the conduct of the parties.⁶⁰

press or even destroy competition.” *Id.* at 238. A full analysis of the anticompetitive conduct must be determined prior to holding the restraint illegal. *Id.*

In applying the rule of reason approach, courts examine whether the restrictions on competition are reasonably necessary to achieve a legitimate business purpose. *See Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (must balance genuine business goal against behavior which restrains competition). *See also United States Trotting Ass’n v. Chicago Downs*, 665 F.2d 781, 790 (7th Cir. 1981) (“trial court must find rather than presume harm to competition”).

⁵⁶ *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1392 (5th Cir. 1983). *See Cavanagh, supra* note 52, at 796-97 n.100 (if activity not illegal per se, must balance procompetitive and anticompetitive conduct to determine legality).

⁵⁷ *See United States v. Trenton Potteries, Co.*, 273 U.S. 392, 397-98 (1927) (seminal case declaring direct price fixing unlawful). *See also United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982) (“[e]ven more egregiously contrary to vital competition among businesses, however, is the contract allocation agreement . . . [which] eliminates not only price competition but also competition in service and product quality.”); *United States v. Koppers Co.*, 652 F.2d 290, 297 (2d Cir.) (agreements between competing retailers deemed per se violation), *cert. denied*, 454 U.S. 1083 (1981); *COMPACT v. Metro. Gov’t*, 594 F. Supp. 1567, 1577-79 (M.D. Tenn. 1984) (agreements not to bid on contracts were per se unlawful price fixing).

⁵⁸ *See Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 987-88 (5th Cir. 1983) (internal memoranda of defendant adequate to evidence conspiracy), *cert. denied*, 465 U.S. 1100 (1984); *Wilder Enters, Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1141 (4th Cir. 1980) (conspiracy evidenced by letters soliciting bids).

⁵⁹ *See Northern Cal. Pharmaceutical Ass’n v. United States*, 306 F.2d 379, 388-91 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962); *Plymouth Dealers Ass’n v. United States*, 279 F.2d 128, 133 (9th Cir. 1960).

⁶⁰ *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984) (conduct of parties may establish a common commitment); *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966) (same); *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942) (conscious parallelism can be inferred from the circumstances surrounding the agree-

While presently no express price fixing agreement has been established as between bottlers who enter into CMAs, cause for concern may be warranted. Where bottlers, such as Coca-Cola and PepsiCo, enter a particular geographic market and share year-round CMAs with retailers, the result of both brands obtaining the highest market share and retaining the lowest-priced cola evidences items from which an agreement to fix prices may be inferred. However, this parallel conduct, known as "conscious parallelism"⁶¹ does not in and of itself constitute an illegal agreement.⁶² Further analysis of this parallel conduct must be carried on to determine whether the purpose was to achieve a result contemplated by both parties, and not merely an unintended result.⁶³ Even though competing manufacturers independently execute their CMAs with individual retailers, it is plausible to suggest that between manufacturers a controlling price element is tacitly observed. This premise can be inferred from the actions of manufac-

ments). *See also* *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("[A]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is a restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.").

Indirect horizontal conspiracy can be indicated from conduct among competitors. *See Interstate Circuit, Inc.*, 306 U.S. at 227 (1939) ("unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators"); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1213 (4th Cir.) ("[a]ntitrust civil conspiracy or combination has traditionally been inferred 'from a course of dealing or other circumstances' in which the determinative facts are 'what the parties actually did' rather than whether an express agreement existed" (quoting *United States v. Parke Davis & Co.*, 362 U.S. 29, 43-44 (1960))) (footnote omitted), *cert. denied*, 464 U.S. 894 (1983). *But see Theatre Enters., Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 540-41 (1954) (court allowed evidence of parallel business conduct to be admitted as circumstantial evidence of conspiracy, but stated it does not "conclusively" demonstrate an illegal agreement).

⁶¹ *See* Note, *Conscious Parallelism and the Sherman Act: An Analysis and a Proposal*, 30 VAND. L. REV. 1227, 1228 (1977) (defines conscious parallelism as "firms . . . conducting their similar businesses in a uniform manner, aware that their counterparts are pursuing the same course of action."); *see* Comment, *Conscious Parallelism and Price Fixing: Defining the Boundary*, 52 U. CHI. L. REV. 508, 508 (1985) ("[C]onscious parallelism" is defined as "similar conduct by rival firms that suggests they are attempting to set prices . . . for a particular product."). When parties cannot prove "independent business reasons for engaging in such practices" conduct will be considered illegal per se. *Id.* at 509.

⁶² *See Theatre Enters., Inc.*, 346 U.S. at 540-41. *See, e.g.,* *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902-03 (9th Cir. 1987) (consistency of defendants in refusal to deal is only evidence of illegality); *Transource Int'l, Inc. v. Trinity Enters., Inc.*, 725 F.2d 274, 281-82 (5th Cir. 1984) (defendant's refusal to deal not a conspiracy when it has plausible business reasons).

⁶³ *See generally* Givens, *Parallel Business Conduct Under the Sherman Act*, 5 ANTITRUST BULL. 273 (1960) (analyzing types of conduct necessary for conclusive inference).

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turers engaged in CMAs, such as the division of calendar weeks between bottlers, and previous price fixing convictions.⁶⁴ However, the inference that parallel action was intended by the parties may be either rebutted or enhanced by examining evidence of alternative explanations: plus factors.⁶⁵ For example, would price fixing still be engaged in if others did not conspire in this activity?⁶⁶ Are the manufacturers' prices consistently the lowest? Do these manufacturers follow each other in market share? Could these activities be the result of legitimate market forces?⁶⁷ In large measure, this information is not available, partially because of the

⁶⁴ See *United States v. Allegheny Bottling*, No. 87-123-N (E.D. Va. Sept. 9, 1988) (LEXIS, Genfed Library, Dist. file) (defendant found guilty of price fixing conspiracy); *Soda Bottler's Sales Manager Faces § 1 Charges*, 53 *Antitrust & Trade Reg. Rep. (BNA)* No. 1342, at 818 (Nov. 26, 1987) (sales manager engaged in conspiracy to fix prices); *Soda Bottlers Plead Guilty to Price Fixing Accusations*, 53 *Antitrust & Trade Reg. Rep. (BNA)* No. 1337, at 633-34 (Oct. 22, 1987) (Coca-Cola bottlers plead guilty to price-fixing).

⁶⁵ See, e.g., *Montana v. Superamerica*, 559 F. Supp. 298, 302 (D. Mont. 1983) (defines "plus factors" as "independent items of evidence which, when coupled with evidence of conscious parallelism and a showing that the parallelism suggests collusion in that case, tend to support a finding of collusive agreement"). Cf. *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952). The court stated that "'plus factors' . . . when standing alone and examined separately, could not be said to point directly to the conclusion that the charges of the indictment were true beyond a reasonable doubt, but which, when viewed as a whole, in their proper setting, spelled out that irresistible conclusion." *Id.* See also *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (conscious parallelism alone is not unlawful); *Milgram v. Loew's*, 192 F.2d 579, 583 (3d Cir. 1951) (additional facts must be weighed to determine if conduct is unlawful conscious parallelism), *cert. denied*, 343 U.S. 929 (1952).

The value placed on "plus factors" and the requisite amount needed to determine that conspiracy exists is examined on a case-by-case basis. See P. AREEDA, *ANTITRUST ANALYSIS* 371-82 (1981); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 *HARV. L. REV.* 655, 658 (1962) (with conscious parallelism additional facts always needed to find antitrust violation).

⁶⁶ See *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978) In order to maintain a valid cause of action plaintiff must provide evidence that "defendants engaged in (1) consciously parallel action, (2) which was contrary to the economic self-interest so as not to amount to a good faith business judgement." *Id.* See *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975) (plaintiff's evidence must show "acts by defendants in contradiction of their own economic interests").

⁶⁷ See *United States v. Container Corp.*, 393 U.S. 333, 336-38 (1969) (where defendants accounted for substantial market share, agreement among themselves to exchange price information was held to restrain competition); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940) (where agreements made as to prices, price fixing exists where entities involved control substantial market share); *Gainesville Utils. v. Florida Power & Light Co.*, 573 F.2d 292, 303 (5th Cir.) ("In a concentrated market . . . we believe a court should carefully scrutinize firms to see if their conduct or any communication among them supports or requires a finding of conspiracy"), *cert. denied*, 439 U.S. 966 (1978).

manufacturers' refusals to comment,⁶⁸ and partially because the relevant statistical and empirical data concerning the market structure of the soft drink industry has yet to be compiled.

Nevertheless, it is suggested that a number of court-defined "plus factors" are apparent when considering the validity of CMAs in the soft drink industry. The primary motivation for a bottler to enter into a CMA is the potential increase in sales, profit, and market share.⁶⁹ Furthermore, it is suggested that CMAs can accomplish these goals when used as part of an indirect horizontal conspiracy. CMAs afford a select cartel of major bottlers in a highly concentrated market⁷⁰ the ability to maintain high profiles through secondary store displays, increase their shelf space, achieve the lowest market prices, and increase their already high market shares. Thus, CMAs conquer the Davids of the soft drink industry who perish because they themselves cannot afford to enter into the Goliaths' CMAs,⁷¹ and thus cannot profitably reduce their prices to within a necessary stone's throw of the competition.⁷²

Furthermore, although the consumer will temporarily gain the benefit of low prices, this situation may rapidly change if major bottlers are able to eliminate the competing bottlers with a weaker economic position by forcing them from the field. If the price charged by a bottler is reasonably calculated to pressure rivals out of the market, or to substantially damage them so that the predator can impose supracompetitive prices in the future, the act is one of predatory pricing.⁷³ In the soft drink industry, both ma-

⁶⁸ See Waldon, *supra* note 14, at 16 (both Coca-Cola and Pepsi-Cola bottling companies refuse to comment on CMAs); *60 Minutes: Cola Payola*, *supra* note 14, at 9 (neither Coca-Cola nor Pepsi-Cola would agree to a 60 Minutes interview).

⁶⁹ See *supra* notes 26-27 and accompanying text.

⁷⁰ See Carter, *Yes, Antitrust Can Still Say No*, FORTUNE, Sept. 1, 1986, at 64 (describes the soda industry as already concentrated); *What's Brewing for Soft Drinks in 1987*, *supra* note 13, at 62 (soda market highly concentrated); *It's Still a Free-For-All on the Soda Shelf*, BUS. WK., July 7, 1986, at 37 (same).

⁷¹ See Mason, *supra* note 17, at 3 ("To the little bottlers . . . [t]hey know they're Davids going up against two Goliaths.").

⁷² See *infra* notes 73-75 and accompanying text.

⁷³ See *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U.S. 350, 358 (1921); *Aikens v. Wisconsin*, 195 U.S. 194, 206 (1904); see also Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975). Predatory pricing occurs when a business entity engages in a practice of

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major bottlers currently price above the marginal cost of the product sold.⁷⁴ Yet, it is suggested that were major bottlers to forego short-run profits for the purpose of driving rivals from the market so that they could raise long-run prices, this act could be considered predatory pricing as well. If this asphyxiation of rivals occurs, the major bottlers would then be left to command supra-competitive prices.⁷⁵ Could it not be that the controlling market share enjoyed by Coca-Cola and PepsiCo has arisen because of anticompetitive activity rather than through economic genius or keen entrepreneurial skills?⁷⁶

lowering prices such that competitors are unable to compete and are forced to drop out of the market. *Id.* Hovenkamp & Silver-Westrick, *supra* note 44, at 445 (below cost pricing drives out competition, thereafter profits are recovered in controlled market). *See generally* 3 P. AREEDA & D. TURNER, *supra* note 10, at 148-94 (discussing marginal cost theory of predatory pricing).

Predatory pricing has been difficult both to define and to determine when it exists. *See, e.g.*, *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 88 (2d Cir. 1981) (distinguishing between predatory pricing and true to form competition is difficult), *cert. denied*, 445 U.S. 943 (1982); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.) (marginal cost was basis for determining distinction between lawful and unlawful pricing), *cert. denied*, 434 U.S. 879 (1977); *Industrial Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 722 (5th Cir. 1975) (court found predatory pricing to be "troublesome" and "never clearly defined"), *cert. denied*, 424 U.S. 943 (1976). At any rate, courts have been inclined to regard the more blatant instances of predatory pricing as illegal under section two of the Sherman Act. *See, e.g.*, *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954) (Court found predatory pricing practices included under antitrust theories as illegal); *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959) (court found practices to be within the violations of the antitrust laws), *cert. denied*, 363 U.S. 843 (1960).

⁷⁴ *See* Worthy, *Coke and Pepsi Stomp on the Little Guys*, *FORTUNE*, Jan. 7, 1985, at 68. (PepsiCo had a 1985 net profit of \$203 million while Coca-Cola had a net profit of over \$618 million). In order to maintain a net profit, a corporation must price above its marginal cost. *See* R. Blair & D. Kaserman, *supra* note 43, at 125 (profit maximizing point is above marginal cost). Marginal cost is the incremental cost of producing an additional unit of output. *See* P. AREEDA & D. TURNER, *ANTITRUST LAW* 24, § 715a.

⁷⁵ *See* Hovenkamp & Silver-Westrick, *supra* note 44, at 445. "As a consequence, the predator allegedly gains market power and subsequently is able to raise prices to supernormal levels and reap monopoly profits." *See generally* Telser, *Cutthroat Competition and the Long Purse*, 9 *J.L. & ECON.* 259 (1965) (discussing price-cutting and long-run effect of increased prices and high profits).

⁷⁶ *See* *Standard Oil Co. v. United States*, 221 U.S. 1, 48 (1911). In *Standard Oil*, the defendants argued that their success in business was not the result of unlawful competition. *Id.* Rather, they argued their success was attributed to: "economic genius of the highest order, sustained by courage, by a keen insight into commercial situations resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products . . . at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals." *Id.* *But see* *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-45 (9th Cir. 1983)

B. Vertical Price Fixing

Vertical price fixing and resale price maintenance combinations are terms applied synonymously to arrangements between or among independent entities in the chain of distribution whereby, a wholesaler and a retailer establish the retail price at which the product will be sold.⁷⁷ Similar to horizontal price-fixing, the Supreme Court has determined that vertical price fixing is so pernicious in and of itself as to be illegal *per se*.⁷⁸ However, under *United States v. Colgate & Co.*,⁷⁹ if an entity achieves resale price stability solely through its own actions by announcing its pricing policy and refusing to deal with those unwilling to comply, this

(Kodak did not violate antitrust laws through use of technology to increase market share), *cert denied*, 465 U.S. 1038 (1984); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 712 (7th Cir.) (superior skill and efficiency which lead to increased sales is permitted), *cert. denied*, 439 U.S. 822 (1978); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 344 (D. Mass. 1953) (per curiam) (success achieved by technological advances is permitted by antitrust laws), *aff'd*, 347 U.S. 521 (1954).

⁷⁷ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-09 (1911) (landmark case which held vertical price fixing illegal *per se*); see also ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 56 (2d ed. 1984). Vertical price fixing is effected when a manufacturer agrees impliedly or explicitly with a distributor to set a price at which the goods will be resold. *Id.* *Shores, Vertical Price-Fixing and the Contract Conundrum: Beyond Monsanto*, 54 FORDHAM L. REV. 377, 377-78 (1985) (violation of Sherman Act when manufacturer and dealer agree on resale price). There are numerous types of behavior which have been held to be illegal vertical price-fixing. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) (system for wine pricing which gives wine producer power to prevent competition is illegal vertical control that "destroys horizontal competition"); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960) (drug manufacturers may not combine with wholesalers to fix retailers' prices). See also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-2 (1977) ("The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."). See generally L. SULLIVAN, *supra* note 4, at 25-32 (outlining vertical restraint in antitrust law).

⁷⁸ See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) (price fixing "subject to *per se* treatment and treble damages.") In *Monsanto*, the court additionally declined an opportunity to consider whether vertical price restraints should be subject to the less rigorous rule of reason. *Id.* at 761 n.7.

See also *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1986) (per curiam) (even though fixed prices are reasonable they are still unlawful); *Albrecht v. Herald Co.*, 390 U.S. 145, 151-52 (1968) (*per se* rule applies to vertical agreements aimed at establishing maximum resale prices); *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U.S. 373, 408 (1911) (no distinction could save complainant's plan from being condemned as illegal price fixing). See generally Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985) (discussing vertical price restraints and *per se* violations of antitrust laws).

⁷⁹ 250 U.S. 300 (1919).

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unilateral conduct will be upheld.⁸⁰ Unilateral conduct does not violate section one of the Sherman Act because by definition, a “contract, combination . . . or conspiracy” requires a plurality of actors, and a unilateral announcement of prices does not contain the requisite collusion.⁸¹ Therefore, should a bottler establish a pricing policy and refuse to deal with those entities not embracing this policy, it would be legal.⁸² However, some CMAs have been found to contain express agreements between bottlers and retailers as to price.

Recently, in *Sun-Drop Bottling v. Coca-Cola Bottling Co.*,⁸³ a United States District Court refused to enjoin Coca-Cola’s 1985 CMA, but determined that its prior 1984 CMA with convenience stores revealed per se violations of the Sherman Antitrust Act in the form of vertical pricefixing.⁸⁴ That CMA stated: “Our brands must be the exclusive soft drinks with a reduced retail,” but failed to establish a specific price.⁸⁵ The court then held that absent a

⁸⁰ See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The *Colgate* Court was the first court to express the concept that, absent monopoly, unilateral conduct is not illegal. *Id.* Thus, a private firm “may announce in advance the circumstances under which [it] will refuse to sell.” *Id.* The Court stated that the goal of the Sherman Act was to stop unlawful activities which would “unduly interfere” with free trade. *Id.* See also Jacobson, *On Terminating Price-Cutting Distributors in Response To Competitors’ Complaints*, 49 BROOKLYN L. REV. 677, 710 (1983) (fact finder should only find concerted action when certainty exists that “supplier’s decision was not independent and unilateral”).

The *Colgate* Doctrine was later strictly construed by the courts to allow only conduct which consisted of a manufacturer’s announcement of pricing policy and a unilateral refusal to deal with those who declined to adhere to it. See *Parke, Davis & Co.*, 362 U.S. at 43 (only a “simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible. . . .”). Use of any other conduct in attempting to set prices would be unlawful. *Id.* at 44-47. The Court suggested that conduct by a manufacturer which goes beyond merely announcing his pricing policy is apt to induce his retailers to comply unlawfully. *Id.* at 46-47. Affirmative action taken by a firm with the goal of impelling customers to adhere in order to eschew price competition is anticompetitive and therefore illegal. *Id.* In such instances “[t]he manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.” *Id.* at 47; cf. Scott, *R.C. Doubles Budget Behind New Spots*, ADWEEK, Nov. 16, 1987, at 22, col. 1. RC Cola filed a 53 page document with the Federal Trade Commission requesting that CMAs be banned. *Id.*

⁸¹ See generally E. KINTER, *supra* note 1, § 9.7 — .16, at 19-34.

⁸² See *supra* note 80; *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1357 n.4 (9th Cir. 1976) (suggested prices do not violate antitrust laws), *cert. denied*, 429 U.S. 1074 (1977).

⁸³ 604 F. Supp. 1197 (W.D.N.C. 1985).

⁸⁴ See *id.* at 1198-99. The reason for the denial of a preliminary injunction was the removal of illegal provisions in the CMA governing prices charged. *Id.* Further, the court decided that CMAs must be examined under a rule of reason test. *Id.* at 1199.

⁸⁵ *Id.* at 1199. This provision was subsequently removed. *Id.* But, it is suggested that it remains questionable as to whether this agreed practice is still followed as to pricing.

price element in the 1985 CMA, no per se violation existed and thus, the request for preliminary injunction was denied.⁸⁶ It is suggested that although an express agreement no longer exists, an implied agreement by the parties may be evidenced from their prior course of dealing.⁸⁷

In addition, a distributor's use of affirmative conduct to enforce set prices has also been held illegal. This affirmative conduct consists of obtaining assurances from buyers that the established price of the manufacturer will be adhered to,⁸⁸ and the use of coercion to achieve this result.⁸⁹ Does affirmative conduct also include agreements to provide specific shelf space for a product, promote the product with feature ads, and display the product in prime locations? In recent years, courts have been concerned with the end result of promotional efforts whereby the sellers use of promotional techniques interferes with the ability of retailers to freely exercise their independent pricing decisions.⁹⁰ Perhaps

⁸⁶ *Id.* at 1200.

⁸⁷ See *Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F. Supp. 945, 950, 954-55 (S.D. Tex. 1972) (vertical price fixing can arise out of agreement or understanding between manufacturer and distributor). See, e.g., *United States v. Schrader's Son, Inc.*, 252 U.S. 85, 99-100 (1920) (when manufacturer enters into express or implied agreements it takes away retailer's control and eliminates competition); *Capital Temporaries v. Olsten Corp.*, 383 F. Supp. 902, 906-09 (D. Conn. 1974) (within agreement there are statements which are impliedly vertical restraints and therefore illegal).

⁸⁸ See 2 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 6B.02[3], at 6B-38 (1987). One way in which suppliers enforce lawful price fixing is to "obtain[] assurances from buyers that the supplier's pricing policy will be adhered to. . . ." *Id.* See, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960) (any means employed to obtain adherence to resale price violates Sherman Act); *Schnapps Shop, Inc. v. H.W. Wright & Co.*, 377 F. Supp. 570, 577 (D. Md. 1973) (securing agreement from retailers to comply by any means is illegal).

Since *Colgate* it has been generally held that a manufacturer's only means of controlling his price is to announce his resale price and refuse to deal with those who decline to adhere to it. *But cf.* Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 137. Professor Easterbrook suggests, however, that this doctrine has been so drastically narrowed as to become, in effect, almost useless. *Id.*

⁸⁹ See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145, 153-54 (1968) (threat of terminating exclusive territory arrangement if maximum retail price was exceeded deemed violative of section one); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 52-53 (2d Cir. 1980) ("[c]reating a coercive business climate" was found to be illegal price maintenance); *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616, 626-27 (4th Cir. 1979) (wholesalers controlled their retail dealers prices illegally), *cert. denied*, 444 U.S. 1074 (1980); *Greene v. General Foods Corp.*, 517 F.2d 635, 644 n.5 (5th Cir. 1975) (economic sanctions exerted by dealer withholding assistance), *cert. denied*, 424 U.S. 942 (1976).

⁹⁰ See *Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972) (critical question for fact finder is whether dealers were deprived of ability to make their own pricing decisions),

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courts should take a closer look at the promotional requirements of CMAs.

It is suggested that CMAs have the potential to be classified as illegal vertical price fixing agreements. Although suggestive pricing by bottlers in and of itself is legal,⁹¹ ad features required by CMAs specify that only a featured brand may be displayed and discounted,⁹² thereby eliminating flexibility as to the grocer's pricing decision.⁹³ Thus, CMA's place the retailer's power to control pricing⁹⁴ substantially within the distributor's realm.

While it has been held that a CMA containing a vertical price restraint is a per se antitrust violation,⁹⁵ it is submitted that a CMA without such a pricing agreement but with vertical non-price restraints may also be held illegal under a rule of reason analysis. In examining the particular facts and circumstances surrounding CMAs, courts must determine whether the agreement has sufficient procompetitive justifications to outweigh its potential anticompetitive effect.

C. Group Boycott

A group boycott is an anticompetitive horizontal conspiracy between two or more competitors through which they attempt to

cert. denied, 412 U.S. 943 (1973); *Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F. Supp. 945, 955 (S.D. Tex. 1972) (those in position of reselling must be able to independently determine price).

⁹¹ *See, e.g.*, *Lewis Serv. Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845 (8th Cir. 1983) (sales assistance program which reduced wholesalers prices not illegal), *cert. denied*, 467 U.S. 1226 (1984); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1357 n.4 (9th Cir. 1976) (manufacturer who suggests a price does not violate antitrust laws), *cert. denied*, 429 U.S. 1074 (1977). Price maintenance agreements have been held to be legal when made under a valid consignment agreement. *See United States v. General Elec. Co.*, 272 U.S. 476, 488 (1926). The Court indicated that there was no true restraint on alienation where a consignment, rather than a sale, is at issue. *Id.* *Peter v. Union Oil Co.*, 328 F. Supp. 998, 1005 (C.D. Cal. 1971) (voluntary consignment program not violative of antitrust laws). *But cf.* *Simpson v. Union Oil Co.*, 377 U.S. 13, 16, 21-24 (1964) (consignment agreement held violative of § 4 of Clayton Act, but Court distinguished case from *General Elec. Co.* on grounds that in *General Elec. Co.* product was patented).

⁹² *See supra* note 12.

⁹³ *See supra* notes 14-16 and accompanying text.

⁹⁴ *See supra* notes 14-17 & 20. It is suggested that although entering into a CMA is voluntary, retailers have no choice due to substantial benefits derived from entering and severe detriments incurred for failing to participate.

⁹⁵ *See Sun-Drop Bottling Co. v. Coca-Cola Bottling Co.*, 604 F. Supp. 1197, 1199 (W.D.N.C. 1985).

drive a rival from the market by denying that rival a source of supply or needed customers.⁹⁶ The original perception of group boycott agreements was that they were per se violative of the Sherman Act due to their anticompetitive nature.⁹⁷ However, in recent years several courts have suggested that a rule of reason analysis, balancing both the benefits and detriments of such conduct, should be examined.⁹⁸ The criterion for this per se standard was emphasized in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*:⁹⁹ "Cases to which this Court has applied the

⁹⁶ See *Counseling Your Client on Horizontal and Vertical Restraints*, 55 ANTITRUST L.J. 293, 310 (1985); ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 40 (2d ed. 1984) ("Horizontal agreements among suppliers refusing to deal with particular customers, . . . or customers refusing to deal with particular suppliers . . . are typically referred to as concerted refusals to deal or 'group boycotts.'"); C. HILL, ANTITRUST ADVISOR 19 (3d ed. 1985). Group boycotts encompass "agreements among suppliers to refuse to sell to particular customers, the refusal to enter into a new business relationship or the termination of an existing one, or a restrictive membership provision in trade association bylaws." *Id.* L. SULLIVAN, *supra* note 4, § 83, at 230. A traditional boycott involves "traders at one level" attempting to shield themselves from competition by other non-group members. *Id.* The method utilized is by taking concerted action aimed at depriving the excluded wholesalers of some [necessary] trade relationship. *Id.* at 230. Group boycotts may be effectuated through inducement of a supplier or customer. *Id.*

In 1904 the Supreme Court first held that a concerted refusal to deal violates section one of the Sherman Act. See *Montague & Co. v. Lowry*, 193 U.S. 38, 45-46 (1904) (manufacturers and dealers formed an association whereby they agreed not to sell to nonmembers).

⁹⁷ See *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). The Court held the conduct of the defendant, a chain department store which induced certain national manufacturers and distributors to discontinue selling to plaintiff, a local retail store, illegal per se. *Id.* The Court recognized that "[g]roup boycotts, or concerted refusals by traders to deal, have long been held to be in the forbidden category." *Id.*

However, the Supreme Court did not explicitly refer to the term per se violation when discussing group boycotts until 1963. See *Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963). The court noted the actions of the "Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of § 1 of the Sherman Act." *Id.* See also *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966) ("Elimination, by joint collaborative action of discounters from access to the market is a per se violation of the act."); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961) (per curiam) (conspiratorial refusal to provide gas service is group boycott and illegal).

⁹⁸ See Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV., 685, 703-05 (1979) (author suggests a new analysis rather than per se). Today several commentators and lower courts suggest that the per se rule should not apply to group boycotts. See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 216 (D.C. Cir. 1986) ("The Supreme Court has now made explicit what has always been understood . . . [T]he per se illegality of all boycotts has now been squarely rejected."); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 788 (7th Cir. 1981) (court cautioned use of per se rule to all group boycotts).

⁹⁹ 472 U.S. 284 (1985). See also *Klor's Inc.* 359 U.S. at 211-12 (certain classes of dealing are unduly restrictive and violative of antitrust policy). See, e.g., *Silver v. New York Stock*

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per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need' ¹⁰⁰

Thus, an analysis of the major bottlers' use of CMAs reveals ostensibly that bottlers contract with retailers in such a way as to deprive competitors full and fair access to the market. As previously stated, in some regions Coca-Cola and PepsiCo enter into consecutive twenty-six week CMAs, thus substantially depriving smaller bottlers of needed shelf space, advertising area and customers. It seems clear, therefore, that where such arrangements are the result of concerted action they must be examined in terms of group boycotts.¹⁰¹ This analysis will lend further credence to the monopoly theory to be discussed presently.

D. Essential Facilities Doctrine

The essential facilities doctrine requires that competitors share scarce facilities which cannot realistically be duplicated and which are essential to effective competition within a given market.¹⁰² While the boundaries of this doctrine have yet to be determined, the four elements required for liability thereunder have been established: (1) control of the essential facility by a business or group of businesses; (2) the inability of a competitor to duplicate the essential facility; (3) the denial of access to the facility by its

Exchange, 373 U.S. 341, 347 (1963) (deprivation of valuable business service held group boycott); *Radiant Burners, Inc.* 364 U.S. at 659 (refusal to provide gas held group boycott).

¹⁰⁰ See *Northwest Wholesale Stationers*, 472 U.S. at 294 (quoting L. SULLIVAN, *LAW OF ANTI-TRUST* 261-62 (1977)).

¹⁰¹ Cf. *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966) (Court noted "explicit agreement is not a necessary part of a Sherman Act conspiracy."); *United States v. Foley*, 598 F.2d 1323, 1331 (4th Cir. 1979) ("Proof of a section one conspiracy need not be direct"), *cert. denied*, 444 U.S. 1043 (1980); *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (no need for an express agreement to violate section one). See also 3 P. AREEDA & D. TURNER, *Supra* note 10, § 841a, at 361-62 (1978) ("It is not necessary that there be advance or verbally communicated agreement.")

¹⁰² See *Bouknight, Aspen Skiing Co. v. Aspen Highlands Skiing - The Conduct Standard Under Section 2 of The Sherman Act*, 6 ENERGY L. J. 275, 277 (1985) (essential facilities doctrine was first used when competitors were prevented from using a facility that was essential to effective competition). See generally Tye, *Competitive Access: A Comparative Industry Approach To The Essential Facility Doctrine*, 8 ENERGY L. J. 337 (1987) (discussing economic principles of essential facility doctrine).

controller; and (4) the feasibility of the controlling business to provide for its competitors access to the controlling facility.¹⁰³ In the soft drink industry shelf space, because of its limited availability and the fierce competition for it, should be deemed an essential facility.¹⁰⁴

CMA's give major bottlers control over shelf space as well as secondary displays used to promote their products.¹⁰⁵ This is because in many instances, a retailer is under extreme economic pressure to enter into a CMA due to the substantial monetary benefits offered:¹⁰⁶ Bottlers virtually buy control. Although smaller bottlers

¹⁰³ See *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). In order to satisfy the requirement of an essential facility "it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants." *Id.* *Driscoll v. City of New York*, 650 F. Supp. 1522, 1529 (S.D.N.Y. 1987) ("[t]he doctrine is applicable only where a party is being denied access to something necessary for that party to engage in business which is controlled by his competitors." (quoting *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558, 569-70 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984))); *Antitrust Division, U.S. Dep't of Justice, Antitrust Guide for International Operations* 20, 23-4 (1977) (a facility is essential if its exclusion "imposes a serious handicap on other members of the industry"); *cf.* *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132-3 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The court enunciated the four elements of the essential facilities doctrine, stating as requirement number one, control by a monopolist. *Id.* However, in subsequent cases it was recognized that the party in control need not always be a monopolist. See *Byars v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir. 1979) (upon describing the essential facilities doctrine court noted "a group of competitors control an indispensable facility which cannot be easily duplicated"); *cf.* *Beverage Management, Inc. v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1156 (S.D. Ohio 1986) (no mention of monopolist as requirement). A railroad bridge has been held to be an essential facility. See *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 409 (1912); see also *Otter Tail Co. v. United States*, 410 U.S. 366, 368 (1973) (transmission line held to be essential facility); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520-21 (10th Cir. 1984) (ski lift tickets held essential facility), *aff'd on other grounds*, 472 U.S. 585 (1985).

¹⁰⁴ See *Jabbonsky, Sympathy for the Retailer?*, BEVERAGE WORLD, Oct. 1987, at 53 ("retailers continue to charge more and more for slotting allowances and space"). See also *Williams, supra* note 23, at 93 (soft drink competitors fight for displays which "can increase a product's sales sixfold.").

¹⁰⁵ See *supra* note 13 and accompanying text. See also Plaintiff's Reply Memorandum at 20, *Beverage Management, Inc. v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144 (S.D. Ohio 1986) (No. 1-84-1300). "Certainly Kroger decides who to run in its feature ads, but chooses, out of economic common sense, to run the most profitable programs. Coke's CMA program, therefore, does control this essential facility." *Id.*; *Worthy, supra* note 26, at 68 ("[I]f Kroger . . . had taken advantage of all the discounts that Coke and Pepsi bottlers offered in exchange for store advertising and promotion in 1984, the retailer would have reaped about \$2 million."); *60 Minutes, supra* note 14, at 8 ("[T]hey were trying to take control of my soft drink business and I was losing control of it.").

¹⁰⁶ See *supra* note 20 and accompanying text.

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still retain minority shelf space, they are rapidly losing market share as CMAs gain power and popularity.¹⁰⁷ The small bottler has neither the finances nor the ability to compete for or demand more shelf space.¹⁰⁸ In effect, CMAs substantially foreclose small bottlers from an essential facility: shelf space.

In order to provide better access to the essential facility, major bottlers need only eliminate the CMA program.¹⁰⁹ This action would return control over shelf space to retailers,¹¹⁰ and eliminate the pressure created by the substantial monetary benefits of CMAs.¹¹¹ The result — each bottler would have equal access to shelf space¹¹² and the increase in competition might drive market prices down to a more competitive level.

¹⁰⁷ See Scott, *supra* note 13, at 22. The CMA program requires that retailers give major bottlers preferential shelf space and secondary displays as well as feature advertising. *Id.* The result of these preferences is increased sales because soft drinks are high impulse products. See Blair, *supra* note 13, at 60. Furthermore, it has been proven that end-of-aisle displays increase sales over 295%. See Ellerman, *Supermarkets: Opportunities for The Making*, BEVERAGE WORLD, June 1987, at 1; Wiegert, *The Quest For Space*, BEVERAGE WORLD, Apr. 1987, at 1. More importantly, “the bulk of packaged soft drink volume in supermarkets is sold through off-shelf displays.” Blair, *supra* note 13, at 58.

¹⁰⁸ Cf. Fishman v. Estate of Wirtz, 807 F.2d 520, 540 (7th Cir. 1986) (duplication of Chicago Stadium would have been unreasonably costly); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984) (costs and regulatory restrictions may make duplication of facility unreasonable), *aff'd*, 472 U.S. 585 (1985); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1133 (7th Cir.) (“It would not be economically feasible for MCI to duplicate Bell’s local distribution facilities . . .”), *cert. denied*, 464 U.S. 891 (1983); Consolidated Gas Co. v. City Gas Co., 665 F. Supp. 1493, 1534 (S.D. Fla. 1987) (duplication costs deemed impracticable where they render competitor unable to compete effectively). See also L. SULLIVAN, *supra* note 4, at 131 (if it is not feasible for competitor to duplicate facility, a competitor must have access on “reasonable, non-discriminatory” terms).

Applying the essential facilities doctrine to shelf space: See National Dairy Prods. Corp. v. FTC, 412 F.2d 605, 615 (7th Cir. 1969) (“modern grocery store has a limited amount of shelf space . . .”); E. MCCARTHY, J. GRASHOF, & A. BROGOWICZ, *supra* note 13, at 223 (finite supermarket shelf space); Blair, *supra* note 13, at 54 (shelf space for soft drinks remains constant); Williams, *supra* note 21, at 93 (“scarcity of shelf space has . . . put the retailer in the real estate business; manufacturers have little choice but to bid for territory to display their wares.”); Worthy, *supra* note 32, at 68 (bottler is afraid if shelf space is taken away he will go out of business).

¹⁰⁹ See 60 Minutes, *supra* note 14, at 9 (without CMAs the soda market would provide far greater variety while retaining competitive prices).

¹¹⁰ *Id.*

¹¹¹ See *supra* notes 14 and 20.

¹¹² See 60 Minutes, *supra* note 14.

CONCLUSION

As the analysis in this article suggests, CMA programs instituted by major bottlers are vulnerable to attack under various antitrust theories. It is plausible that the social interest of free and uninhibited trade among the members of our capitalistic society may be violated by these agreements. In light of the issues raised in this article, further analysis of CMAs is warranted to determine if the goal of the Sherman Antitrust Act— the promotion of free competition among competitors— has been violated.

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