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Dealer-Restraint Litigation Trends in the Sixth Circuit

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DEALER-RESTRAINT LITIGATION TRENDS IN THE SIXTH CIRCUIT

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I. INTRODUCTION

Restrictions upon product distribution, as in those sometimes arising out of the manufacturer-distributor or franchisor-franchisee relations, today occur in an endless variety limited only by the fertile imaginations of manufacturers and sellers. Such restrictions are typically motivated by manufacturers' desires to promote their products—that is, interbrand competition,[1] or by manufacturers' dealers' wishes to limit competition among themselves—that is, intrabrand competition.[2]

A common method of inhibiting this latter "intrabrand" competition is the imposition of restraints[3] upon potential distributors of a certain manufacturer's product by the manufacturer, the distributors, or the two forces combined. This article will focus on the Sixth Circuit's assessment of such arrangements, as plaintiffs have sought to bring this anticompetitive activity within the ambit of the strictures against group boycotts and concerted refusals to deal.[4]

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1. The term "interbrand competition" refers to "the competition among manufacturers of the same generic product." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977). This type of competition is clearly the major motivation underlying the antitrust laws. *Id.*

2. "Intrabrand competition" involves the competition among all distributors, wholesale and retail, of a particular manufacturer's product. *Id.*

3. *See* Pollock, *Antitrust Problems in Distribution*, in 13 ADVANCED ANTITRUST WORKSHOP 243, 251 (1983).

4. *See, e.g.*, White and White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495 (6th Cir. 1983); Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241 (6th Cir. 1982); Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982); Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982); Nurse Midwifery Assocs. v. Hibbett, 549 F. Supp. 1185 (M.D. Tenn. 1982).

The evolution of the theory on group boycotts has taken a somewhat inconsistent path. In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), the Supreme Court found a group boycott despite the fact that only one competitor on the same horizontal level was involved in the agreement. However, the Second Circuit in Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 1104 (1978), distinguished *Klor's* and seemed to require numerosity at the horizontal level. Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979), presented a third view by rejecting the numerosity requirement where price motivation was shown. Finally, yet another twist was supplied by Justice Posner in Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660 (7th Cir. 1982), who required an anticompetitive market effect be shown in order to prevail on a group-boycott theory.

II. Background

Dealer restraints are of two species: horizontal and vertical. Agreements between competitors at the same level of the market structure constitute horizontal restraints.[5] A prevalent example of the horizontal restraint is the concerted refusal to deal or group boycott.[6] A vertical restraint involves a combination of persons at different levels of the market structure—generally manufacturers and distributors—to effectuate a similar purpose.[7] There are four principal types of vertical restrictions: 1) agreements designed to limit a manufacturer's freedom in choosing its customers, 2) agreements designed to limit a distributor's freedom in choosing its customers, 3) resale-price restrictions, and 4) restrictions concerning other products which the customer purchases or sells.[8]

Since *Continental T.V., Inc. v. GTE Sylvania Inc.*,[9] the most recent developments in the evolution of the law of vertical restraints[10] have contributed two fundamental precepts.[11] The first is that nonprice restraints of trade[12] imposed by a manufacturer upon its dealers shall be tested under the rule-of-reason standard.[13] Under this standard,

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5. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 1104 (1978).

6. *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

7. *See Topco*, 405 U.S. at 608; *Oreck*, 579 F.2d at 131.

8. *See* Pollock, *supra* note 3, at 251.

9. 433 U.S. 36 (1977). In *GTE Sylvania*, the Court overruled the test established by *Schwinn*, that nonprice vertical restraints were *per se* illegal. The Court here declared that the validity of nonprice vertical restrictions upon the geographic or marketing activities of dealers must be tested under the rule of reason. *Id.* at 59.

10. Early rules of antitrust law regarding purely vertical restraints on marketing activities via geographic or customer limitations stemmed from White Motor Co. v. United States, 372 U.S. 253 (1963). In *White Motor*, the Supreme Court held that such restrictions should not be judged *per se* illegal, because the Court knew "too little of the actual impact of" these types of restrictions. *Id.* at 261. However, four years later in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), the Court apparently changed its mind. In *Schwinn*, the Court held that vertical restrictions on resale activities of dealers constituted *per se* violations of the Sherman Act.

11. *See generally* Rill, *Non-Price Vertical Restraints since* Sylvania: *Market Conditions and Dual Distribution*, 52 Antitrust L.J. 95 (1983); II E. Kintner, Federal Antitrust Law §§ 10.45–.48 (1980).

12. Nonprice vertical restraints include limitations on a distributor's freedom with respect to territory, customers, or other products. *See* Pollock, *supra* note 3, at 251.

13. *See Topco*, 405 U.S. 596 (1972); *Oreck*, 579 F.2d 126 (2d Cir. 1978). The rule of reason was set out by the Court in Board of Trade v. United States, 246 U.S. 231 (1918). The Court stated:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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.

courts weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[14] Namely, faced with dealer-restraint cases, courts apply the rule of reason to nonprice vertical restraints to determine whether such restraints are reasonably ancillary to the primary and lawful business purpose of promoting interbrand competition between the manufacturer and its competitors.[15]

The second major premise to develop of late is that horizontal restraints between dealers, with or without the assistance of the manufacturer, and resale-price restraints imposed by the manufacturer are *per se* unlawful.[16] If a restraint falls within the penumbra of *per se* illegality, then it is conclusively unlawful[17] and the purpose or effect of the restraint with respect to interbrand competition is irrelevant.[18]

It appears, then, that once a plaintiff has proven the existence of a horizontal arrangement or a price-related vertical arrangement, there remains no issue of liability.[19] Recent cases, however, particularly in the Sixth Circuit, have cast serious doubt upon the continuing applicability of traditional rules of *per se* liability in the dealer-restraint context.[20] Some new opinions have reflected a judicial preference for substance over form: a willingness to examine clearly horizontal arrangements to determine if they are in reality motivated by the manufacturer's legitimate purpose of promoting interbrand competition. While still mantled in *per se* language, these opinions suggest that purpose and effect are important elements of proof in determining the le-

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Id. at 238. *See also* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688, 696 (1978); *GTE Sylvania*, 433 U.S. at 49.

14. *GTE Sylvania*, 433 U.S. at 49 (footnote omitted).

15. *See White Motor*, 372 U.S. at 261–63; Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265–67 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982); United States v. Addyston Pipe & Steel Co., 85 F. 271, 280–82 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

16. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 322 (1982); *Topco*, 405 U.S. 596 (1972) (horizontal-territorial and customer restraints); Albrecht v. Herald Co., 390 U.S. 145 (1968) (vertical price restraints); *Klor's*, 359 U.S. 207 (1959) (group boycott); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951) (horizontal price restraint).

17. *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). In *Northern*, the Court stated that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 5.

18. *See* Rill, *supra* note 11. *See also Maricopa*, 457 U.S. at 357 (horizontal agreements between competitors fixing maximum prices are *per se* illegal); Dr. Miles Medical Co. v. John D. Panic & Sons, 220 U.S. 373, 408–09 (1911) (agreement to fix maximum resale price held unlawful).

19. *See Maricopa*, 457 U.S. at 351.

20. *See, e.g.*, White and White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495 (6th Cir. 1983); Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982); Nurse Midwifery Assocs. v. Hibbett, 549 F. Supp. 1185 (M.D. Tenn. 1982).

gality of even clearly horizontal agreements.

III. LOOKING BEHIND "VERTICAL" RESTRICTIONS

The Supreme Court has consistently held that group boycotts or concerted refusals to deal are unlawful *per se*.[21] Equally clearly, the court has declared that section 1 of the Sherman Act[22] does not prohibit unilateral refusals to deal.[23]

The recent case of *Com-Tel, Inc. v. DuKane Corp.*[24] presents a strong indication of the prevailing attitude of the Court of Appeals for the Sixth Circuit toward the vast gray area between these two deceptively simple edicts. In *Com-Tel*, the plaintiff brought an action against Central Sound Supply Co., a direct competitor engaged in the business of selling, installing, and servicing sound systems in the Louisville area, and against Central Sound's franchisor, DuKane Corp.[25] Com-Tel alleged that DuKane and Central Sound had engaged in a group boycott to prevent Com-Tel from obtaining DuKane's products.[26] Com-Tel, not a franchised DuKane distributor, had won a contract award over Central Sound for a project for the Jefferson County, Kentucky, Board of Education. The project specifications included DuKane products.

Prior to submitting its bid, Com-Tel had endeavored unsuccessfully to obtain the required DuKane products from Central Sound.[27] Upon subsequent searching, Com-Tel received assurance from Eubanks Supply, a DuKane franchisee, that it could supply the necessary products to Com-Tel.[28] After inspecting Com-Tel's bid, Central Sound appealed to DuKane for its aid in barring Com-Tel's receipt of the neces-

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21. St. Paul Fire and Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

22. 15 U.S.C. § 1 (1982). Section 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy . . . declared to be illegal shall be deemed guilty of a felony . . . .

23. *See* United States v. Colgate & Co., 250 U.S. 300 (1919). Under the *Colgate* doctrine,

> [i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

Id. at 307; *see, e.g.*, H.L. Moore Drug Exch. v. Eli Lilly and Co., 662 F.2d 935, 941 (2d Cir. 1981); Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 110–11 (3d Cir. 1980).

24. 669 F.2d 404 (6th Cir. 1982).

25. *Id.* at 406.

26. *Id.* at 408.

27. *Id.* at 406.

28. *Id.*

sary equipment.[29] DuKane reacted by pressuring its distributors not to sell to nonfranchised distributors such as Com-Tel.[30] In its letter to franchisees, DuKane referred to those who sold to nonauthorized dealers as "quislings" and pledged to meticulously monitor its distributors for evidence of such prohibited sales.[31] Fearing nondelivery by Eubanks, Com-Tel solicited DuKane products from Clodi & Clodi, another franchised DuKane distributor.[32] DuKane responded by threatening to terminate Clodi & Clodi's distributorship.[33] DuKane also imposed uniquely burdensome credit terms on the proposed sale to Com-Tel to further deter Clodi & Clodi's delivery.[34] Not surprisingly, Clodi & Clodi cancelled the Com-Tel order.[35] Eubanks also cancelled the order after receiving DuKane's request not to sell outside its territory.[36] As it was unable to obtain the necessary equipment, Com-Tel resigned from the project and assigned its rights under the contract to Central Sound.[37]

The case was tried solely on a *per se* theory.[38] The jury returned a verdict for Com-Tel which the court trebled to $62,000.[39] Although the form of restraint appeared vertical, the Sixth Circuit Court of Appeals affirmed the judgment on a *per se* theory. The court distinguished *GTE Sylvania*[40] on the grounds that the restraint in that case had been unilaterally imposed by the manufacturer to enhance interbrand competition.[41] In contrast, the restraint in *Com-Tel*[42] originated and operated horizontally (at the distributor level), was contrary to the manufacturer's distribution policy, and was not intended to enhance interbrand competition. Its sole purpose was to prevent price competition at the dealer level via independent dealers such as Com-Tel.[43]

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29. *Id.*

30. *Id.* at 407. Under DuKane's usual policy, a DuKane distributor is allowed to sell its products to a distributor or customer outside its territory, but it must pay a 10% commission to the DuKane distributor in whose territory the sale is made. *Id.* at 406.

31. *Id.* at 407.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 408.

38. *Id.*

39. *Id.*

40. 433 U.S. 36 (1977).

41. *Com-Tel*, 669 F.2d at 410.

42. 669 F.2d 404 (6th Cir. 1982).

43. The court rejected the defendants' argument that the *per se* test was not applicable. Defendants cited three reasons for their position: 1) there were too few horizontal participants to constitute a group necessary for a group boycott, 2) the plaintiff lost only one job, and 3) pressure on distributors came from DuKane the manufacturer without an agreement between the dis-

In view of the participation of several franchised distributors in the group boycott, this case would appear to be directly controlled by *United States v. General Motors Corp.*[44] DuKane's action toward Com-Tel was not only at the request of a distributor and solely for the benefit of distributors, but was contrary to DuKane's express policies. In dictum, the court cited *Cernuto, Inc. v. United Cabinet Corp.*,[45] a Third Circuit case which held that a manufacturer's action against a discounting distributor is a primarily horizontal restraint and *per se* illegal.[46] The court's reference to *Cernuto* suggests the applicability of a *per se* rule of liability to *Com-Tel* even absent any participation of other franchised distributors in the group boycott.[47] The court in *Com-Tel* stated:

> Although the restraints were nominally applied vertically, it was really to Central Sound's advantage that the restraints were applied to exclude its horizontal competitor. The thrust of the arrangement was to protect Central Sound from horizontal competition in supplying sound systems in the Louisville area by persuading the manufacturer and common supplier to impose a restraint on Central Sound's co-distributors with respect to resales to Com-Tel. The decision to exclude Com-Tel originated with Central Sound, but it lacked the ability to impose it upon its fellow dealers. Only DuKane had the power to force Clodi and Smith to comply and to police the arrangement; Central Sound used its leverage with its supplier to initiate a course of conduct that could benefit only Central Sound. . . . This arrangement must be viewed as a horizontal attempt to exclude a competitor on the horizontal level and to restrict intrabrand competition without an offsetting benefit to interbrand competition.[48]

This dicta could have a significant impact, for it is arguable that a *per se* violation exists any time a restriction is imposed by a manufacturer at the behest of even one distributor, especially where departure from past practice is shown and promotion of interbrand competition is

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tributors. *Id.* at 409.

44. 384 U.S. 127, 141–48 (1966) (Court inferred conspiracy absent explicit agreement from manufacturer, out of dealers' concerted action in a scheme with the manufacturer, uniform participation in that scheme, and their interdependent and interrelated acts).

45. 595 F.2d 164 (3d Cir. 1979).

46. *Id.* at 166. The court in *Cernuto* focused on the motivating factor behind the boycott. Upon finding such motivation to be price, the court found the boycott illegal *per se* without regard to the number of horizontal participants.

47. *But see* Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982) (questioning the horizontal approach used in *Cernuto* because of the difficulty in assessing a manufacturer's true motive in terminating a distributor); Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168 (8th Cir. 1982) (mere complaints of price-cutting from distributors to manufacturer were insufficient to establish a conspiracy).

48. *Com-Tel*, 669 F.2d at 412 (footnotes omitted).

unclear.[49]

However, *Com-Tel* must be read in contrast to the Sixth Circuit's later opinion in *Davis-Watkins Co. v. Service Merchandise.*[50] In that case, the plaintiff Davis-Watkins, an exclusive distributor of Amana microwave ovens, had initiated a price discrimination suit against SMC, a retailer. The main claim was settled but SMC counterclaimed against Davis-Watkins and Amana Refrigeration, the manufacturer, alleging price stabilization,[51] group boycott, and horizontal market division.[52] The gist of SMC's claim was that it had been unable to obtain Amana microwave ovens from any Amana distributor including Davis-Watkins. This inability was allegedly due to geographic, customer, and location restrictions imposed to maintain wholesale and retail prices and to insulate distributors from price competition initiated by discounting retailers such as SMC.[53]

The evidence indicated that Amana had imposed national resale restrictions hoping to stop dealer infighting and improve its rapidly eroding share of the microwave market. Amana's action was undertaken only subsequently to its receipt of numerous complaints from its distributors concerning dealer price-shopping and transshipping.[54] Another reason for the restrictions was that discount dealers were coupling their low retail prices with refusals to provide postsale service, thereby shifting the burden of providing product services to authorized Amana dealers.[55]

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49. The court in *Com-Tel* held that a victimized competitor need not show that it was excluded from the market to prevail. *Id.* at 414. The Sixth Circuit's approach appears to reject the requirement of market effect advanced by Justice Posner of the Seventh Circuit in Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660 (7th Cir. 1982). However, the court in *Com-Tel* seemingly follows the Supreme Court's approach in *Klor's*, in holding that "numerosity on the same horizontal level as the boycotted party is not required." *Com-Tel*, 669 F.2d at 414.

50. 686 F.2d 1190 (6th Cir. 1982).

51. Price stabilization is a consensual arrangement to determine the price at which goods are to be resold. These agreements are illegal *per se*. *See Maricopa*, 457 U.S. 32 (1982) (agreement among doctors to set maximum fees for patients held unlawful); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (implied agreement among several major oil companies to raise and maintain certain gasoline prices held unlawful *per se*).

52. Horizontal agreements between competitors to divide markets or allocate customers are *per se* unlawful. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

53. *Davis-Watkins*, 686 F.2d at 1193.

54. *Id.* The court defined price-shopping as "where retailers had outlets in more than one territory, retailers began to buy all of their needed product in the territory with the lowest prices." *Id.* at 1193. Transshipping occurs, for instance, "when ovens [are] purchased within one territory, where the price [is] favorable to the purchaser, for resale and/or use within another territory." *Id.* at 1193.

55. *Id.* at 1194. The "free rider" problem arises when authorized dealers offer repair services along with the product as an integrated sales package. Discounters take advantage of these services by selling only the product, at a lower price. The effect of this is to place the burden of

Although the factual context of *Davis-Watkins* seemingly appears to fit within the *Com-Tel* rationale, the court refused to apply a *per se* rule of liability. At trial, the district court agreed with Amana that its nonprice vertical restraints fell within the rule-of-reason standard as set out in *Continental T.V., Inc. v. GTE Sylvania Inc.*[56] The court dismissed all *per se* claims and a jury found for Amana and its distributors on all counts.[57] The Sixth Circuit Court of Appeals affirmed the district court's judgment in all respects.

The court of appeals noted that Amana was simply attempting to promote interbrand competition by providing both a product and services.[58] In contrast, SMC was attempting to compete on the intrabrand level by offering a lower-priced product only.[59] Therefore, the dispositive issue concerned whether the restrictions were vertical restraints originating as unilateral action by Amana or whether they were essentially horizontal restraints originating from the concerted action of distributors or retailers.

In affirming the district court's order granting summary judgment on the *per se* claims, the appeals court agreed that the distributors' complaints and refusals to sell to SMC were insufficient to constitute a group boycott because there was no element of concerted action.[60] The court summarily distinguished *Com-Tel* by stating that the restrictions were there contrary to the manufacturer's market strategy—whereas in *Davis-Watkins*, SMC "failed to demonstrate that Amana's restrictions were inconsistent with its general marketing strategy."[61] Most importantly, the court noted:

> The fact that distributors and dealers complained to Amana concerning SMC's pricing of Amana ovens does not, without more, balloon this case into an illegal boycott. Dealer initiated contact or actively sought change does not establish that a manufacturer did not ultimately impose restrictions based on its independent business judgment. . . . There is no evidence that would establish dealer coercion causing Amana to act otherwise than consistent with its market strategy. SMC has not submitted any evidence that Amana's distributors or dealers acted jointly. Complaints to Amana by its distributors and dealers concerning SMC's low prices and lack of services does not establish a causal rela-

providing product services on the authorized dealers without the corresponding benefit of retail sales. *Id.* at 1195 n.8.

56. 433 U.S. 301 (1977).

57. *Davis-Watkins*, 686 F.2d at 1192.

58. *Id.* at 1195.

59. *Id.*

60. *Id.* at 1199.

61. *Id.* at 1200.

tionship between such complaints and Amana's imposed restrictions.[62]

The Sixth Circuit also affirmed the district court's rule-of-reason instructions to the jury to the effect that a violation of section 1 of the Sherman Act[63] could be found only if the jury concluded that Amana had "'*substantial market power* to unreasonably restrain trade in the relevant market.'"[64] Finally, the court affirmed the district court's refusal to instruct the jury that the restraint violated section 1 if the *purpose* of the restraint was to stabilize prices. The rationale for rejecting this proposed instruction was that application of the rule of reason requires proof of anticompetitive market *effect*, not merely anticompetitive *purpose*.

Com-Tel and *Davis-Watkins* appear consistent in result if not in form. Both cases support the principle that dealer restraints imposed primarily to enhance interbrand competition are tested under the rule of reason. Both lead to the conclusion that if dealer complaints precede manufacturer action but simply echo the manufacturer's own concerns, such complaints do not transform an otherwise vertical restraint into a horizontal conspiracy. An important factor in this regard is whether the manufacturer's action is consistent with its established marketing policies. As noted by the court in *Davis-Watkins*, "[d]ealer initiated contact or actively sought change does not establish that a manufacturer did not ultimately impose restrictions based on its independent business judgment."[65] The courts appear to recognize that it is often a chicken or egg question with respect to the origin of restraints; the opinions suggest that the answer lies in the purpose for the restraint. It appears questionable, however, whether a restraint can be classified *per se* unlawful if the court must first analyze its purported purpose. In theory at least, the practical distinction between the *per se* and rule-of-reason tests is that the *per se* rule is merely evidentiary, while the rule of reason requires substantive analysis.[66]

IV. Traditional Vertical Analysis

In other recent dealer-restraint cases, the Sixth Circuit has applied the traditional rule-of-reason analysis where the facts have not supported a finding of a horizontal arrangement, although a single dealer's complaints have provoked manufacturer action. For example, in *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*,[67] plaintiff, a new-car trans-

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62. *Id.* at 1199 (footnote & citation omitted).
63. 15 U.S.C. § 1 (1982).
64. *Quoted in Davis-Watkins*, 686 F.2d at 1202.
65. *Id.* at 1199.
66. *See* II E. Kintner, *supra* note 11, § 9.20, at 58–59.
67. 691 F.2d 241 (6th Cir. 1982).

port trucker for Chrysler, brought an action under sections 1 and 2 of the Sherman Act[68] alleging that a competing transporter had conspired with Chrysler to drive Dunn & Mavis out of business.[69] The crux of Dunn & Mavis' claim was that Chrysler replaced it with Nu-Car Driveaway as its sole carrier at one of its plants with the knowledge that this action would destroy Dunn & Mavis.[70] The Sixth Circuit affirmed the district court's dismissal of the complaint, explaining: "[N]o invalid collective refusal to deal or group boycott is alleged since the complaint does not assert that a group of competitors on the same level [of the distribution chain] coerced, suggested or agreed that Chrysler terminate plaintiff."[71] The court further noted that an agreement to substitute one dealer for another is presumptively lawful unless the agreement is ancillary to an otherwise unlawful arrangement or attempt to monopolize.[72]

The court acknowledged that a few decisions had held agreements between a manufacturer and a single distributor to be *per se* unlawful;[73] such cases were, however, distinguished as involving "termination of a dealer for cutting prices to consumers."[74] Therefore, the court left open the question of whether an agreement between a manufacturer and a single dealer, providing that the manufacturer will refuse to sell its product to discounting distributors, is alone sufficient to bring the manufacturer's action under the *per se* test.[75]

Also indicative of the Sixth Circuit's view on this question is the recent case of *Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati*.[76] In *Riverfront Coliseum*, the United States District Court for the Southern District of Ohio relied upon *Dunn & Mavis* to deny plaintiff's motion for summary judgment, finding that a horizontal stifling of competition did not create a group boycott.[77] *Riverfront Coliseum* involved a leasing agreement whereby plaintiff, Cincinnati Riverfront

68. 15 U.S.C. §§ 1, 2 (1982).

69. *Dunn & Mavis*, 691 F.2d at 242.

70. *Id.* at 242–43.

71. *Id.* at 243.

72. *Id.* at 244. This principle was stated in Ale Beer Distribs. Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963). In *Ale* the court stated that "[t]he substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade." *Id.* at 286–87. *See also* Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 (5th Cir. 1975); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

73. *See, e.g.*, Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979).

74. *Dunn & Mavis*, 691 F.2d at 245.

75. *Id.*

76. 556 F. Supp. 664 (S.D. Ohio 1983).

77. *Id.* at 667.

Coliseum, covenanted not to schedule events within one and one-half hours following a stadium event without prior consent from the Reds, a lessee baseball team. The coliseum alleged that the Reds' consistent refusal to consent to its proposed scheduling constituted a group boycott between the city of Cincinnati and the Reds.[78]

The district court rejected the coliseum's arguments and refused to extend *Com-Tel* to cover this vertical arrangement.[79] The court found *Dunn & Mavis* factually on point and accordingly found no collective action on a horizontal level.[80]

V. Effects of Com-Tel upon the Characterization of Dealer Restraints

Recent cases in the Sixth Circuit such as *Nurse Midwifery Associates v. Hibbett*[81] and *White and White, Inc. v. American Hospital Supply Corp.*[82] appear consistent with the rationale of *Com-Tel*. In *Hibbett*, a plaintiff-physician and nurse-midwives brought suit against a physician-owned and operated insurance company and one of its directors, also a physician, under section 1 of the Sherman Act.[83] The plaintiffs alleged that the director had sought to prevent the plaintiff-physician from obtaining insurance coverage because of his plan to offer maternity services involving nurse-midwives.[84] The defendants had allegedly denied insurance coverage in an attempt to restrict competition for maternity services in Nashville, Tennessee.[85] The alleged boycott encompassed several subsidiary goals. These included: 1) preventing plaintiffs from operating a family-centered maternity practice and offering midwife services at hospitals, 2) barring nurse-midwives from obtaining hospital privileges at local hospitals, and 3) preventing nurse-midwives from obtaining necessary supervision from qualified obstetricians.[86] In furtherance of these objectives, the physicians allegedly brought pressure to bear by denying insurance coverage for the plaintiff-physician or any physician who engaged in collaborative practice

78. *Id.* at 666.
79. *Id.* at 667.
80. *Id.*
81. 549 F. Supp. 1185 (M.D. Tenn. 1982).
82. 723 F.2d 495 (6th Cir. 1983).
83. 549 F. Supp. at 1185.
84. *Id.* at 1187.
85. Plaintiffs also alleged that such denial of insurance coverage was a boycott not entitled to the insurance-business exemption under the McCarran-Ferguson Act. *Id.* at 1188. The McCarran-Ferguson Act at 15 U.S.C. § 1012(b) states that the Act shall be applied to the business of insurance if not regulated by state law. However, other provisions of this Act provide that nothing in the Act shall prevent the application of the Sherman Act to boycotts. McCarran-Ferguson Act, ch. 20, § 3(b), 59 Stat. 33, 34 (1945).
86. *Hibbett*, 549 F. Supp. at 1187.

with nurse-midwives.[87]

The plaintiffs alleged that malpractice insurance coverage is essential to medical practice. And the effect of defendants' actions was alleged to be particularly widespread, with the defendant-insurer controlling over eighty percent of the medical malpractice insurance market.[88] Further, according to plaintiffs, the defendants' refusal of coverage for the plaintiff's contemplated practice influenced other available insurers as well as other physicians' practices.[89] In addition, the plaintiffs claimed that Dr. Hibbett, the director, sought to further his own economic and professional interests in procuring the cancellation of the plaintiff-physician's policy.[90] Defendants' conspiratorial actions allegedly produced several harmful effects. These included monopolization by obstetricians of maternity services, maintenance of higher costs for normal maternity care, and the prevention of nurse-midwives and supervising physicians from providing maternity care.[91]

Following the *Com-Tel* rationale, the court noted that the fact that pressure was applied vertically rather than directly by the competitors did not preclude finding a group boycott.[92] Nor was the plaintiffs' failure to allege total exclusion from the insurance market fatal to their claim.[93] Therefore, the court concluded that plaintiffs had adequately presented a claim of concerted refusal to deal and denied defendants' motion to dismiss.[94]

Following the same principles of *Com-Tel* and *Hibbett* but reaching a different conclusion is the case of *White and White*.[95] In *White and White*, four regional distributors of medical-surgical supplies brought suit against American Hospital Supply Corporation (AHSC), the nation's largest manufacturer and distributor of hospital supplies.[96]

The primary focus of the suit was a purchasing agreement between AHSC and Voluntary Hospitals of America (VHA), a nonprofit hospital association. Under the arrangement, AHSC agreed to sell a high volume and broad range of health-care products and services to at least twenty-nine VHA hospitals. In return, the hospitals became eligible for volume discounts, price protection, and certain vendor services. The agreement did not expressly require any VHA hospital to purchase

87. *Id.*
88. *Id.*
89. *Id.* at 1187.
90. *Id.* at 1188.
91. *Id.*
92. *Id.* at 1190.
93. *Id.* at 1191.
94. *Id.* at 1192.
95. 723 F.2d 495 (6th Cir. 1983).
96. *Id.* at 498.

AHSC products nor was AHSC bound to sell to VHA hospitals at specified prices.[97]

At the conclusion of an eighty-day bench trial, the district court entered judgment for the plaintiff on the attempt-to-monopolize and restraint-of-trade claims, but rejected the exclusive dealing and boycott claims.[98] The Sixth Circuit reversed.[99]

The appeals court first found that the district court had erred in using a submarket analysis in lieu of—instead of as a subset of—the market-analysis test.[100] Due to this error, the court restated the appropriate product-market test as the reasonable interchangeability standard,[101] and it also clarified the geographic-market test.[102] The court then outlined the submarket criteria[103] which it found could be used in conjunction with both the product-market and geographic-market tests.[104]

After examining the factual conclusions of the trial court, the circuit court determined that the finding of the medical-surgical supplies as a relevant product market was not clearly erroneous.[105] The trial court had, however, fundamentally erred in defining the relevant geographic market,[106] as it relied upon the less rigorous submarket test instead of the " 'area in which the seller operates, and to which the purchaser can practicably turn for supply.' "[107]

The appeals court then examined the claimed section 1 violation of the Sherman Act.[108] Its review indicated that the defendant, AHSC,

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97. *Id.* at 498–99.

98. *Id.*

99. *Id.* at 509.

100. *Id.* at 500.

101. *Id.* The court outlined the reasonable interchangeability standard as a comparative analysis which identified identical products or available substitutes. *Id.* The court also noted that to determine reasonable interchangeability a court must look at the product uses, whether substitutes can perform the same function, and the consumer response to changes in price levels. *Id.* at 500–01.

102. *Id.* at 501.

103. *Id.* The court adopted the criteria used in Brown Shoe Co. v. United States, 370 U.S. 294 (1962). This included recognition by the public of the submarket, peculiar uses and characteristics of the product, unique production facilities, separate customers, distinct prices, sensitivity to price changes, and a separate group of sellers. *Id.* at 325.

104. *White and White*, 723 F.2d at 501. The submarket criteria are additional criteria, allowing more accurate definition of the relevant product market and geographic market. *Id.* at 504.

105. *Id.* at 502. The court also noted that the district court failed to identify sufficient evidence to properly address the issue of cross-elasticity. *Id.* Yet due to its other conclusions, the court did not find it necessary to remand the issue. *Id.*

106. *Id.*

107. *Id.* at 503 (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)). *See also White and White*, 723 F.2d at 501.

108. *White and White*, 723 F.2d at 504–06.

had not imposed an unreasonable restraint of trade in violation of section 1.[109] The court concluded that the leverage analysis applied by the district court was legally incorrect.[110] AHSC was simply an integrated company adjusting the market demand for larger-scale competition.[111] Lastly, the court rejected the section 2 claim of attempt to monopolize.[112] Because of significant changes in the servicing of supplies to the hospital market, the court found untenable the lower court's finding of a "dangerous probability" of monopolization.[113] The court noted that the emergence of new multiregional markets for hospital supplies was due to a reformed approach by consumer hospitals that had come to realize that they "must demand new, more cost-effective, products and services" in order to compete.[114] AHSC had merely acted upon this change in approach and sought to offer supplies in large volume.[115]

The Sixth Circuit stated that it would not, "like King Canute, employ the antitrust laws to hold back the tides that threaten these plaintiffs."[116] Earlier in the opinion, the court elaborated on this theme: "If the rise in health costs and expanding government involvement and regulation are creating a national supply industry, the antitrust laws will not shelter the out-dated local suppliers . . . ."[117] These statements indicate that the court will focus upon the so-called anticompetitive conduct and distinguish "between conduct that injures *competition* and that which may injure *competitors*."[118] The antitrust laws will not, in other words, be applied to restrain or prohibit vigorous competition, but only to protect less efficient competitors.[119]

VI. CONCLUSION

If there is a lesson to the recent dealer-restraint cases in the Sixth Circuit, it is that the plaintiff's bar need be concerned with substance over form. While purely vertical agreements may result in *per se* illegality where intrabrand competition is designed to suffer, similarly even collective efforts by dealers to influence a manufacturer may be upheld

109. *Id.* at 506.

110. *Id.*

111. *Id.* The court stated, "AHSC sought to challenge that competition by superior organization; that is, by acquiring national and all-inclusive product range capability." *Id.*

112. *Id.* at 508–09.

113. *Id.* at 508.

114. *Id.* The court pointed to "expensive medical technologies, a progressively aging population, the strain on public and private payment plans, and competition from franchised for-profit hospital chains . . . ." *Id.*

115. *Id.* at 508–09.

116. *Id.* at 509.

117. *Id.* at 506.

118. *Id.* at 505.

119. *Id.*

as lawful if their central purpose and effect is the promotion of interbrand competition. At least in the Sixth Circuit, any future dealer-restraint litigation will be shaped much more by notions of functional analysis than by black-letter rules of *per se* liability.