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In perhaps its most sweeping antitrust opinion to date, the 1972 United States Supreme Court decisively ruled in *United States v. Topco Associates, Inc.*[1] that all horizontal trade restraints are per se illegal.[2] Writing for the majority, Justice Marshall reasoned that this broad proscription would accomodate predictability and avoid burdensome judicial investigation in the cases where horizontal restraints are discovered.[3] A prior decision left some doubt whether territorial exclusivity, the restraint at issue in *Topco*, is per se illegal when unaccompanied by price fixing.[4] The *Topco* opinion removed that doubt not only as to territorial restrictions but also as to all horizontal restraints.[5]

It is therefore interesting that the Supreme Court has never cited *Topco* for its bold per se sentencing of all horizontal restraints.[6] It is even more interesting that the horizontal restraint decisions which followed *Topco* have betrayed Justice Marshall's objectives of predictability and relief from burdensome judicial investigation by exemplifying conspicuous unpredictabilty and

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1. 405 U.S. 596 (1972) [hereinafter *Topco*].

2. *Id.* at 608. A restraint of trade is traditionally considered "horizontal" when it is by agreement between competitors and "vertical" when it is by agreement between persons at different levels of distribution (*e.g.*, manufacturers and distributors). *See* Business Elec. Corp. v. Sharp Elec. Corp., 108 S. Ct. 1575, 1523 (1988); National Collegiate Athletic Ass'n (NCAA) v. Board of Regents of Univ. of Okla., 468 U.S. 85, 99 (1984); *Topco*, 405 U.S. at 608. *But see Business Elec. Corp.*, 108 S. Ct. at 1526-31 (Stevens, J., dissenting). In *Business Elec. Corp.*, a manufacturer terminated its relationship with one distributor upon an ultimatum of another distributor. The dissent argued that this restraint was horizontal because its anticompetitive effects were identical to those of an agreement between two distributors to demand that their supplier terminate its relationship with a third distributor. *Id. Contra id.* at 1522 n.4.

3. *Topco*, 405 U.S. at 609 n.10 & 610-12.

4. *Id.* at 609 n.9; United States v. Sealy Corp., 388 U.S. 350 (1967).

5. *Topco*, 405 U.S. at 609 n.9.

6. The United States Supreme Court has cited *Topco* in the following instances: (i) for the proposition that a horizontal agreement to divide territories is per se illegal (Business Elec. Corp. v. Sharp Elec. Corp., 108 S. Ct. 1515, 1524 (1988) (dictum)); (ii) as authority for the definition of a "horizontal restraint" (NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 99 n.18 (1984)); (iii) in holding that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations . . . ." (*NCAA*, 468 U.S. at 100 n.21; Broadcast Music, Inc. (BMI) v. Columbia Broadcast System, 441 U.S. 1, 9 (1979)); and (iv) for its identification of the virtues of the per se rule (*BMI*, 441 U.S. at 8 n.11).

only minimal restraint of judicial analysis. Thus, the *Topco* decision stands at a crossroads. The Court has not expressly overruled or qualified its holdings; yet, *Topco* has clearly failed as an adjudicative basis for subsequent cases. This failure raises doubt concerning the decisions present validity.

Until recently, it seemed that the Court had simply forgotten *Topco*.[7] However, in *Business Electronics Corp. v. Sharp Electronics Corp.*,[8] a 1988 Supreme Court vertical restraint case, the majority mysteriously cited *Topco* for its condemnation of horizontal market divisions.[9] It is questionable why the Court cited *Topco* in a vertical restraint case when the previous horizontal restraint cases failed to even cite *Topco's* principal holding.[10]

Topco's obscure coordinates make for an intriguing study of its probable destiny. More importantly, an examination of the history and developments surrounding *Topco* should provide antitrust lawyers insight into the Court's progress with horizontal restraint law and the wisdom or errancy of its present views. Part I of this article focuses on prior case history by reviewing the law on horizontal restraints that was available to the *Topco* Court. Part II examines and critiques *Topco*. Part III analyzes the developments that followed and juxtaposes the present law with popular perceptions of the law. Finally, Part IV surmises how *Topco* would be decided today and proposes a method of analysis by which *Topco* ought to be adjudicated. This article not only explores the continuing validity of *Topco*, but generally emphasizes that today's antitrust law has been shaped by three independent models of trade restraint analysis—the ancillary restraints doctrine, the rule of reason and the per se rule.

I. *The Law on Horizontal Restraints Available to the Topco Court*

Addyston Pipe & Steel: The Ancillary Restraints Doctrine

Nearly 200 years of common law laid the foundation for the Sherman Act,[11] a cornerstone of American antitrust law.[12] Eight years after its enactment,

7. The Court had not cited *Topco* in recent horizontal restraint cases as authority for any position. *See, e.g.*, Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

8. 108 S. Ct. 1515 (1988).

9. *Id.* at 1524.

10. See *supra* notes 6-7.

11. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)). Section 1, the provision relevant to this article, reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

12. Associated Gen. Contractors of Cal., Inc. v. State Council of Carpenters, 459 U.S. 519, 530-31 (1983) (J. Stevens citing 21 CONG. REC. 2456, 2459, 3151-52 (1890)). The heritage of

Judge William Howard Taft (later Chief Justice of the Supreme Court[13]) wisely looked to the common law for guidance in evaluating a horizontal trade restraint under the Act in *United States v. Addyston Pipe & Steel Co.*[14] In *Addyston Pipe & Steel*, the defendants, manufacturers and vendors of cast-iron pipe, entered into an agreement to raise pipe prices over most of the United States. The defendants controlled over 55% of the total cast-iron producing industry and about 65% of the relevant market.[15] Judge Taft, writing for the Sixth Circuit, ruled that the agreement was per se illegal, because its sole purpose was to restrain trade and thereby diminish competition.[16]

Judge Taft prudentially clarified, however, that not all restraints of trade, whether horizontal or vertical, are per se illegal. Explaining that some restraints can be reasonable, he framed a criterion, known as the ancillary restraints doctrine, by which such restraints are to be adjudged:

> [I]t would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the convenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.[17]

The inquiry, Judge Taft elaborated, should not focus on the trade restraint itself. Rather, a court ruling on the legality of a restraint should examine the main purpose of the transaction or contract which the restraint is designed to enhance.[18] As Judge Taft reasoned, "[t]he main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."[19] Once a court resolves the legitimacy of a contract's main purpose, the restraint must be determined ancillary—subordinate and collateral[20]—to that main purpose to be exempt from the per se rule of illegality.[21]

American antitrust law derives from early cases such as Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711). *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688-89 (1978) (references by J. Stevens).

13. 257 U.S. iii n.2.

14. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

15. *Id.* at 291-92.

16. *Id.* at 283. The Court added that the policy of the common law had been to foster competition. *Id.*

17. *Id.* at 282.

18. *Id.* at 282-83.

19. *Id.* at 282.

20. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033. Judge Bork described an "ancillary restraint" as follows:

> The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.

Id.

21. *Addyston Pipe & Steel Co.*, 85 F. at 282.

Addyston Pipe & Steel, unanimously affirmed by the Supreme Court,[22] furnished courts with a balanced model for trade restraint analysis. A restraint may be entirely reasonable not because it is procompetitive[23]—the restraint itself may be only anticompetitive—but because it complements a transaction that has a legitimate purpose which would be impotent without the restraint. The ancillary restraints doctrine can be used to determine whether the restraint restricts competition only to the degree necessary to effect the main purpose of the transaction. By such an analysis, the total effect on competition can be measured, not just the effect of the restraint. Accordingly, *Addyston Pipe & Steel* limited per se condemnation to naked restraints. A restraint is "naked" when its illegitimate purpose outweighs any legitimate purpose of an underlying contract or when its existence is unnecessary for the fruition of the contract.[24]

The Rule of Reason

The rule of reason, a second model for trade restraint analysis was formally introduced in *Standard Oil Co. of New Jersey v. United States*.[25] This model, like the ancillary restraints doctrine, was predicated on the common law notion that some restraints deserve analysis and some remain inherently unreasonable beyond potential justification through an exercise of judgment.[26] Perhaps the most famous expression of the rule of reason was announced by Justice Brandeis in *Chicago Board of Trade v. United States*:[27]

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret the facts and to predict consequences.[28]

22. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235 (1899).

23. *Cf.* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). The Court asserted that restraint is the very essence of any agreement concerning trade. *Id.* at 238.

24. *See Addyston Pipe & Steel Co.*, 85 F. at 282.

25. 221 U.S. 1 (1911).

26. *Id.* at 64-65. *See* P. AREEDA, ANTITRUST ANALYSIS ¶¶ 144, 302(c) (3d ed. 1981).

27. 246 U.S. 231 (1918).

28. *Id.* at 238.

Standard Oil held that section 1[29] of the Sherman Act defers the determination of whether an activity is within its contemplation to the reasoning of the court, guided by "principles of law" and public policy.[30] *Chicago Board of Trade* established the characteristics of a reasonable restraint: the restraint must merely regulate; its only possible consequence should be to promote competition; and a restraint which may suppress or destroy competition is unreasonable, because its purpose and possible effect exceed mere regulation. *Chicago Board of Trade* also provided guidelines on the scope and extent of a rule of reason inquiry into the purpose and effect of a restraint.

Judges and antitrust scholars have not openly articulated the distinctions between the ancillary restraints doctrine and the rule of reason. Perhaps they believe that any distinctions between the models are inconsequential. Perhaps authorities are simply unaware of the differences and therefore interrelate the models.[31] However, at least two distinctions differentiate the ancillary restraints doctrine from the rule of reason.

The first and primary distinction regards the central focus of each model. The fundamental inquiry under the rule of reason is whether the challenged restraint itself enhances competition.[32] Yet, the foremost inquiry under the ancillary restraints doctrine is whether there exists a lawful contract having a legitimate main purpose.[33] The ancillary restraints doctrine then evaluates the restraint by determining not whether it is procompetitive but whether it is ancillary to the lawful contract and necessary for the contract's legitimate potency.[34] The ancillary restraints doctrine impliedly assumes that all restraints are anticompetitive. Accordingly, the doctrine weighs the adverse character of the restraint against the procompetitive virtues of the legitimate contract.

29. See *supra* note 11.

30. *Standard Oil Co. of N.J.*, 221 U.S. at 63-64.

31. *See, e.g.*, Business Elec. Corp. v. Sharp Elec. Corp., 108 S. Ct. 1515, 1526-29 (Stevens, J., dissenting); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 356 (1982); United States v. Sealy Corp., 388 U.S. 350, 356 (1967); National Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592, 599-603 (11th Cir. 1986), *cert. denied*, 479 U.S. 923; General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 595 (7th Cir. 1984); Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1395-96 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984); Liebeler, *1984 Economic Review of Antitrust Developments: Horizontal Restraints, Efficiency and the Per Se Rule*, 33 UCLA L. REV. 1019, 1025-30 (1986) [hereinafter *Antitrust Developments*]; 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, 22-24 (1984) [hereinafter *Streamlining Antitrust*]. *Cf.* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224-30, *cert. denied*, 479 U.S. 1033 (J. Bork reconciling the rule of reason with the ancillary restraints doctrine out of apparent acquiescence to the uncertain modern state of the law on trade restraints). The Court's confusion between the ancillary restraints doctrine and the rule of reason is discussed *infra* in the text accompanying notes 52-53.

32. *See NCAA*, 468 U.S. at 104; *Chicago Bd. of Trade*, 246 U.S. at 238. *See also NCAA*, 468 U.S. at 103 & 109 n.39.

33. *See Addyston Pipe & Steel Co.*, 85 F. at 282-83.

34. *Id.*

The ancillary restraints doctrine, because of its central focus, can result in a finding contrary to that derived by analysis under the rule of reason. In a given scenario involving a plainly anticompetitive horizontal restraint, a strict analysis under the rule of reason may result in a finding of unreasonableness. However, under the ancillary restraints doctrine, this same restraint may be held valid, if it is determined to be ancillary to a legitimate main transaction and necessary for that transaction's fruition.[35]

A second distinction between the ancillary restraints doctrine and the rule of reason concerns the role of the per se rule of illegality in each. A court applying the ancillary restraints doctrine must impose the per se rule—it must rule the restraint inherently and inescapably illegal[36]—if the restraint exceeds the legitimate necessity presented by the main purpose of the lawful contract.[37] Justice Brandeis' rule of reason, on the other hand, is a test unto itself; if the restraint fails the test, it fails only under a rule of reason analysis, and the per se rule is not then formally introduced to reinforce or define the condemnation.[38] Perhaps this distinction is merely academic. Even so, note that Justice Brandeis, in *Chicago Board of Trade*, credited no role in the development of antitrust analysis to *Addyston Pipe & Steel* or the ancillary restraints doctrine. It appears therefore that Justice Brandeis constructed his model of trade restraint scrutiny not upon the ancillary restraints doctrine but rather alongside it.

The Per Se Rule

The per se rule emerged as a third model, independent of other models, for the adjudication of trade restraints in *Northern Pacific Railway v. United States*.[39] In *Northern Pacific*, the Supreme Court held that, where a restraint has a pernicious effect upon competition and lacks any redeeming virtue, this justifies a conclusive presumption of per se illegality without elaborate economic analysis of the restraint.[40] *Northern Pacific* inaugurated a novel

35. For the importance of this distinction to *Topco*, see *infra* text accompanying notes 98-104.

36. *See Addyston Pipe & Steel Co.*, 85 F. at 282-83.

37. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 302(c) (3d ed. 1981) (comparison between *Standard Oil* and *Addyston Pipe & Steel*).

38. *See Chicago Bd. of Trade*, 246 U.S. at 238 (indication that the exercise of judgment can result in either a finding for or against a restraint). *See also* Federal Trade Comm'n v. Indiana Fed'n of Dentists, 106 S. Ct. 2009 (1986); *NCAA*, 468 U.S. 85 (1984). The Court in each case rejected the restraint expressly under the rule of reason. For a discussion of the validity of the analysis in these decisions, see *infra* notes 168-201 and accompanying text.

39. 356 U.S. 1 (1958).

40. *Id.* at 5. The Court added:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id.

device for presuming certain horizontal restraints illegal—categorical illegality. Justice Black, writing for the majority, listed several trade practices which the Court had declared per se illegal,[41] including price fixing,[42] division of markets,[43] group boycotts[44] and tying arrangements.[45] Having presented his per se doctrine and category of historically illegal restraints in one breath,[46] Justice Black effectively held that a judicial search for the legitimacy of any price fixing arrangement, division of markets, group boycott or tying arrangement is overly complex, costly and usually fruitless.[47]

Northern Pacific's blacklist seemingly disquieted the Supreme Court in subsequent opinions. For example, *United States v. Sealy Corp.*[48] held a hybrid of price fixing and division of markets, both blacklisted restraints, to be per se illegal.[49] However, despite the fact that *Northern Pacific* held division of markets categorically illegal, the *Sealy* Court had trouble ruling that territorial division was per se illegal independent of its annexation with price fixing.[50] Because of this struggle, *Sealy* cast doubt on whether a horizontal division of markets is by itself a per se violation of the Sherman Act.[51]

41. *Id.*

42. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Price fixing represents agreements between competitors (horizontal agreements) or between suppliers and distributors (vertical agreements) to fix the prices at which they sell their products. *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980); *Socony-Vacuum Oil Co.*, 310 U.S. at 222-23; Knuth v. Erie-Crawford Dairy Co-op Ass'n, 326 F. Supp. 48, 53 (W.D. Pa. 1971).

43. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). *Topco* defined a horizontal division of markets ("territorial division," "territorial exclusivity") as "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *Topco*, 405 U.S. at 608.

44. Fashion Originators' Guild of Am. v. Federal Trade Comm'n, 312 U.S. 457 (1941). A group boycott, or "concerned refusal to deal," occurs where two or more competitors (horizontal scheme) or a supplier and distributor (vertical scheme) agree to boycott or refuse to deal with another competitor or another distributor. Such agreements have been made for a variety of actionable purposes. *See, e.g.*, Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959) (various suppliers and a distributor agreed to not sell to another distributor or to sell to the other at discriminatory prices and terms); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (film producers agreed to deal only with exhibitors who entered into a certain standard exhibition contract); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (retailer association circulated among its members a "blacklist" of wholesalers who had sold directly to consumers).

45. International Salt Co. v. United States, 332 U.S. 392 (1947). A "tying arrangement" is an agreement whereby a seller conditions the sale of one product, the "tying product," on the purchase of another product, the "tied product." *Northern Pac. Ry.*, 356 U.S. at 5-6; Northern v. McGraw-Edison Co., 542 F.2d 1336, 1344 (8th Cir. 1976). *Northern Pacific* concerned whether the restraint at issue was an illegal tying arrangement. *Northern Pac. Ry.*, 356 U.S. at 3-4.

46. *See Northern Pac. Ry.*, 356 U.S. at 5.

47. *Id.*

48. 388 U.S. 350 (1967).

49. *Id.* at 354-57.

50. *See id.* at 356-57.

51. *See Topco*, 405 U.S. at 609 n.9. This doubt was temporarily resolved in *Topco* which ruled, partly on the basis of categorization, that a division of markets was independently per se illegal. *Id.* at 608 & 609 n.9.

Sealy is further notable for two supplemental points. First, the Supreme Court finally unmasked its confusion over the distinction between an ancillary restraints inquiry and a rule of reason inquiry. The appellee argued that the territorial restraints at issue were "mere incidents of a lawful program of trademark licensing."[52] This position is clearly an ancillary restraints argument, as is evidenced by the focus on a lawful arrangement to which the restraints were asserted ancillary. However, the *Sealy* majority misread the appellee's contention, stating, "it may be true, as appellee vigorously argues, that *territorial exclusivity* served many other purposes."[53] The Court interpreted the appellee's argument to mean that the restraint was itself legitimate. The appellee, to the contrary, argued that the restraint was merely ancillary to a legitimate arrangement. Thus, the *Northern Pacific* per se rule inadvertently preempted the ancillary restraints doctrine relied upon by the appellee in *Sealy*.

Of more obvious relevance to this article's forthcoming analysis of *Topco*, the Supreme Court in *Topco* characterized *Sealy* as "on all fours."[54] Interesting therefore is the *Sealy* majority's reaction when pressed with a hypothetical situation strangely congruent to *Topco*:

> It is urged upon us that we should condone this territorial limitation among manufacturers of Sealy products because of the absence of any showing that it is unreasonable. It is argued, for example, that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as *per se* unlawful. But condemnation of appellee's territorial arrangements certainly does not require us to go so far as to condemn that quite different situation, *whatever might be the result if it were presented to us for decision.*[55]

Sealy clearly suggested that condemnation of territorial limitations which foreshadowed those in *Topco* would be predicated on the facts of the case. According to *Sealy*, an adjudication of the legality of the hypothetical restraint would compel a court to analyze the restraint. However, the assumption created by *Sealy* stands in stark contrast to the holding merely five years later in *Topco* that territorial limitations are per se illegal as a matter of law[56] without the slightest hope of potential justification through the analysis suggested by *Sealy*.

Summary of Analytic Models Available to the Topco Court

In summary, the *Topco* Court had to its avail three popular models of trade restraint analysis. An analysis under the ancillary restraints doctrine apparently

52. *Sealy Corp.*, 388 U.S. at 356 (citation omitted).
53. *Id.* (emphasis added).
54. *Topco*, 405 U.S. at 609.
55. *Sealy Corp.*, 388 U.S. at 357 (footnote omitted) (emphasis added).
56. *See Topco*, 405 U.S. at 608-10.

requires of a court the following steps: (1) to initially ascertain the existence of a lawful contract and the legitimacy of its main purpose; (2) to determine if the restraint at issue is ancillary by ascertaining whether the restraint functioned with the necessity presented by the main purpose; and (3) to determine the necessity of the restraint for the fruition of the lawful contract. If the restraint is found unreasonable, then a court will not exempt the restraint from illegality under the per se rule.[57]

An analysis under the rule of reason involves an entirely different focus than the ancillary restraints doctrine. A court is to focus only on the restraint and inquire whether the restraint merely regulated and possessed procompetitive tendencies or whether it possessed anticompetitive tendencies. This inquiry involves an extensive analysis of the many circumstances surrounding the restraint.

Finally, the *Topco* Court had to its avail an independently applied per se rule. This model mandates inherent and unavoidable illegality and, in *Topco's* day, had gained judicial popularity largely due to *Northern Pacific. Northern Pacific* compiled a list of restraints, such as territorial divisions, which merited conclusive denunciation. However, *Sealy* cast doubt on whether any one of *Northern Pacific's* restraints, unaccompanied by price fixing, would be per se illegal.

II. *United States v. Topco Associates, Inc.*

Topco was a cooperative association wholly owned and controlled by twenty-five small to medium sized grocery chains operating in some thirty-three states.[58] The association was organized in 1944 in reaction to the rivalries of the marketplace.[59] A few large national supermarket chains dominated the retail grocery business.[60] As the large chains grew, independent grocers and smaller chains disappeared at an accelerated rate.[61]

The success of the large supermarket chains was perhaps chiefly due to their exploitation of "private label" products.[62] Virtually every chain had an extensive program by which it marketed broad lines of goods bearing its own labels.[63] An efficient program was often accomplished by vertically integrating sources of manufacturing, supply, packaging, product testing and so forth.[64] The numerous cost economies achieved by vertically integrating sources resulted in a myriad of advantages. These advantages included the creation and retention of customer loyalty, by offering exclusive low-priced brands equivalent

57. *See Addyston Pipe & Steel Co.*, 85 F. at 282-83.

58. United States v. Topco Assoc., Inc., 319 F. Supp. 1031, 1032, 1039 (N.D. Ill. 1970), *aff'd*, 405 U.S. 596 (1972).

59. *Id.* at 1032-34. The association originated as Food Cooperative, Inc.

60. *Id.* at 1034 n.19. "In 1967, sales of the 25 largest supermarket chains represented 85.6 per cent of total supermarket chain sales." *Id.*

61. *Id.*

62. *Id.* at 1035.

63. *Id.* at 1039.

64. *See id.* at 1032, 1034-35.

in quality to higher-priced national brands and the establishment of a broad supply base of manufacturers.[65]

Private label programs were considered an essential element in supermarket competition.[66] However, a single company could not afford to launch a competitively effective program unless it grossed a minimum annual sales volume of $250 million.[67] Most Topco members grossed well under $100 million each.[68] Thus, Topco was organized for the principal purpose of providing, through its members' combined purchasing power, an efficient program that would enable each member to genuinely compete with the large supermarket chains located in its market territory.[69]

Through Topco's cooperative buying efforts, its members could purchase over 1000 different inventory items.[70] Most of these items were sold under brand names owned by Topco.[71] Members purchased the goods at costs equivalent to those incurred by their large rivals. Topco members used the resulting cost savings, which had been enjoyed only by the large chains, to retail their goods at competitive consumer prices.[72]

Topco's efforts proved successful. By 1967, its members' combined retail sales exceeded $2.3 billion; only A&P, Safeway and Kroger boasted greater retail sales.[73] The local market share respective to each member averaged 6%, ranging from 1½% to 16%.[74] Goods purchased from Topco accounted for about 10% of the members' total sales. Goods actually bearing Topco brands accounted for only 6% of the members' total sales.[75]

Topco members believed that the effectiveness of any private label program, whether undertaken by a cooperative or a single chain, depended upon exclusivity.[76] They contended that private labeling would no longer serve its competitive, "private" function if Topco members shared each other's primary markets.[77] The Topco brand would no longer serve to distinguish a member's store and develop and hold customer loyalty if another member around the corner offered the same brand.[78] The competitive value of and the member's investment in his private label program would be destroyed or severely impaired.[79]

65. *Id.* at 1035; *Topco*, 405 U.S. at 599 n.3.
66. *Topco*, 319 F. Supp. at 1035, 1039.
67. *Id.* at 1036.
68. *Id.* at 1033.
69. *Id.*
70. *Id.* at 1032, 1039.
71. *Id.*
72. *Topco*, 405 U.S. at 598-99 & n.3. *See Topco*, 319 F. Supp. at 1035-36.
73. *Topco*, 319 F. Supp. at 1033.
74. *Id.* at 1033, 1039.
75. *Id.*
76. *Id.* at 1036, 1040.
77. *Id.*
78. *Id.*
79. *Id.*

For these reasons, each new member signed an agreement with Topco, designating the territory in which that member could market Topco-brand products. Generally, no member could sell or offer for sale those products outside its designated territory.[80] Members were free to expand into each other's territories and market other brands, and they often did so; but they could not sell Topco-brand items in those territories in which they held no license.[81] However, as members grew to the point where they could independently develop a successful private label program of their own, they usually left Topco.[82] For this reason and more, Topco constantly sought new members either to be placed in vacant market areas or to replace withdrawing members.[83]

Many grocers would not have joined Topco had it not assured them exclusive rights to market Topco-brand products in their primary marketing areas.[84] Nevertheless, the government challenged Topco's practice of market exclusivity under section 1 of the Sherman Act, contending that the territorial restraints operated to prohibit competition in Topco-brand products among Topco members.[85] The government conceded that were Topco a single chain, instead of a cooperative buying organization, none of its practices would be objectionable under the antitrust laws.[86] It also conceded that Topco's private label program actually increased competition in the supermarket industry by enabling its members to successfully compete with larger regional and national chains.[87] The government argued, however, that any agreement for territorial exclusivity is prohibited by section 1 without regard to its overall effect on competition.[88]

The *Topco* district court framed the issue as:

> whether the anti-trust laws prohibit practices by a cooperative buying organization which may reduce competition between its members or potential members in the sale of private label brands but which enable its members to compete more effectively with national chains whose private label brands are sold exclusively through their own outlets.[89]

The court found that whatever anticompetitive effect the division of markets may have had on intrabrand competition was far outweighed by the increased

80. *Id.* at 1036-37, 1039; *Topco*, 405 U.S. at 601-02.
81. *Topco*, 319 F. Supp. at 1036-37.
82. *Id.* at 1038-39.
83. *Id.*
84. *Id.* at 1036, 1040, 1043.
85. *Id.* at 1040; *Topco*, 405 U.S. at 603. The government also challenged Topco's restrictions on the freedom of its members to sell at wholesale. *Topco*, 405 U.S. at 603-04, 612. Those subsidiary challenges are not addressed in this article.
86. *Topco*, 319 F. Supp. at 1040.
87. *Id.*
88. *Id.* at 1041. The government cited five Supreme Court cases to support its proposition. *Id.*
89. *Id.* at 1042-43.

ability of Topco members to compete with other supermarket chains.[90] The opinion reasoned that a ruling in favor of the government would substantially diminish competition in the supermarket industry, would benefit only the large national chains, and would not increase competition in Topco brands.[91] For these reasons, the district court concluded Topco's licensing provisions were "ancillary and subordinate to the fulfillment of the legitimate, procompetitive purpose of the Topco cooperative, reasonable and in the public interest."[92]

On direct appeal, the United States Supreme Court reversed the district court's judgment.[93] Justice Marshall, for the majority, held that horizontal restraints are per se violations of the Sherman Act regardless of their reasonableness.[94] Because Topco's territorial restrictions were horizontal—between competitors at the same level in the market structure[95]—they were per se illegal, even though unaccompanied by price fixing.[96]

Topco is notable for extending *Northern Pacific*'s doctrine of categorization and thereby removing the doubt created in *Sealy* as to whether a division of markets unaccompanied by price fixing is conclusively per se illegal.[97] However, the panacea that the *Topco* majority developed to review the adjudication of Topco's restrictions was grounded upon some baseless assumptions.

The Court preceded the substance of its opinion by rejecting an application of the rule of reason, which the Court alleged the district court applied in its analysis of *Topco*.[98] This allegation is simply untrue. A rule of reason inquiry would have led the lower court to analyze the territorial restraint not only for its anticompetitive tendencies, which the district court did analyze, but also for its procompetitive potential,[99] which the district court did not analyze. A rule of reason analysis might well have resulted in a finding against Topco at trial. The division of markets had clear potential to suppress or destroy intrabrand competition. Moreover, absent the underlying legitimate purpose of the Topco cooperative, the restraint lacked any procompetitive possibility.

However, it was not the rule of reason which buttressed Topco's defense or the district court's holding. Rather, the defendant and, more importantly, the court rested their positions on the ancillary restraints doctrine. The district court never held, as the Supreme Court majority maintained, that Topco's territorial divisions were procompetitive.[100] Rather, the court held that,

90. *Id.* at 1043.
91. *Id.*
92. *Id.* at 1038.
93. *Topco*, 405 U.S. at 612.
94. *Id.* at 607-08.
95. *Id.* at 609. See *supra* note 2.
96. *Id.* at 608, 609 n.9.
97. *Id.* at 609 n.9.
98. *Id.* at 606, 608.
99. See *supra* notes 27-30 and accompanying text.
100. *See Topco*, 405 U.S. at 606.

although the restraints were anticompetitive, they were ancillary to the fulfillment of the main purpose of the Topco cooperative.[101] This main purpose, held the district court, was not only legitimate, it was procompetitive and even in the consumers' interest![102]

Thus, *Topco* at the trial court level demonstrates the crucial distinction between the ancillary restraints doctrine and the rule of reason.[103] Unfortunately, the Supreme Court failed to recognize this distinction and rejected a rule of reason analysis when it was not there to reject. One commentator suggests that the Court may have intentionally ignored the ancillary restraints doctrine believing that market division among potential competitors, who were so large and numerous that they could not have merged, was so intentionally restrictive as to preclude even a claim under the doctrine.[104] While this might be true, a claim was made under the doctrine; the trial court applied and rested its opinion on the doctrine; and further, it seems that the dominance of the doctrine at the trial court level would have prompted some discussion by the Supreme Court on the merit and relevance of its application. Therefore, if one does not accept the proposition that the Supreme Court inadvertently misinterpreted the district court's analysis, it is plausible that the majority intended, by avoiding discussion of the ancillary restraints doctrine, to eliminate it as a model for antitrust analysis.

Topco climactically held that because the territorial restraint involved was a horizontal one, it was "therefore . . . a per se violation of Section 1" of the Sherman Act.[105] Justice Marshall in his conclusion relied upon a line of cases, including *Northern Pacific*,[106] which he asserted supports the immutable rule that every horizontal restraint is per se illegal. *Topco*'s dogma, however, went far beyond precedent, which had never automatically denounced all horizontal restraints.[107] *Topco* thus represents the pinnacle of the Court's inflexibility regarding horizontal restraints.

One of the reasons for developing the per se rule, the Court explained, was that courts are incapable of competently weighing procompetitive effects in one economic sector against anticompetitive effects in another.[108] It would

101. *Topco*, 319 F. Supp. at 1038, 1043.

102. *Id.* Justice Marshall stated that courts are of "limited utility" in weighing destruction of competition in one economic sector against promotion of competition in another. *Id.* However, in *Topco*, the district court found that the anticompetitive source was ancillary to the procompetitive source. Justice Marshall did not controvert the validity of this finding, so it is therefore difficult to understand his inability to meaningfully weigh the economic inputs.

103. See *supra* notes 31-35 and accompanying text.

104. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music? 66 VA. L. REV. 879, 892-93 (1980).

105. *Topco*, 405 U.S. at 608.

106. *Id.* at 608. In dissenting, Chief Justice Burger carefully distinguished each of these cases and charged that the majority contrived a new per se rule with no reliable basis on precedent. *Id.* at 613-24 (Burger, C.J., dissenting).

107. See *supra* note 106.

108. *Id.* at 609-11. Were this true in its literal sense, there could be no operative rule of reason or ancillary restraints doctrine. Both are predicated on the assumption that courts must be equipped, in many instances, to make this determination. *See id.* at 620-22, 624 (Burger, C.J., dissenting).

seem therefore that the more experience a court has with a certain restraint and business environment the better equipped and willing it would be to determine the effects of the restraint on the balance of competition. Yet, the majority asserted, in apparent reference to *White Motor Co. v. United States*,[109] that courts can classify a particular business practice a per se violation of the Sherman Act only when it has "considerable experience" with that practice.[110]

These rationales present an interesting dichotomy. The more experience a court has with a particular restraint the more likely that restraint will not escape the court's presumption of illegality. On the other hand, the less experience a court has with a restraint, the more likely the court will deem itself incapable of weighing the economic effects of the restraint and its underlying main transaction, thus again strengthening justification for the per se rule.

Certainly the Supreme Court could not have intended such an illogical proclivity for the per se rule in horizontal restraint cases. Yet, the majority did hold that if a restraint is horizontal, it is conclusively illegal. Perhaps this chaos in *Topco* reveals why the case is so rarely cited by the Supreme Court and all but forsaken for its condemnation of all horizontal restraints.[111] Despite the purported magnitude of *Topco's* ruling,[112] time has proven Justice Marshall's opinion to be of little significance to the subsequent development of antitrust law.

For more substantive reasons given above, however, the Court's ruling in *Topco* is faulty. The Court exchanged a sound district court holding, perhaps on an inexcusable misinterpretation of the opinion, for an inflexible rule constructed upon impulsive reasoning. As Chief Justice Burger noted in his dissent, the majority did not charge that the district court's findings and conclusions were incorrect; the opinion simply held that the district court had no business analyzing Topco's practices.[113] This holding indicates that the majority acquiesced to the validity of the lower court's findings and conclusions, ruling only that the court was unwarranted in making the analysis. If the majority could not controvert that the procompetitive benefits of both the Topco cooperative and the private label program on interbrand competition outweighed any anticompetitive effects of the restraint on intrabrand competition, then no legally valid interpretation of the Sherman Act indicates fault in the district court's decision. Accordingly, the Supreme Court should have affirmed the district court's opinion.

109. 372 U.S. 253, 261 (1963).

110. *Topco*, 405 U.S. at 607-08 (citing Van Cize, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964)).

111. See *supra* notes 6-7 and accompanying text.

112. See *supra* note 51 and text accompanying note 97.

113. *Topco*, 405 U.S. at 614.

III. *Post-Topco Developments of the Law on Horizontal Restraints*

The Rule of Reason-Ancillary Restraints Doctrine Distinction

Although the Supreme Court ignored the ancillary restraints doctrine in *Sealy* and *Topco*,[114] it finally voiced its position on the role of the doctrine in *National Society of Professional Engineers v. United States*.[115] Justice Stevens asserted for the majority that, in *Addystone Pipe & Steel*, Judge Taft formulated the ancillary restraints doctrine from his understanding of a historic common-law rule of reason.[116] Justice Stevens concluded that the rule of reason and the per se rule are the only two operative models of antitrust analysis.[117] Stevens recently reiterated this position in his dissenting opinion in *Business Electronics Corp. v. Sharp Electronics Corp.*[118] In this vertical restraint case, he argued that ancillary restraints "are perfectly lawful unless the 'rule of reason' is violated."[119] His proclamation seems to suggest that the ancillary restraints doctrine and the rule of reason have merged.

This point of Stevens' dissent is quite similar to, and perhaps annotative of, the majority's view in *Business Electronics*. Citing *GTE Sylvania*, the majority explained that the rule of reason is nothing more than a fact determination:

> Ordinarily, whether particular concerted action violates (section) 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[120]

At quick glance, the foregoing statement may appear inoffensive. However, if the rule of reason merely constitutes a broad consideration of all facts presented at trial and the per se rule represents a court's refusal to consider the facts, then what remaining utility has the ancillary restraints doctrine? If the rule of reason is really a plenary fact determination, then there is no room for the ancillary restraints doctrine. Any analysis under the doctrine could instead be integrated within the broader analysis under the rule of reason.

Perhaps Judge Taft was not one to quarrel over whether his ancillary restraints doctrine should be set apart from other models of trade restraint scrutiny. Yet, the real point is that, regardless whether Judge Taft cared how his formulation was recognized or titled, its intended focus and effect on a

114. See *supra* text accompanying notes 52-53 and 98-104.
115. 435 U.S. 679 (1978).
116. *Id.* at 689.
117. *Id.* at 691-92.
118. 108 S. Ct. 1515 (1988) (Stevens, J., dissenting).
119. *Id.* at 1527.
120. *Id.* at 1516 (citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977)). *See also id.* at 1523.

case's outcome differs significantly from that of the rule of reason announced in *Chicago Board of Trade*.[121] It makes no sense therefore to merge the two models, unless courts better emphasize whether they uphold or reject a particular restraint because of the restraint's own competitive merit or rather because of an evaluation of its ability to further the legitimate main purpose of an underlying contract.

Because courts appear to have not yet reached this level of specificity in antitrust analysis, and because the *GTE Sylvania* and *Business Electronics* majorities offered no explanation for their words, it seems therefore that the Court's latest definition of the rule of reason is, at best, unwitting. If so, then the Court has probably left the ancillary restraints doctrine unaltered. In its misunderstanding of the independent magnitude of the doctrine, the Court has contributed nothing to the doctrine's development and detracted nothing from its proper role in trade restraint analysis.

In *Business Electronics*, the Court contributed more to the ancillary restraints doctrine in one footnote than it had in nearly one hundred years of case law. The doctrine, as originally framed in *Addyston Pipe & Steel*, held that a valid trade restaint must be ancillary to the legitimate main purpose presented by a lawful contract.[122] The *Business Electronics* dissent seemed to complain about the lack of an express contractual obligation to which the restraint could have attached. In response, the majority commented in dicta that a valid restraint may be ancillary to a relationship[123] and need not formally accompany a contractual provision.[124] The Court reasoned that to require "manufacturers to agree to otherwise inefficient contractual provisions for the sole purpose of attaching to them efficient nonprice vertical restraints . . . would . . . create precisely the kind of 'irrational dislocation in the market' that legal rules in this area should be designed to avoid."[125]

Although Justice Scalia did not express whether his analysis in *Business Electronics* extends to horizontal restraints, his assertion that, to be valid, a restraint need only reinforce a business relationship, not a contract, is sound. An economically beneficial main purpose does not necessarily flow only from a contractual provision expressed between parties to a preexisting commercial relationship. The very relationship itself could be impotent without the attachment of a restraint qualifying its terms. For example, the relationship between the grocers in *Topco* might not have been possible without restrictions, such as the territorial limitations, qualifying its terms.[126] Assuming this is true, requiring a group such as that in *Topco* to create some unnecessary covenent to which the restrictions must attach for validity is overly formalistic, probably beyond the contemplation of Judge Taft, and beyond common reasoning.

121. See *supra* notes 27-28 and accompanying text.

122. See *supra* text accompanying note 17.

123. *Business Elec. Corp.*, 108 S. Ct. 1522 n.3 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 187, 188 (1981)).

124. *Id.*

125. *Id.* (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)).

126. See *supra* notes 58-59, 70-72 and accompanying text.

The Rule of Reason and the Per Se Rule

Unlike the ancillary restraints doctrine, the rule of reason and the per se rule have undergone developments which are significant to a reanalysis of *Topco*. Among the illustrative cases to be discussed, *Broadcast Music, Inc. v. Columbia Broadcast System*[127] presents a few of these developments. Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) were each created as a clearinghouse through which authors and composers could collectively license and police the masses of users and performers of copyrighted works.[128] Both companies issued blanket licenses which gave the licensees the right to perform any and all of the compositions owned by members and affiliates for a stated term. Each license was sold at a predetermined fee.[129] One of the giant licensees, Columbia Broadcasting System ("CBS"), brought a suit challenging that the blanket licenses were instruments of illegal price fixing.[130]

The Supreme Court rejected the Second Circuit's imposition of the per se rule as "overly simplistic" and held that the rule of reason should apply.[131] The *BMI* majority explained that the Court and the Second Circuit had not examined this type of case and therefore did not have the "considerable experience" necessary for an application of the per se rule.[132] However, it is apparent that the Court opted for a rule of reason analysis for reasons more compelling than the Court's alleged inadequate experience.

Blanket licensing developed as an efficient mechanism to bring order to a marketplace of innumerable sole participants.[133] It resulted in lower costs and simplified the total copyright licensing process of negotiation and enforcement, thereby creating procompetitive efficiencies.[134] Moreover, blanket licensing was an acceptable method of copyright licensing for a large part of the market.[135] The restraint's own efficiencies would therefore have redeemed it from per se illegality without the aiding justification of the Court's inexperience.

The insignificance of the "considerable experience" theory in *BMI*[136] is further emphasized by the majority's seven-page synopsis of the intensive scrutiny that blanket licensing and ASCAP had received by the Justice Department, Congress and the Ninth Circuit.[137] Although any experience attributable to

127. 441 U.S. 1 (1979).
128. *Id.* at 4-5.
129. *Id.*
130. *Id.* at 4, 6.
131. *Id.* at 8-9, 24.
132. *Id.* at 9-10. The Court cited *Topco*, 405 U.S. at 607-08, to justify its reluctance of imposing the per se rule without "considerable experience." This is *BMI*'s only reference to *Topco* and, as previously mentioned, the "considerable experience" holding is one of only a few holdings for which the Court ever has cited *Topco*. See *supra* note 6.
133. Broadcast Music, Inc. v. Columbia Broadcast System, 441 U.S. 1, 20.
134. *Id.* at 20-23.
135. *Id.* at 24.
136. For a related discussion, see *Streamlining Antitrust*, *supra* note 31, at 6-7.
137. *BMI*, 441 U.S. at 10-16.

the Court from the government's scrutiny is vicarious, the Court's acute comprehension of the government scrutiny raises doubt whether the restraint was as novel as the Court initially maintained.[138]

Whatever the present strength of the "considerable experience" requirement, the notion was probably more convincing in 1963[139] than it is in 1989. Even excluding *Topco*, the last twenty-five years have given the Supreme Court considerable experience with a variety of horizontal restraints. Yet, cases such as *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*[140] indicate that the Supreme Court will accord a restraint the rule of reason even when it shares the characteristics of those restraints which the Court has frequently ruled unreasonable.[141] Moreover, *NCAA* indicates that considerable experience is a collateral requirement—that the Court will invoke the per se rule for reasons to which considerable experience is a mere pendant.[142] Thus, it is doubtful that today's Court, if confronted with the territorial restraint in *Topco*, would have the temerity to invoke an automatic per se rule simply out of its experience with the restraint.

Another development altering the rule of reason-per se rule framework involves the probable retirement of the per se categorization of horizontal restraints introduced in *Northern Pacific* and extended in *Topco*. Merely five years after *Topco, Continental T.V., Inc. v. GTE Sylvania, Inc.*[143] recognized that procompetitive aspects of nonprice vertical restraints may warrant analysis under the rule of reason.[144] *GTE Sylvania* held that a departure from the rule of reason "must be based upon demonstrable economic effect rather than . . . formalistic line drawing."[145] *BMI* later extended a similar admonition against systematically denouncing per se all horizontal restraints, even those involving price fixing:

> To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense . . . But this is not a question simply of determining whether two or more competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overly broad . . . . Thus,

138. *See id.; Streamlining Antitrust, supra* note 31, at 6-7.

139. In 1963, White Motor Co. v. United States, 372 U.S. 253 (1963), first established that "considerable experience" was necessary to invoke the per se rule. *See id.* at 263.

140. 468 U.S. 85 (1984). See *infra* notes 168-95 and accompanying text.

141. *See NCAA*, 468 U.S. at 99-100.

142. *See id.* at 100 n.21.

143. 433 U.S. 36 (1977).

144. *Id.* at 58-59.

145. *Id.* at 58.

> it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing."[146]

BMI's token preservation of the notion of categorical illegality belies the notion's practical demise. Prior to *BMI*, a restraint itemized within *Northern Pacific* had been illegal by virtue of its stigma. If, for example, a restraint involved price fixing between potential competitors, it was accordingly labeled "price fixing" and condemned as a matter of law.[147] A plaintiff challenging the legality of a horizontal restraint merely had to identify it as one of the trade practices blacklisted in *Northern Pacific*.[148]

The blanket licensing in *BMI* clearly constituted price fixing, for it involved the predetermination of license fees between copyright assignors.[149] However, the Court refused to place blanket licensing within the category of illegal behavior called "per se price fixing." Because the Court could not have conscientiously ruled that blanket licensing was not price fixing, it instead held that not all price fixing arrangements are predominately anticompetitive.

One of the reasons the categorization principle had been so binding was that the Court had formerly presumed, without further investigation, that horizontal restraints serve no other purpose than to stifle competition.[150] However, the *BMI* Court refused to be bound to such a restrictive presumption and invoked a threshold analysis for determining whether the per se rule was indeed the wisest method of adjudicating BMI's blanket license.[151] Under this analysis, blanket licensing facially appeared to be procompetitive.[152] Thus, the threshold inquiry in *BMI* rebutted the Court's long-held presumption that all horizontal restraints are inherently anticompetitive.

BMI corresponds with *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[153] a 1985 group boycott case. *Pacific Stationery* ruled that a "plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominately anticompetitive effects."[154] Because not all group boycotts are predominately anticompetitive, the Court held the rule of reason applicable.[155] Although *BMI* and *Pacific Stationery* appear to have preserved the notion of categorization, they disposed of the traditional blacklist-type of categoriza-

146. *BMI*, 441 U.S. at 8-9. The Court concluded, "That will often, but not always, be a simple matter." *Id.* (footnote omitted).

147. *See Topco*, 405 U.S. 596 (1972); *Sealy*, 388 U.S. 350 (1967).

148. *See Topco*, 405 U.S. at 608-09, 611.

149. *See BMI*, 441 U.S. at 5.

150. *See Topco*, 405 U.S. at 608.

151. *BMI*, 441 U.S. at 19-20.

152. *Id.* at 20.

153. 472 U.S. 284 (1985).

154. *Id.* at 298.

155. *Id. Northern Pac. Ry.* had listed the group boycott as one of the restraints presumptively illegal. *See Northern Pac. Ry.*, 356 U.S. at 5.

tion used by prior Supreme Courts. In its place, they established a per se category into which a horizontal restraint would be placed only if, upon a threshold examination, the restraint's probable effects were determined predominately anticompetitive. Thus, *BMI* and *Pacific Stationery* arrested the *Northern Pacific/Topco* concept of categorization and returned the law to the purer balancing approach initially emphasized in *Chicago Board of Trade.*[156]

This emerging re-emphasis on the substance of each restraint rather than on its form seems hindered by a conflicting portion of the recent *Business Electronics* opinion.[157] Justice Scalia, writing for the Court, initially extended the attention to substance to the definition of a trade restraint. He asserted that "[t]he term 'restraint of trade' refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances."[158] Justice Scalia then explained that just as the term "restraint of trade" and the rule of reason evolve with the commercial environment, so too does the notion of per se illegality.[159] This seems to bolster the Court's attempts in *BMI* and *Northern Pacific* to quietly suppress the principle to categorization.

However, these general advancements in *Business Electronics* are at odds with subsequent language in the opinion. The Court ultimately affirmed a Fifth Circuit decision that a vertical restraint is not per se illegal unless it involves an express or implied agreement on price or price levels.[160] The petitioner had contended that, because certain horizontal agreements had been determined illegal per se though they did not involve price-fixing, it was erroneous to require that a vertical agreement involve price-fixing before it too became illegal.[161] Yet, in distinguishing horizontal agreements from vertical ones, the majority, citing *Topco*, revived the principle of categorization by an awkward, unrelated reference to territorial exclusivity:

> This notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania*, . . . as it had to be, since a horizontal agreement to divide territories is *per se* illegal, . . . while *GTE Sylvania* held that a vertical agreement to do so is not.[162]

This irrelevant language seems to approve the per se treatment of any horizontal division of territories. However, the preceding portion of *Business Electronics* extends the Supreme Court's prior departure from the stale concept of routine adjudication according to a restraint's attributed label.

It is difficult to assign much weight to the majority's dictum on horizontal

156. See *supra* note 28 and accompanying text.
157. Business Elec. Corp. v. Sharp Elec. Corp., 108 S. Ct. 1515 (1988).
158. *Id.* at 4391.
159. *Id.*
160. *Id.* at 4392.
161. *Id.* at 4391.
162. *Id.* (citing in part *Topco*, 405 U.S. at 608 (emphasis original).

market divisions for several reasons. First, the Court had not voiced such a broad proscription or cited *Topco* for its authority in years.[163] Furthermore, the Court sprang its surprise assault on horizontal market divisions, without discussion, in a completely unrelated vertical restraint case. Finally, the *Business Electronics* opinion as a whole, in keeping with its recent precedent, clearly abates the idea that certain types of restraints are forever condemned in spite of their utility in an evolving marketplace.

Given the *Business Electronics* opinion in its entirety and precedent such as *BMI* and *Pacific Stationery* which truncate the notion of categorization, it remains probable that the *Northern Pacific/Topco* principle of categorization has been discarded. If this is true, its demise poses two ramifications. First, a plaintiff challenging the legality of a particular horizontal restraint must now initially show that the restraint is likely to have predominately anticompetitive effects. This showing of anticompetitive predominance is a more difficult burden of proof than the previous apparent requirement of merely establishing that the challenged conduct fits within the traditional per se category.[164] Second, because the plaintiff's burden of proof established in *Pacific Stationery* involves a factual matter, a rational determination of the case requires analysis—a threshold analysis similar to, but probably less elaborate[165] than, a rule of reason analysis of the challenged restraint. Still, a threshold inquiry increases the likelihood that a horizontal restraint will be examined under the rule of reason, because it may remove a court's preconception that the restraint is inherently illegal.[166]

The erosion of per se categorization is arguably beneficial to the prudent adjudication of trade restraints. As Chief Justice Burger noted in his *Topco* dissent, the Sherman Act has assigned the courts to determine the validity of restraints, even when those determinations are made difficult by economic complexities.[167] However, the credibility of the shift away from the per se rule toward the rule of reason has also been marred by the Supreme Court's attempts to analyze a restraint that is naked on its face. The case of *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*[168] represents an example of this disservice.

163. See *supra* notes 6-7 and accompanying text.

164. A noted antitrust lawyer has written that in addition to the *Pacific Stationery* burden of proof, a plaintiff must also initially prove that the challenged conduct is within a traditional per se category of offense. Pasahow, *Erosion of the Per Se Rule: Trend in the Law of Horizontal Restraints*, 2 ANTITRUST 22, 25 (Fall 1987).

165. *See Northern Pac. Ry.*, 356 U.S. at 5.

166. A number of federal courts, however, continue to generally subject vertical restraints to the rule of reason and horizontal restraints to the per se rule. *E.g.*, M&H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 978 (1st Cir. 1984); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946 (1979); Smith Int'l Inc. v. Kennametal, Inc., 621 F. Supp. 79, 87-88 (D.C. Ohio 1985); L. C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477, 487 (M.D. N.C. 1985).

167. *Topco*, 405 U.S. at 620, 624 (Burger, C.J., dissenting).

168. 468 U.S. 85 (1984).

The NCAA, as part of its regulation of intercollegiate athletics, adopted a plan to govern telecasts of college football games.[169] The plan, in part, limited the number of games that any one member-college could televise. No college could sell television rights independently. Instead, members were limited to negotiations with only two networks, and prices were prearranged by the NCAA.[170] Several colleges, dissatisfied with these limitations, negotiated a contract with a third network that guaranteed them more television appearances for more money than did the NCAA plan.[171] In response, the NCAA threatened sanctions against any dissenting college that performed the contract. Several of the colleges then brought suit under section 1 of the Sherman Act, challenging the NCAA's restraints.[172]

The NCAA television plan recited that it was designed to reduce the adverse effect of live television upon football game attendance.[173] The NCAA further asserted at trial that its television policies "tended to preserve a competitive balance" among the football programs of its members.[174] The district court disagreed and ruled that the television plan constituted illegal per se price fixing.[175] The Tenth Circuit affirmed this holding.[176] The Supreme Court affirmed the lower courts' condemnation of the plan but refused to apply the per se rule.[177] Instead, the Court adopted a perplexing version of the rule of reason.

NCAA represents an extreme departure from prior decisions, because the majority settled on the rule of reason even after acknowledging that the television plan was a "naked restraint on price and output" and exclusively anticompetitive.[178] Justice Stevens, writing for the majority, explained the basis for its deviation:

> [W]e have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product[179] is to be available at all.[180]

169. *Id.* at 88, 91-92.
170. *Id.* at 92-94.
171. *Id.* at 94-95.
172. *Id.* at 95.
173. *Id.* at 91.
174. *Id.* at 96.
175. *Id.*; Board of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1319 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).
176. *NCAA*, 707 F.2d at 1162.
177. *NCAA*, 468 U.S. at 100, 120.
178. *Id.* at 104-06, 110, 114.
179. The opinion later identified the product as "competition itself—contests between competing institutions." *Id.* at 101.
180. *Id.* at 100-01 (footnotes omitted).

The opinion subsequently noted the plaintiffs' concession that certain essential restraints enhanced competition among member institutions.[181] Such essential restraints included the regulation of team size, physical violence and class attendance.[182] The procompetitive virtues of these restraints included preservation of academic character, expanded opportunities for student athletes and broadened consumer choice.[183]

However, such essential regulations as team size, physical violence and class attendance were not at issue in *NCAA*. The case involved only the television plan which restricted price and output. The plan was not even remotely related to the body of restraints that the Court deemed essential to the product's existence. Yet, Justice Stevens inexplicably reasoned that the necessity and procompetitive character of the legitimate regulations required the Court to consider the NCAA's justifications for an unrelated restraint that was plainly anticompetitive and quite inessential to the existence and integrity of college football.[184] As a result, he applied the rule of reason when he clearly should have applied the per se rule.[185]

The Court's incorrect choice of analysis unsurprisingly resulted in faulty reasoning. In earlier cases, a traditional rule of reason analysis included a "consideration of the facts peculiar to the business in which the restraint (was) applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."[186] The drawback of the traditional analysis was that it usually was "elaborate . . . incredibly complicated and prolonged."[187] However, the *NCAA* Court's analysis entailed no complexities of this sort; if anything, it mocked the traditional analysis. Although the Court's drawn-out statement of facts could be interpreted as a consideration of the NCAA's circumstances and the details of the restraint, the substantive portion of the opinion did not expound on these facts. Instead, the opinion, as one commentator observed, emphasized the television plan's anticompetitive aspects with such force that it constituted an explanation of why the Court should have applied the per se rule.[188]

The NCAA, the petitioner in the case, presented four arguments: (1) its plan could not have a significant anticompetitive effect because the NCAA lacked market power;[189] (2) the plan constituted a cooperative joint venture

181. *Id.* at 103.

182. *Id.* at 101.

183. *Id.* at 102-03. The Court cited *BMI*, 441 U.S. at 18-23, and *GTE Sylvania Inc.*, 433 U.S. at 51-57, and noted that "[a] restraint in a limited aspect of the market may actually enhance marketwide competition." *NCAA*, 468 U.S. at 103.

184. *NCAA*, 468 U.S. at 117.

185. For a parallel discussion, see *Antitrust Developments, supra* note 31, at 1053-61.

186. *Topco*, 405 U.S. at 607 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

187. *Northern Pac. Ry.*, 356 U.S. at 5.

188. *See Antitrust Developments, supra* note 31, at 1055.

189. *NCAA*, 468 U.S. at 109 (Court holding that, as a matter of law, proof of market power is irrelevant in rule of reason cases). *But cf. Pacific Stationery*, 472 U.S. at 298 ("When the

that was procompetitive because it assisted in the marketing of broadcast rights;[190] (3) the plan was necessary to protect live attendance;[191] and (4) the plan helped maintain a competitive balance among college football teams.[192] Justice Stevens refuted each argument by unduly emphasizing the exclusively anticompetitive nature of the television plan in language reminiscent of the most stern per se opinions, such as *Sealy* and *Topco*.[193]

The pretense of *NCAA*'s "analysis," once discovered, should alert one to the principal failure of the opinion. That is, the Court errantly determined that the television plan should be judged under the rule of reason but then condemned the plan under the per se rule. The Court initially rejected a determination of per se illegality, explaining that "per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[194] Yet, on the heels of that explanation followed language that can hardly be said to buttress the Court's selection of the rule of reason:

> Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects. The findings of the District Court indicate that this potential has been realized . . . . [I]t is clear that the NCAA controls utterly destroy free market competition . . . . The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.[195]

In the final analysis, *NCAA* represents a grave deterioration of established antitrust doctrine. An admittedly "naked" restraint was subjected to some unprecedented mutation of conventional analysis purported to be the rule of reason. The Court demoted the traditionally extensive rule of reason analysis to a one-sided survey of anticompetitive tendencies—a song and dance prelude to the per se rule. Consequently, *NCAA* has now put at risk the credibility of a rule of reason analysis in a situation where a traditionally extensive analysis is needed.

NCAA's negative influence is especially blatant in *Federal Trade Commission v. Indiana Federation of Dentists*.[196] In that recent case, the Supreme Court unanimously chose to evaluate, under the rule of reason, an agreement by which competing dentists refused to submit X-rays to insurance companies

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plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition.").

190. *NCAA*, 468 U.S. at 113.

191. *Id.* at 116.

192. *Id.* at 117.

193. *See id.* at 109-20; *Antitrust Developments, supra* note 31, at 1055-60.

194. *NCAA*, 468 U.S. at 103-04 (footnote omitted).

195. *Id.* at 104-07, 106 n.30 (footnotes and citations omitted).

196. 106 S. Ct. 2009 (1986).

in conjunction with claim forms.[197] Dental insurers used the X-rays to help determine whether the dentists were treating insured patients by the least expensive yet adequate means.[198]

The Court "decline[d] to resolve this case by forcing the Federation's policy into the (group) 'boycott' pigeonhole and invoking the *per se* rule."[199] After selecting the rule of reason, however, the opinion smacked of per se rule language:

> While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.[200]
>
> . . . .
>
> A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost-justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher-priced services, than would occur in its absence.[201]

Thus, *Federation of Dentists*, true to *NCAA*, initially announced that the group boycott at issue was to be adjudged under the rule of reason. However, because the boycott required no elaborate industry analysis to determine its manifest anticompetitiveness, the rule of reason analysis became no more than a lengthened per se rule discussion.

Summary of Today's Law on Horizontal Restraints

In summary, several Supreme Court opinions, notably *NCAA*, have quieted *Topco*'s legacy. These opinions have radically altered the judiciary's views on horizontal restraints. Only *Business Electronics*, however, has contributed to the time-honored ancillary restraints doctrine, stating in dicta that a valid restraint may be ancillary to a relationship and need not accompany an express contractual provision. The Court in other opinions has posited only that Judge Taft constructed the ancillary restraints doctrine upon his interpretation of the rule of reason. Yet, the fallacy of this explanation should not weaken the fact that the ancillary restraints doctrine is still a sound model

197. *Id.* at 2014, 2018. The Court selected the rule of reason on three grounds: (1) the Court considered the per se rule limited in group boycott cases to situations where a defendant with market power boycotts suppliers or customers in order to discourage them from dealing with his competitor; (2) the Court preferred the rule of reason in cases involving professional association rules; and (3) the Court believed that the economic impact of the dentists' agreement was not immediately obvious. *See id.* at 2018.

198. *Id.* at 2013.

199. *Id.* at 2018.

200. *Id.* (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

201. *Id.* at 2019.

for trade restraint analysis and is available to any court so enlightened as to perceive its independent relevance.

The rule of reason and the per se rule, on the other hand, seem to change unrelentingly. Perhaps this is because blanket holdings such as *Topco* remain unmodified while the Court speeds down the path of antitrust progression. For whatever reasons of jurisprudence, the rule of reason/per se rule structure is different today for several reasons. First, the role of judicial experience, which may have once largely determined the applicability of the per se rule, is today subordinated to other factors. Notwithstanding *BMI*, the Supreme Court will, according to *NCAA*, examine under the rule of reason a restraint with which the Court has ample experience. Today, it is doubtful that considerable experience with a restraint will be enough to condemn it per se.

Second, unless *Business Electronics*' pointless jab at horizontal territorial divisions is to be taken seriously, today's Supreme Court is unlikely to categorize any restraint per se illegal simply because it is horizontal. Moreover, such a restraint probably will not be denounced merely because it resembles one of the restraints black-listed in *Northern Pacific*. Today's plaintiff has a stricter burden of proof than twenty years ago. The plaintiff must initially show that the restraint is likely to have predominately anticompetitive effects. In accordance with *BMI*, the Court will perform a threshold analysis of the restraint's likely effect on competition to determine whether to apply the per se rule. This facial inquiry could bring under the rule of reason a restraint that, twenty years ago, would not have escaped categorical illegality.

Finally, today's Court will subject even a "naked" restraint to the rule of reason in certain conditions. Defendants, however, should bridle their enthusiasm over the potential of such an analysis of their restraints. As *NCAA* and *Federation of Dentists* show, when the Court inappropriately applies the rule of reason in lieu of the per se rule, the resulting analysis ultimately reverts to a per se rule discussion, and the restraint is condemned.

IV. *Topco Today*

To most accurately predict the Court's probable position on *Topco* today, at least two district court scenarios must be developed: one in which the district court's decision mirrors that of the 1970 *Topco* decision by the Northern District Court of Illinois;[202] and another in which the district court hypothetically holds Topco's territorial limitations per se illegal. The reason for both scenarios is that the Northern District upheld *Topco's* restraints by utilizing the ancillary restraints doctrine.[203] Because the Supreme Court apparently misunderstands the doctrine, the Court's present views might be more practically predicted upon its review of a hypothetical per se ruling. Moreover,

202. *See* United States v. Topco Assoc., Inc., 319 F. Supp. 1031 (N.D. Ill. 1970), *aff'd*, 405 U.S. 596 (1972).

203. See *supra* notes 98-104 and accompanying text.

it would be too speculative to hypothecate a rule of reason opinion by the district court, because, today, the degree of analysis under the rule can widely vary.

The *Topco* Court heavily relied upon its considerable experience with horizontal restraints in ruling all such restraints, including the division of markets at issue, per se illegal.[204] *NCAA* indicates that this experience would not preclude today's Court from analyzing *Topco*'s restriction if the Court felt so compelled. Furthermore, the *BMI* Court's alleged insufficient experience seemed to merely play a supplemental role in the Court's decision to forego the per se rule for a more productive analysis. Therefore, under either district court scenario, it is unlikely that today's Supreme Court would place much emphasis on its experience with territorial restraints in determining how the restraint in *Topco* should be treated.

Subsequent decisions eroded the primary foundation on which *Topco* ruled horizontal restraints per se illegal—categorical illegality. *BMI, NCAA* and *Federation of Dentists* show that not all horizontal restraints are considered, or at least initially declared, per se illegal. Furthermore, *BMI* and *Pacific Stationery* effectively discarded *Northern Pacific*'s blacklist of historically illegal horizontal restraints. Because of this and other developments of law discussed above, the Court has effectively overruled *Topco*.[205] However, attention must be given to *Business Electronics*' untimely resurrection of *Topco*, to the extent that the latter ruled horizontal territorial divisions per se illegal.

Still, because *Topco*'s purposes for rejecting the territorial restraints no longer coincide with settled antitrust theory (and arguably never did), it is presumable that today's Supreme Court would affirm the district court's holding which was based on the ancillary restraints doctrine. The Court would probably maintain that the trial court properly applied the "rule of reason" and then possibly conduct its own analysis, whatever form that might assume.

Turning to the hypothetical per se ruling, one of the ramifications stemming from post-*Topco* antitrust developments is that a plaintiff must now show that the challenged conduct is likely to have predominately anticompetitive effects. In *Topco*, the government complained that intrabrand competition was diminished and argued that the territorial limitations were per se illegal, "even if the ultimate result of these practices may be an overall increase in supermarket competition."[206] The government presented no live witnesses, only documents obtained in discovery and several advertisements from one newspaper in which two different local chains advertised Topco-labeled products, presumably by Topco's permission.[207]

204. See *supra* notes 108-10 and accompanying text.

205. *Cf.* Rothery Storage and Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986). Judge Robert Bork reasoned that the United States Supreme Court in *BMI, NCAA* and *Pacific Stationery* returned to the ancillary restraints doctrine and thus effectively overruled *Topco* and *Sealy*. *Id.* at 226, 229.

206. *Topco*, 319 F. Supp. at 1040.

207. *See id.* at 1036-37.

The Supreme Court today would not likely affirm a per se holding arising from these allegations, even if proven. The burden of proof established in *Pacific Stationery* would not be met. It is not enough that a restraint has anticompetitive attributes; rather, the government must show that those attributes would likely dominate procompetitive ones.[208] Because the government would fail to meet its burden of proof, the Court would overrule the hypothetical trial court's per se decision and would analyze, to whatever extent, Topco's practices under the rule of reason.

The Court at this point would be placed at a juristic crossroads. The government conceded at trial that Topco's private label program increased competition in the supermarket industry.[209] Topco maintained that territorial exclusivity was indispensible to an effective private label program.[210] Yet, Topco never contended that its challenged practices were likely procompetitive.

The pleadings in *Topco* unveil the shortcomings of the traditional rule of reason. The rule works well in the adjudication of a restraint that has procompetitive virtues, such as blanket licensing in *BMI*. However, the rule of reason falls short in the adjudication of a restraint which itself bears no procompetitive virtues but which is necessary to effect the overriding procompetitive virtues of a business practice having a greater legitimate purpose. This shortfall occurs because the rule, when traditionally applied, focuses only on the restraint, which in the second instance is anticompetitive by itself, yet reasonable in the total scheme. A properly conducted analysis under the rule of reason would ultimately find Topco's territorial exclusivity unreasonable, regardless of its necessity to the private label program. If the necessity is real, the rule of reason as traditionally applied would lend injustice to Topco members.

This juncture may only be traversed by asserting how *Topco* should be analyzed today—under the ancillary restraints doctrine. The doctrine would permit an examination of the procompetitive effects of private labeling and the Topco cooperative. It would also permit a critique of the necessity of territorial exclusivity to Topco's program of private labeling and whether territorial exclusivity is ancillary to the program—that is, whether the anticompetitive division of markets is subordinate and collateral to, yet necessary for, the procompetitive private label program. The rule of reason, strictly applied, would result in certain condemnation of Topco's conduct, notwithstanding the Court's latest failures to actually adhere to the rule. However, the ancillary restraints doctrine, strictly applied, could result in a finding either for Topco or for the Justice Department. Either way, the Court would ultimately chart a rational path of antitrust consistency by determining *Topco* on the basis of its facts using a model of analysis that would not, by its inherent shortcomings, prematurely determine the outcome.

208. *See Pacific Stationery*, 472 U.S. at 298.
209. *Topco*, 319 F. Supp. at 1040.
210. *Id.* at 1036, 1040.

Conclusion

The Supreme Court held in *United States v. Topco Associates, Inc.*[211] that the horizontal territorial restraint at issue was illegal because all horizontal restraints are illegal. The Court inaccurately alleged that the district court had applied the rule of reason, and then the Court rejected that application. However, the district court upheld Topco's territorial division by analyzing the practice under the ancillary restraints doctrine. The essential inquiry of the rule of reason is whether the restraint itself enhances competition.[212] The primary focus of the ancillary restraints doctrine, however, is on the legitimate main purpose of an underlying contract or relationship and whether the restraint, anticompetitive as it may be, is ancillary to that main purpose and essential for its fruition. Because the trial court in *Topco* correctly utilized the ancillary restraints doctrine—a sound, balanced model of trade restraint analysis that is rooted in the common law[213] and has found favor with the Supreme Court[214]—the trial court's holding that the restraint was reasonable should have been affirmed.

Furthermore, antitrust developments since *Topco* have eroded its reasons for ruling all horizontal restraints per se illegal. Today's Court probably will not rule a restraint per se illegal simply because the Court has considerable experience with that type of restraint. Nor will the Court brand a restraint illegal per se simply because it is horizontal or is associated with one of the restraints itemized in *Northern Pacific*. In fact, as *NCAA* has shown, even naked restraints can be scrutinized under the rule of reason. Yet, when a naked restraint is improperly subjected to an examination for its procompetitive possibilities, *NCAA* also shows that the examination will constitute a de facto per se condemnation.

For these reasons, today's Supreme Court would probably approve of the district court's analysis in *Topco* and affirm the decision. However, the Court continues to misunderstand the independent significance of the ancillary restraints doctrine, the basis of the district court's opinion. The Court would therefore probably affirm the trial court's decision by finding that it validly applied the "rule of reason." Had the *Topco* district court invoked the per se rule, today's Supreme Court would likely reverse the decision by holding that the government had not met its burden of proving that the restraint was likely to be predominately anticompetitive. However, a credible rule of reason analysis would fare Topco's territorial divisions no better than would a per se ruling, since these restraints were never alleged or found at trial to be procompetitive. Because a rule of reason opinion would denounce *Topco's* restraint without properly analyzing the restraint's necessity to the procompetitive private label program, the ancillary restraints doctrine offers the most consummate and objective analysis by which to accurately adjudge *Topco's* restraint.

211. 405 U.S. 596 (1972).
212. *NCAA*, 468 U.S. at 104.
213. See *supra* note 14 and accompanying text.
214. See *supra* note 22 and accompanying text.