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I. INTRODUCTION

For some time, both economic and legal commentators have recognized the economic irrationality of the Supreme Court's ruling in *Al-*

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brecht v. Herald Co.,[1] which prohibited the imposition of maximum resale prices by a supplier on its resellers.[2] Ordinarily, unwise decisions receive critical reviews and eventually lose their force as they are overruled explicitly or by implication in subsequent decisions.[3] In order for this evolution to occur, however, the Court must be presented with an opportunity to alter its earlier rulings. Recently, the Supreme Court had just such an opportunity to revisit the *Albrecht* rule in *Atlantic Richfield Co. v. USA Petroleum (ARCO)*.[4] Although the Court's reasoning in *ARCO* severely restricts some private suits, the Court refused to overturn *Albrecht* directly and left standing the shell of the per se doctrine.[5] This is unfortunate because the *Albrecht* precedent remains on the books even though it is at odds with the promotion of consumer welfare.[6] Two undesirable consequences follow. First, businesses avoid some procompetitive business arrangements for fear of antitrust liability.[7] Given that the purpose of the antitrust laws is to promote competition, this is particularly perverse. Second, the lower courts are forced to rely on standing rules as a means of rejecting claims presented by undeserving plaintiffs.[8]

In this Article we assess the implications of *ARCO* for the future vitality of *Albrecht*. In Part II we review the development and economic consequences of the *Albrecht* rule. In Part III we examine the judicial hostility that has developed in the lower courts toward the anticompetitive nature of the *Albrecht* rule. In Part IV we analyze the *ARCO* decision with respect to substantive antitrust policy and antitrust injury.[9]

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1. 390 U.S. 145 (1968). For devastating critiques of the *Albrecht* rule, see the dissenting opinions of Justices Harlan and Stewart, *id.* at 156 and 168, respectively.

2. Maximum resale price fixing limits the reseller's ability to increase prices to its customers. This is in sharp contrast to the typical resale price-maintenance case, in which the manufacturer is alleged to restrict a reseller's ability to reduce price to its customers. *See, e.g.*, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984). In *Albrecht* the Supreme Court ruled that vertical maximum price fixing is illegal per se. 390 U.S. at 152-53.

3. The ruling in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), succumbed to a decade of academic criticism and lower court avoidance in Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977). *See* Bork, *Vertical Restraints:* Schwinn *Overruled*, in THE SUPREME COURT REVIEW: 1977 (P. Kurland & G. Casper eds. 1978), and Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1 (1977).

4. 110 S. Ct. 1884 (1990).

5. That is, the *Albrecht* court's ruling that vertical maximum price fixing is illegal per se. *See supra* note 2. For a justification of this assertion, see *infra* Part V.

6. For a full analytical development, see Blair & Kaserman, *The* Albrecht *Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981). In addition, see Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981) (pointing out that maximum resale price fixing is used to prevent distributors from exploiting their exclusive territories).

7. *See infra* notes 64-68 and accompanying text.

8. *See infra* notes 61-112 and accompanying text.

9. Antitrust injury is injury of a type that the antitrust laws were intended to prevent; it flows from the anticompetitive consequences of an antitrust violation. *See* Brunswick Corp. v.

We then examine the implications of *ARCO* for the *Albrecht* rule in Part V. In doing so, we develop two examples that highlight the mischief caused by the Court's strained reasoning in *ARCO* and its faulty reasoning in *Albrecht*. The concluding section offers two solutions to the present problems that the Court left unresolved.

II. THE *ALBRECHT* RULE

To understand the importance of *ARCO*, we begin with the emergence of the *Albrecht* rule. After a brief examination of the judicial history, we provide an economic assessment of this unfortunate decision.

A. *Judicial Development of the* Albrecht *Rule*

One can trace the beginnings of the *Albrecht* rule to the Court's landmark decision in *United States v. Socony-Vacuum Oil Co.*[10] In that case, the major petroleum refiners, in an attempt to prop up the spot price, agreed to soak up some distress gasoline being sold in the spot market.[11] This strategy served the refiners' interests because the contracts with their jobbers were formula driven and dependent on the spot price.[12] Although the major refiners had not agreed on uniform and inflexible prices, they acted collusively in purchasing gasoline on the spot market and thereby substantially affected the prices paid by their jobbers.

Writing for the majority, Justice Douglas dismissed as irrelevant the major refiners' contention that they had not set uniform prices. He pointed out that any combination which tampers with price structures is unlawful.[13] To clarify just how expansive this prohibition was, Justice Douglas went on to say that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, *depressing*, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[14] Thus, the stage was set for the condemna-

Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Blair & Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539 (1989); Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1979-80) [hereinafter Page, *Antitrust Damages*]; Note, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309 (1984); Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 CAL. L. REV. 437 (1984) [hereinafter Comment, *A Farewell to Arms*]; Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 MINN. L. REV. 1011 (1983) [hereinafter Note, *Antitrust Standing*].

10. 310 U.S. 150 (1940).
11. *Id.* at 169.
12. *Id.*
13. *Id.* at 221.
14. *Id.* at 223 (emphasis added).

tion of maximum resale price fixing.

Following the *Socony-Vacuum* decision, the prohibition against depressing prices remained dictum until the Court's 1951 ruling in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons.*[15] In response to a horizontal conspiracy among Kiefer-Stewart and other wholesale liquor dealers to raise prices, Calvert and Seagram agreed to refuse to sell unless the wholesalers agreed not to charge more than a specified maximum price. When Kiefer-Stewart refused to respect these maximum resale prices, Calvert and Seagram denied it access to their products. Kiefer-Stewart sued for lost profits on lost sales. The Court ruled in favor of Kiefer-Stewart and reaffirmed the *Socony-Vacuum* dictum on the grounds that agreements to fix maximum resale prices "cripple the freedom of traders and thereby restrict their ability to sell in accordance with their own judgment."[16]

Although the generality of the *Kiefer-Stewart* ruling could be questioned because of the apparent horizontal agreement between Calvert and Seagram,[17] all doubt was removed in *Albrecht*.[18] In *Albrecht* the Herald Company, publisher of the *Globe-Democrat*, a St. Louis morning newspaper, awarded exclusive territories to its carriers.[19] The carriers purchased newspapers at wholesale prices and resold them at retail prices by providing home-delivery service to subscribers.[20] The publisher advertised a home-delivered price and required that its carriers honor that price under threat of termination. Albrecht was a carrier who charged customers on his route more than the advertised price.[21] In response to Albrecht's price increase, the publisher hired a third party to solicit subscriptions at the lower published price from Albrecht's customers. The publisher also designated a new carrier who took over the route with the understanding that the publisher would tolerate no unauthorized price increases and that the carrier might lose the route if Albrecht reduced his price to the publisher's desired level. During the ensuing squabble, Albrecht sued the Herald Company, which, in response, gave him sixty days' notice to sell his route.[22] Although the

15. 340 U.S. 211 (1951).

16. *Id.* at 213.

17. Calvert and Seagram were not actual horizontal competitors because they were owned by the same parent. Under current law, they would not be found capable of conspiring with each other. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

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

19. *Id.* at 147.

20. *Id.*

21. *Id.*

22. *Id.* at 148. The injury claimed was the difference between the actual sale price and the potential sale price for the route had the Herald Company not taken away some of Albrecht's subscribers.

lower courts found no restraint of trade, the Supreme Court reversed and ruled for Albrecht.[23]

The Supreme Court reaffirmed its *Kiefer-Stewart* ruling and condemned maximum resale price fixing. The Court explained: "[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market may severely intrude upon the ability of buyers to compete and survive in that market."[24] The Court went on to explain how it reached this conclusion:

> Maximum prices may be fixed too low for the dealer to furnish services essential to tbe value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always tbe fixed maxinum price . . . the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.[25]

Thus, the Court found that fixing maximum resale prices, like agreeing to fix minimum prices, was illegal per se under Section 1 of the Sherman Act.

B. Economic Assessment of the Albrecht *Rule*

1. Rationale for Setting Maximum Resale Prices

Examining the economic rationale for the publisher's interest in setting maximum resale prices reveals the economic consequences of the *Albrecht* rule.[26] Typically, the daily newspaper publisher is the only producer of a newspaper of general circulation or local interest in its area, and, therefore, is viewed as a "monopolist."[27] The publisher typically assigns exclusive home-delivery routes to its carriers. The purpose of the exclusivity is both to obtain maximum efficiency in the home delivery of the newspaper and to ensure that service quality is maintained. The cost of delivery per paper is minimized by having one carrier serve all subscribers along an assigned route. In addition, the publisher is better able to control the quality of service by providing subscribers in nearby areas with a single carrier. The danger that this

23. *Id.* at 148-49.

24. *Id.* at 152.

25. *Id.* at 152-53.

26. This rationale is explained fully in R. BLAIR & D. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 31-36 (1983).

27. Although some courts have deemed or assumed newspaper publishers to be monopolists in tbe sale of newspapers, *see, e.g.*, Paschall v. Kansas City Star Co., 727 F.2d 692 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 872 (1984), publishers face keen competition in the sale of advertising space from other media such as television, radio, magazines, billboards, the Yellow Pages, and direct mail. *See, e.g.*, Midwest Radio Co. v. Forum Publishing Co., 1990-1 Trade Cas. (CCH) ¶ 69,082 (D.N.D. 1990).

poses, however, is that the carrier will act as a monopolist and charge what the publisher considers an excessive price. The consequences of such a price increase are that the distributor's sales go down, resulting in a decline in the publisher's sales revenue, and more important, deprive the publisher of the readership it needs to sell space to advertisers. Under these circumstances, the publisher would like to limit the distributor's pricing freedom by specifying a maximum home-delivered price such that the markup over the wholesale price is just equal to the cost of performing the distribution function.[28] If the publisher has no control over the resale price, however, the distributor may seek monopoly profits by increasing the home-delivered price above the sum of the wholesale price plus the competitive cost of distribution. The result of the higher home-delivered price is to reduce circulation, thereby causing the publisher's profits to fall.[29]

These concerns are demonstrated in Figure 1, which displays the demand for home-delivered newspapers as *D*, the associated marginal revenue as *MR*, the marginal (and average) cost of publishing as MC_P, and the hypothetical marginal (and average) cost of the home-delivery service as MC_D.[30] This figure describes the hypothetical market conditions on one of the newspaper's exclusive distribution routes.[31] To determine the price and output of home-delivered newspapers, one must examine the profit-maximizing behavior of the distributor. Since the distributor is a monopolist along its assigned route,[32] it will maximize

28. The cost will include a competitive return on the resources invested in the distribution enterprise.

29. Newspapers are more complicated than most products because the publisher is selling both the newspaper to its readers and the advertising space to advertisers. Moreover, the demands are interdependent. The higher the circulation, the higher the demand for advertising space. Additionally, the more advertising, the higher the circulation. Thus, a drop in circulation has two impacts on the publisher: (1) a loss in circulation revenue and (2) a loss in advertising, which feeds back on circulation for another round of decreases. *See* J. Rosse, Vertical Price Fixing in Newspaper Distribution: A Per Se Rule That Makes Everyone Worse Off (May 1980) (unpublished manuscript). In fact, the typical daily newspaper receives only 20-25% of its revenue from sales of the newspaper; the balance is derived from sales of advertising space—in reality, readership—to advertisers. *See* B. COMPAINE, THE NEWSPAPER INDUSTRY IN THE 1980S: AN ASSESSMENT OF ECONOMICS AND TECHNOLOGY 18-19 (1980).

30. These costs are assumed to be constant. This assumption makes the graphical analysis less confusing than it would be with more general cost conditions. The results, however, carry over to more complicated cost conditions.

31. These market conditions are hypothetical in the sense that the typical daily newspaper publisher does not derive profit from the sale of the newspaper to its readers. In fact, newspaper sales to readers do not even cover costs since circulation revenue accounts for only 75-80% of the costs of ink and newsprint. *See* B. COMPAINE, *supra* note 29, at 30. The publisher relies on its readership to permit sales of space to advertisers for profit. We have simplified the analysis here so it would be consistent with the sale of "single" products such as gasoline.

32. The publisher confers this monopoly power on the carrier because having a single carrier on each route minimizes the costs of delivery.

its profits by equating its marginal revenue to its marginal cost, which is the sum of the wholesale price *(p)* that the publisher charges and the marginal cost of the delivery service (MC_D). Accordingly, absent the power of the newspaper publisher to remove the distributor because of declining sales, profit maximization requires that the distributor deliver the quantity of newspapers where $MR = (p) + MC_D$. Another way of looking at this is to equate the wholesale price paid for the newspapers *(p)* to the net marginal revenue ($MR - MC_D$). This equality, $p = MR - MC_D$, describes the derived demand for newspapers by the distributor along the exclusive route.[33] One uses this derived demand to find the publisher's profit-maximizing wholesale price.

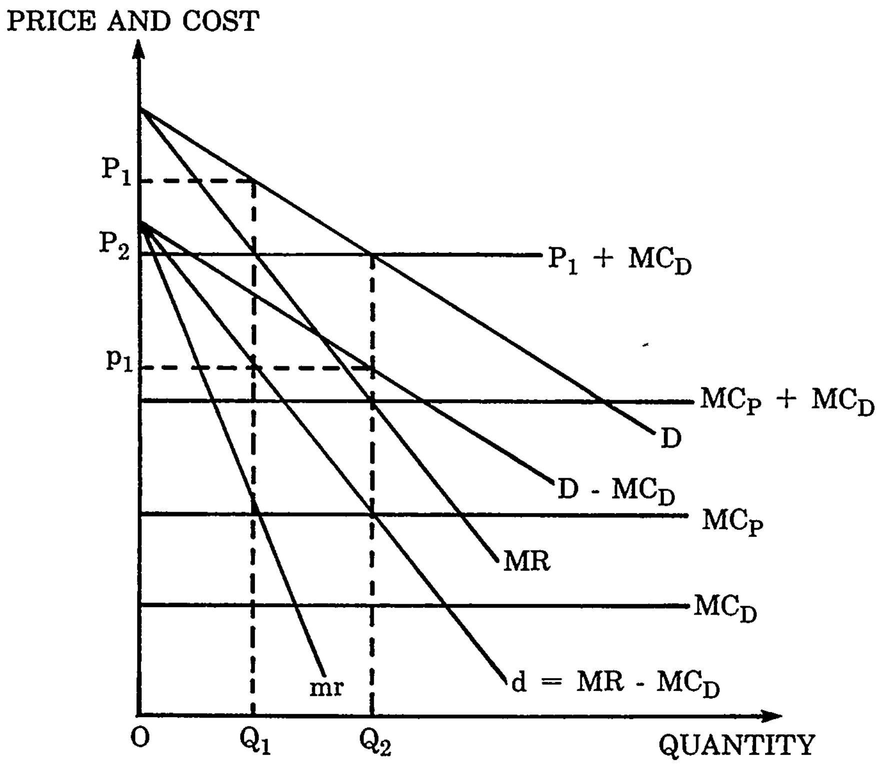

Figure 1

In Figure 1, the derived demand is shown as $d = MR - MC_D$ and the associated marginal revenue is *mr*. The publisher can exploit its monopoly power by selecting the price and output where its marginal cost of publishing (MC_P) equals its marginal revenue (*mr*). Accordingly, the publisher will produce Q_1 newspapers for this route and will charge a

33. The wholesale demand is derived from the demand for newspapers at retail since the carrier is not a final consumer and, therefore, only wants newspapers for resale.

wholesale price of p_1. The publisher's resulting profits will be equal to the difference between the price per paper and the marginal cost (p_1 - MC_P) multiplied by the number of papers (Q_1). Thus, the publisher's profit equals $(p_1 - MC_P)Q_1$.

The distributor will treat the wholesale price as the marginal cost of goods sold. By adding this to the marginal (and average) cost of distribution, the distributor will have the marginal cost of a home-delivered newspaper. Proceeding in the usual way, the distributor maximizes its profits in the short run by selling that number of papers (Q_1) where marginal cost (p_1 - MC_D) equals marginal revenue (MR).[34] The home-delivered price that corresponds to Q_1 is P_1. For the distributor, profit equals the markup ($P_1 - p_1 - MC_D$) multiplied by the number of papers sold (Q_1) or $(P_1 - p_1 - MC_D)Q_1$. Thus, the distributor earns excess[35] profits by virtue of its monopoly position along its assigned route. It is this behavior that leads the newspaper publisher to impose maximum resale prices.

2. A Numerical Example

A numerical example may help to bring the graphical results into focus. Suppose that the demand for home-delivered newspapers is represented by the formula

$$P = 14 - 0.02Q$$

and the associated marginal revenue is

$$MR = 14 - 0.04Q.$$

The marginal cost of publishing is $MC_P = 5$ and the marginal cost of delivery is $MC_D = 1$. The derived demand facing the publisher is represented by the formula

$$p = MR - MC_D$$

or

$$p = 14 - 0.04Q - 1$$

and the marginal revenue associated with this derived demand is

$$mr = 14 - 0.08Q - 1.$$

Equating mr with MC_P and solving for Q yields

$$14 - 0.08Q - 1 = 5$$

or

$$Q = 100.$$

Substituting into the derived demand yields a wholesale price of \$9.00:

34. It is not a coincidence that the publisher and the carrier select precisely the same number of newspapers. The publisher's decision on the wholesale price and output takes into account the profit-maximizing behavior of the distributor.

35. This is not meant to be pejorative. The distributor's profits are excess because they exceed the level necessary to keep the distributor's resources invested in this industry. In other words, the distributor's profits will generate a return on investment above the competitive level.

$p = 14 - 0.04(100) - 1 = 9$

Thus, the publisher's profits are (\$9-5)(100) = \$400.

The distributor's marginal cost will be the sum of the wholesale price (p = \$9) and the marginal cost of performing the delivery function (MC_D = \$1). To maximize its profits, the distributor will equate its marginal cost with its marginal revenue to find the optimal quantity:

$10 = 14 - 0.04Q$

or

$Q = 100.$

The home-delivered price is found by substituting the optimal quantity into the demand curve:

$P = 14 - 0.02(100)$

or

$P = 12.$

The distributor's profits are (\$12-10)(100) = \$200.

3. Maximum Resale Prices

The publisher has an incentive to impose maximum resale prices on the distributor because of the distributor's excessive markup. The competitive cost of distribution is MC_D, which is the price subscribers would pay for the delivery service if the carriers did not exercise their monopoly power. In that case, the price of a home-delivered newspaper would be the publisher's monopoly wholesale price (p_1) plus the marginal cost of delivery (MC_D), or $P_2 = p_1 + MC_D$. At that price, subscribers purchase Q_2 newspapers and the publisher's profits are equal to its markup of (p_1 - MC_P) multiplied by the quantity Q_2—*i.e.*, $(p_1 - MC_P)Q_2$. Since Q_2 is considerably larger than Q_1, the publisher obviously earns more profits. In contrast, the carrier's profit falls to the competitive level. One way for the publisher to achieve this more desirable outcome is to impose maximum resale prices on its carriers. It sells the newspaper at the wholesale price for p_1 on the condition that the resale price not exceed P_2. Thus, the carrier's markup will be limited to the competitive cost of delivery, MC_D.[36] The maximum resale price is a binding constraint on the distributor and, therefore, the home-delivered price will be the maximum permitted. This, however, does not mean that "the scheme tends to acquire all the attributes of an arrangement fixing minimum prices."[37] In fact, the maximum resale price ceiling prevents the distributor from charging prices that would flow from an arrangement fixing minimum prices.

36. The distributor will not earn excess profit, but will earn a competitive return on its investment because a competitive return is considered part of the cost of distribution.

37. Albrecht v. Herald Co., 390 U.S. 145, 153 (1968).

In the numerical example outlined above, the publisher would set its wholesale price at \$9 and would set the maximum resale price at \$10, which equals the wholesale price of \$9 plus the competitive distribution cost of \$1. Substituting $P = \$10$ into demand ($P = 14\text{-}0.02Q$) and solving for Q yields a quantity of 200. The publisher's profit from the sale of newspapers alone—without any increase in advertising revenues—is (\$9-5)(200) = \$800, twice the profit as without the maximum resale price. The distributor's profit is zero, which is the competitive level.

4. Economic Consequences

The economic consequences of maximum resale price fixing for the publisher, the consumer, and the carrier can be summarized as follows. The publisher is clearly much better off because its profits rise from $(p_1 - MC_P)Q_1$ to $(p_1 - MC_P)Q_2$ or from \$400 to \$800. The subscribers are better off as well because the number of newspapers sold increases from Q_1 to Q_2 (or from 100 to 200) and the price paid decreases from P_1 to P_2 (or from \$12 to \$10). The only loser in all of this is the carrier, whose profits fall from the monopoly level of $(P_1 - p_1 - MC_D)Q_1$, or \$200, to the competitive level. Thus, the economic consequence of setting a maximum resale price is to eliminate the carrier's monopoly profit and promote consumer welfare. To the extent that the goal of antitrust policy is the promotion of consumer welfare,[38] the *Albrecht* rule, which forbids maximum resale price fixing, yields perverse results—consumers are made worse off.[39]

In *Albrecht* the Court of Appeals recognized the problem caused by exclusive routes and reasoned that a maximum resale price could protect consumers from price gouging by carriers with monopoly power in their exclusive territories.[40] In dismissing this argument,[41] the Supreme

38. The literature on the goals of antitrust is substantial. For a summary of some of tbis literature as it pertains to the *Albrecht* rule, see Blair & Fesmire, *Maximum Price Fixing and the Goals of Antitrust*, 37 SYRACUSE L. REV. 43 (1986). For more general considerations, one sbould consult Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965).

39. The publisher's interests and those of tbe consumer are consistent here. To be sure, it is the extra profit rather than charitable concern for the welfare of subscribers that motivates the publisher to impose maximum resale prices. Nonetheless, the consumer benefits from the maximum resale prices.

40. 390 U.S. at 153-54.

41. The Supreme Court stated that "[t]he assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive." *Id.* at

Court ignored the adverse impact on consumers who had to pay higher prices. In doing so, the Court enunciated a rule that is clearly inconsistent with the promotion of consumer welfare.[42]

C. *Evolution of the* Albrecht *Rule*

When Congress passed the Sherman Act[43] in 1890, it provided a legislative skeleton with the intent that the courts were to develop the judicial muscle.[44] For example, Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[45] The Act does not define what constitutes a restraint of trade. That task was left to the judiciary. As a result, "restraint of trade" is a term of art that gained its current meaning through a series of judicial antitrust decisions.[46] In effect, the Sherman Act can be viewed as enabling legislation that invited the federal courts to develop a federal common law of business practices that would make businesses and markets work in socially efficient ways.[47] In doing so, the courts used the usual techniques of judicial reasoning, considered that reasoning in the light of decisions by other common-law courts, and participated in the evolution of the law in the dynamic common-law tradition.[48]

In the course of common-law evolution, some inefficient rules may emerge.[49] But when legal rules are economically inefficient, the value of the inefficient rule to its beneficiary is less than the loss to the disadvantaged party. As a consequence, the disadvantaged party has more to

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154. In this connection, we have to recall that exclusive territories were illegal per se in 1968. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977).

42. Irrespective of which goal or goals one adopts for antitrust, the *Albrecht* rule cannot be defended. *See* Blair & Fesmire, *supra* note 38.

43. 15 U.S.C. §§ 1-7 (1988).

44. This, of course, mandated judicial activism, which some have criticized. *See, e.g.*, Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263 (1986).

45. 15 U.S.C. § 1 (1988).

46. A. NEALE & D. GOYDER, THE ANTITRUST LAWS OF THE U.S.A. 22 (3d ed. 1980).

47. H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 52 (1985).

48. P. AREEDA, ANTITRUST ANALYSIS ¶ 144 (3d ed. 1981).

49. A fascinating series of articles has improved our understanding of the common law's evolutionary process. The seminal piece was provided by Paul Rubin. *See* Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). *See also* Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986); Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Blume & Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405 (1982); Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

gain than the beneficiary has to lose by a change to an efficient rule.[50] If the litigants have a continuing interest in precedent, they will represent all future interests in the legal rule in question.[51] Under these circumstances, there will be an incentive for the inefficient rule to be litigated until precedent is changed and an efficient rule emerges.[52]

The preceding section demonstrated the economic inefficiency of the *Albrecht* rule.[53] The only beneficiaries of the rule are the distributors who are exploiting the monopoly power along their exclusive delivery routes. The publisher and the consumers are worse off. The publisher earns fewer profits and consumers pay higher prices and buy fewer papers. It can be shown that the losses are larger than the gains[54] and, therefore, the stage is set for the common-law evolution to occur. Subsequent litigation should lead to a change in the legal rule, but this has not transpired for at least two reasons. First, the conditions necessary for potentially correcting litigation have not been present.[55] Second, there are at least three alternatives to fixing maximum resale prices that may not be as simple or as efficient, but nonetheless pose fewer antitrust risks.[56] Thus, the publisher has less incentive to challenge the *Albrecht* rule than one might suppose.

As a result of the strength of precedent,[57] the high costs of litigation,[58] and the availability of legally less risky alternatives,[59] litigation

50. In Figure 1, the inefficient rule provides the distrihutor with profits of $(P_1 - p_1 - MC_D)Q_1$, but reduces the publisher's profits by more than that. In the numerical example, the gain to the distributor was $200 while the loss to the publisher was $400.

51. Rubin, *supra* note 49, for a fuller discussion of this issue.

52. In practice, contingent fees, treble damages, joint and several liability, and the like create complications for this analysis.

53. The economic inefficiency is explained carefully in R. BLAIR & D. KASERMAN, ANTITRUST ECONOMICS 342-49 (1985).

54. In Figure 1, the increase in the publisher's profit that results from maximum resale prices is equal to $(p_1 - MC_P)(Q_2 - Q_1)$. This exceeds the carrier's profit of $(P_1 - p_1 - MC_D)Q_1$. A formal proof of this proposition is provided in R. BLAIR & D. KASERMAN, *supra* note 26, at 34-35. In our numerical example the increased publisher's profits are $400 while the reduced carrier profits are $200.

55. The condition necessary for litigation to ensue is that the probability of a successful lawsuit by the disadvantaged firm multiplied by the dollar value of the inefficiency must exceed the litigation costs of both parties. Blair & Schafer, *Evolutionary Models of Legal Change and the* Albrecht *Rule*, 32 ANTITRUST BULL. 989, 1002 (1987).

56. The supplier could vertically integrate, implement performance standards, or engage in dual distribution. In principle, each of these can provide economically equivalent results with reduced antitrust exposure. *Id.*; *see* Blair & Fesmire, *supra* note 38, at 59-67. They are not necessarily perfect suhstitutes in practice, however, due to differences in the costs of implementing these approaches. *See* Blair & Kaserman, *supra* note 6, at 479-82.

57. The strength of the precedent is exhibited by the per se illegality of vertical maximum price fixing.

58. The costs of litigating antitrust suits are notoriously high. Costs per case in excess of $1 million are not uncommon and even the cases that are resolved quickly involve costs in the $400,000 range. *See* Teplitz, *The Georgetown Project: An Overview of the Data Set and Its Collection*, in PRIVATE ANTITRUST LITIGATION 61-81 (L. White ed. 1988).

59. *See supra* note 56 and sources cited therein.

to overturn *Albrecht* has not been substantial. Nevertheless, several lower courts have demonstrated hostility toward the anticompetitive results of the *Albrecht* rule.

III. Judicial Hostility Toward *Albrecht*

Although most of the lower courts have continued to recognize formally the *Albrecht* holding,[60] several courts have blunted its force by awarding only nominal damages. Prior to *ARCO*, this was particularly true in newspaper distribution cases.[61] To understand the importance of this reaction, the following section briefly examines the concepts behind antitrust damages and antitrust injury.

A. *Antitrust Damages and Antitrust Injury*

Section 4 of the Clayton Act[62] provides in relevant part that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained."[63] Thus, private parties assist in the enforcement of the antitrust laws through private suits for the recovery of damages suffered as a result of antitrust violations.[64] While a literal reading of Section 4 suggests that an extensive array of private parties could sue for a multitude of actual injuries,[65] the courts have restricted those who have standing to sue[66] and the types of injuries[67] that are compensable.[68] We argue below that the putative victims

60. The Seventh Circuit has been a notable exception. *See infra* notes 102-12 and accompanying text.

61. An interesting examination of vertical price fixing in newspapers is provided in Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 Iowa L. Rev. 451 (1984).

62. 15 U.S.C. §§ 12-27 (1988).

63. 15 U.S.C. § 15 (1988).

64. Private Antitrust Litigation (L. White ed. 1988) provides an extremely interesting empirical view of private suits.

65. For example, when widget manufacturers fix prices, the quantity sold is necessarily reduced. This imposes injury upon all of their input suppliers, employees who are laid off, firms that transport raw materials to the manufacturers and those that transport the finished widgets to their customers, and so on. The ripple effect is substantial, but these injured parties cannot sue for damages.

66. Antitrust standing identifies those who may sue. Hanover Shoe Co. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), establish tbat only those suffering direct injury may sue. Added specificity flowed from the Court's rulings in Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) and Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983). *See also In re* Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286 (10th Cir. 1989), *cert. granted sub nom.* Kansas v. Kansas Power & Light Co., 110 S. Ct. 833 (1990).

67. Antitrust injury identifies those harms that the antitrust laws were intended to prevent and, therefore, are compensable under § 4 of the Clayton Act. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). *See* Blair & Harrison, *supra* note 10.

68. Note, *Antitrust Standing*, *supra* note 9, and Comment, *A Farewell to Arms*, *supra* note

of maximum resale price fixing do not suffer antitrust injury and, therefore, should not be able to sue for damages.

The antitrust injury doctrine began with the Supreme Court's ruling in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[69] In the late 1950s Brunswick's sale of bowling lanes, automatic pinsetters, and related equipment soared along with the popularity of bowling as family entertainment. Brunswick financed a good deal of its sales by extending credit to the bowling alley operators. When bowling's popularity waned in the 1960s, Brunswick's sales fell. In addition, some of the bowling centers Brunswick financed defaulted on their loans. As a result, Brunswick repossessed the equipment, but had limited success in reselling or leasing it. Facing financial difficulties of its own, Brunswick began to acquire and operate the failing bowling centers as a way of salvaging something financially.

Pueblo was a rival bowling center not affiliated with Brunswick. It filed suit under Section 7 of the Clayton Act claiming that the acquisitions were potentially anticompetitive.[70] Pueblo's theory was that Brunswick's superior size enabled it to reduce competition by driving smaller rivals out of business. Although there was no evidence that Brunswick had actually driven rivals out, a jury agreed that Brunswick had the ability to do so. Thus, the jury found that Brunswick's acquisitions violated Section 7. Pueblo then claimed damages that resulted from the acquisition. It identified these damages as the additional profits that it would have earned if Brunswick had allowed the acquired bowling centers to fail. In other words, absent Brunswick's acquisitions, Pueblo would have faced less competition, enjoyed a larger market share, and earned more profit.

The Supreme Court agreed that Pueblo's profits were lower than they would have been absent Brunswick's illegal acquisition. Thus, there was no dispute over whether Pueblo had suffered injury in fact. The Court, however, ruled that Pueblo had not suffered an injury that was compensable under the antitrust laws. Since the antitrust laws were

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9, provide useful surveys of early decisions.

69. 429 U.S. 477 (1977). This ruling was anticipated in Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

70. The Act provides in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

15 U.S.C. § 18 (1988).

enacted to promote and protect competition, not competitors, it would have been perverse to compensate Pueblo for the extra profits it would have earned if competition had been reduced. The Court explained the fundamental nature of antitrust injury:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.[71]

To apply the antitrust injury doctrine, one must first identify the anticompetitive effects of a particular violation. Then, one must determine the logical consequences of those anticompetitive effects. If a plaintiff has been injured in its business or property due to the anticompetitive effects of an antitrust violation, then it would have suffered antitrust injury under the *Brunswick* rule. Any injury that is not a consequence of the anticompetitive effects of an antitrust violation would not be antitrust injury and, therefore, would not be compensable under the remedial provisions of Section 4 of the Clayton Act.

B. Antitrust Injury and the Albrecht *Rule*

It is readily apparent that the victim of maximum resale price fixing has not suffered antitrust injury. Figure 1 demonstrates that maximum resale price fixing reduces the price to subscribers from P_1 to P_2. As a result, the carrier's profits fall from $(P_1 - p_1 - MC_D)Q_1$ to zero.[72] The carrier has unquestionably suffered an injury to its business or property. This, however, is simply injury in fact; it is not antitrust injury. The injury at issue flows from the procompetitive consequences of the restraint.[73] Since the harm flows from an increase in the number of newspapers sold from Q_1 to Q_2, the publisher's behavior has improved efficiency.[74] The purpose and effect of maximum resale price fixing is not to restrain competition; rather, it is to prevent distributors from exploiting their exclusive territories.[75] Phillip Areeda and Donald Turner have concluded that "[i]t seems most doubtful that the purposes of the antitrust laws are served by awarding damages for the impairment of the plaintiff's monopoly power over newspaper subscribers."[76]

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71. 429 U.S. at 489.

72. In the numerical example the carrier's profits fell from $200 to zero. It must be recalled, however, that the carrier earns a normal return on his investment of time and other resources in the route because these opportunity costs are included in his cost function.

73. In fact, the restraint yields the same price and quantity combination that would flow from competition at the distribution stage. The markup over the wholesale cost of the newspapers is limited to the competitive cost of distribution.

74. Page, *Antitrust Damages*, *supra* note 9, at 492 & n.96.

75. Easterbrook, *supra* note 6, at 890 n.20.

76. P. AREEDA & D. TURNER, 2 ANTITRUST LAW ¶ 347 (1978).

To illustrate the point, consider the damage claim in *Albrecht*. Albrecht had to sell his exclusive route for less than it would have been worth if the Herald Company had not intervened and caused Albrecht to lose customers.[77] Thus, he sued for the reduced value of his business. But, as William Page points out, the size of the reduction in the route's value was equal to the capitalized profits that flow from the route's exclusivity.[78] *Brunswick* teaches us that an award based on the loss of monopoly profits is improper. This is not the kind of injury that the antitrust laws were designed to prevent.

Justices Harlan and Stewart wrote dissenting opinions in *Albrecht* that clearly displayed serious flaws in the majority's reasoning.[79] Justice Harlan distinguished maximum resale price fixing from resale price maintenance, which limits price reductions. He pointed out that a newspaper publisher would like to have the newspapers delivered for the lowest possible cost because that yields the lowest overall price to the subscribers and the largest circulation. Imposing a price ceiling on the carriers contributes to this objective.[80] He went on to explain that price ceilings "do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the [publisher] who dictates them and the [carrier] who accepts them have both miscalculated."[81] Moreover, maximum resale prices arguably prevent the carriers from reaping monopoly or supracompetitive profits.[82] Justice Stewart also insisted that if the Herald Company prevented Albrecht from charging higher prices than would have existed in a competitive market, the Herald Company's "actions were fully compatible with the antitrust laws."[83]

C. *Judicial Response*

In *Knutson v. Daily Review, Inc.*[84] terminated news dealers complained about a clause in their written contracts that expressly fixed the resale price of the newspaper. The district court held that under *Albrecht* the contract violated the Sherman Act, but that the plaintiffs had failed to establish the fact or amount of damages.[85] After the Ninth Circuit Court of Appeals reversed and found the plaintiffs had proved

77. Albrecht v. Herald Co., 390 U.S. 145, 149 (1968).
78. Page, *Antitrust Damages*, *supra* note 9, at 491.
79. 390 U.S. at 156-68 and 168-70, respectively.
80. *Id.* at 157-58.
81. *Id.* at 159.
82. *Id.*
83. *Id.* at 169. Stewart went on to say that "[t]he Court today stands the Sherman Act on its head." *Id.* at 170.
84. 383 F. Supp. 1346 (N.D. Cal. 1974).
85. *Id.* at 1376, 1388.

the fact of damages,[86] the district court determined that the plaintiffs were entitled to only nominal damages.[87]

The plaintiff dealers, the court found, were aware of the publisher's need to keep subscription prices low to maximize its number of subscribers and, in turn, to obtain higher advertising revenues.[88] The plaintiffs were also aware that if they raised prices, the publisher was likely to terminate their contracts, change distribution systems (as in fact it did after receiving a complaint from a dealer about the price-fixing clause), or take other action to terminate their position as independent distributors.[89] The plaintiffs were not entitled to more tban nominal damages, the court found, because given their knowledge of the economics of the newspaper business, they would not have raised their prices, "even if they had been free to do so."[90]

Foreshadowing arguments that would later be addressed in *ARCO*, Judge Renfrew wrote that the Court of Appeals' decision that the plaintiffs had proved the fact of damage "might be subject to some dispute" because the "alleged loss probably was not of 'the type that the statute was intended to forestall' ":[91]

> [I]t is not unreasonable to conclude that defendants' maximum resale price restraint had a pro-competitive effect and that price freedom would have had anticompetitive consequences. By seeking the removal of the resale price restrictions, plaintiffs sought the power to increase profits by raising subscription prices in their areas of distribution. However, because each plaintiff had a *de facto* monopoly in his or her area, these increased profits could only be characterized as monopoly rents. The result of lifting the price ceiling would therefore be to encourage each dealer's fortification and exploitation of his or her particular monopoly. . . . This analysis suggests that although plaintiffs' alleged losses may be of the type that the claimed violation would be likely to cause, they are not of the type that the antitrust laws were intended to prevent.[92]

In *Northwest Publications, Inc. v. Crumb*[93] the court noted that "maximum vertical price-fixing arguably benefits consumers, the intended beneficiaries of the antitrust laws,"[94] but held under *Albrecht* that an express maximum price-fixing clause in contracts between the defendant newspaper publisher and the plaintiff distributors was illegal per se. The court held, however, that the plaintiffs were not entitled to

86. Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

87. Knutson v. Daily Review, Inc., 468 F. Supp. 226, 240 (N.D. Cal. 1979).

88. *Id.* at 239.

89. *Id.* at 240.

90. *Id.*

91. *Id.* at 230-31. Renfrew appears to have been confused by the distinction between injury in fact and antitrust injury.

92. *Id.* at 232 n.7.

93. 752 F.2d 473 (9th Cir. 1985).

94. *Id.* at 475.

damages. The plaintiffs would not have raised their prices even if they had been permitted to do so, the court held, because they had the "sophistication" to understand that if they had raised prices, they would have been terminated.[95]

In *Newberry v. Washington Post Co.*[96] the court ruled that distributors who had not raised their prices were entitled to only nominal damages, even though they had a price-fixing agreement with the publisher that prohibited them from charging more than the published price.[97] These plaintiffs were not entitled to more than nominal damages because there was no proof of when the plaintiffs would have raised their prices, what prices they would have charged, and what the subscriber response to the price increase would have been.[98]

Furthermore, even when the lower courts followed *Albrecht*, they were sympathetic to the changes in business practices that *Albrecht* engendered.[99] Faced with the prospect of decreasing circulation and advertising revenues due to excessive distributor pricing, many publishers chose to terminate their independent distributors and replace them either with their own employees or with delivery agents. Such vertical integration by the publisher yields roughly the same economic results as a vertical maximum price-fixing agreement. In each case, the publisher determines the price to the consumer.[100] The courts uniformly have upheld such vertical integration by newspaper distributors against federal antitrust challenges.[101]

The most direct assault on *Albrecht* was launched in two Seventh Circuit decisions, *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*[102] and *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*[103] In *Jack Walters* a building and materials dealer alleged that a manufacturer of prefabricated farm houses and the manufacturer's dealers conspired to fix

95. *Id.* at 476-77.

96. 438 F. Supp. 470 (D.D.C. 1977).

97. *Id.* at 483.

98. *Id.*

99. For a survey of the newspaper cases, see P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 729.7 (Supp. 1988).

100. *See, e.g.*, Blair & Fesmire, *supra* note 38, and Note, *Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on Its Head*, 38 U. FLA. L. REV. 479 (1986).

101. *See, e.g.*, Kowalski v. Chicago Tribune Co., 854 F.2d 168 (7th Cir. 1988); Belfiore v. New York Times Co., 826 F.2d 177 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988); Paschall v. Kansas City Star Co., 727 F.2d 692 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 872 (1984); Auburn News Co. v. Providence Journal Co., 659 F.2d 273 (1st Cir. 1981); Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976); Ampar Enterprises v. Reno Newspapers, 8 Media L. Rep. (BNA) 1670 (D. Nev. 1982); Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977); Lamarca v. Miami Herald Publishing Co., 395 F. Supp. 324 (S.D. Fla.), *aff'd*, 524 F.2d 1230 (5th Cir. 1975).

102. 737 F.2d 698 (7th Cir. 1984).

103. 864 F.2d 1409 (7th Cir. 1989).

maximum resale prices.[104] The district court granted summary judgment for the defendant.[105] On appeal, the court held that the plaintiff had not proven a vertical price-fixing agreement between the manufacturer and the competing dealers.[106] The court then made two additional points. First, it stated that whether vertical maximum price fixing was illegal per se seemed to be "an open question."[107] The court noted that although exclusive territories were illegal per se at the time *Albrecht* was decided, *Continental T.V., Inc. v. GTE Sylvania, Inc.*[108] subsequently established that exclusive territories were subject to the rule of reason. Therefore, the court reasoned that "a manufacturer-imposed price ceiling intended to limit the power that exclusive territories give dealers to raise prices . . . may also be lawful."[109]

Second, the court found that even if the manufacturer had engaged in price fixing, the dealer did not have standing to bring suit because it had not suffered antitrust injury as a result of the price-fixing agreement. Judge Posner found that the only harm to Walters resulted from the fact that competing dealers would lower their prices to consumers if Walters did not. Walters presented no evidence that the lower prices would have been below cost and were thus unlawful. Judge Posner concluded that Walters could not "complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust violation."[110]

In *Indiana Grocery* a supermarket chain alleged that a competing chain and that chain's supplier had engaged in maximum resale price maintenance. A different Seventh Circuit panel held that, as in *Jack Walters*, the complaining dealer had not suffered antitrust injury, and thus did not have standing to make a vertical maximum price-fixing claim.[111] The court rejected the argument that it was bound by *Al-*

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104. 737 F.2d at 701.

105. 1983-1 Trade Cas. (CCH) ¶ 65,284 (E.D. Wis. 1983).

106. 737 F.2d at 708.

107. *Id.* at 707.

108. 433 U.S. 36 (1977).

109. 737 F.2d at 706. Phillip Areeda and Herbert Hovenkamp reviewed *Jack Walters* and found that "[t]he reduction in the plaintiff's price-cost margin is not an injury to competition." P. AREEDA & H. HOVENKAMP, *supra* note 99, at ¶ 335.2h. In footnote 56 they went on to explain that vertical maximum price fixing is virtually never anticompetitive. It is designed to prevent resellers from exercising monopoly power. In order to show an injury to competition, a plaintiff would have to prove that the price was higher or that the output was lower. In general, such a burden of proof cannot be met. *Id.*

110. 737 F.2d at 709. One judge concurred in the decision that the plaintiff had not established a vertical maximum price-fixing claim, but not in the court's broader discussion, which he found to be dicta. *Id.* at 713 (Swygert, J., concurring).

111. "The antitrust laws simply are not in the business of protecting higher-pricing grocers

brecht to grant the dealers standing because *Albrecht* was decided nine years before the court formulated the antitrust injury requirement in *Brunswick* and did not address the issues of antitrust injury or antitrust standing.[112]

In the newspaper distribution cases, and in the Seventh Circuit's *Jack Walters* and *Indiana Grocery* decisions, none of the courts expressly reversed *Albrecht*. Moreover, in several of the newspaper distribution cases, the courts purported to follow it.[113] Nevertheless, through sophisticated damage analysis and the concept of antitrust injury, these courts succeeded in largely immunizing those manufacturers who engaged in vertical maximum price fixing from damage liability, and in some cases from private civil suit.

Although Congress has not enacted legislation to overrule *Albrecht*, it too has shown uneasiness with the *Albrecht* rule. In 1988, in response to the Supreme Court's rulings in *Monsanto Co. v. Spray-Rite Service Corp.*[114] and *Business Electronics Corp. v. Sharp Electronics Corp.*,[115] the Senate considered a bill that would have established standards of proof for vertical price-fixing agreements and codified the applicability of the per se rule to such agreements. Several senators criticized the bill, specifically noting the deleterious effects of a ban on vertical maximum price fixing on newspaper publishers and subscribers. The bill was amended on the Senate floor to remove vertical maximum price-fixing agreements from the scope of the legislation.[116] In the 101st Congress, the successor Senate bill and a similar House bill excluded vertical maximum price-fixing agreements from the proposed per se codification.[117] In the most recent Congress, the Senate's version of the legislation specifically provided that vertical maximum price fixing is subject to the rule of reason.[118]

IV. The *ARCO* Decision

The *ARCO* case began in May 1983 when USA Petroleum (USA), an independent retail gasoline seller, brought suit against Atlantic Richfield Company (ARCO).[119] ARCO was an integrated oil company

from lower-pricing competition." 864 F.2d at 1419-20.

112. *Id.* at 1420.

113. *See* cases cited *supra* notes 84-101 and accompanying text.

114. 465 U.S. 752 (1984).

115. 485 U.S. 717 (1988).

116. S. 430, 100th Cong., 2d Sess., 134 Cong. Rec. S12492 (daily ed. Sept. 14, 1988) (introducing Rudman Amendment No. 3037).

117. The House bill, H.R. 1236, passed the House of Representatives on April 18, 1990, and was referred to the Senate Judiciary Committee.

118. S. 429, 102d Cong., 1st Sess., 137 Cong. Rec. S5605 (daily ed. May 9, 1991).

119. USA Petroleum Co. v. Atlantic Richfield Co., 577 F. Supp. 1296 (C.D. Cal. 1983).

that sold gasoline to consumers through its own stations and also sold gasoline to ARCO-brand retail dealers. USA alleged that ARCO conspired with the ARCO-brand dealers to sell gasoline at artificially low and uncompetitive levels in violation of Section 1 of the Sherman Act and attempted to monopolize the local retail gasoline market in violation of Section 2 of the Sherman Act.[120] USA claimed that through a vertical maximum price-fixing conspiracy, ARCO and its dealers had taken sales from USA and other independent sellers, driving independent sellers from the market.[121]

The district court dismissed the Section 2 claim. USA's complaint alleged that the market would be dominated by the major oil companies, and thus there was no dangerous probability that a single firm, ARCO, would be successful in monopolizing the market.[122] The district court later granted summary judgment on USA's vertical maximum price-fixing claim, holding that even if the plaintiffs could prove such a price-fixing agreement, the plaintiff could not satisfy the antitrust injury requirement of the Clayton Act, Section 4 without showing such prices to be predatory.[123] USA could make no such showing of predatory prices, the court held, because ARCO's share of the retail gasoline market was low (never more than seventeen percent), and even if the market were limited to only discount gasoline sellers, there were several potential entrants whose existence prevented ARCO and its dealers from exercising monopoly power.[124]

USA appealed the grant of summary judgment, but not the court's finding that the allegedly fixed prices were not predatory. The Ninth Circuit panel thus framed the issue as "whether in the absence of proof of predatory pricing a competitor can recover damages because of a maximum resale price maintenance agreement."[125] A divided court found that one could and reversed. According to the majority, the inquiry was "straightforward":

> The "antitrust injury" standard requires us to determine whether the plaintiff's injuries resulted from a disruption of competition in the plaintiff's market caused

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120. Section 2 of the Sherman Act states in relevant part:

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. § 2 (1988).

121. Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1887, 1888 (1990).

122. 577 F. Supp. at 1304. USA then amended its § 2 claim, but voluntarily dismissed that claim with prejudice after ARCO moved for summary judgment. *See* 110 S. Ct. at 1888 n.3.

123. 577 F. Supp. at 1307.

124. *Id.* at 1304. In Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court ruled that an inference of predatory pricing will not be sustained when predation is not economically plausible.

125. USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687, 689 (9th Cir. 1988).

> by the defendant's antitrust violation . . . . In the present case the inquiry seems straightforward: USA's claimed injuries were the direct result, and, indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries.[126]

The court found that, if USA's allegations were true, ARCO had reduced competition by reducing the number of independent gasoline retailers.[127] The court determined that financial losses allegedly suffered by USA and its forced exit from the market due to ARCO's illegal price fixing were the types of injuries that the antitrust laws were intended to prevent.[128] The court recognized that its decision was contrary to that of the Seventh Circuit in *Jack Walters*, but simply disagreed, stating that "the competitive process can only rule when participants in the process are not allowed to combine to fix prices ahead of time."[129]

The Supreme Court granted certiorari.[130] As in the Ninth Circuit, however, the issue to be decided by the Court was limited. Although ARCO had suggested in its petition for certiorari that the Court could reconsider the per se treatment of vertical maximum price fixing "if it believes that it now is necessary and appropriate,"[131] neither ARCO nor the federal enforcement agencies petitioned the Court to overrule *Albrecht*. Thus, the question before the Court was whether a firm incurs an " 'injury' within the meaning of the antitrust laws when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme."[132] In an opinion written by Justice Brennan and joined by six other Justices, the Court reversed the Ninth Circuit decision and held that a firm does not suffer antitrust injury from a vertical maximum price-fixing scheme involving its competitor.[133]

The Court's analysis began with a repetition of its holding in *Brunswick* and subsequent cases that a private plaintiff must prove the existence of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which

126. *Id.* at 693.
127. *Id.* at 696.
128. *Id.*
129. *Id.* at 697. Judge Alarcon dissented, on the grounds that "USA's loss of profits from Atlantic Richfield's vigorous competition is not antitrust injury." *Id.* at 704 (Alarcon, J., dissenting).
130. Atlantic Richfield Co. v. USA Petroleum Co., 490 U.S. 1097 (1989).
131. Atlantic Richfield Petition for Certiorari at 15, n.5, *ARCO*, 110 S. Ct. 1884 (1990) (No. 88-1668).
132. *ARCO* 110 S. Ct. at 1887.
133. *Id.* at 1895.

makes the defendants' acts unlawful."[134] The Court then summarized its *Albrecht* holding, stating in a footnote that "we assume *arguendo*, that *Albrecht* correctly held that vertical, maximum price-fixing is subject to the *per se* rule."[135]

The vertical maximum price-fixing scheme in *Albrecht* was illegal per se, the Court stated, "because it threatened to inhibit vigorous competition by the dealers bound by it and because it threatened to become a minimum price-fixing scheme."[136] The Court then reviewed the four reasons given in *Albrecht* for applying the per se rule to vertical maximum price fixing: (1) "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, [vertical maximum price fixing] may severely intrude upon the ability of buyers to compete and survive in that market";[137] (2) "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay";[138] (3) "[b]y limiting the ability of small dealers to engage in nonprice competition, a maximum price-fixing agreement might 'channel distribution through a few large or specifically advantaged dealers' ";[139] and (4) "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices."[140]

The Court then sought to distinguish USA's situation from *Albrecht*. The conduct in *Albrecht* was unlawful per se "because of its potential effects on dealers and consumers, not because of its effects on *competitors*."[141] The Court found, largely as the government's amicus brief urged, that USA had not suffered any of the injuries to competition recognized in *Albrecht*. If ARCO's alleged maximum price-fixing agreement set prices that were too low for ARCO's dealers to furnish services desired by consumers, such as credit card sales, or that resulted

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134. *Id.* at 1889 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977)).

135. *Id.* at 1889 n.5. The Court described Albrecht v. Herald Co., 390 U.S. 145 (1968), as "the only case in which the Court has confronted an unadulterated vertical, maximum price-fixing arrangement." *Id.* at 1890 n.6.

136. *Id.* at 1889.

137. *Id.* at 1890 (citing *Albrecht*, 390 U.S. at 152).

138. *ARCO*, 110 S. Ct. at 1890 (citing *Albrecht*, 390 U.S. at 152-53).

139. *ARCO*, 110 S. Ct. at 1890 (citing *Albrecht*, 390 U.S. at 153). In fact, the Court's rewrite of the third factor was substantial: the *Albrecht* Court was concerned that channeling "distribution through a few large or specifically advantaged dealers would eliminate non-price competition among them," 390 U.S. at 153, not that eliminating such competition would lead to a few large dealers.

140. *ARCO*, 110 S. Ct. at 1890 (citing *Albrecht*, 390 U.S. at 153).

141. *ARCO*, 110 S. Ct. at 1890.

in the channeling of business to large distributors, then competing firms would be benefited rather than harmed. USA similarly would have benefited had the alleged maximum price-fixing agreement ultimately acquired the attributes of a minimum price-fixing scheme, because ARCO dealers charging higher prices would have worked to USA's advantage. In fact, the complaint's allegation that the price-fixing scheme enabled ARCO's dealers to increase their sales was an assertion that the dangers with which the Court was concerned in *Albrecht* had not materialized in the instant case. USA did not suffer antitrust injury, the Court concluded, because "its losses do not flow from the aspects of vertical, maximum price-fixing that render it illegal."[142]

Having found, as a matter of fact, that USA did not suffer the injuries discussed in *Albrecht*, the Court then explained that the injuries which USA alleged it did suffer, and which the Court accepted as true, did not constitute antitrust injury. First, the Court held, as a matter of law, that

> [w]hen a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business loss by rivals can not be viewed as an "anticompetitive" consequence of the claimed violation. A firm complaining about the harm it suffers from non-predatory price competition "is really claiming that it [is] unable to raise prices." (citation omitted) This is not *antitrust* injury; indeed "cutting prices in order to increase business often is the very essence of competition."
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> Although a vertical, maximum price-fixing agreement is unlawful under § 1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing. Antitrust injury does not arise . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct. . . . Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they can not give rise to antitrust injury.[143]

The Court rejected USA's argument that antitrust injury need not be shown for a per se violation. Per se violations "may have *some* procompetitive effects,"[144] which might nevertheless harm private parties. "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior."[145]

Although the issue before the Court was narrow, it nevertheless examined the merits of *Albrecht*. In a long footnote the Court largely accepted the proposition of the *Albrecht* dissenters that vertical

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142. *Id.* at 1890-91.

143. *Id.* at 1891, 1891-92 (in part citing Cargill, Inc. v. Monfort & Colorado, Inc., 479 U.S. 104, 116 (1986)).

144. *ARCO*, 110 S. Ct. at 1894.

145. *Id.* This ruling follows the advice offered by Phillip Areeda and Herbert Hovenkamp, P. AREEDA & H. HOVENKAMP, *supra* note 99, ¶ 334.2C.

maximum price fixing protects consumers from the monopoly power wielded by exclusive-territory distributors:

> When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist. The manufacturer acts not out of altruism, of course, but out of a desire to increase its own sales—whereas the dealer's incentive, like that of any monopolist, is to reduce output and increase price. If an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors. Vertical, maximum price-fixing thus may have procompetitive interbrand effects even if it is *per se* illegal because of its potential effects on dealers and consumers.[146]

Although the Court gave something to *Albrecht*'s critics, it also gave something to its supporters. In closing its opinion, the Court stated that providing a cause of action for competing dealers was unnecessary[147] because the manufacturer's own dealers and consumers might sue "if such a scheme causes the anticompetitive consequences detailed in *Albrecht*."[148]

Justice Stevens, joined by *Albrecht* author Justice White, dissented. By driving competitors out of business, they argued, ARCO's scheme could reduce competition or potential competition "in the long-run."[149] Justice Stevens found that USA had suffered antitrust injury because Section 1 was intended to forbid price-fixing conspiracies designed to drive competitors out of the market.[150] The dissenters conceded, however, that "a price agreement that is ancillary to an exclusive distributorship might protect consumers from an attempt by the distributor to exploit its limited monopoly."[151]

In *ARCO* the Court—like the lower courts in the newspaper distribution cases, and in *Jack Walters* and *Indiana Grocery*—did not reverse *Albrecht*. In fact, the question of whether *Albrecht* should be overruled was not before the Court. What the Court did do, much like the Seventh Circuit in *Jack Walters*, was limit *Albrecht*'s force by denying standing to one group of persons, and undermine its rationale

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146. *ARCO*, 110 S. Ct. at 1894 n.13. In *Albrecht* the majority assumed that the exclusive territorial agreements between the publisher and the distributors were unlawful. Justices Douglas and Harlan, concurring and dissenting, respectively, argued tbat such agreements were subject to the rule of reason. Albrecht v. Herald Co., 390 U.S. 145, 154, 157 (1968) (Douglas, J., concurring, and Harlan, J., dissenting, respectively).

147. The government made this argument with respect to price-fixing dealers in its amicus brief. Brief for Amicus Curiae United States at 21 & n.15, *ARCO*, 110 S. Ct. 1884 (1990) (No. 88-1668).

148. *ARCO*, 110 S. Ct. at 1895.

149. *Id.* at 1896 (Stevens, J., dissenting).

150. *Id.* at 1897 (Stevens, J., dissenting).

151. *Id.* at 1901 (Stevens, J., dissenting).

by recognizing the procompetitive aspects of vertical maximum price-fixing agreements.

V. *ALBRECHT* AFTER *ARCO*

What now remains of *Albrecht*? Four conclusions follow directly: First, although the Court's assumption *arguendo* that *Albrecht*'s holding was correct is no ringing endorsement, many lower federal courts may feel bound by precedent to hold that vertical maximum price-fixing agreements remain illegal per se. Second, because Section 4 of the Clayton Act[152]—and thus the antitrust injury requirement—does not apply to enforcement actions by the Justice Department or the Federal Trade Commission, the ability of those agencies to bring suits challenging vertical maximum price-fixing agreements remains unimpaired.[153] Third, *ARCO* provides the equivalent of a per se rule that competing dealers do not suffer antitrust injury as a result of nonpredatory vertical maximum price-fixing agreements between other competing dealers and those competing dealers' supplier. Thus, such competing dealers' suits should be effectively barred. Fourth, other dealers or consumers who wish to bring suits on vertical maximum price-fixing claims will have to prove, in addition to the violation, that they were injured by the anticompetitive aspects of the maximum price-fixing agreement and not by the procompetitive effects of the agreement.

Unless—or perhaps until—the Court reverses *Albrecht*, the problem of interpreting the requirement of "antitrust injury" must still be faced. The Court described antitrust injury as being "adversely affected by an *anticompetitive* aspect of the defendant's conduct,"[154] as losses that "stem from an *anticompetitive* aspect of the defendant's conduct,"[155] and as a loss that "stems from a competition-*reducing* aspect or effect of the defendant's behavior."[156]

152. 15 U.S.C. § 15 (1988).

153. 15 U.S.C. § 4, which authorizes the United States to bring actions to prevent and restrain violations of the Sherman Act, does not require that the government be injured in its business or property by reason of an antitrust violation. By contrast, a state government would have to show antitrust injury in a treble damage action. *See* 15 U.S.C. § 15c (1988) (providing that state attorneys general may seek monetary relief for injuries "*by reason of* any violation" of the Sherman Act (emphasis added)). The likelihood of the Federal Trade Commission or the Justice Department bringing an action against vertical maximum price fixing is remote, at least in the short run. The Department of Justice has not initiated any vertical restraint case since fiscal year 1981. GENERAL ACCOUNTING OFFICE, REPORT TO HOUSE JUDICIARY COMMITTEE CHAIRMAN ON CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES OF THE JUSTICE DEPARTMENT, 59 ANTITRUST & TRADE REG. REP., No. 1495 at S-34. *Cf.* Kreepy Krauly USA, Inc., 56 Fed. Reg. 1813 (Fed. Trade Comm'n 1991) (proposed consent order barring resale price maintenance).

154. *ARCO*, 110 S. Ct. at 1892 (1990) (emphasis in original).

155. *Id.* (emphasis in original)

156. *Id.* at 1894 (emphasis in original).

One could reasonably argue that, under the analysis employed in *ARCO*, there are no anticompetitive or competition-reducing aspects of nonpredatory vertical maximum price-fixing agreements. If, as the Court stated, low prices do not cause antitrust injury to competing dealers because "[l]ow prices benefit consumers regardless of how those prices are set,"[157] those same prices should not cause antitrust injury simply because the complaining person is now the dealer through whom the vertical price-fixing agreement was enforced (such as the ARCO-brand dealers in *ARCO*), or a consumer who received lower prices and thus benefited (and had no injury in fact) from the vertical price-fixing agreement.[158]

The Court did not need to lay down such a broad rule in *ARCO*, however, and in dicta suggested it was not doing so: if a nonpredatory vertical maximum price-fixing scheme "causes the anticompetitive consequences detailed in *Albrecht*, consumers and the manufacturers' own dealers may bring suit."[159] Reading this dicta broadly, and in a vacuum, one might contend that a dealer would have incurred the requisite antitrust injury if it could prove it suffered one of the anticompetitive consequences detailed in *Albrecht*—presumably the four factors identified by the Court in *ARCO*. As examined below, this reading could not be what the Court intended because it conflicts both with the proconsumer rationale of the *ARCO* opinion and the Court's express recognition of the competitive benefits of vertical maximum price fixing.

A. *Example 1: Exclusive Distributorships*

For example, consider the situation that is most common in the daily newspaper industry today. The newspaper publisher produces the only daily newspaper in its area, which includes national and local news, information, and advertising. The publisher sells its newspaper to independent distributors who in turn resell the newspaper to consumers. The newspaper distributors have exclusive routes—that is, defined geographic areas in which each is the only independent distributor of the newspaper.

Two of the four factors the Court discussed in *Albrecht* and *ARCO* are not applicable because the distributor does not compete with other dealers. We need not worry about the ability of the dealer to compete with other dealers, and there are no other dealers with whom the com-

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157. *Id.* at 1892.

158. *See* Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 n.17 (5th Cir. 1978) (observing in dicta that retail customers would not have standing to challenge maximum price-fixing agreement because they would not be injured by it).

159. *ARCO*, 110 S. Ct. at 1895.

plaining dealer could engage in service and convenience competition. As to the fourth *Albrecht* factor, it may not apply to any situation. If the price-fixing agreement really attains the attributes of an arrangement fixing minimum prices, one of two scenarios is possible: either the dealer benefits from the higher prices and thus has no injury in fact, or the dealer loses profits because it could sell substantially more newspapers at a lower price. In the latter case, however, the dealer's claim is not that it is the victim of a maximum price-fixing agreement, but that it is the victim of a minimum price-fixing agreement.[160]

The only remaining *Albrecht* factor is the notion that prices could be too low for the dealer to furnish essential services and conveniences for which consumers are willing to pay.[161] What the *Albrecht* and *ARCO* Courts had in mind as essential services is unclear, but examples of conveniences in the newspaper industry for which some consumers might be willing to pay could include special delivery requirements such as placement of the newspaper on the customer's porch or protecting the newspaper from inclement weather by placing it in a waterproof bag. By being barred from charging higher or additional prices for such services, a dealer might argue, post-*ARCO*, that it was effectively prevented from providing these services to consumers. Under a simplistic analysis, by introducing evidence that some customers wished to have special deliveries or waterproof bags and that it was effectively prevented from providing such services at the vertically imposed maximum prices, a dealer might argue that it has suffered the anticompetitive consequences detailed in *Albrecht*.

This argument contains a serious flaw. If subscribers wanted additional services, the publisher would encourage the provision of such services because it would make the newspaper more valuable to the subscriber. This would expand the demand for the newspaper, thereby increasing circulation. In turn, the increased circulation would increase advertising revenue and make the publisher better off. Thus, it is hard to envision circumstances under which the publisher would intentionally set maximum resale prices that preclude the provision of desired services. This, of course, does not preclude a publisher from making a mistake, but the antitrust laws need not be used to correct managerial error. In any event, such mistakes will reduce the publisher's profits and thereby create incentives to correct errors in business judgment.

160. If this were the case, the frustrated discounter would complain of an illegal resale price-maintenance scheme. For an analysis of antitrust injury in these circumstances, see Blair & Harrison, *supra* note 10, at 1556-61.

161. 110 S. Ct. at 1890. This concern is misguided because the publisher or gasoline refiner has no incentive to preclude the provision of such services. In fact, tbe supplier benefits from such services because tbey expand the demand for its product.

The dealer's would-be position has three additional problems. The first is quantitative. Suppose that the dealer can show that some consumers would indeed prefer to pay more for additional services. How many such consumers are necessary to establish antitrust injury? If, for example, five percent of the customers on a dealer's route would pay more, but ninety-five percent prefer lower prices and existing service, should that fact confer standing to sue on the dealer?

Second, but more important, the finding that an exclusive route dealer has antitrust injury directly contradicts the *ARCO* Court's opinion that "[w]hen a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist,"[162] and that when an exclusive distributorship "is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors."[163]

That carefully constructed passage endorsed the views of the *Albrecht* dissenters that maximum price fixing protects consumers from price gouging by distributors, and noted that compelling the manufacturer to abandon vertical maximum price fixing could be contrary to the public interest.[164] Given the Court's strong statement of its concerns, as well as its recognition that much of the rationale for *Albrecht* was rendered obsolete by the Court's abrogation of the per se ban on exclusive territories,[165] the Court could not have intended to expose consumers to dealer exploitation, or force the publisher to abandon the most efficient means of distribution, simply because price ceilings may prevent some consumers from receiving (and paying for) additional services in certain deliveries.

Finally, if the exclusive territory dealer had standing, how would damages be determined? In the pre-*ARCO* maximum resale price-maintenance cases, the typical measure of damages was lost profits—the difference between the distributor's actual profit and the profit it would

162. *Id.* at 1894 n.13.

163. *Id.*

164. The adverse consequences of permitting pricing freedom are not removed by competitive bidding for the exclusive routes. Those competing for each route will bid up the price to a level that corresponds to the monopoly profit that the winner could earn. In this way, the publisher will be able to extract all of the profit that the resulting inefficient pricing will generate, but the outcome for consumer welfare is unchanged because the home-delivered price will still be above the optimal level from the publisher's perspective.

165. "The procompetitive potential of a vertical maximum price restraint is more evident now than . . . when *Albrecht* was decided, because exclusive territorial arrangements . . . were unlawful *per se* in 1968." 110 S. Ct. at 1894 n.13.

have had if there had been no price-fixing agreement.[166] Although such damages may relate to the injury in fact suffered by the dealer, they do not reflect the anticompetitive consequences detailed in *Albrecht* or the anticompetitive aspect of the defendant's behavior. Providing the dealer with lost profits would penalize the publisher for conduct that benefited consumers and pay the dealer for its injury in fact, rather than for its antitrust injury which may not exist. In theory, the dealer's damages could be limited to the anticompetitive consequences suffered by the dealer. But how would a jury measure damages suffered by the dealer as a result of the dealer's inability to make special deliveries? These damages would have to be calculated as lost profits on lost sales, which are speculative at best given the nature of the dealer's claim. Moreover, although the *ARCO* Court spoke of the benefits to interbrand competition that vertical price fixing might achieve,[167] the benefits to consumers are arguably greater when there is no interbrand competition. When the publisher competes with another newspaper (assuming that newspaper is sold by different dealers), that competition in itself may force dealers to keep prices down. When the newspaper faces no real competition in sales to subscribers, the market power of the exclusive distributor will be greater and, therefore, the benefit to consumers of maximum price ceilings will be greater. The benefits of maximum resale price maintenance are especially strong in the newspaper industry because the publisher has a strong incentive to keep prices low. Most newspapers receive over two-thirds of their revenues from advertising.[168] Thus, the publisher needs low circulation prices to attract readers that advertisers will pay to reach.[169]

B. *Example 2: Competing Dealers or Products*

When the dealer competes either with other dealers of the manufacturer's product or with sellers of a competing product,[170] a finding of antitrust injury may be more plausible. If dealer pricing is unduly restricted by the manufacturer, *ARCO* and *Albrecht* suggest that the dealer may be driven out of business by other dealers and unable to

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166. *See, e.g.*, Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 569 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); Newberry v. Washington Post Co., 438 F. Supp. 470, 483 (D.D.C. 1977).

167. *See* 110 S. Ct. at 1894 n.13.

168. Circulation revenue of a composite large city newspaper accounted for 19.5% of total revenue in 1967, 15.6% in 1971, 20.8% in 1975, and 22.8% in 1978. For a medium-size daily newspaper, circulation revenue appears to be more important. It was 28.3% of total revenue in 1971 and 29.2% in 1978. B. COMPAINE, *supra* note 29, at 18-19.

169. *See* J. Rosse, *supra* note 29.

170. If there is a competing newspaper, but that competing newspaper is sold exclusively by the same dealer, the dealer would still have the "monopoly" suggested by the *ARCO* Court.

engage in nonprice competition. Thus, newspaper consumers might be deprived of the special deliveries discussed above, or gasoline consumers might lose the ability to pay by credit card or to have an attendant pump their gasoline or clean their windshields. In addition, the need for protecting consumers from price-gouging distributors may be diminished because competition with other dealers or products could act to keep the dealers' prices down.

A finding that these nonexclusive dealers have antitrust injury, however, has at least two problems. First, it produces the anomalous result that although the competing dealers allegedly targeted by a vertical price-fixing scheme (like the USA Petroleum dealers in *ARCO*) do not have standing, the dealers (like the ARCO-brand dealers in *ARCO*) who entered into the price-fixing agreement with the manufacturer do have standing.

Second, assuming *arguendo* that the dealer has suffered some of the anticompetitive consequences alleged in *Albrecht*, the question remains of which issues would be tried. Is it enough for the dealer to show that it has suffered some of the injuries described by *Albrecht*, for example, that some consumers desire and would pay for more services? Or should such consequences to the dealer be weighed against the benefit to consumers of the maximum vertical price-fixing agreement? The Court's concern for the protection of consumers and its recognition of the benefits to consumers of manufacturer imposed price ceilings indicates that the courts should apply a balancing test. As the Court noted, the same conduct may "in some respects . . . reduce competition, [and] in other respects increase competition."[171] If a dealer merely has to show that it falls within one or more of the *Albrecht* pigeonholes, the law will deter conduct that may have some anticompetitive consequences, but which, on balance, is procompetitive.

VI. Conclusion: Toward a Rule of Reason/Antitrust Injury Standard

The *ARCO* Court was not asked to overrule *Albrecht* and, similar to the actions of the lower courts in the newspaper distribution cases, it ameliorated, but did not eliminate, *Albrecht*'s harms. The Court held that a dealer does not suffer antitrust injury from a nonpredatory vertical maximum price-fixing agreement between competing dealers and those competing dealers' supplier, even though the complaining dealer may have lost sales or have been forced out of business as a result. Although the Court thereby denied standing to competing dealers, the Court suggested in dicta, somewhat less thoughtfully, that either the

171. *ARCO* 110 S. Ct. at 1894.

dealers who are the parties to the price-fixing agreement or consumers may bring suit if they suffer the anticompetitive consequences detailed in *Albrecht*.

The notion that dealers or consumers may have antitrust injury contradicts much of the Court's opinion, especially its comments that "low prices . . . cannot give rise to antitrust injury," and that vertical maximum resale price fixing may protect consumers from exploitation by dealers. Providing standing to dealers and consumers when only the *Albrecht* factors have been shown could lead both to the condemnation of conduct which, on balance, is procompetitive and to the award of damages in direct proportion to the benefit to consumers of the conduct of which the dealer complains.

One solution would be to extend the Court's holding in *ARCO* that bans suits by competing dealers to prohibit suits by consumers and the dealers who were parties to the vertical maximum price-fixing agreement. Under such a rule, some persons who suffered some of the alleged harms identified in *Albrecht*, such as the inability to offer or receive certain services, will not have legal redress. Courts, however, would avoid protracted litigation on such amorphous issues as whether consumers would have preferred and paid for delivery of their newspaper in a plastic bag and, if so, how many consumers would have paid more, and the amount they would have paid. The case for extending the *ARCO* rule to bar suits by consumers and price-fixing dealers is particularly strong when the dealer has an exclusive territory and is an arguable monopolist, because vertical maximum price fixing protects the public from price gouging by the distributor.

An alternative position, and one we believe is implicitly required at a minimum by *ARCO*, is to convert the dealer's antitrust injury standard to a rule of reason inquiry.[172] That is, rather than grant standing to any dealer or consumer who suffers any of the injuries identified in *Albrecht* in any degree, that dealer or consumer would be required to show that for the vertical maximum price-fixing agreement as a whole, the "anticompetitive effects outweigh its procompetitive effects." Such a rule of reason/antitrust injury standard would not eliminate litigation entirely, but it should avoid the judicial condemnation of conduct that is, on the whole, procompetitive.

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172. For a good examination of the rule of reason, see P. AREEDA, 7 ANTITRUST LAW ¶¶ 1500-11 (1986); Posner, *supra* note 3. In addition, see Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. REV. 265 (1979); Gellhorn & Tatham, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. L. REV. 155 (1984); Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction*, 60 WASH. L. REV. 1 (1984).

Additionally, under the rule of reason or antitrust injury standard, lost profits should be rejected as the measure of dealer damages. Permitting lost profits as damages—especially when trebled—penalizes conduct that benefits consumers. In theory, damages could be limited to the precise economic harm suffered by the dealer due to any anticompetitive consequences of vertical maximum price fixing and reduced by the amount of procompetitive effects. The determination and quantification of such alleged damages at trial, however, would be extremely difficult and speculative, at best. A no-damage rule would be the better policy. Dealers would still be free to obtain injunctive relief, and the federal enforcement authorities would continue to have the power in their discretion to bring actions against vertical maximum price-fixing agreements that they believe are contrary to the public interest.