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An Analysis of the Vertical Price-Nonprice Dichotomy

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by
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ANTITRUST POLICY TOWARD VERTICAL RESTRAINTS

The Policy Debate

The debate concerning the appropriateness of existing antitrust standards for distribution (vertical) restrictions continues unabated. Some observers have criticized current national antitrust policy, which treats vertical price restraints (usually referred to as either resale price maintenance or vertical price fixing) as per se illegal and vertical nonprice restraints as illegal only if found unduly anticompetitive under the rule of reason, as being seriously lacking in theoretical unity.[1] These commentators usually contend that resale price maintenance, like vertical nonprice restraints, should be judged under the rule of reason.[2] A few have even called expressly for a rule of per se *legality* for all forms of vertical restraint.[3] On the other hand, current policy toward vertical restrictions is not without scholarly support.[4]

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[1] *See, e.g.*, R. BORK, THE ANTITRUST PARADOX 280-98 (1978); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966); Butler & Baysinger, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics, and Organization Theory*, 32 EMORY L.J. 1009 (1983); Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Liebeler, *1983 Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restrictions*, 31 U.C.L.A.L. REV. 384 (1983); Mathewson & Winter, *An Economic Theory of Vertical Restraints*, 15 RAND J. ECON. 27 (1984); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977).

[2] *See, e.g.*, Baxter, *Vertical Restraints and Resale Price Maintenance: A "Rule of Reason" Approach*, 14 ANTITRUST L. & ECON. REV. 13 (1982); Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 B.U.L. REV. 521 (1984); Phillips & Mahoney, *Unreasonable Rules and Rules of Reason: Economic Aspects of Vertical Price-Fixing*, 30 ANTITRUST BULL. 99 (1985); White, *Vertical Restraints in Antitrust Law: A Coherent Model*, 26 ANTITRUST BULL. 327 (1981).

[3] *See, e.g.*, Butler & Baysinger, *supra* note 1; Easterbrook, *supra* note 1; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

[4] *See, e.g.*, Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania*, 64 IOWA L. REV. 461 (1979); Cann, *Vertical Restraints and the "Efficiency" Influence: Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, 24 AM. BUS. L.J. 483 (1987); Flynn, *The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 CORNELL L. REV. 1095 (1986); Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis*, 1981 DUKE L.J. 417; Gerla, *Discounters and the Antitrust Laws: Faces Sometimes Should Make Cases*, 12 J. CORP. L. 1 (1986); Gould & Yamey, *Professor Bork on Vertical Price Fixing*, 76 YALE L.J. 722 (1967); Gould & Yamey, *Professor Bork on Vertical Price Fixing: A Rejoinder*, 77 YALE L.J. 936 (1968); Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487 (1983); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978). *See also* Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143 (1985) (supporting existing rules, except for assertion that vertical nonprice restraints may be even more anticompetitive than resale price maintenance).

Resolution of Free-Rider Problems

The kernel of the arguments most often voiced by those critical of current policy is that the motives for and effects of resale price maintenance usually are the same as in the case of vertical nonprice restraints. Critical scholars frequently assert that the usual motives for both vertical price and nonprice restraints are the enhancement of distribution efficiency and stimulation of *interbrand* competition through the resolution of free-rider problems.[5] In other words, if local promotion, point-of-sale service, and other demand-stimulating activities by distribution channel members (distributors or dealers)[6] are an important part of the marketing effort for a particular product, the manufacturer or other supplier must adopt some system to insure optimal levels of these activities. Such activities normally require substantial investment by dealers, thus creating a climate for opportunistic behavior. If a particular dealer can benefit from the demand-stimulating activities of other dealers while foregoing such activities himself, he can operate at a significant cost advantage. Free riding on the costly, demand-stimulating activities of other dealers, so the argument goes, will often be detected by those engaging in these activities, thus diminishing their incentive to continue doing so. Without some type of distribution channel control by the supplier, it is theorized that dealers may ultimately not engage in these activities even though they would be better off if all of them did so.

The type of free riding discussed here, and that most frequently serving as the theoretical foundation for critics of current antitrust policy, is that involving product-specific services. Other types of free riding are possible, of course, such as opportunistic capitalization by a lower reputation dealer on the decision of a higher reputation dealer to carry the goods of (and lend its goodwill to) a supplier whose brand is not yet as well established as is the name of the high-reputation dealer. Although free riding of this latter type is becoming somewhat more popular in the literature as a vertical restraints justification, it still is not offered as a justification for distribution restrictions with the fervor and frequency of alleged free riding on product-specific services.[7]

[5] For more detailed discussions of free riding, *see, e.g.*, R. BORK, *supra* note 1; Bork, *supra* note 1, at 430-38; Butler & Baysinger, *supra* note 1, at 1023-24, 1060-63; Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 89-96 (1960).

It also has been argued that vertical restraints can be productive of efficiency in ways other than the solving of free-rider problems, such as facilitating the recruitment of new dealers. *See, e.g.*, Louis, *Vertical Distributional Restraints Under Schwinn and Sylvania: An Argument for the Continuing Use of a Partial Per Se Approach*, 75 MICH. L. REV. 275, 296-300 (1976).

[6] The term "distributor" frequently is used to describe a distribution channel member at the wholesale level, while the term "dealer" most often is used to describe one at the retail level. In this article, the terms are used interchangeably, and "dealer" frequently is used generally to denote any downstream channel member.

[7] For arguments that quality-certification services may form the basis for another type of free-rider justification, *see* Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U.L. REV. 736, 744-48 (1984); Marvel & McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346 (1984); Oster, *The FTC v. Levi Strauss: An Analysis of the Economic Issues*, in IMPACT EVALUATIONS OF FTC VERTICAL RESTRAINTS CASES 47, 62-67 (R. Lafferty, R. Lande, & J. Kirkwood ed. 1984). Goldberg also argues that other dealer services to manufacturers, such as grant-

Use of Vertical Restrictions to Solve Distribution Problems

Although there is lively debate about the actual regularity and importance of free riding in distribution channels, it is clear that some free riding does occur.[8] Various distribution channel controls may be employed in an attempt to prevent free-rider problems. Supplier-monitored contractual requirements for prescribed levels of promotion, service, and so forth are one way. Several forms of vertical restriction also may be used for this purpose. Resale price maintenance precludes intrabrand price competition among dealers and, consequently, diminishes the incentive for free riding because the cost advantage resulting from free riding cannot be used to undercut other dealers. Vertical nonprice restraints can be used for the same purpose, because they also limit intrabrand competition and prevent realization of a competitive advantage from free riding. Nonprice restraints include restrictions on the territory within which or the customers to whom the dealer can resell, requirements that a dealer operate only from a designated location, profit passover clauses requiring a dealer to pay a portion of the proceeds from an out-of-territory sale to another dealer whose area was encroached, guarantees to dealers of several types of exclusive distribution rights, and other variations on a similar theme.

Problems of Application

There is little room for doubt that the dichotomy in the legal standards applied to vertical price and nonprice restraints has produced significant application problems. Perhaps the most perplexing problem is the not infrequent difficulty encountered by courts in distinguishing price from nonprice restrictions.[9] As we have seen, the demand-stimulating activities that are supposed to be encouraged by vertical nonprice restraints can be quite costly to the dealer, thus giving a significant cost advantage to the dealer who does not engage in those activities. When this advantage is used by the lower-cost dealer to fund price competition, the supplier's resulting concern about this dealer's failure to perform the required service or promotion may have originated when the supplier learned of the discounting (often from other dealers). As a consequence, even when the supplier had not attempted to control or substantially influence dealers' resale prices, the supplier's investigation of the recalcitrant dealer and

ing scarce shelf space, provide justifications for vertical restrictions because they are similarly susceptible to free riding. Goldberg, *supra*, at 738-44.

[8] Some observers have been skeptical of the free-rider justification for distribution restrictions, especially as it relates to product-specific services. *See, e.g.*, L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 382-83 (1977); Barrett, *Restrictive Distribution and the Assault of the "Free Riders,"* 7 J. CORP. L. 467 (1982); Flynn, *supra* note 4, at 1130-32; Gerhart, *supra* note 4, at 431-36; Pitofsky, *supra* note 4, at 1492-93; Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 694-95 (1983); Steiner, *supra* note 4, at 187-89. For a discussion of several ways in which free-rider problems can be solved without using distribution restrictions, *see* Levmore, *Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information*, 67 IOWA L. REV. 981 (1982).

[9] This problem is discussed by the Court in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984). *See also*, Liebeler, *supra* note 1, at 388-91 (pointing to application difficulties, among other reasons, as supporting an argument that the price-nonprice dichotomy is not an appropriate doctrinal distinction).

attempted enforcement of the dealer's promotion and service obligations may take on a price-motivated aura. Thus, in the formulation and implementation of distribution controls, business planning is more difficult and the legal risk less predictable than if the distinction between price and nonprice restrictions were clearer or if the same legal standards applied to both.

Motivations and Effects

Despite these difficulties, application of a dual legal standard to distribution restrictions may be warranted on policy grounds if 1) vertical price restrictions are motivated by competitively illegitimate objectives with substantially greater frequency than are vertical nonprice restrictions or 2) substantial adverse effects on competition are more likely to result from price restraints than from nonprice restraints. The existence of anticompetitive motives is important primarily because such motives increase the chances that conduct such as the implementation of a vertical restriction will have actual anticompetitive effects, and decrease the chances that such conduct will have offsetting procompetitive effects.

Regarding the question of motives, although enhancement of distribution efficiency and consequent promotion of interbrand competition through the resolution of a free-rider problem is often asserted as the justification for a distribution restriction, there can be other motivations that are not as easily justified from the perspective of national competition policy. For example, vertical restrictions on intrabrand competition, especially resale price maintenance, can be employed as a facilitating mechanism for interbrand supplier collusion. The reason for this horizontal-vertical relationship is that colluding suppliers are likely to have less incentive to cheat by surreptitiously cutting prices when each employs resale price maintenance. A member of a supplier cartel who cheats presumably does so to increase wholesale volume. If that seller's downstream channel members cannot use the resulting cost advantage to compete for additional sales at their level because they are constrained by resale price maintenance, they are not likely to buy more from the supplier. Thus, the supplier probably has essentially the same market share with a lower profit margin.

In addition, the existence of resale price maintenance may provide members of the supplier cartel with another means for policing compliance because price cutting at wholesale may produce a violation of the resale price maintenance policy downstream. In other words, the supplier's price cutting may actually achieve its objective downstream by inducing more sales to dealers who then attempt to increase their sales volume by cutting prices in contravention of the resale price maintenance system. This action, in turn, will normally produce complaints by other dealers who do not choose to price compete. Other sellers will not find it difficult to discover such complaints.

Even if other sellers do not discover these complaints, or if there were not any made, pricing activities of downstream channel members often will be more visible and thus more discernible to other participants in the seller cartel than the pricing activities of sellers themselves, thus giving sellers a basis for drawing inferences about the wholesale prices of cartel members from the structure of downstream pricing.

From a public policy standpoint, the vertical restriction is likely to be more easily detected by antitrust enforcers than the seller-level conspiracy because of the usually much larger number of participants in the vertical restriction and the frequently greater visibility of pricing at lower levels in the distribution channel. Intuitively, it would seem that the use of vertical restraints to facilitate supplier collusion would be greater in the case of resale price maintenance than in the case of vertical nonprice restrictions, thus supporting a harsher legal standard for the former. This supposition has not been satisfactorily substantiated, however.[10]

In addition, either a vertical price or nonprice restriction can be employed as an implementing device for dealer collusion. Pressuring the supplier to impose various distribution restrictions can be an ideal way to operationalize the channel members' agreement. There often will not be enough evidence to prove a conspiracy among these dealers, but if the genesis of the restriction was at the dealer level, the underlying motivation is not as likely to have been the achievement of distribution efficiencies or enhancement of service and promotion. Again, the horizontal conspiracy is often more difficult to detect than the vertical restrictions. Indeed, even if there was not a dealer cartel, distribution restrictions resulting from dealers' independent or interdependent pressuring of the supplier may be less likely to have been motivated by the supplier's service/promotion concerns.[11]

Again, if these or other less justifiable motives are more likely to be the producing cause of vertical price restraints than vertical nonprice restraints, a stricter legal standard for the former may be warranted because of the in-

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[10] In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 (1977), the Court indicated that resale price maintenance is more likely than vertical nonprice restrictions to be used as a supplier cartel facilitator, but provided no substantiation. At least one writer had earlier rejected this view. Bork, *supra* note 1, at 415.

For general discussions of the possibility of vertical restrictions serving to facilitate supplier collusion, *see, e.g.*, L. SULLIVAN, *supra* note 8, at 385; Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 844-48 (1955); Hovenkamp, *supra* note 2, at 534-40; Telser, *supra* note 5, at 96-99; White, *supra* note 2, at 340-41; Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 967-68 (1979).

Some observers have expressed skepticism about the likelihood of resale price maintenance being used to facilitate supplier collusion with any significant frequency. *See* Bork, *supra* note 1, at 411-15; Easterbrook, *supra* note 1, at 141-42; Ornstein, *Resale Price Maintenance and Cartels*, 30 ANTITRUST BULL. 401 (1985).

[11] For general discussions of the possibility of vertical restrictions serving to facilitate dealer collusion, *see, e.g.*, T. OVERSTREET, RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 13-19 (1983); L. SULLIVAN, *supra* note 8, at 383-84; Posner, *supra* note 1, at 17.

Some observers also have expressed skepticism about the likelihood of resale price maintenance being used more than rarely to facilitate dealer collusion. *See* Bork, *supra* note 1, at 405-10; Easterbrook, *supra* note 1, at 141-42; Ornstein, *supra* note 10.

creased chances of adverse competitive effects.[12]

If we assume that a supplier's employment of distribution restrictions was motivated by competitively positive objectives, we then must consider the possibility that other factors may cause these restrictions to have anticompetitive effects. In this regard, a foundational principle is that a truly vertical restriction normally has a *direct* impact only on intrabrand competition. The *overall* effect of a vertical restriction depends, however, on a number of interrelated variables, including but not limited to 1) the degree of market power possessed by the manufacturer or other supplier imposing the restriction, 2) even without substantial supplier market power, the position of the product as being either established or recently introduced, 3) the relative intensity of *interbrand* competition, 4) the historical role and importance of *intrabrand* competition in the distribution of this product, 5) the extent to which vertical restrictions are employed in the remainder of the market, 6) the existence of additional restrictions or other factors indicating that the intrabrand effect may have spillover interbrand effects, 7) the existence or nonexistence of feasible, less competitively restrictive alternatives for achieving legitimate distribution objectives, 8) the existence and substantiality of entry barriers in the relevant markets, and 9) the relative differentiated or fungible nature of the product in question.[13] Again, if vertical price restrictions are significantly more likely than vertical nonprice restrictions to produce adverse effects on competition, application of a harsher standard to the former is probably warranted. Some of these variables could not be explored in the present study because the necessary data was unavailable in the selected sample. Those factors chosen for analysis are discussed later in the article.

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[12] Another possible motive for vertical restraints may be to facilitate price discrimination. A seller wishing to exploit greater market power in one downstream market than in another may sell at different prices, or at the same prices in the face of different costs. Dealers can largely overcome such discrimination by arbitrage; i.e., a favored dealer can resell to a disfavored one at a price between the prices charged by the seller to the two dealers. Vertical restrictions can prevent arbitrage. Vertical nonprice restrictions, such as those confining dealers to particular territories, are more efficacious for this purpose than resale price maintenance. Because price discrimination is regarded as inefficient in some circumstances, this phenomenon may support a conclusion that resale price maintenance should not receive harsher legal treatment than vertical nonprice restrictions. *See* Hovenkamp, *supra* note 2, at 548-61. Price discrimination as a possible motive is not examined in this study because there seems to be little doubt that nonprice restrictions may further such a purpose and that resale price maintenance does not.

[13] An extraordinary amount of scholarship has attempted to analyze these and other factors that may have a bearing on the effects of vertical restrictions. In addition to those authorities cited *supra* notes 1-12, the following is a small but representative sample: Carstensen, *Vertical Restraints and the Schwinn Doctrine: Rules for the Creation and Dissipation of Economic Power,* 26 CASE W. RES. L. REV. 771 (1976); Carstensen & Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition,* 1986 WIS. L. REV. 1; Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy,* 98 HARV. L. REV. 983 (1985); Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath,* 81 HARV. L. REV. 1419 (1968); Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective,* 58 TEX. L. REV. 91 (1979); Meehan & Larner, *A Proposed Rule of Reason for Vertical Restraints on Competition,* 26 ANTITRUST BULL. 195 (1981); Strasser, *Vertical Territorial Restraints After Sylvania: A Policy Analysis and Proposed New Rule,* 1977 DUKE L.J. 775; Zelek, Stern & Dunfee, *A Rule of Reason Decision Model After Sylvania,* 68 CALIF. L. REV. 13 (1980).

THE NATURE AND DESIGN OF THE STUDY

The present study seeks to determine whether there is substantial credible evidence either supporting or refuting the existing legal dichotomy between vertical price and nonprice restraints. In other words, does the evidence indicate that there is anything really "different" about distribution systems in which the supplier has attempted to directly control dealers' resale prices that justifies today's harsher legal standard for resale price maintenance? The unit of study is the restricted distribution system, i.e., a distribution system in which the manufacturer or other supplier has placed controls on downstream channel members relating to price, territory, or customer type, or otherwise has limited intrabrand competition by granting to channel members any of several types of exclusive distribution rights.

Sample Selection

1. Initial Parameters

Because much of the information relating to particular distribution systems is perceived by suppliers as legally sensitive, and is not within the scope of periodic reporting requirements for publicly held firms, a choice was made to examine those distribution systems that had been subjected to legal challenges resulting in reported court decisions.

The legal status of a given restriction obviously affects the seller's choice of restriction. To remove this bias, the 1967-77 period was chosen for study because both price and nonprice restraints were per se illegal during this time. The per se illegal status of resale price maintenance, adopted by the Supreme Court in 1911,[14] continued in these years and thereafter. In 1967 the Court ruled nonprice restraints to be per se illegal, as well, in *United States v. Arnold, Schwinn & Co.*[15] The Court overruled *Schwinn* in 1977, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[16] and reverted to a rule of reason analysis for nonprice restrictions.

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[14] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Although the Court did not expressly adopt a per se rule in *Dr. Miles*, the rationale it employed was later interpreted as manifesting such a rule. *See* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 258 (1984).

[15] 388 U.S. 365 (1967). The *Schwinn* case left some characterization issues. While territorial customer and resale restrictions were illegal per se under *Schwinn*, there continued to be questions whether location clauses and some other variations on the same theme were within the scope of this per se prohibition. *See, e.g.*, L. SULLIVAN, *supra* note 8, at 406-11. The fact that characterization issues remained does not affect the validity of the chosen sample, however, because per se rules always create characterization issues. In any case in which legality depends on how particular conduct is denominated, a premium is placed on the judicial act of denomination. *See* Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUS. L. REV. 761 (1979). The per se rule against resale price maintenance similarly created, and continues to create, the same kinds of characterization issues. *See, e.g.*, Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964) (concluding that distributional price restrictions in consignment arrangements can constitute illegal resale price maintenance).

[16] 433 U.S. 36 (1977).

2. Exclusion of Unchallenged Restrictions

Use of this sample excludes those restricted distribution systems not subjected to legal challenge. When empirical analysis of legal standards is attempted, inclusion of only those instances of conduct that had produced legal challenges could bias the data toward factors indicating illegality. By focusing on the time period in which both categories of restriction were per se illegal, however, the present study substantially negates this problem. The reason is that this study seeks to identify factors influencing the likely purposes and effects of distribution restrictions, and these factors have no bearing on the question of legality when a per se rule is applied.

3. Exclusion of Settled Claims

The chosen sample also excludes those distribution restrictions subjected to legal challenge but not resulting in reported court decisions. Thus, lawsuits that were settled out of court are not reflected. There is no objective method for determining whether exclusion of these situations affects the results in a significant way, because so many variables influence the decision to settle out of court. Most antitrust cases involving vertical restrictions are treble damage suits brought against suppliers by terminated dealers or distributors claiming that the termination resulted from their refusal to comply with an allegedly illegal distribution restriction. One might assume that the exclusion of settled claims from the study would increase the proportion of distribution restrictions having minimal chances of success, because the prospect of receiving treble damages might cause plaintiffs to be less likely to settle claims having only minimal chances of success and to continue to pursue them in litigation. A contrary assumption is equally plausible, however: the prospect of treble damage liability may lead a larger number of defendants to press for settlement of claims having minimal chances of success, thus decreasing the proportion of unmeritorious claims within the sample. These offsetting possibilities, coupled with the existence of other randomly occurring and often immeasurable variables affecting the likelihood of out-of-court settlement, probably result in a wash. In addition, the fact that the per se rule causes the factors examined in this study to have no direct bearing on the probability of a claim's ultimate success or failure leads to the conclusion that excluding settled cases has no significant impact.

4. Exclusion of Unreported Decisions

The choice of sample similarly excludes court decisions that were not formally reported. The rules guiding a federal court's determination whether to formally publish its decision vary among federal districts and circuits; the percentage of decisions published also varies significantly. Cases that are dismissed at an early stage in the proceedings are less likely to result in published opinions, thus possibly causing the sample to included a larger proportion of challenged restrictions in which the plaintiff's claim has somewhat greater merit. Once again, because courts' decisions whether to publish are characterized by a not insubstantial degree of randomness, and because the focus of the study has little to do with factors affecting legality, exclusion of unreported decisions also has minimal impact on the appropriateness of the sample.[17]

5. Exclusion of Settled and Unappealed FTC Proceedings

Finally, limitation of the sample to reported court decisions excludes distribution restrictions challenged by the Federal Trade Commission that were either resolved informally or that were resolved formally within the Commission's administrative process without subsequent review by a federal appeals court. One may logically assume that the Commission would be less likely to make frivolous challenges than a private plaintiff in a treble damage action, and that exclusion from the sample of most FTC-challenged restrictions would increase the proportion of marginal claims in the sample. For many of the same reasons previously discussed, the impact of this exclusion is likely to be minimal or nonexistent. Moreover, if this or other exclusions were to have an effect on the sample, any such effect would almost certainly be manifested equally in price and nonprice restraints during the period of measurement and would not influence comparisons between the two categories.

Methodology

1. Search Design

Two intentionally overbroad searches of the Lexis data base were conducted. Each was limited to reported decisions in federal district courts, courts of appeal, and the United States Supreme Court during the 1967-77 period. One search sought all such cases containing the key word "Schwinn," in order to retrieve those containing a reference to the Supreme Court's 1967 *Schwinn* decision which adopted the rule of per se illegality for vertical nonprice restraints. It is extremely unlikely that a court would have dealt with a claim relating to a vertical nonprice restriction during this period without citing *Schwinn.* The second search sought all cases containing either "Dr. Miles," "Colgate," or "Parke-Davis." These terms were elements in three of the landmark Supreme Court decisions of earlier years involving resale price maintenance.[18] Again, it is highly unlikely that a court dealing with a claim of resale price maintenance during this period would have failed to refer to at least one of these precedents.

[17] *See* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 592 (1981). *See also* Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219, 242 & n.181 (1986).

[18] United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Colgate & Co., 250 U.S. 300 (1919); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

These two searches yielded an initial total of 639 cases. Of this number, 124 were found to be duplicates. The remaining 515 were read initially for the purpose of consolidation and further elimination. The designedly overbroad nature of the searches causes retrieval of several irrelevant cases that were quickly eliminated. For example, the overbreadth of the "Schwinn" search produced several cases involving Arnold, Schwinn & Co. as a party to patent litigation.

2. Consolidation of Litigation Involving the Same Distribution System

A substantial number of decisions were consolidated because they involved the same litigation at different stages. The same lawsuit may have produced two or more opinions by the trial court relating to matters such as preliminary injunction or summary judgment, as well as a final opinion after trial. One or more opinions at the appellate level also may have been generated in the same case. All were read carefully, because different bits of background information occasionally can be extracted from opinions at different stages. In addition to consolidating those judicial opinions relating to the same litigation, different cases involving the same restricted distribution system were consolidated.

3. Exclusion of Cases with Pre-*Schwinn* Facts

A case was retained for study only if the facts indicated that a distribution restriction was in use after the 1967 *Schwinn* case and before the 1977 *Sylvania* case. The search yielded a number of cases that were litigated during the first part of the 1967-77 period but that involved facts occurring prior to *Schwinn*. If the relevant facts did not extend past *Schwinn*, the case was excluded. Moreover, a case was excluded even if the circumstances indicated a significant likelihood that the facts were pre-*Schwinn*. For example, decisions by district courts as early as 1969 and courts of appeal as early as 1970 were scrutinized closely for circumstantial dating evidence when the courts' factual recitations did not give dates. Almost all such cases were excluded. Occasionally, one was retained when circumstantial evidence preponderated toward a conclusion that the relevant facts extended past *Schwinn*, as when a 1969 or 1970 decision involved summary judgment or preliminary injunction.

4. Exclusion of Fair Trade Cases

Although the selection of the 1967-77 period substantially purged the data of bias caused by differing legal standards, and solved most of the other potential difficulties involved in isolating comparable sets of data, there remained one problem of potential bias at the initial stage of sample selection. Resale price maintenance under certain conditions remained exempt from antitrust challenge under state Fair Trade laws until 1975. These laws existed under authorization granted by Congress in the Miller-Tydings and McGuire Acts, which were repealed in 1975.[19] By the beginning of the period in question, however, the Fair Trade laws of many states had been repealed, and many more had been invalidated by state judicial action under state constitutional provisions.[20] Some state court decisions had struck down these laws in their entirety, and many had declared only the laws' nonsigner provisions unconstitutional.[21] Invalidation of nonsigner provisions, which permitted sellers to enforce their resale price maintenance systems against all downstream channel members on the basis of a single contract with one member, made implementation of resale price maintenance much more difficult and rendered those Fair Trade laws largely ineffective. Consequently, by the beginning of the period only about one-third of the states had truly effective Fair Trade laws and, even when legal, enforcement of contracts made pursuant to such laws was frequently difficult.[22] Furthermore, many uncertainties about judicial interpretation of these laws caused reliance upon them to be risky. For example, dual distribution by a seller (sales in both wholesale and retail markets) created substantial risks that a state's Fair Trade law would not be applicable.[23] In addition, sellers encountered great difficulty in sufficiently controlling national distribution so that resale price maintenance could be practiced in those states where lawful but avoided in those where unlawful.[24] These risks increased, and the practicability of lawfully maintaining resale prices in a regional or national distribution network decreased, as fewer states had effective Fair Trade Laws. By the beginning of the period under study, the risks were great and the practicability low. Ultimately, the search in this study turned up a very small number of decisions in which the seller apparently had attempted to rely on Fair Trade protection, and these were eliminated from the sample. Any remaining bias in the data resulting from the presence of a state Fair Trade law would seem to be quite minor, for the reasons discussed above.

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[19] The Miller-Tydings Act, Ch. 690, Title VIII 50 Stat. 673, 693 (1937), amended Section 1 of the Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1982)), by adding a proviso permitting states to legalize minimum resale price maintenance. In Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), the Supreme Court held that this proviso only permitted state laws to validate consensual vertical price fixing between the actual parties to the agreement. The McGuire Act, Pub. L. No. 542, 66 Stat. 631 (1952) (codified at 15 U.S.C. § 45 (note) (1982)), further amended Section 1 to authorize state Fair Trade laws to include nonsigners, i.e., to bind all dealers or distributors of a good sold under a resale price maintenance agreement in that state, regardless of whether the particular dealer or distributor was a party to such an agreement. The Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (1975), repealed the Miller-Tydings and McGuire Acts.

[20] *See* P. AREEDA, ANTITRUST ANALYSIS 663-64 (1981); L. SCHWARTZ, J. FLYNN, & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST 590-97 (1983); L. SULLIVAN, *supra* note 8, at 378-79; 2 TRADE REG. REP. (CCH) ¶ 6041.

[21] *Id.*

[22] 2 TRADE REG. REP. (CCH) ¶ 6041. Regarding the difficulty of specifically enforcing price maintenance contracts under Fair Trade laws, see P. AREEDA, *supra* note 20, at 663-64.

[23] United States v. McKesson and Robbins, Inc., 351 U.S. 305 (1956).

[24] For an illustration of the difficulty encountered by a national marketer when attempting to rely on state Fair Trade laws, see United States v. Revlon, Inc., 1975 Trade Cas. (CCH) ¶ 60, 202 (S.D.N.Y. 1975) (involving Revlon's fair trade program during 1948-63).

5. Exclusion of Restrictions in Vertically Integrated Enterprises

The *Schwinn* search turned up a number of cases involving termination of suppliers' agents in distribution systems that were completely integrated. These were ultimately eliminated because, in a price-nonprice classification scheme, the nature of the plaintiffs' complaints in cases arising from vertically integrated distribution systems can only produce a nonprice classification. Moreover, these cases do not really represent "restricted distribution systems" in the legal sense. The problems encountered in this regard are yet another manifestation of the application difficulties inherent in the price-nonprice dichotomy.

6. Exclusion of Tying and Exclusive Dealing Cases

The searches also yielded a number of cases involving tying arrangements, under which the supplier conditions the availability of one product on the dealer's acceptance of an additional product, and exclusive dealing arrangements, under which the dealer agrees either directly or indirectly to not buy from the supplier's competitors. Although the motives for tying and exclusive dealing may be different in many cases, their effects often will be similar. The important point for present purposes, however, is that these two conceptually related restrictions normally are energized by different objectives and produce different effects than resale price maintenance or the various nonprice intrabrand restraints.[25] In addition, the key words used in the Lexis search were not designed to retrieve cases involving only tying or exclusive dealing, and such cases yielded by this particular search would not provide a suitable sample of these restrictions. Therefore, cases involving only tying or exclusive dealing agreements were eliminated from the study even though they could be included within a broad conception of the vertical nonprice restraints classification. However, in those instances where the restricted distribution system included tying or exclusive dealing *in addition to* resale price maintenance or intrabrand nonprice restrictions, the case was retained for study.

After all consolidations and eliminations, cases representing 113 distribution systems remained for study.

Cases as Data Sources

Judicial decisions possess certain inherent infirmities as data sources, and must be used carefully. The most important factors dictating caution in the use of cases as data sources in the present study are 1) the likely irrelevance of ultimate legal conclusions to the objectives of a study using cases as data sources, 2) the effect of the per se rule on data availability, and 3) the issuance of judicial

[25] *See* H. HOVENKAMP, *supra* note 14, at 242-43 (discusses similarity of tying and exclusive dealing). For an example of the frequent similarity between exclusive dealing and tying, *see* Jefferson Parish Hosp. District No. 2 v. Hyde, 466 U.S. 2 (1984), and Bock, *An Economist Appraises Vertical Restraints*, 30 ANTITRUST BULL. 117, 126-33 (1985) (discussing this similarity in *Jefferson Hospital*). *See generally* Marvel, *Exclusive Dealing* 25 J.L. & ECON. 1 (1982) (discusses possible motives and effects of exclusive dealing).

opinions at several different stages in the litigation process.

1. Irrelevance of Legal Conclusions

In this study information derived from these decisions is used to classify distribution restrictions and to identify certain characteristics of systems employing those restrictions. This particular use of judicial opinions makes the courts' ultimate conclusions on liability questions irrelevant, because a judicial finding of nonliability may be based on legal requirements having nothing to do with the objectives of the study. The irrelevance to the present study of judicial conclusions on liability issues is even more evident in the context of distribution restrictions, because 1) as mentioned earlier, most antitrust cases involving distribution restrictions are brought by private plaintiffs, usually terminated dealers or distributors claiming that the termination resulted from their noncompliance with illegal vertical restraints, and 2) some of the legal requirements for proving a violation are more difficult to satisfy in a suit brought by a private plaintiff than in one brought by the Justice Department or the Federal Trade Commission. Some of the most important reasons for the decision in this study to disregard the courts' ultimate legal conclusions are as follows.

First, the applicable statutory provision, Section 1 of the Sherman Act, can be violated only if it is proved that the challenged conduct resulted from a "contract, combination . . ., or conspiracy" (i.e., an agreement).[26] In the normal case brought by a terminated dealer or distributor, it is not uncommon for a court to conclude that the statute is inapplicable because the termination was purely a unilateral action by the supplier rather than being part of an agreement to maintain and enforce distribution restrictions. Because the plaintiff must produce evidence connecting its termination with an unlawful agreement, this result can occur even if other evidence indicates that restrictions of arguable legality actually were present.[27]

Second, a court's finding of nonliability may result from its conclusion that the supplier's termination of this particular distribution channel member was based on the latter's breach of contract, fraud, poor performance, or other reasons unrelated to the maintenance of distribution restrictions. Again, this result can occur even when there is substantial evidence of restrictions having a legal status that is at least questionable.[28]

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[26] 15 U.S.C. § 1 (1982).

[27] *See, e.g.*, United States v. Colgate & Co., 250 U.S. 300 (1919); Business Elec. Corp. v. Sharp Elec. Corp., 780 F.2d 1212 (5th Cir. 1986) *cert. granted*, 107 S. Ct. 3182 (1987) (No. 85-1910); Russell Stover Candies, Inc. v. F.T.C., 718 F.2d 256 (8th Cir. 1983).

[28] *See, e.g.*, Morton Bldgs. of Neb., Inc. v. Morton Bldgs. Inc., 531 F.2d 910 (8th Cir. 1976); O. M. Droney Beverage Co. v. Miller Brewing Co., 365 F. Supp. 1067 (D. Minn. 1973). *See also* Allison, *Complaining Dealers, the Terminated Price Cutter, and Sherman Act Conspiracy Doctrine*, 22 AM. BUS. L.J. 467 (1985) (discussing importance of evidence regarding cause for termination in cases also involving some evidence of resale price maintenance, with emphasis on the agreement issue).

Third, a private plaintiff may lose an antitrust case by not producing sufficient evidence of its damages, even though it has proved a violation of the law.

Fourth, even when a judge or jury concludes that no illegal distribution restrictions are present, that conclusion often reflects an interpretation of ambiguous and conflicting evidence that easily could have gone the other way.

A fifth reason, closely related to the fourth, is that the evidence in such a case may indicate rather clearly that some form of restriction on intrabrand competition did exist even though the court was unable to label the restriction as one of those species condemned by the Sherman Act. Legal rules, especially those of a per se nature, frequently place a premium on the labeling or characterization of conduct.[29] The fourth and fifth reasons suggest that a restricted distribution system does not have to rise to a level of illegality for that system to be an appropriate item in a study of motives and effects even when a finding of nonliability related substantively to the restriction itself.

2. Effect of the Per Se Rule on Data Availability

The reason for selecting the 1967-77 period for study was to eliminate, as nearly as possible, any influence that different legal standards might have on a supplier's choice of distribution restriction. The use of this period, however, also produced an additional problem relating to the quality and quantity of data available in the cases. As discussed previously, application of a per se rule of illegality causes many of the factors relevant to this study to be irrelevant to the issues in the case. Consequently, it is to be expected that less information on the purposes and effects of particular distribution restrictions would be found in these cases than if the rule of reason were applicable.

Although the per se rule clearly has an impact on the amount of data available, this impact is less than one might think, and these cases did contain much relevant information. The reason is that, in cases involving distribution restrictions, especially those in which a terminated dealer or distributor claims that its termination resulted from refusal to comply with an illegal restriction, there frequently are close factual questions pertaining to the issues of 1) whether there was an agreement ("contract, combination, or conspiracy") as required by Section 1 of the Sherman Act, 2) whether the alleged restriction appropriately can be classified as either resale price maintenance or a nonprice resale restriction, and 3) whether the particular dealer or distributor was actually terminated for refusal to comply with such a restriction or for some other, legally permissible reason.

A court's inquiry into these issues often generates substantial evidence regarding distribution problems and methods in the market in question, the origins

[29] *See* Allison, *supra* note 15; Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593 (1980); Van Cise, *The Future of Per Se in Antitrust Law*, 50 MASS. L. REV. 165 (1964).

of the supplier's use of the challenged restriction, the supplier's and dealer's conduct leading up to the dispute, and the supplier's probable reasons (from both the supplier's and dealer's perspectives) for termination of the dealer. In many cases, evidence of the factual background also outlines the nature of the business, the scope of the market, and this supplier's position in the market.

3. Opinions from Different Stages of the Litigation Process

Because reported decisions may be issued at several different stages in the judicial process, they are not equally useful information sources. A decision and concomitant opinion on the merits written after trial usually will be a more fruitful source than one rendered in response to a petition for a preliminary injunction or a motion for summary judgment. On the other hand, it is not essential that an opinion be based upon a full trial in order for it to contain useful information. It *is* necessary, however, for the opinion at least to reveal the existence of evidence sufficient to support a reasonable inference that some restriction on intrabrand competition probably existed, regardless of the court's ultimate conclusions on particular legal issues. Based on this standard, decisions based solely on the pleadings were excluded automatically. Others, however, including those rendered in response to a petition for a preliminary injunction or motion for summary judgment and those rendered after trial, were included so long as they reflected sufficient evidence to support the above inference. More will be said about the process of drawing this inference in the discussion of how cases were placed in the price and nonprice categories.

Categorizing the Restrictions

The 113 distribution systems under study were separated into price and nonprice categories. In many cases, distribution restrictions clearly involved either resale price maintenance or one of the several variations of nonprice restriction. As one would expect, however, several problems were encountered in making the price-nonprice distinction. The nature of these problems and the methods used to resolve them are discussed below.

1. Problems of Proof

As previously discussed, for several reasons a court's legal conclusions are largely irrelevant to the objectives of this study. This proposition holds true even when a conclusion of nonliability is based on findings that illegal restrictions did not exist. To be sure, some cases were eliminated from the study because they contained no evidence of any attempted restriction on intrabrand competition. Decisions based solely on the pleadings were excluded, as were several other cases in which the plaintiff's evidence was so weak as not to permit an inference that the supplier had any substantial interest in limiting intrabrand competition. Regardless of whether the court's decision was rendered after a full trial or after a more limited evidentiary hearing on a request for a preliminary injunction or motion for summary judgment, a case was retained for study if the court's opinion revealed sufficient evidence to permit a reasonable inference by the author that restrictions on intrabrand competition existed. The need for drawing such inferences in some cases introduced an unavoidable element of subjectivity into the study, but an awareness of this fact and an insistence on significant evidence of intrabrand restrictions should have minimized the impact of such subjectivity.

2. Making the Price-Nonprice Distinction

A case was treated as one involving a vertical price restriction if it contained sufficient evidence to support a reasonable inference that the supplier had made a substantial effort to directly control the dealer's resale price. A case was treated as one involving a vertical nonprice restriction if it contained sufficient evidence to support a reasonable inference that the supplier had made a substantial effort to place limits on intrabrand competition among downstream channel members in ways not directly involving their resale prices. Distribution systems involving both a price and a nonprice restriction were placed in the price category because the ultimate objective of this study is to determine whether there is anything really different about systems in which the supplier has directly attempted to control resale price that justifies today's harsher legal treatment of vertical price restrictions.[30]

3. Maximum Vertical Price Fixing

Agreements setting *maximum* prices were declared per se illegal by the Supreme Court in 1951 in *Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons.* [31] Although the challenged arrangement did relate to maximum resale prices, it was imposed on distributors by two suppliers acting in concert and thus was treated as horizontal rather than vertical price fixing. These two suppliers were wholly-owned subsidiaries of a common parent, but the law at that time treated such affiliated companies as separate entities and permitted a finding of conspiracy between them.[32] Using *Kiefer-Stewart* as precedent, in 1968 the Court

[30] Combinations of price and nonprice restrictions are relatively common in situations involving maximum vertical price fixing, because a manufacturer can use this type of resale price restriction to counteract the market power acquired by a dealer as a result of an exclusive territory. Most of the distribution systems in this study having both price and nonprice restraints did involve maximum vertical price fixing. As discussed in the next subsection, cases of maximum vertical price fixing were segregated from the price restriction category because they probably are characterized by purposes and effects different from tradtiional resale price maintenance in most situations. See *infra*, text accompanying notes 31-38.

Only six cases involved nonprice restrictions coupled with minimum price restrictions. As a precaution against any results being affected by combinations of price and nonprice restrictions, the price category minus these six distribution systems was separately analyzed. No significant differences were found between the price category with and without these six systems; consequently, separate results were not reported for this analysis.

[31] 340 U.S. 211 (1951).

[32] The law on this point was changed by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), in which the Supreme Court ruled that a corporation and its wholly-owned subsidiary are a single economic entity and therefore are legally incapable of conspiring under Section 1 of the Sherman Act.

held in *Albrecht v. Herald Co.* that purely vertical maximum price fixing also is illegal per se.[33] Thus, a distribution restriction setting maximum resale prices was subject to the same per se rule as ordinary resale price maintenance during all but the first year of the period being studied. The absence of a per se rule for maximum vertical price fixing in the first year of the 1967-77 period did not affect the study, however, for two reasons: 1) All but one of the cases involving maximum vertical price fixing were based on facts occurring after or extending beyond the time when the legal status of the practice was subject to any doubt. One 1969 case involved facts that arose while there was still some doubt whether maximum vertical price fixing was per se illegal.[34] 2) Even before the *Albrecht* decision in 1968, however, maximum vertical price fixing was of highly questionable legality. As mentioned, the *Kiefer-Stewart* case had involved the fixing of *resale* prices, and the facts causing the Court to treat the arrangement as horizontal were tenuous and technical. Therefore, even the one case involving pre-*Albrecht* facts was retained for study.

A more serious problem with maximum vertical price fixing is that it can be, and probably is, characterized by different motives and effects than traditional resale price maintenance. Persuasive critical scholarship has focused on the perceived error in applying the same rule of per se illegality to maximum vertical price fixing as is applied to resale price maintenance. The most commonly voiced criticism is that maximum vertical price fixing does not represent the same type of limitation on intrabrand competition as traditional resale price maintenance, but instead represents an attempted curb by suppliers on the market power of downstream distribution channel members.[35]

Because of this controversy, and because of the very real possibility that maximum vertical price fixing may be characterized by motives and effects quite different than those that characterize resale price maintenance or vertical nonprice restraints, the analysis of distribution systems that were placed within the price category was done twice. The first analysis included cases of maximum vertical price fixing along with cases of traditional resale price maintenance; the second excluded maximum price cases and included only traditional resale price maintenance cases. Results were reported separately.

Segregating maximum resale price restrictions created a minor additional difficulty. A purported maximum can be used as a guise for a *de facto* minimum and, in fact, a few of the distribution restrictions in this study were difficult to classify as maximum or minimum resale price restraints. One possible reason for this difficulty, of course, is that some of the restrictions may actually have been covert minimums disguised as maximums. An explanation of at least equal

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

[34] A. S. Abell Co. v. Chell, 412 F.2d 712 (4th Cir. 1969) (relevant facts extended into 1968 but not later).

[35] *See, e.g.*, Blair & Fesmire, *Maximum Price Fixing and the Goals of Antitrust*, 37 SYRACUSE L. REV. 43 (1986); Blair & Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981); Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

plausibility, however, is that the courts sometimes did not attempt to make the distinction in their opinions because the same legal standards applied to both. The present study approached this particular problem as it approached others. Where the totality of reported evidence preponderated toward an inference that the supplier was primarily interested in putting a ceiling on the dealers resale prices, the restriction was classified as a maximum price restriction; where this evidence indicated that the supplier's primary interest was in establishing a minimum resale price or absolutely controlling the resale price, the restriction was classified as traditional resale price maintenance. In making this distinction, as in making other decisions in this study, evidence from more than one reported decision involving the same distribution system was used when available and relevant. For example, there were several instances of litigation within a close time and geographic proximity involving Crown Central Petroleum Company's distribution system. In one of these cases, the allegation and evidence indicated a maximum resale price restriction.[36] In another, however, the evidence demonstrated that the supplier not only set a maximum but also a minimum, and actually controlled resale price absolutely.[37] This distribution system was classified as one involving traditional resale price maintenance. Also supporting this classification was clear evidence of a supplier cartel in the region for the purpose of preventing price wars.[38]

4. Pure Exclusive Dealerships

Distribution systems involving pure exclusive dealerships presented a taxonomical problem. Although nonprice restrictions on resale were per se illegal during the period under study, a pure exclusive dealership binding the supplier to have no other outlet in the area but not restricting the dealer's area of resale was judged under the rule of reason.[39] Initially, I perceived this problem as one relating solely to sample selection, and tentatively concluded that the absence of a per se rule for this type of restriction warranted automatic exclusion. After further reflection, however, I decided that reasonable arguments could be developed for retaining pure exclusive dealerships and including them in the nonprice category. These arguments follow.

a) With regard to a supplier's likely motives in selecting a form of distribution restraint, it frequently is very difficult, if not impossible, to tell whether a particular distribution system actually involved only territorial exclusives or also included restrictions on resale. The evidence of both exclusives and resale

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[36] Crown Cent. Petrol. Corp. v. Brice, 427 F. Supp. 638 (E.D. Va. 1977).

[37] Phillips v. Crown Cent. Petrol. Corp., 395 F. Supp. 735 (D. Md. 1975).

[38] *Id.*

[39] *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). *See also* P. AREEDA, *supra* note 20, at 675-83 (discussing exclusive dealerships, with many annotated citations); L. SULLIVAN, *supra* note 8, at 423-27 (discussing exclusive dealerships).

restrictions often is circumstantial and the two may be quite difficult to distinguish in such cases. In other words, the problem can be more one of characterization than categorization. Moreover, even when a distribution contract expressly provides for an exclusive but places no express restrictions on resale, the evidence sometimes suggests but does not legally prove the concomitant existence of *de facto* territorial resale restrictions. This scenario was likely to be especially common during the period in question because of the legal standards then applicable.

b) A resale restriction usually is more attractive to the supplier than an exclusive: the former restricts the dealer's freedom, the latter restricts the supplier's freedom. Moreover, in many situations the intrabrand effects of exclusives and resale restrictions will be very similar. This combination of factors means that suppliers normally would be expected to seek resale restrictions over exclusives whenever possible. Since it is logical to assume that suppliers will have bargaining power superiority with significantly greater frequency than will dealers, it follows that restricted distribution systems are more likely to contain resale restrictions alone or in combination with exclusives than to contain exclusives alone, *ceteris paribus.* The existence during the period in question of a per se rule for resale restrictions and a rule of reason for exclusives certainly would have affected the supplier's behavior. This behavioral effect would have been manifested either in the type of restriction the supplier chose to seek, the method of creating and implementing the restriction, or both. Given the common evidentiary ambiguities and resulting difficulties in distinguishing exclusives from resale restrictions, as well as the frequently similar intrabrand effects of the two types of nonprice restraints, during this time period it would be completely rational and even predictable for a supplier with some degree of bargaining advantage and a desire to use nonprice restrictions to employ contractual exclusives as a guise for *de facto* (and often unprovable) resale restrictions.

In those cases in which exclusive dealerships existed and in which the evidence also suggested but did not prove the simultaneous existence of resale restrictions, the factors just discussed make it reasonable to infer that resale restrictions were in fact part of the distribution system. Indeed, these factors create a substantial probability that most exclusive dealership arrangements during the period also included some form of tacit restriction on resale even if no evidence in the case even suggested such. Consequently, logic supports retaining for further study those cases involving pure exclusive dealerships despite the applicability of the rule of reason rather than the per se rule.[40]

Despite the logic of these arguments, however, the existence of per se standards for both price and nonprice restrictions during the period forms the very

[40] *See* L. SCHWARTZ, *supra* note 20, at 629-30 (discussing tendency of exclusive dealerships to lead to restrictions on resale).

foundation for the present study and the constraints it creates must be adhered to. To satisfy this fundamental parameter as well as the logical attraction of retaining pure exclusive dealerships for study, separate analyses were done for the nonprice category including and excluding systems with pure exclusives. Results are reported separately.

Ultimately, 47 distribution systems were classified as involving price restrictions (31 when maximum price restrictions were excluded), and 66 were classified as involving nonprice restrictions (44 when pure exclusive dealerships were eliminated).

FACTORS AND FINDINGS

It was recognized early in the study that a number of those factors relevant to a weighing of the purposes and effects of distribution restrictions could not be identified from the type of evidence normally discussed in court decisions.

In addition, one factor was included initially but abandoned early in the course of the study. The extent to which similar vertical restrictions are used by other suppliers in the market clearly is relevant to the question of a restriction's likely effects. Although there were several instances in which similar distribution restrictions imposed by two or more suppliers in the same industry were separately challenged, there was not enough evidence to permit useful market definitions. Although relevant product markets could have been delineated in most cases, there usually was almost no evidence to permit any inferences about geographic markets. Consequently, it was not possible to draw any meaningful conclusions about the extent to which particular distribution restrictions were employed by suppliers in a given market.

The factors ultimately chosen for testing are as follows: 1) whether the supplier had substantial market power; 2) whether the product in question was an established one; 3) whether the product was new or had been newly introduced in the particular geographic area; 3) whether there was evidence of actual free riding by a dealer or distributor involved in the dispute; 4) whether there was evidence showing a definite absence of free riding by dealers or distributors in the particular distribution system; 5) whether there was significant credible evidence that substantial dealer pressure played a role in the institution or enforcement of the restriction, but no evidence of collusion among such dealers; 6) whether there was significant credible evidence of *intrabrand* dealer collusion; 7) whether there was significant credible evidence of *interbrand* dealer collusion; 8) whether there was significant credible evidence of interbrand supplier collusion; 9) whether there was significant credible evidence indicating a likely interbrand effect resulting from the challenged distribution restriction, but no evidence of interbrand supplier or dealer collusion; 10) whether the intrabrand restriction was combined with exclusive dealing or tying; and 11) whether the evidence indicated only an intrabrand effect resulting from the challenged restriction. Each of these factors is examined separately in the following discussion. Included is a statement of the rationale for including the factor, a description of the method used to test for its presence, and a presentation of the study's findings. These findings are summarized in Table 1 (Price Restrictions), Table 2 (Price Restrictions Excluding Maximum Vertical Price Fixing), Table 3 (Nonprice Restrictions), and Table 4 (Nonprice Restrictions Excluding Pure Exclusive Dealerships).[41]

Supplier's Market Power

The degree of market power possessed by a supplier has obvious relevance to the question of whether distribution restrictions employed by that supplier are likely to have substantial adverse effects on competition. The greater is the supplier's power, the less vigorous is interbrand competition and the more important is the supplier's restriction of intrabrand competition.[42] In addition, the extent of a supplier's market power is related to other effects such as an increased likelihood of price discrimination.[43]

Because the per se rule applied to both price and nonprice distribution restrictions during the period, the supplier's market power was not directly relevant to the ultimate question whether a particular restriction was illegal. However, a court's discussion of the factual background in a distribution restriction case commonly will include recitations of facts that do relate to the market power question. These recitations normally are gratuitous and, therefore, a conservative approach was taken toward their use in the study. Specifically, a supplier was characterized as having substantial market power if the court made a direct finding of such power or a direct finding that clearly translated into such power. For example, in *United States v. General Electric Co.*, the court specifically found that although General Electric no longer had a complete monopoly of the market for light bulbs, fluorescent tubes, and other "large lamps" as it had several decades earlier, it still possessed at least 50 percent of that market.[44] In *Jacobson & Co. v. Armstrong Cork Co.*, the court found that the supplier was the largest producer of acoustical and nonacoustical ceiling products in the United States.[45] These and similar findings in other cases were treated as sufficient to support an inference that the supplier had substantial market power. In a few instances, notice was taken of common knowledge

[41] In comparing findings in the price and nonprice categories, I attempted no statistical testing to determine significance levels for any differences I found. Such testing would not be meaningful because 1) nonprobability sampling was the only available sampling procedure, and 2) some subjective interpretations could not be avoided in identifying distribution system characteristics.

[42] *See, e.g.*, Meehan & Larner, *supra* note 13, at 224-25; Strasser, *supra* note 13, at 834-36; Gerhart, *supra* note 4, at 438-39, 441-43.

[43] *See, e.g.*, Carstensen & Dahlson, *supra* note 13, at 22-23; Hovenkamp, *supra* note 12, at 548-61.

[44] 358 F. Supp. 731, 737 (S.D.N.Y. 1973).

[45] 548 F.2d 438, 440 (2d Cir. 1977).

about a particular supplier in drawing an inference of substantial market power. This, again, was done conservatively, and a company was treated as having substantial market power only if it was well-known that the company was either the market leader or was one of the top two or three firms in a tightly oligopolistic market. For example, it is well known that Anheuser-Busch and General Motors had substantial power in the early 1970s when legal challenges to their distribution systems appeared in the study. The former was clearly the leading brewer at the time and had a market share that was steadily rising. The latter had long been the market leader and had a market share averaging 45 to 50 percent during the period. Similarly, Ford Motor Company was treated as having substantial market power because of its solid position as the second leading firm in an oligopoly, with about 25 percent of the market during the late 1960s and early 1970s when legal challenges to its distribution restrictions appeared in this study.

The treatment of newspapers is illustrative of the conservative approach employed in identifying suppliers with substantial market power. It is probable that most of the newspapers appearing in the study possessed such power; indeed, some certainly were monopolists. On the other hand, some of them may have been the struggling second newspaper in a natural monopoly. In any event, none of the newspapers appearing in this study were characterized as having substantial market power, because the exact nature of these geographically localized markets has not commanded sufficient attention to make the structure of any one of them a matter of common knowledge. In addition, there was insufficient information in any of the newspaper cases to permit a specific conclusion about market power.

In the price restrictions category, only three out of 47 suppliers (6.4%) were found to have had substantial market power. When maximum price restrictions were excluded, one of 31 suppliers (3.2%) was found to possess such power. Perhaps surprisingly, 14 out of 66 suppliers (21.2%) in the nonprice category were found to possess substantial market power; when pure exclusive dealerships were eliminated the proportion was 10 of 44 (22.7%).

Established Product

One commonly offered justification for distribution restrictions is that they may be useful in facilitating introduction of a new product or entry into a new geographic market. The insulation of dealers from intrabrand competition is sometimes thought to be an appropriate means of inducing them to take risks attendant to market entry.[46] In addition, if it is argued that insulation from intrabrand competition is being used to compensate an established dealer for cer-

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[46] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977); Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 LAW & CONTEMP. PROBS. 506, 511 (1965); White, *supra* note 2, at 342.

tifying the quality of a product, the argument loses validity as the supplier's product becomes more established itself.[47] Moreover, any adverse competitive effects of distribution restrictions obviously will be less in the case of relatively new products than for established ones.[48]

A conservative approach also was taken in identifying suppliers whose products were established but who were not characterized as having substantial market power. For a product to be so identified the court must have made specific findings that clearly translated into an established product characterization, or it must have been undisputable common knowledge that the product had been in the marketplace for a substantial period of time. Because the substantial market power characterization is a conceptual subset of the established product characterization, and because of the caution used in identifying firms as possessing substantial market power, a number of firms were probably identified as merely having an established product that actually possessed substantial market power. Thus, in addition to including firms with established products who clearly did not have substantial market power (such as Seven-Up Bottling Co.), the established product characterization also served to identify suppliers who actually may have had substantial market power but for whom there was insufficient evidence to so identify them (such as Coca-Cola Bottling Co. and the newspapers).

In the price category, 29 out of 47 firms (61.7%) were identified as having established products; when maximum price restrictions were excluded, 17 of 31 (54.8%) were so identified. In the nonprice category, 16 out of 66 firms (24.2%) had established products; when pure exclusive dealerships were eliminated the propostion was 11 of 44 (25.0%).

Because the line between the market power and established product characterizations was occasionally fuzzy, and because the concerns caused by the two factors are similar in nature (if not in magnitude), a combination of the two may be meaningful. Combining the market power and established product factors, 32 of 47 firms (68.1%) were identified in the price category. When maximums were excluded, the number was 18 of 31 (58.1%). In the nonprice category, 30 of 66 (45.5%) were identified; when pure exclusive dealerships were eliminated the proportion was 21 of 44 (47.7%). Although the perceived incidence of market power was greater in the nonprice category, and the existence of established products was greater in the price category, an aggregation of the two characteristics produced much less variant results. The aggregate market power-established product characteristic was found more commonly in

[47] *See, e.g.*, Oster, *supra* note 7, at 62-80; Marvel & McCafferty, *supra* note 7, at 358-59.

[48] *See* Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985). Comanor argues that vertical restraints involving established products are more likely to reduce consumer welfare than those involving new products or products of new entrants because in the former situation a much smaller number of customers need the information and services financed by the higher prices that vertical restrictions produce.

the price category, but the magnitude of difference probably is not sufficient to make a compelling case for different legal standards. On the other hand, the very high level of incidence overall may support an argument that any proposed uniform legal standard for vertical restrictions should be harsher than the present rule of reason that is applied to nonprice restrictions. However, when drawing unified conclusions about vertical restrictions in the aggregate, rather than comparing price and nonprice restrictions, the sampling of only those distribution restrictions that had been legally challenged could bias the results toward a greater incidence of market power and established products.

New Product or New Geographic Market

Seeking to identify those distribution systems in which the product was new or was newly introduced in the subject geographic market represents an attempt to further focus on a critical factor. As just discussed above, some observers have offered geographic market entry or new product introduction as justifications for distribution restrictions. Considering this concept from one perspective, an attempt has been made to identify suppliers with either market power or established products. Looking at the concept from another perspective, an attempt then was made specifically to identify distribution systems in which the product was new. If a supplier's marketing effort really involved the introduction of a new product, evidence relating to such a fact is the type of thing a court might be expected to reference when outlining the factual background of a dispute in which the supplier's distribution restriction is being challenged. A court's development of this factual background usually contains some gratuitous elements, but a significant part of the information does have a bearing on issues such as how the restriction originated, whether the statutory "agreement" requirement has been met, how the restriction was enforced, and what led to the dispute in question (that dispute often involving termination of the plaintiff-dealer).

In the price category, no suppliers were identified from the evidence as having a new product or entering a new geographic market. In the nonprice category, 3 of 66 firms (4.5%) were so identified; when pure exclusive dealerships were eliminated, the proportion was 1 of 44 (2.3%). These findings were a bit surprising and could indicate error in my assumption that this kind of evidence is a reasonably expectable part of the court's factual background development. If this assumption was not fundamentally erroneous, these findings clearly do not lend support to the argument that either price or nonprice restrictions are justified as facilitators of market entry. It is interesting that the findings on this point and those on the market power and established product factors seem to be cross-confirming. This confirming relationship with the previous categories tends to indicate that my assumption was not erroneous.

Free Riding

As previously discussed, the resolution of free-rider problems is the justification for distribution restrictions most often voiced in the literature. When a rule of per se illegality applies, resolution of a free-rider problem certainly is not a cognizable defense. In this study, however, it was assumed that evidence indicating a free-rider justification could be expected to surface in a significant percentage of cases in which it actually existed. The basis for this assumption, again, was that most of these cases are brought by terminated distributors or dealers, and the reason for termination will be a crucial question. The relevant issue would not be expressed in free-rider terms, especially in the 1967-77 period, but would be couched in terms of whether the dealer in fact was terminated for violating an allegedly illegal distribution restriction, or was really terminated for such failures as not having properly trained personnel, not engaging in sufficient promotional efforts, not providing adequate customer service, and so on. Credible evidence that a termination was for such a failure indicates that the dealer may have been a free rider. In addition to its relevance to the issue of why the dealer was terminated, evidence relating to the dealer's performance is the type of information that creates an overall positive aura for the party in whose favor it operates, and this party seemingly would have a strong incentive to produce it. One might logically expect to find evidence of poor dealer performance introduced in a larger portion of the cases in which such evidence existed than evidence of good dealer performance, because poor performance is more susceptible to tangible proof. Nonetheless, an assumption that dealer performance evidence of both types could be expected to shed light on possible free-rider problems in many of these cases seemed appropriate.

An attempt first was made to identify situations in which substantial credible evidence regarding the terminated dealer's performance indicated that he actually was a free rider. In the price category, one of 47 distribution systems (2.1%) was so identified; when maximum price restrictions were excluded, one of 31 (3.2%) was found. None was so identified in the nonprice category.

Examining the dealer performance evidence from an opposite perspective, an effort then was made to identify situations in which there appeared to be a clear absence of free riding. In the price category, this identification was made in 3 out of 47 distribution systems (6.4%). When maximums were excluded, 3 out of 31 (9.7%) were found. In the nonprice category, the identification was made in one of 66 situations (1.5%); when pure exclusive dealerships were eliminated, the proportion was 1 of 44 (2.3%).

The small number of situations in which evidence was found relating to the presence or absence of free riding was somewhat surprising. Because the effort was made from opposite perspectives, and the numbers were so small from both views, it must be concluded that my assumptions about the likely presence of evidence shedding light on the free-rider phenomenon was in error, and that this characteristic was not testable from the data available in the study. Logic seemed to support the assumption, but the facts did not.

Dealer Pressure

Although the proposition would stir lively debate, it can be argued that a distribution restriction is less justifiable when dealer pressure plays a significant role in its origin or enforcement.[49] The rationale for such an argument is that in such a case the restriction is less likely to have been motivated by a desire to enhance distribution efficiency, either when the restriction was initially implemented or later when it was enforced. When less likely to have been so motivated, the restriction is less likely to have that positive effect and more likely to have negative effects. In addition, where evidence of dealer pressure is present, there may be a greater likelihood of dealer collusion even though there is insufficient evidence of such.

Evidence of dealer pressure relating to enforcement is much more likely to be present than evidence of dealer pressure to originate a restriction. As previously discussed, in a representative case involving the supplier's termination of the plaintiff-dealer, the factual background developed by the court frequently details the circumstances surrounding the plaintiff-dealer's termination, including the role that other dealers may have played. In such a case it is not nearly so likely that background evidence would include references to the role dealers may have played in the initial institution of the restriction. Moreover, dealer pressure is more likely to have actually played a role in the enforcement than in the institution of a restriction. When exploring the purposes and effects of a distribution restriction, however, it is not meaningful to distinguish between institution and enforcement, because an appropriate inference about the supplier's motivation and an accurate measure of the restriction's effects can only be made by examining the actual operation and enforcement of the restriction. What is expressed in a distribution agreement must be interpreted in light of what was done subsequently. Thus, no attempt was made to differentiate the stages at which manifested dealer pressure occurred.

In the price category, evidence of substantial dealer pressure (but not dealer collusion) was found in 3 of 47 distribution systems (6.4%); when maximums were excluded, it was found in the same 3 systems out of a total of 31 (9.7%). In the nonprice category, 4 of 66 systems (6.1%) were identified as being characterized by dealer pressure; when pure exclusive dealerships were eliminated, the proportion was 2 of 44 (4.5%). The incidence of dealer pressure, without

[49] *See* A.H. Cox & Co. v. Star Mach., 653 F.2d 1302 (9th Cir. 1981); *In re* Beltone Elecs. Corp., 100 F.T.C. 68, 212-13 (1982); R. BORK, *supra* note 1, at 289; NATIONAL ASS'N OF ATTORNEYS GENERAL, VERTICAL RESTRAINTS GUIDELINES § 4.4 (1985); Cann, *supra* note 4, at 512-13. *But see* Liebeler, *Intrabrand "Cartels" Under GTE Sylvania*, 30 U.C.L.A.L. REV. 1 (1982); Ornstein, *supra* note 10 (both seeing little harm in intrabrand dealer cartels, and obviously would see little harm in noncollusive dealer pressure).

evidence of dealer collusion, was both low and essentially uniform across categories.

Intrabrand Dealer Collusion

Although challenged by some observers in recent years, the traditional view is that distribution restrictions are not economically or legally justifiable when these restrictions are energized or strongly influenced by dealer collusion.[50] This view has long been reflected in legal standards that treat such activity as horizontal rather than vertical.[51] Such a distinction is important, of course, any time legal standards are different for vertical and horizontal restraints of trade, as is the case with post-1977 standards for nonprice restrictions.

As with several other types of evidence, if evidence of dealer collusion does exist in a given situation, a plaintiff challenging the supplier's distribution restriction normally should have an incentive to produce such evidence. And once again, such evidence would be relevant to the issue of how the restriction was operationalized. During the 1967-77 period this type of evidence usually would not affect the choice of legal standard because the per se rule applied to both vertical price and nonprice restrictions, and recasting the restriction as horizontal would not change this standard. Even when legal standards are the same, however, horizontal restraints have been and continue to be viewed with greater aversion than vertical ones. Thus, a plaintiff's successful effort to characterize a restriction as horizontal would place the restriction, the supplier, and other dealers in a worse light and greatly emphasize the plaintiff's role as a victim. The importance of a jury's, or even a judge's, overall perceptions of the parties' relative culpabilities should not be underestimated and is well known to the trial lawyer.

A situation was identified as involving intrabrand dealer collusion if there was either substantial evidence in the case itself that dealers were acting in concert or a reference by the court to another proceeding in which dealers had been charged with conspiracy. Dealers' collusive activity was presumed to be purely intrabrand unless other evidence indicated probable interbrand dealer collusion.

Although intrabrand dealer collusion should raise the law's level of concern about the vertical restriction under which they operate only if the former is related to the latter, one can logically expect such a relationship to exist in virtually every case. In this study, even if the evidence did not clearly show a link between the intrabrand dealer collusion and the challenged distribution restriction, such a link was presumed because it is fundamentally counterin-

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[50] *See supra* note 11.

[51] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 n.28 (1977); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. General Motors Corp., 384 U.S. 127 (1966); Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960).

tuitive to think that a vertical restriction limiting intrabrand competition among dealers would be unrelated to an agreement among those same dealers also to limit intrabrand competition.

In the price category, 4 of 47 systems (8.5%) were identified as involving intrabrand dealer collusion; the proportion was 3 of 31 (9.7%) when maximum restrictions were excluded. In the nonprice category, 1 of 66 systems (1.5%) was so identified; when pure exclusive dealerships were eliminated no system was found with this characteristic. Again, the overall proportions were quite low. Although the incidence of perceived intrabrand collusion was somewhat higher in the price category, the difference probably is not sufficient to form the basis for any substantive inferences.

Interbrand Dealer Collusion

Because maintenance of interbrand competition is the ultimate goal of antitrust, distribution restrictions necessarily should cause greater concern when the evidence indicates the presence of interbrand dealer collusion. There probably is a greater chance of a given instance of interbrand dealer collusion being completely unrelated to the distribution restriction under challenge than of an occurrence of intrabrand dealer collusion being unrelated to the distribution restriction. It also is probably true that evidence of interbrand dealer collusion should have the greatest impact on how the vertical restriction is viewed when the evidence also shows a link between the interbrand collusion and the vertical restriction.

On the other hand, even if the evidence showing probable interbrand dealer collusion does not also show a connection with the challenged vertical restriction, the mere presence of interbrand dealer collusion evidence must heighten the economic and legal concern about the vertical restriction. The reason for this concern even without establishment of a direct connection is that the sole justification for distribution restrictions is to enhance interbrand competition; this is the only reason for tolerating the limitation of intrabrand competition. If interbrand competition in the relevant market at the dealer level has been restricted by collusion, the only policy justification for the vertical restriction has already been seriously undermined. Moreover, even though a relationship between the challenged vertical restriction and evidence of interbrand collusion seemed to be present in some cases, an attempt to separate those cases in which such a link existed from those in which it did not would have involved too much speculation to treat the linkage as a testable characteristic. For these reasons, no such separation was attempted.

A situation in which substantial credible evidence indicated collusion among dealers or distributors was treated as involving interbrand rather than just intrabrand competition if there was evidence showing either that 1) the collusion clearly related to more than one brand or 2) the collusion occurred among dealers or distributors handling multiple brands, with no indication that only one brand was involved.

In the price category, 2 of 47 situations (4.3%) were identified as involving interbrand dealer collusion; when maximums were excluded, the same 2 out of a total of 31 (6.5%) were so identified. In the nonprice category, 3 of 66 situations (4.5%) were identified; when pure exclusive dealerships were eliminated the proportion was 2 of 44 (4.5%). These proportions were both low and uniform among categories. It is likely, however, that the lower probability of interbrand dealer collusion being closely related to the challenged vertical restriction would create a correspondingly lower probability that evidence of such collusion would be revealed in the vertical restriction case. Therefore, the findings could be in error on the low side.

Recognizing that imprecision in the evidence may cause the lines between dealer pressure, intrabrand dealer collusion, and interbrand dealer collusion to be rather fuzzy, an aggregation of these characteristics may provide a more accurate picture of the role played by downstream channel members.

The intrabrand and interbrand collusion factors first were aggregated. In the price category, this combination yielded 6 of 47 systems (12.8%); when maximum price restrictions were excluded, the combined proportion was 5 of 31 (16.1%). In the nonprice category, the combined proportion was 4 of 66 (6.1%); when pure exclusive dealerships were eliminated the proportion was 2 of 44 (4.5%).

All three dealer-involvement characteristics then were aggregated. In the price category, the combined proportion was 9 of 47 systems (19.1%); when maximums were excluded, the combined proportion was 8 of 31 (25.8%). In the nonprice category, the combined proportion was 8 of 66 (12.1%); when pure exclusive dealerships were eliminated the proportion was 4 of 44 (9.1%). Thus, when the three dealer-involvement characteristics were aggregated, the findings were less uniform between the price and nonprice categories than when any of the three characteristics was examined individually. Dealer involvement was greater in the case of price restrictions, but not overwhelmingly so. One also must recognize the possibility that this greater proportion of dealer involvement in the price restrictions category could be due to the propensity for dealer expressions to focus on price regardless of the exact nature of the distribution restrictions being used.

Interbrand Supplier Collusion

Facilitation of collusion at the supplier level is one of the traditionally recognized dangers of vertical restrictions, especially of resale price maintenance.[52] As with interbrand dealer collusion, any given occurrence of

[52] *See supra* note 10.

interbrand supplier collusion probably is less likely to be related to the challenged distribution restriction and, therefore, less likely to be revealed by the evidence in a vertical restraint case than is an occurrence of either intrabrand collusion or any of the other characteristics tested for in this study. Resulting proportions, therefore, could be in error on the low side.

As was done when testing for dealer collusion, a situation was identified as involving interbrand supplier collusion if there was either substantial evidence in the case itself that suppliers were acting in concert or a reference by the court to another proceeding in which suppliers had been charged with conspiracy.

In the price category, evidence viewed as being sufficient to permit an inference of supplier collusion was found in 5 of 47 situations (10.6%); when maximums were excluded, the same 5 were identified out of a total of 31 (16.1%). In the nonprice category, the proportion was 5 of 66 (7.6%); when pure exclusive dealerships were eliminated the proportion was 3 of 44 (6.8%). Thus, the incidence of possible supplier collusion was a bit greater in the price category but, again, the difference was not great.

Other Evidence of Interbrand Effect

An attempt also was made to identify distribution systems in which, despite the absence of evidence indicating interbrand dealer or supplier collusion, there was other evidence indicating possible interbrand effects resulting from the challenged distribution restriction. An example of the type of case in which other evidence was viewed as sufficient to infer a possible interbrand effect is found in *Swettlen v. Wagoner Gas & Oil, Inc.* [53] In this case in which a retail gasoline dealer sued its wholesaler for resale price maintenance, the wholesaler completely controlled retail price under a formula for computing wholesale and retail margins. The wholesaler marketed Phillips petroleum products, but had been negotiating a possible switch to Sun, another refiner. Ultimately, Phillips gave in to the wholesaler's demands to implement the margin formula by which the wholesaler was able to control retail price. In return, the wholesaler ceased negotiations with Sun, the intrabrand price restriction thus affecting interbrand refiner competition for wholesale outlets. This effect could be viewed in different ways, of course. One view is that the wholesaler's actions in playing one refiner against another simply reflected the operation of interbrand competition in setting the price that refiners were willing to pay for the wholesaler's services. The wholesaler was able to have that price bid up, and this price included not only the wholesaler's margin but also the wholesaler's control over retail price.

On the other hand, one might wonder about the legitimacy of a wholesaler using an apparent degree of market power to affect downstream resale prices

[53] 369 F. Supp. 893 (W.D. Pa. 1974).

rather than using it only to bid up its own margin. The case also can lead to a question about the insularity with which intrabrand competition is sometimes viewed.[54] There clearly was an interrelationship between interbrand and intrabrand competition in the case, and it produced higher prices. Whether it also produced a greater quantity or quality of service could not be determined.

In the price category, noncollusion evidence indicating possible interbrand effects was identified in 3 of 47 systems (6.4%); when maximums were excluded, the same 3 were identified out of a total of 31 (9.7%). In the nonprice category, 2 of 66 systems (3.0%) were so identified; when pure exclusive dealerships were eliminated the proportion was 1 of 44 (2.3%). The proportions were low, without any striking differences across categories.

Initially, cases in which exclusive dealing or tying were involved along with price or nonprice restrictions on intrabrand competition were treated as indicating possible interbrand effects. After further reflection, however, these cases were segregated and are discussed below.

At this point, another aggregation of factors may be of value. Those situations in which interbrand dealer collusion, interbrand supplier collusion, and other evidence of interbrand effects were identified may be aggregated to form a global interbrand-effect characteristic. In the price category, this combined proportion was 8 of 47 (17.0%) (the sum was 10, but 2 were duplicates); when maximums were excluded, the same 8 were identified out of a total of 31 (25.8%) (again, the sum was 10, but 2 were duplicates). In the nonprice category, the combined proportion was 10 of 66 (15.2%); when pure exclusive dealerships were eliminated the proportion was 6 of 44 (13.6%). This aggregation obviously increases the proportions substantially and decreases the uniformity across categories but, again, the differences between the price and nonprice categories cannot be called striking.

Combined with Exclusive Dealing or Tying

As discussed earlier, distribution systems in which exclusive dealing or tying was the only type of restriction challenged were excluded from the study because the primary focus of such restrictions is interbrand. Those systems involving exclusive dealing or tying in addition to a price or nonprice intrabrand restriction were retained for study. Initially, a decision was made to treat the coterminous existence of exclusive dealing or tying as evidence of an interbrand effect. Upon further reflection, however, this view was discarded as superficial because the addition of exclusive dealing or tying to an intrabrand price or nonprice restriction is likely to have highly ambiguous effects that will depend on a number of other variables.

[54] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977); UNITED STATES DEPT. OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES § 2.1 (1985); Liebeler, *supra* note 1.

For example, if a dealer markets a product under a resale price maintenance arrangement and probably would handle multiple brands but for an exclusive dealing clause limiting the dealer to the products of its present supplier, the exclusive dealing may prevent some interbrand price comparisons by consumers that would be more easily accomplished through a multibrand dealer. Thus, there could be a lessening of interbrand competition's disciplining effect on the intrabrand restriction. Although price advertising would be expected to overcome much of this barrier, consumer search costs involved in comparing prices would be somewhat higher because of exclusive dealing. Also, it has been argued that the use of resale price maintenance to facilitate supplier collusion is likely only when combined with exclusive dealing.[55]

The effect could differ, however, with the introduction of other variables. The competitive consequences of dealer collusion, for example, are not likely to expand beyond an intrabrand effect if these dealers operate under exclusive dealing arrangements. Conversely, the consequences are more likely to extend to interbrand effects if these dealers handle multiple brands. It must be recognized, of course, that the presence or absence of exclusive dealing in such cases represents less of an underlying cause of these observed effects than a symptom of varying supplier-dealer bargaining power relationships and varying marketing necessities in different markets. Even if the presence or absence of exclusive dealing serves primarily as a symptom of conditions that may decrease the adverse effects of dealer collusion, however, identification of exclusive dealing as an adjunct restriction has evidentiary value.

Similar ambiguities can exist in the case of tying, and also in the nonprice restriction context, and the introduction of other variables can further expand the number of possible outcomes.

Consequently, distribution systems in which exclusive dealing or tying existed in addition to intrabrand price or nonprice restrictions were identified separately. The variability of the potential effects of such a combination of restrictions is such that the drawing of any firm conclusions from the identification of these combinations is fraught with uncertainty. Because there are some possible effects, however, the presence of such combinations of distribution restrictions is a phenomenon worth noting.

In the price category, 7 of 47 distribution systems (14.9%) involved exclusive dealing or tying in addition to the intrabrand price restriction; when maximums were excluded, the proportion was 4 of 31 (12.9%). In the nonprice category, only 3 of 66 systems (4.5%) were so identified; when pure exclusive dealerships were eliminated the proportion was 3 of 44 (6.8%). Thus, exclusive dealing or tying did seem to be combined with intrabrand price restraints more frequently than with intrabrand nonprice restraints.

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[55] *See* Bork, *supra* note 1, at 411-12.

Purely Intrabrand Effect

Finally, an identification was made of those distribution systems in which all the available evidence indicated a purely intrabrand effect. Included were those systems not identified with any of the three interbrand-effect characteristics and not involving exclusive dealing or tying as an adjunct restriction.

In the price category, 32 of 47 systems (68.1%) were identified as including no evidence that the distribution systems may have contributed to adverse interbrand effects; when maximum price restraints were excluded, the proportion was 19 of 31 (61.3%). In the nonprice category, the proportion was 53 of 66 (80.3%); when pure exclusive dealerships were eliminated the proportion was 35 of 44 (79.5%). There is a suggestion in these findings that nonprice restrictions may be less harmful because of a higher incidence of purely intrabrand effect, although the difference in proportion between price and nonprice restrictions is far from overwhelming.

CONCLUSION

This study attempted to isolate a relevant sample of distribution systems containing restrictions on intrabrand competition and segregated the sample into price and nonprice categories. In an effort to determine whether there is a factual basis for the different antitrust standards applied to resale price maintenance and vertical nonprice restrictions, the study then tested for the presence of characteristics that might indicate whether the purposes and effects of intrabrand price restrictions differ in significant ways from those of intrabrand nonprice restrictions.

The most important findings of the study may be interpreted and summarized as follows:

1) Excluding maximum vertical price fixing from the price restrictions category usually had little effect on the results as they related to price restrictions.

2) Excluding pure exclusive dealerships from the nonprice restrictions category had practically no effect on the results as they related to nonprice restrictions.

3) A substantially greater proportion of distribution systems in the nonprice category were characterized by suppliers with market power, but a substantially greater proportion of systems in the price category were characterized by established products. The probable imprecision involved in making the market power-established product distinction from the available evidence may cause the aggregation of the two categories to be more meaningful. When the two characteristics were combined, the price category had the greater proportion of identified systems, but the amount by which this proportion exceeded that of the nonprice category was not striking.

4) Regarding the aggregated market power-established product characteristic, although the difference between the price and nonprice categories was not great, the overall proportion of restricted distribution systems characterized by suppliers with market power or established products was very large. Thus, the findings on this point probably do not support different legal rules for price and nonprice restrictions, and lend credence to the argument that a uniform policy toward vertical restraints should be adopted. Significantly, however, these findings may support an argument that any proposed uniform standard for all vertical restrictions should contain stronger presumptions against such restrictions than currently are used for intrabrand nonprice restraints. In other words, according to the findings on this matter, current standards may treat resale price maintenance too harshly and vertical nonprice restraints too leniently. However, when drawing unified conclusions about vertical restrictions in the aggregate, rather than comparing price and nonprice restrictions, the sampling of only those distribution restrictions that had been legally challenged could bias the results toward a greater incidence of market power and established products.

5) Evidence that either price or nonprice restrictions were used to facilitate market entry was found in an extremely small number of situations. Again, these findings do not support the existing difference in the legal standards applied to price and nonprice restrictions. The findings on this point do seem to confirm the overall findings on the aggregated market power-established product characteristic.

6) The assumption that the court's development of factual background in vertical restraints cases would contain sufficient dealer-performance evidence to enable the study to test for the presence or absence of free riding apparently was in error. No conclusions could be drawn on this matter.

7) The identification of dealer involvement in the operation of vertical restrictions involved an assessment of three characteristics: dealer pressure, intrabrand dealer collusion, and interbrand dealer collusion. When each was examined individually, proportions were very low and there were no large differences between the price and nonprice categories. When the two dealer collusion characteristics were aggregated, the overall proportions still were not very large, and the proportion was only slightly greater in the price category than in the nonprice category. When all three dealer-involvement characteristics were aggregated, the incidence of occurrence in the price category was noticeably higher than in the nonprice category. This finding must be tempered by the fact that dealer expressions regarding their relations with the supplier and with other dealers often focus on price regardless of the underlying cause for the expressions. The findings on this point also do not provide strong support for the existing dichotomy in legal standards, and the overall proportions across categories were not so high as to raise serious concerns that vertical restric-

tions commonly originate at the dealer level.

8) The incidence of possible supplier collusion was somewhat greater in the price category than in the nonprice category, but the difference was not striking. The overall proportion across categories was not large, but perhaps was of sufficient magnitude to indicate that the occurrence of supplier collusion along with vertical restrictions is not rare.

9) Miscellaneous evidence of interbrand effects connected with intrabrand restrictions indicated a very low rate of occurrence. When this characteristic was combined with the interbrand supplier collusion and interbrand dealer collusion characteristics to produce an aggregated interbrand-effects characteristic, the incidence was somewhat higher in the price category, but not large enough to provide any substantial support for different legal standards. The overall proportion across categories, about 1 out of 6, indicates that possible interbrand effects are neither common nor rare.

10) Exclusive dealing or tying was found in conjunction with resale price maintenance more frequently than with nonprice restrictions, but the difference was not great. The possible effects of the combination are so variable that no conclusions can be drawn.

11) Overall, the results of the study do not provide strong support for the different legal standards applied to resale price maintenance and vertical nonprice restrictions. Aside from this overall conclusion, the most interesting finding is that vertical restrictions are most commonly used by firms that either have substantial market power or market an established product. Vertical restrictions appear to be used to facilitate market entry only rarely.

TABLE 1
PRICE RESTRICTIONS
N = 47

Characteristic	*Distribution System* (Numbers Referenced To Appendix A)	*Total No.*	(%)	*Total No. & % For Selected Combinations*
Supplier Had Substantial Market Power	16, 41, 44	3	(6.4%)	32 (68.1%)
Established Product (but no clear evidence of substan-market power)	7, 8, 9, 10, 11, 12, 13, 14 18, 19, 20, 21, 22, 23, 25 26, 27, 28, 29, 30, 32, 33 36, 37, 38, 39, 43, 46, 47	29	(61.7%)	
New Product or New Geographic Market		0	(0.0%)	
Evidence of Actual Free Riding	22	1	(2.1%)	
Evidence Indicating Definite Absence of Free Riding	24, 25, 28	3	(6.4%)	
Evidence of Substantial Dealer Pressure (but no collusion)	24, 39, 40	3	(6.4%)	9 (19.1%)
Evidence of Intrabrand Dealer Collusion	5, 12, 27, 29	4	(8.5%)	
Evidence of Interbrand Dealer Collusion	1, 2	2	(4.3%)	6 (12.8%)
Evidence of Interbrand Supplier Collusion	1, 2, 12, 23, 35	5	(10.6%)	8 (17.0%) (There were 10 items with the three characteristics combined here but 2 appeared twice)
Other Evidence Indicating Interbrand Effect	3, 19, 40	3	(6.4%)	
Plus Exclusive Dealing or Tying	4, 15, 21, 25, 31, 42, 43	7	(14.9%)	
Evidence Indicating Only Intrabrand Effect	5, 6, 7, 8, 9, 10, 11, 13 14, 16, 17, 18, 20, 22, 24, 26 28, 29, 30, 32, 33, 34, 35, 36 37, 38, 39, 41, 44, 45, 46, 47	32	(68.1%)	

TABLE 2
PRICE RESTRICTIONS
(Excluding Maximum Vertical Price Fixing)
N = 31*

Characteristic	*Distribution System* (Numbers Referenced To Appendix A)	*Total No.*	(%)	*Total No. & % For Selected Combinations*
Supplier Had Substantial Market Power	41	1	(3.2%)	18 (58.1%)
Established Product (but no clear evidence of substanial market power)	7, 9, 12, 13, 18, 19 22, 23, 25, 26, 27, 28 30, 33, 36, 39, 46	17	(54.8%)	
New Product or New Geographic Market		0	(0.0%)	
Evidence of Actual Free Riding	22	1	(3.2%)	
Evidence Indicating Definite Absence of Free Riding	24, 25, 28	3	(9.7%)	
Evidence of Substantial Dealer Pressure (but no collusion)	24, 39, 40	3	(9.7%)	8 (25.8%)
Evidence of Intrabrand Dealer Collusion	5, 12, 27	3	(9.7%)	5 (16.1%)
Evidence of Interbrand Dealer Collusion	1, 2	2	(6.5%)	
Evidence of Interbrand Supplier Collusion	1, 2, 12, 23, 35	5	(16.1%)	8 (25.8%) (There were 10 items with the three characteristics combined here, but 2 appeared twice)
Other Evidence Indicating Interbrand Effect	3, 19, 40	3	(9.7%)	
Plus Exclusive Dealing or Tying	4, 15, 25, 42	4	(12.9%)	
Evidence Indicating Only Intrabrand Effect	5, 7, 9, 13, 17, 18, 22 24, 26, 28, 30, 33, 35 36, 39, 41, 45, 46, 47	19	(61.3%)	

*Although there are only 31 distribution systems represented in Table 2, the numbering scheme of Table 1 was retained and, consequently, reference numbers in Table 2 go as high as 47.

TABLE 3
NONPRICE RESTRICTIONS
N = 66

Characteristic	*Distribution System* (Numbers Referenced To Appendix B)	*Total No.*	(%)	*Total No. & % For Selected Combinations*
Supplier Had Substantial Market Power	3, 4, 13, 15, 16 29, 34, 36, 41, 48 49, 56, 63, 65	14	(21.2%)	30 (45.5%)
Established Product (but no clear evidence of substanial market power)	2, 9, 14, 17 19, 24, 27, 30, 33 37, 38, 39, 50, 51 53, 57	16	(24.2%)	
New Product or New Geographic Market	12, 18, 42	3	(4.5%)	
Evidence of Actual Free Riding		0	(0.0%)	
Evidence Indicating Definite Absence of Free Riding	59	1	(1.5%)	
Evidence of Substantial Dealer Pressure (but no collusion)	10, 23, 31, 36	4	(6.1%)	
Evidence of Intrabrand Dealer Collusion	15	1	(1.5%)	8 (12.1%)
Evidence of Interbrand Dealer Collusion	11, 16, 37	3	(4.5%)	4 (6.1%)
Evidence of Interbrand Supplier Collusion	1, 2, 9, 45, 49	5	(7.6%)	10 (15.2%)
Other Evidence Indicating Interbrand Effect	10, 36	2	(3.0%)	
Plus Exclusive Dealing or Tying	27, 39, 48	3	(4.5%)	
Evidence Indicating Only Intrabrand Effect	3, 4, 5, 6, 7, 8, 12, 13, 14, 15 17, 18, 19, 20, 21, 22, 23, 24 25, 26, 28, 29, 30, 31, 32, 33 34, 35, 38, 40, 41, 42, 43, 44 46, 47, 50, 51, 52, 53, 54, 55 56, 57, 58, 59, 60, 61, 62, 63 64, 65, 66	53	(80.3%)	

TABLE 4
NONPRICE RESTRICTIONS
(Excluding Pure Exclusive Dealerships)
N = 44*

Characteristic	*Distribution System* (Numbers Referenced To Appendix B)	*Total No.*	(%)	*Total No. & % For Selected Combinations*
Supplier Had Substantial Market Power	3, 4, 13, 16, 29 41, 48, 49, 63, 65	10	(22.7%)	21 (47.7%)
Established Product (but no clear evidence of substanial market power)	9, 14, 24, 27 30, 37, 38, 39 51, 53, 57	11	(25.0%)	
New Product or New Geographic Market	42	1	(2.3%)	
Evidence of Actual Free Riding		0	(0.0%)	
Evidence Indicating Definite Absence of Free Riding	59	1	(2.3%)	
Evidence of Substantial Dealer Pressure (but no collusion)	10, 31	2	(4.5%)	4 (9.1%)
Evidence of Intrabrand Dealer Collusion		0	(0.0%)	2 (4.5%)
Evidence of Interbrand Dealer Collusion	16, 37	2	(4.5%)	
Evidence of Interbrand Supplier Collusion	1, 9, 49	3	(6.8%)	6 (13.6%)
Other Evidence Indicating Interbrand Effect	10	1	(2.3%)	
Plus Exclusive Dealing or Tying	27, 39, 48	3	(6.8%)	
Evidence Indicating Only Intrabrand Effect	3, 4, 5, 6, 13, 14, 20 21, 22, 24, 26, 29, 30, 31 35, 38, 40, 41, 42, 46, 47 51, 52, 53, 54, 55, 57, 58 59, 60, 61, 62, 63, 65, 66	35	(79.5%)	

*Although there are only 44 distribution systems represented in Table 4, the numbering scheme of Table 3 was retained and, consequently, reference numbers in Table 4 go as high as 66.

APPENDIX A
PRICE RESTRICTIONS

1. Schnapp's Shop, Inc. v. H.W. Wright & Co., 377 F. Supp. 570 (D. Md. 1973).
Liquor
Resale price maintenance
Probable supplier and interbrand dealer collusion: Although no conspiracies proved, there was substantial evidence of organized pricing behavior among competitors at both the wholesale and retail levels. Discounting retailer won suit against two wholesalers for resale price maintenance.

2. United States v. Wohl Shoe Co., 369 F. Supp. 386 (D.N.M. 1974).
Shoes
Resale price maintenance
Substantial evidence of manufacturer cartel: Two manufacturers cooperated in imposing resale price maintenance.
Obvious dealer collusion (interbrand) at retail

3. Swettlen v. Wagoner Gas & Oil, Inc., 369 F. Supp. 893 (W.D. Pa. 1974).
Gasoline and petroleum products
Resale price maintenance: Wholesale jobber totally controlled resale price at retail. Also, the method for setting wholesale jobber and retailer margins was negotiated by wholesaler with refiner (Phillips); refiner agreed to the formulas to keep wholesaler from switching to a competitor (Sun).

4. Stan Kane Home Improvement Center v. Martin Paint Stores, 1976-1 Tr. Cas. ¶ 60,743 (S.D.N.Y. 1975).
Paint
Resale price maintenance: Defendant asserted state Fair Trade law obviously as an afterthought, but could not use fair trade protection because it set resale prices for all of the products handled by plaintiff, not just for defendant's products.
Exclusive dealing

5. Mt. Vernon Sundat v. Nissan Motor Corp., 1976-1 Tr. Cas. (CCH) ¶ 60,842 (E.D. Va. 1975), *vacated,* 1977-1 Tr. Cas. (CCH) ¶ 61,507 (E.D. Va.).
Automobiles
Resale price maintenance
Probable dealer collusion (intrabrand)

6. Burton Supply Co. v. Wheel Horse Prods., Inc., 1974 Tr. Cas. (CCH) ¶ 75,224 (N.D. Ohio 1974).
Garden and lawn equipment
Maximum vertical price fixing: Manufacturer required that wholesalers grant retailers a discount of at least 27%; however, there was no apparent attempt by the manufacturer to put a ceiling on *retailers'* prices. The manufacturer's reasons for thus increasing retailers' margins at the expense of wholesalers were not specified.

7. Douglas T.V. Hi-Fi Stereo Center v. U.S. Pioneer Elecs., 1974 Tr. Cas. (CCH) ¶ 74,995 (D.D.C. 1974).
   Stereo equipment
   Resale price maintenance
   Same distribution system and restrictions examined in:
   Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., 1973 Tr. Cas. (CCH) ¶ 74,848 (D.D.C. 1973)

8. Richardson v. Pulitzer Pub. Co., 1974 Tr. Cas. (CCH) ¶ 75,116 (E.D. Mo. 1974).
   Newspapers
   Maximum vertical price fixing: Court found insufficient evidence of actual enforcement, but defendant had showed a definite interest in controlling maximum resale prices.
   The lack of evidence relating to enforcement of maximum prices was likely attributable to the fact that the real dispute in this case developed from the desire of this and other carriers to stop distributing the Saturday edition. Their reasons were not clear.

9. United States v. Standard Oil Co., 1973 Tr. Cas. (CCH) ¶ 74,692 (N.D. Ohio 1973).
   Gasoline and petroleum products
   Resale price maintenance

10. Dahl v. Hearst Corp., 1973 Tr. Cas. (CCH) ¶ 74,322 (C.D. Cal. 1972).
   Newspapers — wholesale
   Maximum vertical price fixing
   Areas of primary responsibility

11. Westphalen v. Mobil Oil Corp., 1973 Tr. Cas. (CCH) ¶ 74,423 (N.D. Cal. 1972).
   Gasoline and petroleum products
   Maximum vertical price fixing

12. Crown Central Petrol. Corp. v. Brice, 427 F. Supp. 638 (E.D. Va. 1977).
   Gasoline and petroleum products
   Resale price maintenance: Although this case was tried on a maximum price fixing theory, evidence from other cases involving the same distribution system indicates that the supplier's resale price control was not limited to maximums, but involved complete control; this system, therefore, is classified as one involving traditional resale price maintenance.
   Evidence of dealer collusion to push price above supplier's maximum
   Same distribution system also examined in:
   Phillips v. Crown Central Petroleum Corp., 396 F. Supp. 735 (D. Md. 1975)

Evidence in this case showed that although Crown tried to keep its prices down, and thus used maximum vertical price fixing, it also exercised control to prevent price wars and keep prices up; it controlled resale price, period.

Evidence of supplier collusion: Much evidence, and court specifically found, a horizontal price fixing conspiracy among independent gasoline marketers in Maryland to prevent price wars (keep prices up).

13. Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975).
Newspapers
Resale price maintenance: Both maximum and minimum; publisher set prices, period.
Exclusive territories
Also, a form of customer resale restriction: Differential pricing system kept home delivery distributors from reselling in street dealer market.

14. Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976).
Beer
Maximum vertical price fixing: Manufacturer pressure to keep prices down to level of other "popular" brands, although court found insufficient evidence of vertical price fixing.
Territorial resale restrictions

15. Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).
Beer
Resale price maintenance at wholesale and retail
Territorial resale restrictions at wholesale
Exclusive dealing on light draught beer at retail

16. Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), *cert. denied,* 424 U.S. 942 (1976)
Coffee
Maximum vertical price fixing
Exclusive territories
Wholesale distributors served both retail accounts and large institutional buyers, but maximum vertical price fixing was limited to institutional accounts; distributors, in effect, had to subsidize institutional accounts by higher prices on retail accounts.
General Foods was the largest processor and marketer of coffee in the U.S., with 45% of the retail market and 10% of the institutional market.

Coffee was marketed quite differently to institutional buyers. The coffee was not vacuum-packed as it was for retail, had a shorter shelf-life, and consequently had to be rotated. Also, distributors often maintained coffee-making equipment on the premises of institutional customers. Thus, institutional accounts required substantially more service than retail accounts, but manufacturer put pressure on distributors to keep prices lower in market where more service was required. This phenomenon is apparently explained by the manufacturer's dominant position in the retail market (45%) and its strong but nondominant position in the institutional market; it faced greater competition in the institutional market.

17. Tamaron Distrib. Co. v. Weiner, 418 F.2d 137 (7th Cir. 1969).
    Toys
    Resale price maintenance

18. Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974).
    Gasoline and petroleum products
    Resale price maintenance: de facto by controlling dealer margin.

19. Oreck v. Whirlpool Corp., 563 F.2d 54 (2d Cir. 1977), *cert. denied,* 439 U.S. 946 (1978).
    Vacuum cleaners
    Resale price maintenance: The court treated this case as one involving only an exclusive distributorship. The evidence demonstrated, however, that the distributor was terminated by Whirlpool because of pressure from Sears & Roebuck. Sears sold private label vacuum cleaners made by Whirlpool, and Sears was concerned about the distributor's prices on branded Whirlpool vacuum cleaners. Sears' pressure on Whirlpool was clearly price-motivated, as was the ultimate termination of the distributor. This case, therefore, was treated as one involving resale price maintenance.

20. O.M. Droney Beverage Co. v. Miller Brewing Co., 365 F. Supp. 1067 (D. Minn. 1973).
    Beer
    Maximum vertical price fixing
    Areas of primary responsibility

21. Hamamciyan v. Mobil Oil Corp., 1973-2 Tr. Cas. (CCH) ¶ 74,722 (N.D. Cal. 1973).
    Gasoline and petroleum products
    Maximum vertical price fixing

22. Blackwelder Furn. Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977).
Furniture ("contemporary upholstered" for residential use)
Resale price maintenance: Termination of retail dealer by wholesale distributor was specifically for discounting.
Evidence of actual free riding by terminated dealer
This brand was one of dealer's top three lines, accounting for 35% of sales.

23. Krutsinger v. Mead Foods, 546 F.2d 328 (10th Cir. 1976).
Bread (wholesale to sandwich makers & restaurants)
Resale price maintenance: Oklahoma had a Fair Trade law, but it apparently did not figure in supplier's motivation, because there was no fair trade agreement. The court ultimately held the law to be inapplicable, anyway, because of dual distribution.
Suggestion of collusion among manufacturers: Mead was pressured by Rainbow, a competitor, to maintain resale prices.

24. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510 (10th Cir. 1976)
Automobiles
Resale price maintenance: Dealer was terminated because of discounting; there had been complaints about this discounting from the two other dealers in the area.
Evidence showed customer satisfaction, apparently no problem with dealer's service or promotion; no evidence to the contrary.

25. Pitchford v. PEPI, Inc., 531 F.2d 92 (5th Cir. 1976), *cert. denied,* 426 U.S. 935 (1976).
(Defendants were Phillips Electronic Instruments Corp. and North American Phillips, Inc.)
Three lines of sophisticated electronic instruments:
1. scientific and analytical; 2. industrial; 3. medical.
Resale price maintenance
Territorial resale restrictions
Exclusive dealing
Court specifically found no health or safety reasons for assuring adequate service (but there was no evidence that plaintiff was not providing adequate service).

26. Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973).
Forklift trucks
Resale price maintenance
Exclusive distributorship

27. Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973).
Gasoline and petroleum products
Resale price maintenance
Dealer collusion: Indictments for horizontal price fixing through three dealer associations.

28. Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), *cert. denied,* 409 U.S. 1077 (1972).
Gasoline and petroleum products
Resale price maintenance: de facto through control of dealer's margin; it was clearly minimum resale price fixing, not maximum. (Gulf had used a consignment system until Simpson v. Union Oil, 377 U.S. 13 (1964), in which the Supreme Court held that a consignment system could not be used as a guise for resale price maintenance.)
Evidence clearly showed that service was not Gulf's motive, and that there was no free riding.

29. A.S. Abell Co. v. Chell, 412 F.2d 712 (4th Cir. 1969).
Newspapers
Maximum vertical price fixing
Exclusive territories
Evidence of distributor collusion to raise price above publisher's maximum.

30. Anaya v. Las Cruces Sun News, 455 F.2d 670 (10th Cir. 1972).
Newspapers
Resale price maintenance: Because a newspaper was involved, one would expect that the price restraint was a maximum one, but the evidence did not so indicate.
Exclusive territories

31. Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971).
Dairy products (through convenience stores)
Maximum vertical price fixing: Actually caused franchisees to sell well below cost; could have been a loss leader strategy.
Exclusive dealing and tying

32. Knutson v. Daily Review, Inc. 548 F.2d 795 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977).
Newspapers
Maximum vertical price fixing
Territorial restrictions

33. Stan Togut Corp. v. Hobart Mfg. Co., 398 F. Supp. 1323 (S.D.N.Y. 1974).
Equipment for food processing and preparation: Distributor sold directly to supermarkets, commercial kitchens, and restaurants. (There also was a line of small home appliances for food preparation; method of distribution for these was unstated.)
Resale price maintenance
Territorial and customer restrictions

34. Capital Temporaries of Hartford, Inc. v. Olsten Corp., 383 F. Supp. 902 (D. Conn. 1974).
Temporary employee services
Maximum vertical price fixing (on national accounts)
Exclusive territories

35. Sunny Hill Farms Dairy Co. v. Kraftco Corp., 381 F. Supp. 845 (E.D. Mo. 1974).
Milk
Resale price maintenance
Substantial evidence of supplier collusion: Agreement on price plus agreement to institute vertical price fixing.

36. Congoleum Indus., Inc. v. Armstrong Cork Co., 366 F. Supp. 220 (E.D. Pa. 1973), *aff'd,* 510 F.2d 334 (3d Cir.), *cert. denied,* 421 U.S. 988 (1975).
Patent on process for chemical embossing
Price restrictions in patent license:
   1. Restrictions on royalty rate licensee could charge to sublicensee;
   2. Restrictions on royalty rate patent owner would subsequently charge to other licensees (most favored licensee clause).

37. Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977).
Newspapers
Maximum vertical price fixing
Territorial and customer resale restrictions

38. Hardin v. Houston Chronicle Pub. Co., 426 F. Supp. 1114 (S.D. Tex. 1977), *aff'd,* 572 F.2d 1106 (5th Cir. 1978).
Newspapers
Maximum vertical price fixing
Territorial restrictions

39. Freed Oil Co. v. Quaker State Oil Ref. Corp., 419 F. Supp. 479 (W.D. Pa. 1976), *vacated,* 1977 Tr. Cas. (CCH) ¶ 61,758 (W.D. Pa. 1977).
Motor Oil (Penn grade)
Resale price maintenance with respect to sales to discount stores
Territorial restrictions
Price restrictions were the result of pressure from retail service stations, although there was no direct evidence of dealer collusion.

40. Continental Distrib. Co. v. Somerset Importers, 411 F. Supp. 754 (N.D. Ill. 1976).
    Liquor (imported)
    Resale price maintenance: At both wholesale and retail levels.
    Pressure from retail dealers, and probable pressure from surviving (nonterminated) wholesaler, but no direct evidence of dealer collusion.

41. United States v. General Elec. Co., 358 F. Supp. 731 (S.D.N.Y. 1973).
    Large lamps (light bulbs, fluorescent tubes, etc.)
    Resale price maintenance
    G.E. still had at least 50% of the market in early 1970s.

42. Ammerman v. Bestline Prods., Inc., 352 F. Supp. 1077 (E.D. Wis. 1973).
    Liquid cleaning products
    Resale price maintenance
    Customer resale restrictions: Distributors could not resell to stores or across the counter.
    Exclusive dealing

43. Lepore v. New York News, Inc., 346 F. Supp. 755 (S.D.N.Y. 1972).
    Newspapers
    Maximum vertical price fixing
    Exclusive territories
    Exclusive dealing

44. Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945 (S.D. Tex. 1972).
    Beer
    A form of maximum vertical price fixing

45. Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2d Cir. 1969).
    Photographic equipment
    Resale price maintenance
    Territorial resale restrictions

46. Garrett's, Inc. v. Farah Mfg. Co., 412 F. Supp. 656 (D.S.C. 1976).
    Men's clothing
    Resale price maintenance

47. Chisholm Bros. Farm Equip. v. International Harvester Co., 498 F.2d 1137 (9th Cir. 1974), *cert. denied,* 419 U.S. 1023 (1974).
    Trucks and farm equipment
    A form of maximum vertical price fixing, although price seemed to be a secondary concern of the manufacturer.

APPENDIX B
NONPRICE RESTRICTIONS

1. United States v. Glaxo Group, 410 U.S. 52 (1973).
   Patented fungicide drug for humans and animals
   A type of intrabrand nonprice restriction: In patent licenses and sublicenses, there was a prohibition against resale of physical product in bulk form. Licenses were accompanied by physical sale in bulk form; thus, restriction was on resale.
   Agreement among manufacturers: Two British companies pooled their patents and joined in the restrictions.

2. Mages v. Spalding Sales Corp., 1975-2 Tr. Cas. (CCH) ¶ 60,579 (N.D. Ill. 1975).
   Golfing equipment
   Exclusive dealership
   Evidence suggested an understanding among manufacturers.

3. Weather Wise Co. v. Aeroquip Corp., 468 F.2d 716 (5th cir. 1972), *cert. denied,* 410 U.S. 990 (1973).
   Coupling devices for connecting precharged air conditioner compressors with other parts of air conditioning systems
   A type of intrabrand nonprice restriction: Refusal to sell for resale; coupling manufacturer would sell only to manufacturers of complete air conditioning systems.
   This coupling manufacturer "controlled a substantial portion of the market," according to the court, and couplings were critical components.

4. Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975).
   Automobiles
   Location clause
   Same distribution system examined in:
   Kaiser v. General Motors Corp., 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd,* 530 F.2d 964 (3d Cir. 1976).
   Same distribution system also examined in:
   Sheldon Pontiac v. General Motors Corp., 418 F. Supp. 1024 (D.N.J. 1976), *aff'd,* 556 F.2d 1170 (3d Cir. 1976). (This case also revealed territorial exclusives; no dealer could be established within five miles of another).

5. Williams v. Independent News Co., 485 F.2d 1099 (3d Cir. 1973).
   Comic books
   Restriction on customers to whom products could be resold

6. Paddington Corp. v. Major Brands, Inc., 359 F. Supp. 1244 (W.D. Okla. 1973).
   Alcoholic beverages (imported Scotch whiskey from England)
   Territorial resale restriction

7. Dreibus v. Wilson, 529 F.2d 170 (9th Cir. 1975).
Imported Italian velvet used in furniture manufacturing
Exclusive distributorship for entire U.S.
In short domestic supply, and costly when imported, but there were several Italian mills producing it for export to U.S.

8. Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245 (5th Cir. 1975).
Sound and communications equipment for use in commercial establishments
De facto exclusive distributorship

9. Beverage Distribs., Inc. v. Olympia Brewing Co., 440 F.2d 21 (9th Cir. 1971), *cert. denied,* 403 U.S. 906 (1971).
Beer
Restriction on customers to whom products could be resold
Evidence of manufacturer collusion: Agreement among brewers to restrict plaintiff's resale to Safeway (for unknown reasons).

10. Athlete's Foot of Delaware, Inc. v. Ralph Libonati Co., 445 F. Supp. 35 (D. Del. 1977).
Athletic footwear
Territorial resale restriction (de facto)
Had an *interbrand* effect, because wholesale distributor not only would not supply its brand to plaintiff's new second store, but used threatened termination of supply at first store to prevent opening of second store. Stores carried other brands, as well.
The entire occurrence resulted from pressure applied by the owner of another store close to the location of plaintiff's proposed second store. Thus, pressure from the dealer level was involved.

11. Erewhon, Inc. v. Northeast Health Food Merchants, 428 F. Supp. 551 (D. Mass. 1977).
Health and natural foods
Exclusive dealership
Coerced by dealers: Health food stores wanted to exclude food coops.
Evidence of dealer collusion
No evidence of reduced service or free riding by coops.

12. Akron Tire Supply Co. v. Gebr. Hofmann KG, 390 F. Supp. 1395 (N.D. Ohio 1974) (supplemental opinion 1975).
Automobile wheel-balancing device
Exclusive territories
Introduction of new product

13. Supermarket Servs., Inc. v. Hartz Mountain Corp., 382 F. Supp. 1248 (S.D.N.Y. 1974).
Pet supplies
Territorial resale restriction
Wholesaler (rack jobber) wanted to give retailers a choice of full service (as had traditionally been done) or no service with lower price. The manufacturer was upset, although all retailers chose traditional full service at higher price, and were given full service by the wholesaler.
Manufacturer was one of the industry leaders, with 1/3 of the market.

14. Fairfield County Beverage Distribs., Inc. v. Narragansett Brewing Co., 378 F. Supp. 376 (D. Conn. 1974).
Beer
Territorial resale restrictions

15. DeFilippo v. Ford Motor Co., 516 F.2d 1313 (3d Cir. 1975), *cert. denied,* 423 U.S. 912 (1975).
Automobiles
A type of exclusive dealership situation: Dealers in the area pressured manufacturer not to grant a new dealership on proposed terms that would have facilitated market entry (new dealer would have been permitted to defer its part of the investment for three months).
Evidence of dealer collusion

16. Todhunter-Mitchell & Co., v. Anheuser-Busch, Inc., 375 F. Supp. 610 (E.D. Pa. 1974), *modified,* 383 F. Supp. 586 (E.D.Pa. 1974).
Beer
Territorial resale restrictions
Apparent interbrand distributor collusion
Supplier was leading brewer in the nation with 19% of market.

17. Bay City-Abrahams Bros., Inc. v. Estee Lauder, Inc., 375 F. Supp. 1206 (S.D.N.Y. 1974).
Cosmetics and toiletries
Exclusive territories

18. Western Wholesale Liquor Co. v. Gibson Wine Co., 372 F. Supp. 802 (D.S.D. 1974).
Wine
Exclusive territories
Supplier was making a market entry.

19. Oak Distrib. Co. v. Miller Brewing Co., 370 F. Supp. 889 (E.D. Mich. 1973).
Beer
Exclusive territories
Supplier's market share in Michigan was small at the time.

20. American Indus. Fastener Corp. v. Flushing Enter. Inc., 362 F. Supp. 32 (N.D. Ohio 1973).
Patented washer for threaded fasteners
Territorial resale restrictions: Patent license included restrictions that extended to the resale of the physical product itself.
License agreement also contained a provision for suggested resale prices at retail, but at preliminary injunction stage there was no evidence as to whether prices were enforced; thus, this was treated as a nonprice restriction.

21. Dobbins v. Kawasaki Motors Corp. U.S.A., 362 F. Supp. 54 (D. Or. 1973).
Motorcycles
Territorial resale restrictions

22. Booth Bottling Co. v. Beverages Int'l, Inc., 361 F. Supp. 340 (E.D. Pa. 1973).
Syrup for carbonated soft drinks
Territorial resale restrictions

23. Munters Corp. v. Burgess Indus., Inc., 450 F. Supp. 1195 (S.D.N.Y. 1977).
Patented cross-fluted packing material for use in evaporative cooling mechanisms
A type exclusive distributorship: Patent owner sold physical product with provision giving buyer exclusive right to use the product in manufacture of evaporative coolers for gas turbines of over 500 horsepower.
Exclusive was the result of pressure from the purchaser; purchaser had actually wanted a more restrictive provision.
No apparent justification; manufacturer was not making a market entry, technology was not difficult, and purchaser had no large investment to recoup.

24. Tomac, Inc. v. Coca-Cola Co., 418 F. Supp. 359 (C.D. Cal. 1976)
Syrup for carbonated soft drinks
Territorial resale restrictions

25. Wisdom Rubber Indus., Inc. v. Johns-Manville Sales Corp., 415 F. Supp. 363 (D. Hawaii 1976).
Irrigation pipe (two types: plastic and asbestos cement)
Exclusive territories

26. Skoda v. A & W Distrib. Co., 414 F. Supp. 1209 (E.D. Tex. 1976)
Syrup for carbonated soft drinks
Territorial restrictions on resale, plus exclusive territory

27. Sulmeyer v. Seven-Up Co., 411 F. Supp. 635 (S.D.N.Y. 1976).
Carbonated soft drinks (lemon-lime, for export to foreign countries)
Territorial resale restrictions
Exclusive dealing
Supplier (Seven-Up) had 80% of lemon-lime soft drink sales in 1960 (data from another case) and only 45% in 1972-73 (this case), but lemon-lime is not a market by itself.

28. Tire Sales Corp. v. Cities Serv. Oil Co., 410 F. Supp. 1222 (N.D. Ill. 1976), *rev'd*, 637 F.2d 467 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).
Automotive tires, batteries and accessories (for resale to gasoline service stations)
Exclusive territories

29. Cook v. Ralston Purina Co., 366 F. Supp. 999 (M.D. Ga. 1973).
Chicken feed (bulk sales to chicken raisers)
Territorial resale restrictions
Manufacturer (Ralston Purina) was the largest producer of animal feed (bulk and bagged) in the nation.

30. Royal Crown Bottling Co. v. Royal Crown Cola Co., 358 F. Supp. 290 (D. Colo. 1972).
Syrup for carbonated soft drinks
Territorial resale restrictions

31. Plastic Packaging Materials, Inc. v. Dow Chemical Co., 327 F. Supp. 213 (E.D. Pa. 1971).
Expanded polystyrene used for loose fill packing material (both processing and distribution)
Areas of primary responsibility: Some evidence of manufacturer interest in keeping distributors within their territories, but court found that manufacturer did not restrict distributor to the territory. Manufacturer was clearly concerned about plaintiff's sales outside territory, but manufacturer was very careful about how it dealt with the matter.
Some evidence of pressure from competing distributors: Other distributors had a meeting, and plaintiff's selling outside its territory was discussed, but court found that meeting was for another purpose.

32. Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972).
Fire extinguishers
Exclusive territories

33. United States v. Chicago Tribune-New York News Syndicate, 309 F. Supp. 1301 (S.D.N.Y. 1970).
Copyrighted features for newspapers (comics, columns, etc.)
Exclusive territories

34. Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F. Supp. 703 (S.D.N.Y. 1969).
Greeting cards
Exclusive territories: Hallmark refused to sell to another, newly opened store in the area.
Manufacturer (Hallmark) was the largest in the country.

35. Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir. 1970), *cert. denied,* 400 U.S. 831 (1970).
Cosmetics for professional use (hair dyes, tints, conditioners, perms, setting lotions, etc., for use by barbers and beauticians)
Customer resale restriction: Prohibition of resale to public at retail
Some evidence of resale price maintenance, but plaintiff lost at summary judgment stage on resale price maintenance claim, so this is treated as a customer restriction case.

36. Holly Springs Funeral Home, Inc. v. United Funeral Serv., Inc., 303 F. Supp. 128 (N.D. Miss. 1969).
Supplies for funeral homes
A type of exclusive territory
Probable pressure from monopolistic purchaser: Refusals by suppliers of various items to sell to new funeral home were very uniform, and for the same reason; they would not sell an item to a competitor of an existing customer. Evidence indicated dominance by the established funeral home.

37. Oakland County Hearing Aid Servs. v. Sonotone Corp., 23 F.R.S.2d 1431 (E.D. Mich. 1977).
Hearing aids
Territorial and customer resale restrictions
Although this case was only at class certification stage, and no evidence had been presented, a separate proceeding by the Federal Trade Commission corroborated the probable existence of territorial and customer resale restrictions during this time period. *See,* In re Beltone Elec. Corp., 100 F.T.C. 68 (1982). In this case, there was also an allegation of resale price maintenance, but this claim was not corroborated by the separate F.T.C. proceeding, so this case was treated as only involving territorial and customer restrictions.
Evidence of dealer collusion: Court pointed out that two of the retail dealer plaintiffs had been charged civilly and criminally by the Justice Department with horizontal price fixing.

38. Clairol, Inc. v. Boston Discount Center of Berkeley, Inc., 191 U.S.P.Q. 632 (E.D. Mich. 1977), *aff'd,* 608 F.2d 1114 (6th Cir. 1979).
Hair coloring preparations for professional use
Customer resale restrictions: Prohibition of resale to public (in this case, Clairol sued several retailers to prevent them from selling to the public.
Same distribution system examined in:
Clairol, Inc. v. Asaro, 1975 Tr. Cas. (CCH) ¶ 60,350 (E.D. Mich. 1975).

39. Redd v. Shell Oil Co., 184 U.S.P.Q. 675 (D. Utah 1974), *rev'd in part,* 524 F.2d 1054 (10th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976).
Gasoline and petroleum products
Territorial resale restrictions
Exclusive dealing (plaintiff and the court called it tying, but tying product was the Shell trademark, so this was actually a form of exclusive dealing).

40. Mid-America ICEE, Inc. v. John E. Mitchell Co., 1973-2 Trade Cas. (CCH) ¶ 74,681 (D. Or. 1973).
Machines for preparing and dispensing frozen carbonated beverages
Territorial resale restrictions
Suggested resale and sublease prices, but no evidence of enforcement or of any real interest in controlling resale price. Territorial restrictions were clearly the only substantive aspect of the distribution system.

41. Alameda Mall, Inc. v. Houston Lighting & Power Co., 1977-1 Trade Cas. (CCH) ¶ 61,485 (S.D. Tex. 1977).
Electricity
Customer resale restriction: Utility refused to permit shopping mall owner to submeter (resell) to tenants.

42. Mitchell v. U.S. Surgical Corp., 1976-1 Trade Cas. (CCH) ¶ 60,879 (S.D. Ohio 1976).
Medical and surgical devices for use by physicians and hospitals (most important product was a surgical stapler, but manufacturer also produced intravenous infusion sets and total hip prosthesis units).
Territorial resale restrictions: Area of primary responsibility, with total ban on sales outside territory if such sales interfered with dealers sales within his area.
New entrant: Manufacturer was the only producer of such a surgical stapler, but product was still relatively new and potential users were still being educated about it.

43. John Lenore & Co. v. Olympia Brewing Co., 1975-2 Trade Cas. (CCH) ¶ 60,505 (S.D. Cal. 1975).
Beer
Exclusive territories

44. Roth Office Equip. Co. v. G.F. Business Equip. Co., 1975-2 Trade Cas. (CCH) ¶ 60,563 (S.D. Ohio 1975).
Metal office furniture
Exclusive territories

45. U.S. Elec. Supply Co. v. Maurice Elec. Supply Co., 1975-2 Trade Cas. (CCH) ¶ 60,587 (D.D.C. 1975).
Electrical supplies and materials
A type of exclusive distributorship arrangement: Seven manufacturers stopped selling to plaintiff wholesale distributor when they discovered that plaintiff's principal financial backer was an electrical contractor. Manufacturers had a uniform policy of selling only to wholesale distributors and not to electrical contractors.
Evidence suggests manufacturer collusion, although not proved. In writer's opinion, circumstances permit inference that there was some understanding among manufacturers.
Six wholesalers, competitors of plaintiff, were also named as defendants, and there is the suggestion that they pressured manufacturers, but there was no evidence of such pressure at preliminary injunction stage. Circumstances insufficient to infer collusion among, or even pressure from, wholesalers.

46. United States v. Fisons Ltd., 1972 Trade Cas. (CCH) ¶ 73,794 (N.D. Ill. 1972).
Patented iron dextram in bulk form ("any collodial ferric hydroxide complexed with depolymerized dextram" for use in treating deficiency of iron in humans and animals).
A type of intrabrand nonprice restriction: customers were prohibited from reselling in bulk form, but could resell only in dosage form.

47. Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976), *cert. denied,* 419 U.S. 1050 (1974).
Computer software sale (franchised computer time-sharing systems)
Computer hardware rental (Hewlett-Packard 2000A CPU)
Territorial restrictions

48. American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).
Hotels and motels
Territorial restrictions
Exclusive dealing: Franchisees could not operate hotel or motel for anyone else.
Franchisor (Holiday Inns) was the largest hotel-motel chain in U.S.
Same distribution system examined in:
Hawkins v. Holiday Inns, Inc., 1976-2 Trade Cas. (CCH) ¶ 61,072 (W.D. Tenn. 1976).

49. United States v. Ciba-Geigy Corp., 508 F. Supp. 1118 (D.N.J. 1976).
Patented antihypertensive drug HCT in bulk form
A type of intrabrand nonprice restriction: prohibition against resale in bulk form, and requirement that purchasers use the drug only in the production of combination or specialty drugs and not in straight form.
Manufacturer (Ciba) also licensed some firms to manufacture HCT for use in combination or specialty drugs, not in straight form.
Manufacturer distributed through competitors, so the court treated it as a horizontal restriction. Thus, there was manufacturer collusion.
Ciba was second largest producer in market for antihypertensive drugs, but was losing market share. Ciba had 21% in 1969 and 18% in 1974. The largest, Merck, had 36% in 1969 and 45% in 1974. There were 8 producers in all; no other had more than 6%.

50. Eastex Aviation, Inc. v. Sperry & Hutchinson Co., 522 F.2d 1299 (5th Cir. 1975).
Trading stamps
A type of exclusive territory: S & H would not let the plaintiff retailer handle its stamps because a competing retailer at the same airport handled S&H stamps.
An additional type of intrabrand nonprice restriction: Prohibition against resale; in this case, it was a type of transshipment prohibition to enforce the de facto territorial exclusive, but S&H also had a general policy against resale of its stamps.

51. Reed Brothers, Inc. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 423 U.S. 1055 (1976).
Agricultural herbicides
Territorial and customer resale restrictions

52. Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir. 1973), *cert. denied,* 411 U.S. 987 (1973).
Control devices for automatic lawn sprinkler systems
Areas of primary responsibility: The extent to which exclusive distributors were restricted to territories was not clear, but the case was characterized as one involving a territorial resale restriction and not as one involving a pure territorial exclusive because of the primary responsibility clause.
Exclusive territories

53. Pepsico, Inc. v. F.T.C., 472 F.2d 179 (2d Cir. 1972), *cert. denied,* 414 U.S. 876 (1973).
Syrup for carbonated soft drinks
Territorial resale restrictions
FTC had also filed complaints against most other producers in the nation.

54. Ricchetti v. Meister Brau, Inc., 431 F.2d 1211 (9th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971).
Beer
Territorial resale restrictions: Although no violation proved, the evidence, coupled with knowledge of industry practices, creates a strong suggestion that territorial resale restrictions did exist.

55. Edwin K. Williams & Co. v. Edwin K. Williams & Co. East, 542 F.2d 1053 (9th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977).
Bookkeeping and consulting services for retail gasoline outlets
Territorial resale restrictions: Trademark and copyright licenses included territorial restriction.

56. Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466 (8th Cir. 1976), *cert. denied,* 433 U.S. 914 (1977).
Automobiles
Exclusive territories

57. Noble v. McClatchy Newspapers, 533 F.2d 1081 (9th Cir. 1975), *vacated,* 433 U.S. 904 (1977).
Newspapers
Territorial resale restrictions: Court remanded to determine whether there were only areas of primary responsibility or territorial resale restrictions. It is probable that there were territorial resale restrictions because all evidence indicated that dealer was doing an excellent job — had increased sales fourfold — and dealer resisted the splitting of his territory.

58. Morton Bldgs. of Nebraska v. Morton Bldgs., Inc., 531 F.2d 910 (8th Cir. 1976).
Prefabricated wood-framed, metal-covered buildings
Territorial resale restrictions: Dealer could sell outside his territory as long as he did not sell within 50 miles of another dealer. Apparently, territories were not contiguous; within this context, there were definite territorial restrictions on resale.

59. World of Sleep, Inc. v. Stearns & Foster Co., 525 F.2d 40 (10th Cir. 1975).
Bedding products
Territorial resale restriction: Not express, and court found no violation, but there obviously were de facto territorial resale restrictions. Plaintiff had a store in Denver and opened a new one in Atlanta. Manufacturer would not sell to plaintiff's store in Atlanta, plaintiff transshipped from Denver to Atlanta, and manufacturer terminated plaintiff. Manufacturer said it did so out of loyalty to Rich's, a large department store in Atlanta that carried the manufacturer's bedding. Evidence showed that plaintiff was a very aggressive retailer, was very successful, and did heavy advertising.

60. Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309 (3d Cir. 1975).
Non-asbestos fireproofing spray for buildings (district court determined relevant market to be "all structural steel fireproofing materials").
A type of intrabrand nonprice restriction: Manufacturer sold only to "licensees" — contractors who applied the material — and forbade them from reselling the material. It apparently was customary in the industry to not sell for resale.

61. Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425 (10th Cir. 1977).
Malt liquor
Territorial and customer resale restrictions
Same distribution system examined in:
Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (10th Cir. 1977).

62. Arkla Air Conditioning Co. v. Famous Supply Co., 551 F.2d 125 (6th Cir. 1977).
Air conditioners
Territorial resale restrictions

63. Jacobson & Co. v. Armstrong Cork Co., 548 F.2d 438 (2d Cir. 1977).
Acoustical ceiling products
Territorial resale restrictions
Manufacturer (Armstrong) was the largest producer of acoustical and non-acoustical ceiling products in the U.S.

64. Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30 (5th Cir. 1977), *reh'g denied,* 551 F.2d 864 (5th Cir. 1977).
Beer
Exclusive national distributorship

65. FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977).
Automobile "crash parts"
Restrictions on customers to whom dealers could resell the parts: Ford dealers could receive an allowance on purchase of crash parts only if they resold to independent repair shops, and not to parts wholesalers. Thus, Ford dealers were effectively prevented from reselling to parts wholesalers. Until 1968, Ford had imposed tighter customer resale restrictions; in response to pressure from the FTC, Ford changed the system to give independent auto repair shops a chance to compete. In 1971 Ford changed the system again; it continued to permit dealers to resell to independent auto repair shops, but effectively excluded parts wholesalers.

66. Southeastern Hose, Inc. v. Imperial-Eastman Corp., 1973 Trade Cas. (CCH) ¶ 74,479 (N.D. Ga. 1973).
Hydraulic hose assemblies
A type of intrabrand nonprice restriction: Coupling manufacturer apparently put pressure on one of its large wholesale distributors to keep the distributor from getting a component (hose) from the coupling manufacturer's suppliers and engaging in assembly in competition with coupling manufacturer. Thus, coupling manufacturer attempted to restrict its wholesale distributors from entering the assembly market and to limit activities to pure wholesaling.