SYLVANIA AND ITS AFTERMATH

I. Introduction

In the final days of the 1976-77 Term, the United States Supreme Court handed down a landmark decision, *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[1] overruling the decade old decision of *United States v. Arnold, Schwinn & Co.*[2] *Schwinn* held that post-sale territorial and customer restraints were *per se* illegal.[3] Although the restraint at issue was a location clause[4] in the agreements between the manufacturer, Sylvania, and its retailers,[5] the Court concluded that henceforth post-sale vertical restrictions would be governed by the rule of reason and would not be considered *per se* illegal unless a demonstrable anticompetitive impact on the marketplace were shown.[6]

The purpose of this article is to examine the application by the lower federal courts of the standards adopted in *Sylvania* to vertical restraints, with emphasis on the application of the rule of reason in light of the lack of definitive guidelines from the Supreme Court on how the lower courts should apply the rule of reason. Cases dealing with trade and professional associations and patent licenses will be omitted—the former since they are usually judged by the rule of reason absent a price-fixing purpose;[7] the latter since the application of the *per se* rule has been limited to price restriction clauses with territorial restraints usually being upheld.[8] Likewise, labor, insurance, and regulated industry cases will be omitted since they frequently fall within the ambit of statutory or nonstatutory antitrust exemptions.

II. Background

Before examining the *Sylvania* decision and its progeny, it will be helpful to review the development of the law with regard to vertical restraints prior to *Sylvania*. Since this development has been treated extensively elsewhere,[9] this discussion will be a very general overview.

1. 433 U.S. 36 (1977).
2. 388 U.S. 365 (1967).
3. 433 U.S. at 58.
4. Location clauses prevent a franchisee, dealer, or distributor from distributing or selling the manufacturer's products from locations other than those designated by the manufacturer. *Id.* at 37; Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 4 (1978) [hereinafter cited as Pitofsky]; Comment, *The Legal and Economic Status of Vertical Restrictions*, 23 Vill. L. Rev. 547, 578 (1977-1978) [citing *ABA Antitrust Section, Vertical Restrictions Limiting Intrabrand Competition* 2 (Monograph No. 2, 1977)].
5. 433 U.S. at 37.
6. *Id.* at 59.
7. E. Gellhorn, Antitrust Law and Economics 211 (1976) [hereinafter cited as Gellhorn].
8. *Id.* at 349.
9. *See generally* Baker, *Vertical Restraints in Times of Change: From* White *to* Schwinn *to Where?*, 44 Antitrust L.J. 537 (1975); Bork, *The Rule of Reason*

A. *Resale Price Maintenance*

The seminal case involving the establishment of minimum resale prices by a manufacturer was *Dr. Miles Medical Co. v. John D. Parke & Sons Co.*[10] Dr. Miles, a manufacturer of proprietary medicines, brought an action against a wholesaler who had obtained its medicines at discount prices by inducing others to breach their minimum resale price contracts with Dr. Miles. Since the manufacturer had parted with title, the Court, relying on ancient property law doctrine against restraints on alienation, declared the agreements invalid[11] without any inquiry into the possible business justifications for the restraints.[12]

Subsequently, the Court recognized first, the right of a manufacturer to choose how and with whom he would deal, absent "any purpose to create or maintain a monopoly,"[13] and second, the legality of resale price restraints where the manufacturer maintains all indicia of ownership.[14]

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and the Per Se Concept: Price Fixing and Market Division, 74 YALE L.J. 775 (1965) [hereinafter cited as Bork I]; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 YALE L.J. 373 (1966) [hereinafter cited as Bork II]; Carstensen, *Vertical Restraints and the* Schwinn *Doctrine: Rules for the Creation and Dissipation of Economic Power,* 26 CASE W. RES. L. REV. 771, 777-79 (1976); GELLHORN, *supra* note 7; Handler, *The Twentieth Annual Antitrust Review—1967,* 53 VA. L. REV. 1667 (1967) [hereinafter cited as Handler I]; McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal,* 37 ANTITRUST L.J. 137 (1968) [hereinafter cited as McLaren]; Pollock, *Alternative Distribution Methods After* Schwinn, 63 NW. U. L. REV. 595 (1968) [hereinafter cited as Pollock]; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 COLUM. L. REV. 282 (1975) [hereinafter cited as Posner I]; Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards,* 30 L. & CONTEMP. PROB. 506 (1965) [hereinafter cited as Preston]; Robinson, *Recent Antitrust Developments: 1974,* 75 COLUM. L. REV. 243 (1975) [hereinafter cited as Robinson]; Telser, *Why Should Manufacturers Want Fair Trade?,* 3 J. L. & ECON. 86 (1960).

10. 220 U.S. 373 (1911).

11. *Id.* at 404, 409. The restraint against alienation theory on which the Court grounded its decision is tenuous since the only limitation imposed by the restraint in question was the price at which the products could be resold.

12. *Id.* at 407-08. Some scholars have derived a *per se* rule for all vertical resale price arrangements from this case. *See, e.g.,* M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION 568 (1975). The Court, however, equated this arrangement to the formation of a cartel by the dealers. 220 U.S. at 407-08.

13. United States v. Colgate & Co., 250 U.S. 300, 307 (1919). This case involved a refusal to deal with a discount dealer who refused to comply with Colgate's designated resale prices. The pivotal factor was the absence of an agreement between Colgate and its other dealers. *Id.* at 306; *compare with* Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373 (1911). *But see* United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Albrecht v. Herald Co., 390 U.S. 145 (1968).

14. United States v. General Electric Co., 272 U.S. 476 (1926). In Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373 (1911), the contracts were alleged to be contracts of agency; however, the Court found provisions in the contracts which operated as contracts of sale. 220 U.S. at 395-99. It should be noted, however, that the anticompetitive effect on intrabrand competition is the same regardless of the actual or alleged form of the contract.

General Electric Co. eventually abandoned its agency system which involved the sale of its light bulbs. The price to the consumer was promptly reduced by several supermarket chains as a result. *GE Ends Court Plea, and Agency System of Light Bulb Sales,* Wall St. J., Apr. 4, 1974, at 22, col. 4.

The *per se* rule against vertical price fixing was extended from minimum to maximum resale price fixing in 1968.[15]

B. *Non-Price Vertical Restraints*

Prior to 1963, there was a dearth of cases involving non-price vertical restraints.[16] In part, this may have been due to the fact that the Justice Department did not decide to concern itself with vertical territorial and customer restrictions until 1948.[17] Moreover, the initial actions challenging such restrictions were settled by consent[18] until *United States v. White Motor Co.*[19] Since White Motor had raised economic justifications for its restrictions,[20] the Supreme Court held that summary judgment had been improperly granted because enough was not known about the competitive impact of these arrangements to warrant them being decreed *per se* illegal. The case was remanded for trial.[21]

Four years later, in *United States v. Arnold, Schwinn & Co.*,[22] the Court declared all post-sale vertical restraints *per se* illegal. Schwinn, a large manufacturer of bicycles, marketed its bicycles three ways: (1) sales to distributors, (2) sales to retailers through agency and consignment

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But see Simpson v. Union Oil Co., 377 U.S. 13 (1964) (invalidating Union Oil's price-fixing consignment agreement with service stations).

15. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968) (dealer stopped adhering to the newspaper's suggested retail price and his exclusive newspaper route was terminated). The issue of justification for price controls emerged in this case, *i.e.*, the exclusive territory gave the dealer a significant amount of market power within its assigned territory, and the exclusive territorial arrangement was an effective way to distribute the papers. *Id.* at 153.

16. United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944) (upheld territorial restrictions, but customer restrictions ancillary to the price-fixing scheme were condemned).

17. [1979] TRADE REG. REP. (CCH) ¶ 50,370.

18. *Id.; see* United States v. Rudolph Wurtilizer Co., [1958] TRADE CASES (CCH) ¶ 68,011 (W.D.N.Y.); United States v. J. P. Seeburg Corp., [1957] TRADE CASES (CCH) ¶ 68,613 (N.D. Ill.); United States v. Philco Corp., [1956] TRADE CASES (CCH) ¶ 68,409 (E.D. Pa.); United States v. Austenal Laboratories, Inc., [1950-1951] TRADE CASES (CCH) ¶ 62,880 (S.D.N.Y.); United States v. Bendix Aviation Corp., [1948-1949] TRADE CASES (CCH) ¶ 62,349 (S.D.N.Y.); United States v. Libbey-Owens-Ford Glass Co., [1948-1949] TRADE CASES (CCH) ¶ 62,323 (N.D. Ohio).

19. 372 U.S. 253 (1963). White Motor, a truck manufacturer, prohibited its distributors from selling to government and other large accounts, and required its distributors to give these accounts the same discount on parts accessories as White Motor gave. *Id.* at 256, 260.

20. *Id.* at 257. White Motor contended these restraints were necessary if it was to remain competitive with other truck manufacturers for large accounts since competition for their business was especially severe.

21. *Id.* at 261, 263-64. Although the court did not state that the rule of reason was the standard which had to be applied to these vertical restraints, it noted that they could fall within the rule of reason. *Id.* at 263. Nevertheless, the lower courts apparently interpreted the decision as adopting the rule of reason. *See, e.g.*, Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963).

Subsequently, White Motor settled the case primarily on the terms sought by the government, [1964] TRADE CASES (CCH) ¶ 71,195 (N.D. Ohio).

22. 388 U.S. 365 (1967).

contracts with distributors, and (3) sales to retailers with Schwinn paying the sales agent's commissions (the "Schwinn Plan").[23] The Court held that where title to the goods had passed, any restraints on their resale were *per se* illegal, leaving only agency and consignment arrangements to be judged by the rule of reason.[24] The opinion produced a flood of critical comment[25] and gave some judges an opportunity to devise ingenious rationales to circumvent its application.[26]

III. *Sylvania*

A. *The Factual and Procedural Setting*

Prior to 1962, Sylvania, a television manufacturer, sold its televisions to independent and company-owned distributors for resale to retailers.[27] In view of a decline in its market share from one percent to two percent of national television sales, Sylvania restructured its distribution system.[28] Under its new plan, wholesalers were phased out, and sales were made directly to a select group of franchised retailers.[29] The franchisees were free to sell to any customers as long as the sales were made from the location specifically approved by Sylvania.[30] Under this new marketing strategy, Sylvania's market share rose to approximately five percent by 1965.[31]

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23. *Id.* at 370. The distributors were not allowed to sell outside their assigned territory and neither the distributors nor franchised dealers were allowed to sell to unfranchised dealers. *Id.* at 370-71. By the time the Court heard the case, 75% of Schwinn's sales were made under the Schwinn Plan. *Id.* at 370 n.3. While this market plan was in effect, Schwinn's market share fell from 22.5% to 12.8%, but its dollar sales volume increased. *Id.* at 368.

24. *Id.* at 380. The basis for the holding was that the restraints would violate the common-law property rule against restraints on alienation. *Id. See* 372 U.S. at 264-65 (Brennan, J., concurring).

The government had urged the adoption of a standard of presumptive illegality rather than the *per se* rule. 388 U.S. at 374 n.5. The Court declined to consider this new standard for antitrust cases since it was not advanced at the trial court and would have shifted the burden of proof to the defendant. *Id.*

If the Court adopted the rule of reason as the standard for judging vertical restraints in *White Motor,* then *Schwinn* appears to have overruled *White Motor sub silentio.*

25. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 48 n.13 (1977), for a list of articles and comments.

26. *See* note 49 *infra.*

27. 433 U.S. at 38.

28. *Id.* The dominant firm at that time, RCA, had 60% to 70% of the market. *Id.* at 38 n.1.

29. *Id.* at 38.

30. *Id.* at 38, 61 (White, J., concurring). Sylvania imposed no restrictions on interbrand competition. *Id.* at 38 n.3.

31. *Id.* at 38. Both the Court and Sylvania seem to attribute their growth in market share to the new distribution system. It is likely, however, that this gain was partially due to a growth in the sales of color sets that exceeded early predictions. Although color television became available in the mid-1950s, sales did not begin to soar until 1961. G. CHESTER, G. GARRISON & E. WILLIS, TELEVISION AND RADIO 49 (3rd ed. 1963). In 1963 it was estimated that no more than 5% of the homes would have color television by 1965. *Id.* By the beginning of 1965, it was

A series of disagreements arose between Sylvania and Continental, one of Sylvania's most successful dealers in San Francisco, over Sylvania's establishment of an additional San Francisco retailer and over its denial of permission for Continental to open a second store in Sacramento, California.[32] Despite the denial, Continental opened a new outlet in Sacramento and shipped some Sylvania televisions from its warehouse to the new location.[33] From this point on, the relationship rapidly deteriorated, culminating in Sylvania's termination of Continental's franchise and a suit filed by Sylvania's finance company[34] for recovery of money owed and for the unsold merchandise held by Continental.[35] Continental cross-claimed against Sylvania and its finance company, including a claim that the vertical location restriction violated section 1 of the Sherman Act.[36]

The trial court judge,[37] relying on *Schwinn*,[38] instructed the jury that Sylvania's location restrictions were *per se* illegal regardless of their reasonableness. The jury found in favor of Continental.[39]

The Ninth Circuit, sitting *en banc*, reversed.[40] Judge Ely, writing for the majority, distinguished *Schwinn* on the difference in market power between Schwinn and Sylvania at the time of trial and on the basis that the competitive impact of territorial and customer restrictions is greater

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estimated that 10% of the homes would have color sets by the end of the year. *Color TV Set Makers Turn Sales Volume Up*, Business Week, Jan. 23, 1965, at 144. The rapid increase in sales in general was attributed to the removal of certain sales growth barriers; namely, lack of variety of product and programs broadcast in color and misgivings as to the reliability of color sets. *Id.* at 145.

32. 433 U.S. at 39.

33. *Id.*

34. The finance company, John P. Maguire & Co., Inc., was responsible for the credit arrangements between Sylvania and its franchisees. *Id.* at 40.

35. *Id.* There were actually four corporate defendants: Continental T.V., Inc.; A & G Sales; Sylpac, Inc.; and S.A.M. Industries, Inc. The same individual owned a substantial part of each entity; and they all conducted business under the tradename Continental T.V. *Id.* at 39 n.5.

36. *Id.* at 40; 15 U.S.C. §1 (1974). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

37. The trial court judge was the late Tom C. Clark, a retired United States Supreme Court Justice, who was sitting by designation. GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 980 (9th Cir. 1976) (*en banc*). He had dissented in *White Motor* stating his dislike for vertical territorial and customer restraints since in effect they were the same as horizontal market divisions. 372 U.S. at 279-80 (Clark, J., dissenting).

38. 433 U.S. at 40-41. By the time this case reached the Supreme Court, Sylvania had conceded that its location restraints involved understandings with its dealers. 433 U.S. at 40 n.8; *compare with* United States v. Colgate & Co., 250 U.S. 300 (1919).

39. 433 U.S. at 41.

40. GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980 (9th Cir. 1976). Four Judges dissented, in whole or in part, namely Judges Browning, Duniway, Kilkenny, and Wright. Originally, a panel of the Ninth Circuit affirmed the district court over Judge Ely's dissent. GTE Sylvania, Inc. v. Continental T.V., Inc., [1974] TRADE CASES (CCH) ¶75,072 (9th Cir. 1974). This decision was withdrawn since reconsideration of the case *en banc* had been granted. GTE Sylvania, Inc. v. Continental T.V., Inc., [1974] TRADE CASES (CCH) ¶75,435 (9th Cir. 1974).

than that of location clauses.[41] The case was remanded, but Continental petitioned for *certiorari*,[42] which was granted.[43]

B. *The Supreme Court Decision*

A new antitrust majority[44] of the Supreme Court affirmed in a six to two decision, with five members of the majority voting to overrule *Schwinn*.[45]

Justice Powell, writing for the majority, observed that title had passed to Continental in the instant case; therefore, *Schwinn* controlled unless it could be distintinguished.[46] Moreover, *Schwinn* had included location restraints within its broad ruling.[47] However, in view of the plethora of predominantly critical comment following *Schwinn*,[48] and the grounds used

41. 537 F.2d at 997. Judge Ely noted the approval of location clauses in two post-*Schwinn* decisions: Kaiser v. General Motors Corp., 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3rd Cir. 1976); Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975); and two pre-*Schwinn* decisions: United States v. General Motors Corp., 384 U.S. 127 (1966); Boro Hall Corp. v. General Motors Corp., 124 F.2d 882 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943).

In a case dealing with horizontally-imposed location clauses, the clauses ultimately were approved. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972). In *Topco*, a group of small regional grocery chains formed a buying association (Topco) to market the private label Topco brand goods in competition with private label goods marketed by national food chains. Each participating grocery chain was assigned a territory in which it could sell Topco brands. Although obviously a vertical restraint, it was characterized as horizontal. The Supreme Court deemed the restraint *per se* illegal relying in part on *Schwinn*. *Id.* at 607-08. Subsequently, the trial court decree, which was affirmed by the Supreme Court, allowed Topco to continue allocating territories to its participating members. *See* Carstensen, *Annual Survey of Antitrust Developments: 1976-1977*, 35 WASH. & LEE L. REV. 1, 15 n.82 (1978) [hereinafter cited as Carstensen] (citing United States v. Topco Assocs., Inc., 414 U.S. 801 (1973), *aff'd per curiam*, [1973] TRADE CASES (CCH) ¶ 74,391 (N.D. Ill. 1973)).

42. 433 U.S. at 42.

43. 429 U.S. 893 (1976).

44. Due to changes in Supreme Court personnel, only Justices Brennan and Stewart participated in both *Schwinn* and *Sylvania*. Justice Brennan voted in favor of the application of the *per se* standard to nonprice post-sale vertical restraints, *i.e.*, with the majority, in *Schwinn* and dissented in *Sylvania*. Justice Stewart voted with the majority in *Sylvania* but concurred with the result reached in *Schwinn*.

45. Justice Powell wrote the opinion for the court in which Chief Justice Burger and Justices Blackmun, Stevens, and Stewart joined. Justice White filed a separate concurring opinion. Justice Marshall joined the separate dissenting opinion filed by Justice Brennan. Justice Rehnquist took no part in the decision.

46. 433 U.S. at 45-46.

47. *Schwinn* held that any limitation on the distributors or retailers to sell products in which they had title as to where and to whom they could sell was *per se* illegal. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378 (1967). The Court found such restraints "so obviously destructive of competition that their mere existence is enough." *Id.* at 379; United States v. Arnold, Schwinn & Co., 237 F. Supp. 323 (N.D. Ill. 1965). However, ultimately the district court decree allowed Schwinn to continue to use location and primary responsibility clauses. 291 F. Supp. at 565-66 (N.D. Ill. 1968); *see* 433 U.S. at 62 (White, J., concurring).

48. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-48 n.13 (1977). Although the commentators found a number of difficulties with the *Schwinn* decision, its principal fault was the adoption of the *per se* rule for sales and the rule of reason for consignments when the effect on competition could be the same regardless of the form of the underlying arrangement.

by some federal courts to limit or distinguish *Schwinn* indicating judicial displeasure with the holding,[49] a plurality of the Court was convinced that the law in this area needed clarification.[50]

The prevailing standard of analysis for actions under section 1 of the Sherman Act,[51] Justice Powell noted, was the rule of reason.[52] The *per se* rule was applied only when the practice or arrangement was manifestly or substantially anticompetitive.[53] Hence, Justice Powell seems to be saying that the rule of reason is the rule and the *per se* rule the exception regardless of the form of the nonprice vertical restraint.[54]

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49. *Id.* at 48 n.14 (citing Tripoli Co. v. Wella Corp., 425 F.2d 932, 936-38 (3rd Cir. 1970) (*en banc*), *cert. denied*, 400 U.S. 831 (1970)) (cosmetic manufacturer showed restriction of resale to professional end-users to be reasonable since they were to protect the consumer from possible injury and the manufacturer from products liability claims); Janel Sales Corp. v. Lanvin Perfumes, Inc., 396 F.2d 398, 406 (2d Cir. 1968), *cert. denied*, 393 U.S. 938 (1968) (lack of firm and resolute enforcement of restrictions by manufacturer); Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1379-80 (1971) (when purchaser can avoid restraint by opting to buy product at a higher price, the *per se* rule does not apply); Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir. 1973), *cert. denied*, 411 U.S. 937 (1973) (apparent territorial restraint construed to be a primary responsibility clause)). For additional cases which have distinguished or limited *Schwinn*, *see* Robinson, *supra* note 9, at 273 n.191, 193; Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 GEO. WASH. L. REV. 123, 124 n.5 (1971).

50. 433 U.S. at 47.

51. 15 U.S.C. § 1 (1974).

52. 433 U.S. at 49. *Cf.* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14 (1977) [hereinafter cited as Posner II] (suggests the rule of reason is rarely used as the determinative legal standard).

The rule of reason was created by Chief Justice White in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Under the rule of reason the courts examine the facts and circumstances of each case to determine the parties' purpose, market power, and the effect of the arrangement or practice on competition.

The classic statement of the rule of reason was fashioned by Justice Brandeis in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is 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 facts and to predict consequences.

53. 433 U.S. at 49-50.

54. The *per se* rule Justice Powell is referring to is the standard of Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958), *i.e.*, only agreements or practices which have a "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." As the Court pointed out in *Broadcasting Music, Inc. v. Columbia Broadcasting System, Inc.*, the *per se* rule is not to be used until the courts have had experience with the restraint at issue, that is, until they have examined it under the analysis required by the rule of reason. 441 U.S. 1, 19 n.33 (1979). *Cf.* Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958) (certain agreements and practices are illegal on their face obviating the necessity for any inquiry).

The Court then examined whether the *per se* rule in *Schwinn* met the traditional standard of *per se* illegality.[55] Noting that *Schwinn* had rested its holding entirely on whether title to the goods had passed,[56] Justice Powell faulted the *Schwinn* court for not examining the possible procompetitive effects of the vertical restraints in sale transactions on intrabrand competition,[57] while at the same time finding that the application of the *per se* rule to vertical restraints in non-sale transactions would have a crippling effect on the ability of the small businessman to compete with larger companies.[58] On the other hand, the *Sylvania* Court found strong support for the realization of business efficiencies from nonprice vertical restraints regardless of form.[59] Hence, this Court found neither the form of the vertical restraint nor whether title had passed to be distinctions with a sufficient difference to warrant application of the *per se* rule.[60]

Having reached this conclusion, the inevitable result was to overrule *Schwinn*[61] and to return to the rule of reason standard for judging vertical restraints.[62] The possibility that a particular restraint might warrant *per se* treatment was not completely foreclosed, but future "departure from the rule-of-reason standard would have to be based upon demonstrable economic effect rather than . . . formalistic line drawing."[63]

Justice White in his concurrence agreed that Sylvania's location clauses were not *per se* illegal and should be judged by the rule of

55. 433 U.S. at 50. For the classic standard of *per se* illegality, *see* Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958). Justice Powell noted that the *Schwinn* majority decision did not even cite *Northern Pacific*. *Id.* at 51.

56. *Id.* at 52.

57. *Id.* Justice Powell seems to assume the *Schwinn* court had some preconceived notion that vertical restraints on sale transactions either eliminated or had the potential to eliminate intrabrand competition. *Id.*

58. *Id.* at 53 n.22. In actual practice, it is doubtful that small businessmen could afford to market on a consignment basis. This would not only tie up their capital, but would leave them bearing all the risks involved in the sales transactions.

59. *Id.* at 54-56. For example, new market entrants can use them to induce competent and aggressive retailers to invest capital and labor in the promotion of new products, and established manufacturers can use them to induce retailers to promote or provide service and repair facilities. *Id.* at 55 (citing Preston, *supra* note 9, at 511). In addition, the Court noted that such restraints would provide a means of controlling the way products are sold and serviced for those manufacturers having a legitimate concern in the safety and quality of their products. 433 U.S. at 55 n.23; *see* United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (upheld exception to the *per se* rule for new market entrants with a new product); 433 U.S. at 66 (White, J., concurring).

It should be noted that the Court gave recognition to the "free rider" effect on services in the purely competitive situation. *Id.* at 55 (citing Posner I, *supra* note 9, at 285 n.13).

Justice Powell also pointed out that the manufacturer's interest in efficient distribution predisposes him to control intrabrand competition consistent with that interest. *Id.* at 56 (citing Bork II, *supra* note 9, at 403; Posner I, *supra* note 9, at 287-88).

60. 433 U.S. at 54, 57.

61. *Id.* at 58.

62. *Id.* at 59.

63. *Id.* at 58-59; *see* note 49 *supra*.

reason.[64] But he would not have overruled *Schwinn*.[65] Instead he would have distinguished *Schwinn* on the basis that (1) location clauses have less anticompetitive effect than territorial and customer restraints,[66] and (2) Sylvania was a faltering company, whereas Schwinn was not.[67]

However, the failure of the majority to distinguish *Schwinn* was not its major error in Justice White's opinion; rather it was the majority's failure to recognize the businessman's freedom to compete, including the freedom to market goods which he owns as he pleases.[68] In essence, he would have affirmed both the circuit court's holding and its underlying rationale.

Perhaps the most interesting comment in Justice White's concurrence is his reservation concerning the use of substantial economic impact as the

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64. 433 U.S. at 59 (White, J., concurring).

65. *Id.*

66. *Id.* at 59-62, 65 (White, J., concurring). Justice White noted that scholarly opinion readily distinguished location clauses from vertical territorial and customer restrictions and the Third and Tenth Circuits deemed them exempt from *Schwinn*'s *per se* rule. 433 U.S. at 63 (White, J., concurring) (citing Robinson, *supra* note 9, at 278; McLaren, *supra* note 9, at 144-45; Pollock, *supra* note 9, at 603; Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975); Kaiser v. General Motors Corp., 530 F.2d 964 (3rd Cir. 1976)). *See, e.g.*, note 41 *supra*.

67. 433 U.S. at 59, 63-66 (White, J., concurring). The Court in *White Motor* considered the question whether a company was a new market entrant or a failing company a relevant factor in the determination of reasonableness of the restraint. United States v. White Motor Co., 372 U.S. 253, 263 (1963). Justice White went on to note other areas of the antitrust law where the Court had carved out exceptions to the *per se* rule on the basis of *de minimus* market power. 433 U.S. at 66 (White, J., concurring).

68. 433 U.S. at 66-67 (White, J., concurring); *see* GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 1018-22 (9th Cir. 1976) (Browning, J., dissenting); Albrecht v. Herald Co., 390 U.S. 145, 152 (1968); United States v. Topco Assocs., 405 U.S. 596, 610 (1972). The decisions in *Albrecht* and *Topco* were grounded on the freedom of the businessman to compete, including the freedom from being foreclosed from an economic area, which freedom the Sherman Act was designed to protect. The freedom of the businessman to compete had been raised by Dr. Miles as justification for its restraint, but the Court rejected this reverse use of the same argument. Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373, 404 (1911). As Handler so aptly points out, if this became "a general principle of antitrust . . . the rule of reason would necessarily disappear." Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court—1977*, 77 COLUM. L. REV. 979, 988 (1977) [hereinafter cited as Handler II].

Although Handler does not state specifically, he seems to imply by his discussions of *Topco* and *Albrecht* that *Sylvania* has seriously undermined the precedential value of the decisions. *Id.* at 987; *accord*, Pitofsky, *supra* note 4, at 16 n.59. Logically his analysis seems correct. It would be even more compelling as to *Albrecht* if *Sylvania* was extended to vertical restraints with ancillary maximum price restraints. *See* Newberry v. Washington Post Co., 438 F. Supp. 470, 476-80 (D.D.C. 1977). The court held that merely suggesting maximum resale price without an express or implied agreement or overt coercion does not invoke the *per se* rule. *Id.* at 478-79. If *Sylvania*'s analysis undermines *Albrecht*, it follows that *Dr. Miles* rests on the same quicksand. *See* Pitofsky, *supra* note 4, at 15; Posner II, *supra* note 52, at 9.

Notwithstanding the marked similarities between the restraints in *Sylvania* and the restraints in *Topco*, the latter were deemed horizontal technically, and this decision was reaffirmed in *Sylvania*. 405 U.S. at 608; 433 U.S. at 57 n.27. Indeed, if *Sylvania*'s analysis undermines *Topco*, it follows that it also undermines the decision in United States v. Sealy, Inc., 388 U.S. 350 (1967); *see* 405 U.S. at 609. *But see* Ohio-Sealy Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

test for *per se* illegality.[69] In light of the fact that scholars who advocate judging restraints by their effect on the marketplace have shown that the economic arguments in favor of vertical nonprice restraints usually apply equally well to vertical price restraints,[70] Justice White apparently foresees a strong potential for the extension of the substantial economic impact standard adopted in *Sylvania* to cases involving vertical price restraints.

Justice Brennan dissented, simply stating that he would not overrule *Schwinn*.[71] Justice Marshall joined Justice Brennan's brief dissenting opinion.[72]

IV. THE AFTERMATH

A. *First Circuit*[73]

Justice White's misgivings with regard to the extension of the demonstrable economic impact standard to vertical price restraints have materialized, but not exactly as predicted. Actually, the rule of reason has been extended to vertical price restraints.

In *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*,[74] the court held that vertical territorial restrictions enforced by minimum resale price maintenance restrictions outside the territory should be judged by the rule of reason.

Wild, an importer and distributor of scientific instruments manufactured by its Swiss parent, restricted the sale of the instruments outside the assigned territory of Rhode Island at less than list price by its dealer, Eastern.[75] No price restrictions were imposed within the territory.[76]

Although Eastern argued that *Sylvania* applied only to nonprice vertical restrictions, the court found that the price restrictions in this case

69. 433 U.S. at 69 (White, J., concurring); *see* 537 F.2d at 1019 (Browning, J., concurring).

70. 433 U.S. at 69 (White, J., concurring). Justice Powell responded to Justice White's qualms stating that this decision dealt *only* with *nonprice* vertical restraints and that there are significant differences between price and nonprice vertical restraints justifying different treatment. *Id.* at 51 n.18 (emphasis added).

A minor point of interest is that Posner is one of the scholars Justice White cited as advocating use of the economic approach to judge restraints. *Id.* at 69 n.10 (White, J., concurring). Posner briefed and argued *Schwinn* for the government. Since then (by his own acknowledgement) his views on the proper approach to distributional restraints have taken "a 180-degree turn." Posner II, *supra* note 52, at 21.

71. 433 U.S. at 71 (Brennan, J., dissenting).

72. *Id.*

73. District court cases within the circuit will be included where relevant.

74. 572 F.2d 883, 885-86 (1st Cir. 1978). *Compare with* Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373 (1911).

75. *Id.* at 884.

76. *Id.* *See* Haden Co. v. Johns-Manville Sales Corp., 459 F. Supp. 1250, 1258 (N.D. Tex. 1978) (dicta indicating vertical restraints requiring sales to be made at suggested resale prices would be judged under the rule of reason); Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977).

were resale price maintenance agreements in form only.[77] The court analyzed the competitive impact of these restrictions and found them to be less anticompetitive than pure territorial restrictions.[78] As the court observed, if the products were competitive outside the territory at less than list price, the restrictions have the same effect as pure territorial restraints.[79] On the other hand, if the products were competitive at list prices or at prices higher than list price, Eastern was free to sell outside its assigned territory.[80] Therefore, the court concluded, there was no reason why restrictions similar to pure territorial restraints, but having less anticompetitive effect, should not be judged by the rule of reason.[81]

Eastern petitioned for *certiorari,* but the Supreme Court declined to review the case.[82] Justice White, joined by Justice Blackmun, dissented from the denial of *certiorari.*[83]

B. *Second Circuit*

In a dealership termination case, Whirlpool, a manufacturer and retailer of vacuum cleaners, terminated its exclusive dealership with Oreck by failing to renew the contract.[84] There was conflicting evidence [85] as to whether Whirlpool refused to renew the dealership because the

77. 572 F.2d at 885. Actually this restriction is akin to profit pass-over clauses without the obligation to turn over some of the profit on sales outside the territory to the distributor assigned to the territory where the sale was made. The effect would be the same in most cases and less anticompetitive in others depending on the amount of profit required to be passed over. Even prior to *Sylvania,* profit pass-over clauses were judged by the rule of reason and generally upheld. *See, e.g.,* Superior Bedding Co. v. Serta Assocs., Inc., 353 F. Supp. 1143 (N.D. Ill. 1972).

78. 572 F.2d at 885-86.

79. *Id.*

80. *Id.* at 886.

81. *Id.* Apparently ignoring footnote 18 in *Sylvania,* the court looked to the essence of the opinion, and interpreted it as saying: ignore the alleged form of the restraint and analyze it functionally under the rule of reason, unless the economic effect is manifestly anticompetitive. *Id.* at 885; *see* 433 U.S. at 51 n.18. It seems logical to extend the rule of reason to vertical resale price restraints since the effect on intrabrand competition can be the same as or similar to the effect of non-price vertical territorial and customer restraints on intrabrand competition. In this case even though the price restraint is ancillary to the territorial restraint, the logic is compelling.

82. 439 U.S. 833 (1978).

83. *Id.* at 1021. Justice Powell may well have voted with Justices White and Blackmun to grant *certiorari.* However, he did not lend further support to his position in *Sylvania* that the decision in *Sylvania* applied only to nonprice vertical restraints by joining Justice White's dissent from the denial of *certiorari* in this case. *See* 433 U.S. at 51 n.18. Does this mean that he has modified his views? Or that factually this was not the proper case for reaffirmation of the holding in *Sylvania?* The fact that Justice White was unable to muster the two additional votes necessary for *certiorari* to be granted supports either view. However, the latter is probably the better view in light of the dicta in National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978).

84. Oreck Corp. v. Whirlpool Corp., 563 F.2d 54 (2d Cir. 1977), *rehearing,* 579 F.2d 126 (2d Cir. 1978) (*en banc*), *cert. denied,* 439 U.S. 946 (1978) [hereinafter cited as Oreck].

85. *Id. passim.*

dealer was not complying with Whirlpool's market strategy,[86] or because of an implied agreement between Whirlpool and Sears, the only other existing distributor, to exclude Oreck from competition in the marketplace for Whirlpool vacuum cleaners.[87]

A divided panel of the Second Circuit[88] held that (1) evidence of a conspiracy was not shown, rather only a refusal to renew and replacement of the distributor, and (2) the restraint's reasonableness could not be determined on the evidence submitted.[89] Oreck had not presented any evidence showing either the net economic effect of its termination on the national vacuum cleaner industry or that the purpose or effect of the alleged conspiracy was to drive it out of the vacuum cleaner business as required by *Sylvania*.[90]

On rehearing, the only issue considered was whether the *per se* standard used by the trial judge in charging the jury was correct in view

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86. *Id.* at 56. This could be considered a unilateral action and, thus, not an illegal restraint of trade under the *Colgate* doctrine. *See* United States v. Colgate & Co., 250 U.S. 300 (1919).

87. 563 F.2d at 60-62 (Mansfield, J., dissenting). This action could be construed as a concerted refusal to deal based on anticompetitive motives, which would be *per se* illegal, especially if price motivated. *See* United States v. General Motors Corp., 384 U.S. 127 (1966). Alternatively, it could be deemed an exclusive dealership. *See* Standard Oil Co. v. United States, 337 U.S. 293 (1949) (Standard Stations) (rule of reason treatment). In a concerted refusal to deal, competing companies or associations join together to gain market power by eliminating one or more of their competitors. If the thrust of the action is resale price maintenance, it more closely resembles a concerted refusal to deal. *See* GELLHORN, *supra* note 7, at 290. Since Sears sold the vacuum cleaners in question at a lower price than Oreck at all relevant times, the facts and circumstances of this case more closely approximate an exclusive dealership controversy. 579 F.2d at 130.

The Second Circuit (*en banc*) found Sears' alleged inducements may have amounted to tortious interference, but such conduct, absent a showing of anticompetitive effect in the relevant market, would not be unreasonable under the rule of reason. 579 F.2d at 131, 133; *see* note 101 *infra*.

88. 563 F.2d 54 (2d Cir. 1977).

89. *Id.* at 56-57; *see* Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D. Cal. 1974), *rev'd and remanded*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (replacement of independent distributors with employee-distributors).

90. 563 F.2d at 57-58. The national vacuum cleaner industry was the relevant market since Whirlpool vacuum cleaners were not distinctive enough to be a separate market. *Id.* at 58. When the dealership was terminated, the distributor only had 1% of the market share of the vacuum cleaner industry. *Id.* at 56. Subsequent to the termination, the distributor obtained an alternative source of supply and, by the time of trial, was the largest supplier of upright vacuum cleaners. *Id.*

In addition, Oreck sold through direct mail and to institutional supply houses under the Whirlpool trademark, whereas Sears, a mass retailer, sold direct to the consumer under the Kenmore mark. *Id.* at 57, 61. Thus, Oreck's sales were not entirely in direct competition with Sears. Moreover, where they were in direct competition, the consumer may have been totally unaware that the vacuum cleaners came from the same source since they were sold under different brand names. Hence, the consumers would not necessarily be able to identify a particular Kenmore vacuum cleaner as being manufactured by Whirlpool as opposed to Hoover, Electrolux, or one of the other vacuum cleaner manufacturers. If the intrabrand competition cannot be perceived by the ultimate purchasers, how can it have an effect on that competition?

In view of the limited market impact, the ability of Oreck to prove anticompetitive effect is highly questionable. *See, e.g.*, H&B Equip. Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978) (anticompetitive effect was *de minimus*).

of the alleged agreement between Sears and Whirlpool.[91] The court held that the trial judge's instructions were in error, and the restraint should be judged by the rule of reason.[92]

In another case decided by the District Court for the Southern District of New York, the evidence was much clearer.[93] One of Sony's authorized dealers of dictation equipment began selling to a discounter outside of the dealer's territory.[94] When the authorized dealers in other territories complained about the price competition, Sony offered each dealer a modified franchise contract containing a new warranty fee program designed to track a machine from its nonauthorized dealer to the offending authorized dealer's account.[95] Under the new program, all one had to do was send Sony the serial number of the machine allegedly serviced.[96] No proof of actual service to the user was required.[97] A warranty fee was then debited to the source dealer's account.[98] The amount debited effectively wiped out any profit made on the sale to the discounter.[99] Hence, it was really an economic sanction.

The court concluded that this was a warranty program in form only.[100] In substance, the program was found to be a vertical territorial restraint on the resale of the equipment since the primary purpose of the program

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91. 579 F.2d at 130.

92. *Id.* at 131. The court, on rehearing, disagreed with Oreck's contentions that this was a group boycott, and found unavailing Oreck's claim that the nonrenewal of its distributorship amounted to price tampering since the district court had not instructed the jury along these lines. *Id.* at 130-31. *Compare* Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Hence, Oreck's only real chance to recover seems to lie in showing that the purpose of his termination was price related and, therefore, a *per se* violation, which seems doubtful.

In a new twist, this court found the rule of reason to be the appropriate standard to use in order to differentiate exclusive dealership controversies from concerted refusals to deal. 579 F.2d at 131 n.6. In this case, Whirlpool offered a justification for its action and had used a less restrictive alternative to achieve the termination. 563 F.2d at 56. Moreover, Whirlpool's actions did not have an adverse effect on interbrand competition. 579 F.2d at 130 n.5. The latter is a common effect of either exclusive dealing contracts or refusals to deal. GELLHORN, *supra* note 7, at 290. Since the facts of this case did not fit neatly into either pigeonhole, the court looked at the purpose and effect, and found that the conduct more closely resembled an exclusive dealership controversy.

93. Eiberger v. Sony Corp., 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980).

94. *Id.* at 1279. There was ample evidence of Sony's market power in terms of market share. *Id.* at 1283-84.

95. *Id.*

96. *Id.* at 1280.

97. *Id.* There was evidence presented showing that fees were collected with Sony's knowledge for services never rendered. In one instance, the machines had not even been sold to the end user, the serial numbers having been obtained by entering the premises of the unauthorized dealer and breaking open the cases. *Id.*

98. *Id.* Apparently an authorized dealer could sell to discounters within its area.

99. *Id.*

100. *Id.* at 1282.

was to prevent discounting and to eliminate intrabrand competition within each dealer's area.[101] As such, it was an unreasonable restraint of trade.[102]

In judging the legality of exclusivity clauses in shopping center leases, *Sylvania* may have established that the rule of reason is the standard to apply.[103] There is a paucity of judicial opinion dealing with such clauses, but the existing authority has concluded the rule of reason should apply.[104] It is not surprising, however, that the Federal Trade Commission (FTC) has taken the position that exclusivity clauses are *per se* violations.[105]

C. *Third Circuit*

A different result from *Oreck Corp. v. Whirlpool Corp.*[106] was reached in a similar dealership termination case, *Ceruto, Inc. v. United Cabinet Corp.*[107] In *Ceruto,* the supplier, at the behest of one of its other dealers, refused to comply with a three-month-old supply agreement between the supplier, a manufacturer of kitchen cabinets, and a discount house, Ceruto.[108] Ceruto alleged that the other dealer's efforts were price motivated.[109]

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101. *Id.* Although the court noted Sony's justifications, *i.e.,* to keep all the dealers operating profitably and to provide adequate warranty and service coverage in all areas, this warranty plan simply did not fit the alleged purposes, particularly the latter. *Id.* at 1281. In fact, the court found this warranty plan to be without a redeeming business purpose. *Id.* at 1282.

Absent anticompetitive effect such actions would not be illegal under the rule of reason, regardless of whether the other dealer requested such action. *See, e.g.,* Oreck, *supra* note 84; Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D. Cal. 1974), *rev'd and remanded,* 548 F.2d 795 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977); Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564 (5th Cir. 1978) (anticompetitive effect not shown by brewer's local advertising, bar spending, and warehouse requirements, and right to approve the purchaser of the distributor's business); Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676 (9th Cir. 1979).

102. 459 F. Supp. at 1282. The court also found a horizontal conspiracy between Sony and its complaining authorized dealers to divide up the markets—a *per se* violation. *Id.* at 1285.

103. Optivision, Inc. v. Syracuse Shopping Center, 472 F. Supp. 665, 675 (N.D. N.Y. 1979) (the rule of reason approach should be applied relying in part on *Sylvania*); Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 143-44 (3rd Cir. 1978) (question of reasonableness of the restrictive covenants precluded summary judgment).

104. *See* Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 141 & n.56 (3rd Cir. 1978). Most of these opinions involved motions for preliminary injunctions. *See* Optivision, Inc. v. Syracuse Shopping Center, 472 F. Supp. 665, 675 (N.D.N.Y. 1979); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases,* 86 HARV. L. REV. 1201 (1973), *cf.* R. POSNER, ECONOMIC ANALYSIS OF LAW 28-29 (1973) (actual damages should be sole remedy for breach of a restrictive covenant).

105. *See* Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 141 & n.54 (3rd Cir. 1978).

106. *See* Oreck, *supra* note 84.

107. 595 F.2d 164 (3rd Cir. 1979). The case was on appeal from summary judgment in favor of the manufacturer. 448 F. Supp. 1332 (W.D. Pa. 1978).

108. *Id.* at 165. *Oreck* was a refusal to renew a contract. 563 F.2d at 56-57. *Ceruto* was a repudiation of a relatively new contract. 595 F.2d at 165.

109. 595 F.2d at 168. *Compare with Oreck, supra* note 84, at 130 (no evidence other dealer's actions were price motivated).

The court concluded that the challenged conduct may be a *per se* violation of section 1 of the Sherman Act[110] if Ceruto can show that its termination was the result of an agreement between the supplier and its other dealer aimed at eliminating price competition.[111] But the pro-competitive effects necessary for the rule of reason to apply did not seem to be present.[112]

D. *Fifth Circuit*

The conflict between the purposes of the unfair competition law and the antitrust law was examined[113] in yet another case involving the termination of a distributor and the substitution of a new distributor.[114] The court rejected plaintiff's contention that a conspiracy between the supplier and the substituted distributor to use unfair trade practices to eliminate a competitor was *per se* illegal.[115] The opinion noted that the purpose of antitrust law is to prevent sanctions on competition by fair means or foul; whereas, the primary thrust of unfair competition is to prevent unfair methods of competition.[116]

The plaintiff, Northwest, was the number two distributor of power tools in the Dallas-Fort Worth area, having an eighteen to twenty percent market share.[117] Omark, one defendant, ranked second nationally in the manufacture of power tools with a twenty-five percent market share.[118] Omark became concerned with Northwest's financial stability.[119] As a

110. 15 U.S.C. § 1 (1974).

111. 595 F.2d at 170. *Compare with* Oreck, *supra* note 84, at 131, 133 (no conspiracy found between the manufacturer and its only other dealer).

112. *Id.* at 165, 168. The court examined the record under the rule of reason despite the fact that Ceruto had based its case solely on the *per se* illegality of an alleged combination between the manufacturer and the other dealer. *Id.* at 166-68. Unfortunately, Ceruto did not disclose the nature of its evidence showing the anti-competitive effect of the refusal to deal on the marketplace. 448 F. Supp. at 1334. Failure to do so barred admission at trial under a local rule. *Id.*

113. Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83 (5th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1978).

114. *See, e.g.,* Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676 (9th Cir. 1979) (no violation of antitrust laws for a manufacturer to conspire with others simply to switch distributors).

115. 576 F.2d at 90. The plaintiff relied on the holding in Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96 (1st Cir.), *cert. denied,* 286 U.S. 552 (1932), that an intent to eliminate a competitor by unfair competition violated the antitrust law. *Id.* at 86. The early cases applied this rule as a *per se* offense, but in recent cases it has been applied only to horizontal relationships where the defendant was a significant competitor. *Id.* at 87-89 (citing Southland Reship, Inc. v. Flegel, 401 F. Supp. 339, 346-47 (N.D. Ga. 1975)); *see* Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 571 (5th Cir. 1978).

116. *Id.* at 88-89. Thus, where unfair methods are used and the actor has substantial market power, he may run afoul of both bodies of law. *Id.* at 89.

117. 576 F.2d at 85.

118. *Id.* Omark also sold locally at the time of termination. *Id.* The new distributorship had 11.5% of the local market share and Northwest had 2% by the time of summary judgment. *Id.* at 86.

119. *Id.* at 85-86.

result, it began surreptitious machinations to raid some of Northwest's employees in order to run a new distributorship.[120]

Upon termination as Omark's distributor, Northwest continued in business, having found two alternative sources for the tools.[121] This apparently did not sit well with Omark since its agents, as well as the new distributor's agents, began to make false and disparaging remarks to Northwest's customers.[122]

On appeal from summary judgment for the defendants, the court concluded that the rule of reason was the appropriate standard to apply.[123] However, the court found that Northwest failed to show any anticompetitive effect from the distributor substitution since the substitution did not produce a gain in market power, nor did it result in the earning of excess profits by either Omark or the new distributor.[124] Moreover, the conduct in *Northwestern,* though reprehensible, enhanced competition instead of reducing it since the number of sellers was increased.[125]

In *Del Rio Distrib., Inc. v. Adolph Coors Co.,*[126] Adolph Coors Company, under the rule of reason analysis, finally has had its territorial restrictions declared valid on the grounds that its restrictions are necessary to maintain product quality and flavor in view of its unique brewing process by which an unpasteurized beer requiring constant refrigeration is produced. Although the distributor also alleged price fixing, the evidence was conflicting, and the jury returned a verdict of not guilty on all counts.[127]

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120. *Id.* at 86. The new distributorship succeeded in hiring away Northwest's sales manager (at Omark's behest), two of its salesmen, and a secretary, who came complete with customer list.

121. *Id.*

122. *Id.* Northwest was portrayed as having cash flow problems, on the brink of bankruptcy, out of business, and/or merged into the new distributorship. *Id.* As the court noted, these actions affected both intrabrand and interbrand competition. *Id.* at 87.

123. *Id.* at 90.

124. *Id.* at 90-91. In other words, an adverse market impact cannot be shown unless there is a showing of an increase in market power in terms of increased market share or excess profits. *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 571 (5th Cir. 1978).

125. *Id.* at 91. The court did not examine whether or not there was a valid business purpose, although it implied that one existed. *Id.* at 85-86.

126. 589 F.2d 176 (5th Cir.), *cert. denied,* 100 S. Ct. 80 (1979). *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 n.23 (1977) (suggesting quality of product could be a valid business purpose for a vertical restraint). *Contra,* Copper Liquors, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975); Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974) (both decided under the *per se* rule of *Schwinn*).

The court also decided that the adverse judgments against Coors under the *Schwinn* doctrine were not collateral estoppel on the issue of liability since the courts were compelled to rely on the law in effect at that time. 589 F.2d at 179.

127. *Id.* at 179.

E. *Seventh Circuit*

Sealy, Inc., on the other hand, has not faired any better in its second go-around involving its trademark license agreements[128] than it did the first time.[129]

Subsequent to the invalidation of the exclusive sales and manufacturing territorial clauses in their earlier trademark license agreements, Sealy revised the agreements striking the exclusive selling territories and inserting instead manufacturing location clauses, primary responsibility clauses and pass-over provisions.[130]

When the earlier case was tried, Sealy did not manufacture the mattresses, but Sealy's licensees owned substantially all of its stock.[131] By the time this case was tried, Sealy was manufacturing and selling its mattresses in seven territories; however, ninety-eight percent of its stock still was owned by its licensees.[132] The court found that the nature of the restraints were horizontal since Sealy's basic structure remained unchanged,[133] and that Sealy had entered into a horizontal division of markets via its license agreements.[134]

Relying on *Sylvania,* Sealy argued that the rule of reason should apply, notwithstanding the fact that the rstraints were horizontal in nature.[135] The court declined to extend *Sylvania,* pointing to Justice Powell's reaffirmation in *Sylvania* of the application of the *per se* rule to horizontal restraints.[136]

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128. Ohio-Sealy Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979).

129. United States v. Sealy, Inc., 388 U.S. 350 (1967). Decided same day as *Schwinn.*

130. 585 F.2d at 823-24, 826. At the signing of the decree entered in the earlier case, a member of the antitrust division had stated that the Antitrust Division of the Department of Justice did not consider the decree prohibiting *per se* the use of location clauses, primary responsibility clauses or pass-over provisions, but was not expressing any opinion as to their legality. *Id.* at 826 (citing United States v. Sealy, Inc., [1967] TRADE CASES (CCH) ¶72,327 at 84,855 (N.D. Ill.)).

131. 585 F.2d at 823; 388 U.S. at 352-53.

132. 585 F.2d at 823.

133. *Id.* at 827.

134. *Id.* Sealy argued that all of the provisions used in its license agreements have been held valid under the antitrust laws. *Id. See, e.g.,* Superior Bedding Co. v. Serta Assocs., Inc., 353 F. Supp. 1143 (N.D. Ill. 1972) (7% pass-over fees valid under rule of reason analysis); White Motor Co. v. United States, 372 U.S. 253, 270-71 (1963) (Brennan, J., concurring); pre- and post-*Schwinn* decisions, *supra* note 41 (approval of location clauses). The court, however, seemingly relying on an aggregate of trade restraints theory, concluded when viewed as a whole, they amounted to a conspiracy to restrain trade. *Id.* at 827-28. *See* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). *See generally* Pitofsky, *supra* note 4, at 3-4, 17-27.

135. 585 F.2d at 830.

136. *Id.; see* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 n.28 (1977); *see, e.g.,* Pitchford Scientific Instruments Corp. v. Pepi, Inc., 435 F. Supp. 685, 688 (W.D. Pa. 1977).

It is not surprising that Sealy argued that the rule of reason should apply to horizontal territorial, customer, and location restraints since the effect of such restraints can be as anticompetitive or as procompetitive as their vertical counterparts in some instances. In such instances, the only thing which distinguishes them is

F. *District of Columbia*

In *Newberry v. Washington Post Co.*[137] the Post imposed (1) territorial restrictions on its home sales dealers which did not explicitly prohibit sales outside the area,[138] (2) customer restraints barring them from selling to street sales dealers,[139] and (3) maximum resale price maintenance on sales to subscribers.[140]

The court found the territorial restraints reasonable despite their adverse effect on intrabrand competition.[141] The court noted that (1) the territorial divisions had been developed by a course of conduct which was advantageous to both parties,[142] (2) none of the dealers desired to or really were capable of competing with the other dealers,[143] (3) the Post had not reaped excessive profits,[144] and (4) the restraint was reasonably necessary to accomplish maximum penetration and prompt uninterrupted service in which both parties had an interest.[145]

The court then turned to the customer restraints and found that the plaintiff dealers had not shown the restriction against street sales to be unreasonable.[146] None of the plaintiffs so limited had ever requested street

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their source. *See, e.g.,* Pitofsky, *supra* note 4, at 14-16; Bork II, *supra* note 7, at 424-29. Moreover, the Supreme Court did not limit the application of the rule of reason to a particular type or form of restraint in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

137. 438 F. Supp. 470 (D.D.C. 1977).

138. *Id.* at 473.

139. *Id.* at 476.

140. *Id.* at 475.

141. *Id.*

142. *Id.* at 473. In a novel defense, the Post argued that the territorial restriction was a horizontal restraint developed by the dealers. *Id.* at 474 n.5. The court found, however, that the plan was initiated by the Post. *Id.*

143. *Id.* at 474.

144. *Id.* at 475.

145. *Id.* The court noted that the Post was in an essentially noncompetitive market area, and that its dominance in this area had been acquired lawfully. *Id.* at 476 n.8. *Compare with* Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), *aff'd in part, rev'd in part and remanded,* 603 F.2d 263, 307-08 (2d Cir. 1979) (issue of whether market dominance was lawfully acquired was raised collaterally, but not examined) *and with* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945) (Alcoa) (dominant position unlawfully acquired by monopolization).

146. *Id.* at 476. The Court in *Sylvania* was silent as to who had the burden of showing the reasonableness of the restraint. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Carstensen II, *supra* note 41, at 34-35. This court placed the burden on the plaintiff. 438 F. Supp. at 476. Likewise, the Second, Third, Fifth, Seventh, and Ninth Circuits have also placed the burden on the plaintiff to establish unreasonableness. *See, e.g.,* Oreck, *supra* note 84, at 57-58, Ceruto, Inc. v. United Cabinet Corp., 448 F. Supp. 1332, 1334 (W.D. Pa. 1978); Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83, 90-91 (5th Cir. 1978); H&B Equip. Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978); General Beverage Sales Co. v. East-Side Winery, 568 F.2d 1147, 1154 (7th Cir. 1978); Magness Petroleum Co. v. Shelly Oil Co., 599 F.2d 196, 204 (7th Cir. 1979); Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676, 678 (9th Cir. 1979) (by way of dicta, plaintiffs have the burden both to allege and prove the unreasonableness of the restraint).

sale terms.[147] Moreover, the court observed, different editions were sold under the two distribution systems, suggesting a submarket.[148]

In examining the alleged maximum price restraints, the court did not use the demonstrable anticompetitive effect *per se* standard, instead it employed the rule of reason analysis turning first to the legitimate business purposes for the restraints.[149] Although there was ample evidence that Post suggested the price at which the paper should be sold and encouraged its dealers to use that price, the court noted that the Post had to keep the price low in order to expand its circulation.[150] Since any adverse effect on circulation would also affect the dealer's business, the court concluded that the relatively stable price "was the natural result of a confluence of business factors and not the result of an implied agreement or coercion." [151] Further, the court found that absent a showing of an express or implied agreement to fix resale prices or overt coercion, the publication of a suggested retail price does not invoke the *per se* rule.[152]

V. DISCUSSION

The *Sylvania* decision has produced a wave of comment.[153] On the whole the comment has been positive, much of it coming from writers who had been extremely critical of the harsh *per se* rule of *Schwinn* and the Court's underlying rationale for that rule. It is generally agreed that the *Sylvania* decision, even though it was unexpected, and unnecessarily

147. *Id.* Some of plaintiff's contracts did not restrict sales as to customer. *Id.*

148. *Id.* (citing Blankenship v. Hearst Corp., 519 F.2d 418, 423 (9th Cir. 1975)). In addition, the court found the evidence of injury was mere speculation. 438 F. Supp. at 476.

149. 438 F. Supp. at 476-77. The court started its analysis by stating that the price-fixing charges would have to be examined vis-à-vis Post's marketing objectives. *Id.* at 476.

150. *Id.* at 476-77. Post revenues were derived from advertising which in turn depended on circulation. *Id.* at 476.

151. *Id.* at 478-79.

152. *Id.* at 479 (citing United States v. Colgate & Co., 258 U.S. 300, 307 (1919)). The court distinguished Albrecht v. Herald Co., 390 U.S. 145 (1968), on the basis that coercion was used in that case as evidenced by the economic sanctions and termination of the dealership. 438 F. Supp. at 479-80. Thus, according to this court, the fact that the Post had the economic power from which coercion could have been implied was not sufficient to give rise to the *per se* rule.

The Post was found guilty of price fixing with regard to its raising of the rates it charged one dealer in response to the dealer's increase in cost to his customers. *Id.* at 480-82. The court apparently viewed this as an isolated incident which in no way evidenced coercion in general.

See generally GELLHORN, *supra* note 7, at 183 n.4; Bork II, *supra* note 9, at 391-405, 416-24 & 453-65 for a list of the benefits and harms resulting from maximum price fixing.

153. *See generally* Carstensen II, *supra* note 41; Handler II, *supra* note 68; Koches, *Developments in the Law of Vertical Nonprice Restrictions: A Welcome Return to the Rule of Reason*, 33 U. MIAMI L. REV. 247 (1978) [hereinafter cited as Koches]; Miles, *Socking It to Plaintiffs: Supreme Court Antitrust Decisions in the 1976-77 Term*, 12 U. RICH. L. REV. 1 (1977) [hereinafter cited as Miles]; Pitofsky, *supra* note 4; Posner II, *supra* note 52; Note, *Advent of the New Industrial State:* Continental T.V. v. GTE Sylvania, Inc., 14 CAL. W. L. REV. 632 (1979).

(according to some commentators)[154] overruled *Schwinn,* is a positive step.[155] The primary criticism of *Sylvania* has been that the Court's failure to state definitive guidelines for the application of the rule of reason adopted in *Sylvania* may lead to as much confusion and controversy as *Schwinn.*[156] The market-economic impact analysis is not new however. Long before *Sylvania,* some commentators advocated analyzing vertical restraints along functional lines.[157]

Several commentators have agreed with Justice White that it would be logical to extend the *per se* standard of *Sylvania* to vertical price restraints. But none of the commentators have explicity concluded that the rule of reason should be applied to both vertical and horizontal restraints, especially vertical price restraints, if *Sylvania* is pressed to its logical conclusion. In other words, if you are to examine the effect of the restraints, does it matter whether they are vertical or horizontal, with or without price restrictions. Instead this result is implied in their analysis of *Sylvania*'s effect on other precedents, in particular, *Dr. Miles, Albrecht,* and *Topco.*[158]

It is not surprising, therefore, that the First[159] and District of Columbia[160] Circuits have decided that the rule of reason is the standard to be applied to vertical distributional restraints having ancillary price restraints. The First Circuit opinion did not even cite *Dr. Miles* or its progeny despite the fact that the restraints at issue were territorial restraints with a price floor on sales made outside the territory,[161] thereby leaving it for the lower court on remand to grapple with these precedents. The District of Columbia Circuit Court, on the other hand, in ruling on the Post's suggested maximum resale prices, distinguished *Albrecht* on the ground that there was no overt coercion by Post in its conduct with its dealers in general.[162] At the same time, the court found the Post guilty of price fixing with respect to one of its dealers.[163] Although the court noted that the other dealers waited to see what the Post would do to the dealer who had had the temerity to raise its prices to customers, the

154. *See, e.g.,* Miles, *supra* note 153, at 20; Posner II, *supra* note 52, at 2-6.

155. *See, e.g.,* Handler II, *supra* note 67, at 980-88; Posner II, *supra* note 52, at 2-6.

156. *See, e.g.,* Pitofsky, *supra* note 4, at 11; Posner II, *supra* note 52, at 14-15.

157. *See, e.g.,* Bork I & II, *supra* note 9. *Compare with* Camanor, *Vertical Territorial and Customer Restrictions:* White Motor *and Its Aftermath,* 81 HARV. L. REV. 1419 (1968).

158. *See, e.g.,* Koches, *supra* note 153, at 265-67; Handler II, *supra* note 68, at 986-88; Pitofsky, *supra* note 4, at 15, 16 & n.59; Posner II, *supra* note 52, at 9 & n.26.

159. Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883, 886 (1st Cir. 1978).

160. Newberry v. Washington Post Co., 438 F. Supp. 470, 479 (D.D.C. 1977).

161. Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883, 886 (1st Cir. 1978).

162. Newberry v. Washington Post Co., 438 F. Supp. 470, 479-80 (D.D.C. 1977).

163. *Id.* at 480-82.

court apparently viewed this as merely intimidation or constructive coercion. Can this decision really be rationalized with *Albrecht*?

Thus, there is already some expression of judicial displeasure with the limitation of the holding in *Sylvania* to vertical nonprice restraints. If *Eastern* and *Newberry* are viewed as the harbingers of things to come, one could logically predict that the courts would be inconsistent in their treatment of vertical price restraints. That is, some may hold that *Sylvania* does not apply; and others, looking to the analytical basis on which *Sylvania* rests, would apply the rule of reason and devise rationales to get around the applicable *per se* precedents.

Notwithstanding the holdings in *Eastern* and *Newberry*, and the arguments for applying the rule of reason to vertical price restraints, the Court reaffirmed its position that the rule of reason should not be applied to determine whether or not a price restraint is reasonable in *National Society of Professional Engineers v. United States*.[164] As the Court points out in *National Society*, the rule of reason has its genesis in the common-law precedents concerned with the enforceability of covenants in restraint of trade ancillary to legal business deals.[165] Hence, since the rule of reason evolved as the standard for testing such non-price covenants,[166] usually covenants not to compete, and has been interpreted as such when it has been used in judging the legality of restraints under antitrust law,[167] the Court reasoned that these precedents foreclosed any interpretation of the rule as being the proper standard by which to judge "the reasonableness of the prices set by private agreement."[168] Thus, *National Society* has to be read in tandem with the *Sylvania* opinion.

It seems highly unlikely, therefore, that the current Supreme Court personnel would overturn either *Dr. Miles* or *Albrecht* despite the rationale of the *Sylvania* opinion. Moreover, both *Eastern* and *Newberry* can be viewed as aberrational since they were decided prior to the Court's reaffirmation of its holding in *Sylvania*.

This has not been the case when horizontal restraints were at issue. The courts have not shown any inclination to extend *Sylvania*[169] despite defendant's argument that the rule of reason should be applied since functionally horizontal and vertical restraints can be similar,[170] and the restraints used were of the type normally approved by the courts if independent of price motivation.[171]

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164. 435 U.S. 679, 689 (1978).

165. *Id.* at 688.

166. *Id.* at 689.

167. *Id.* (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, *aff'd*, 175 U.S. 211 (1898) which so interpreted the rule of reason).

168. *Id.* at 689.

169. *See* Ohio-Sealy Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 827 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

170. *Id.*

171. *Id.*

How have the courts applied the rule of reason standard as adopted in *Sylvania*? On the whole there does not seem to be any real problem. However, none of the cases which have been decided since *Sylvania* have involved complex economic data.

The dealer termination decisions decided thus far are not contrary to anything stated in *Sylvania,* nor is the application of the rule of reason to those cases inappropriate, unless one considers the *sua sponte* application of the rule of reason in *Ceruto* to be inappropriate under the circumstances.[172] Moreover, inquiry was confined to competitive impact which is clearly what the Court intended.[173]

It is difficult to fault the Court for not having enumerated the factors to be considered when economists (1) cannot agree on which of the traditional economic assumptions are valid,[174] (2) when they agree that little is known about the economic impact of vertical restraints, and (3) when they disagree on the competitive effects of vertical restraints.[175] Since competition in our complex marketplace is imperfect, the Court may well have chosen the best approach, *i.e.,* silence as to specific criteria, thereby leaving the lower courts to examine and to balance the competitive behavior on a case-by-case basis, presumably using the tests set out in *Standard Oil*[176] and *American Tobacco*[177] as guidelines, with market power being the main factor.

The *Newberry* court's holding that one does not have to show that the restraint was the least restrictive alternative,[178] however, raises the question of whether the least restrictive alternative should ever be a factor. If one looks at the market share (Query: what percentage of market share is illegal?), the purpose of the restrictions and whether they were reasonably designed to effectuate their avowed purpose, and the impact of the restrictions on the marketplace, does it matter if there was a less restrictive means if there is a net procompetitive effect? Arguably, it is not a determinative factor, and, in most instances, would be speculative. Moreover, Professor Bork argues that alternatives, such as, exclusive franchises, profit pass-overs, and primary responsibility clauses are not nearly as economically efficient as vertical territorial restraints and are totally inadequate substitutes for vertical customer divisions.[179]

172. Ceruto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166-68 (3rd Cir. 1979).

173. *See* National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 690 (1978). While not enumerating the factors to be considered, it is clear that only factors having an economic impact need apply.

174. Bock, *An Economist's View of the Supreme Court's Recent Antitrust Decisions,* 47 ANTITRUST L.J. 829, 830 (1979).

175. Note, *Advent of the New Industrial State:* Continental T.V. v. GTE Sylvania, 14 CAL. W. L. REV. 632, 669 & nn.290-91 (1979).

176. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

177. United States v. American Tobacco Co., 221 U.S. 106, 179 (1911).

178. Newberry v. Washington Post Co., 438 F. Supp. 470, 475 (D.D.C. 1977).

179. Bork II, *supra* note 9, at 465-69.

The Antitrust Division of the Department of Justice, however, still seems to view them as viable alternatives to territorial and customer divisions.[180]

In addition, with regard to the lack of specific factors which should be considered, it should be noted that the rule of reason is not a new standard. It has been around for quite some time. Thus, the courts have some experience in applying this standard and have considered a number of factors in determining whether the competitive behavior at issue is unreasonable.[181] Most of the factors used are those articulated by Justice Brandeis in *Chicago Board of Trade*.[182] Some, of course, were drawn from the language of the *Schwinn* opinion and were used to avoid the rule laid down in that opinion.[183] It is true that lack of a uniform set of factors will, in all likelihood, lead to varying results since the courts can pick and choose the factors to apply; but it is equally true that a uniform set of factors could lead to varying results. For example, what percentage of market share is illegal, how do you measure the effects of the restraint on interbrand competition, and how do you determine that an alleged less restrictive alternative actually would be less restrictive? Thus, this writer submits that the lack of a uniform set of guidelines really does not present the courts with the handicap some commentators have suggested.[184] The real handicap is the application of any guidelines to complex economic data.

In one area, most of the circuits have resolved one issue left open in *Sylvania, i.e.,* who has the burden of showing the reasonableness or unreasonableness of the restraint. The courts which have addressed the issues have placed the burden of showing the unreasonableness of the restraint on the plaintiff.[185]

VI. CONCLUSION

So far, a mist of confusion from *Sylvania*'s fan has not emerged as predicted. Despite the fact that the analytical underpinnings of the *Sylvania* opinion logically suggest extension of the rule of reason to at least vertical price restraints, the Court has reaffirmed its holding that this standard is not to be applied to price restraints. This is a clear signal to the lower courts to so limit the application of the rule of reason to vertical restraints.

The law regarding the standard to apply to horizontal restraints is destined to remain unchanged, absent a move by the Supreme Court.

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180. *See* [1979] TRADE REG. REP. (CCH) ¶¶ 50,370.

181. *See* Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 GEO. WASH. L. REV. 123, 126-27 (1971) for a list of the variety of factors which have been considered.

182. 246 U.S. 231, 238 (1918).

183. *See* United States v. Arnold Schwinn & Co., 388 U.S. 365, 372 (1967).

184. *See, e.g.,* Pitofsky, *supra* note 4, at 11; Posner II, *supra* note 52, at 14-15.

185. *See* note 146 *supra*.

This seems unlikely to happen given the current personnel. However, five of the justices are over seventy.[186] Thus, the next President will probably have the opportunity to make a number of appointments to the Court which could alter the composition drastically. However, this does not necessarily mean there will be any changes in this particular area of the law.

The application of the rule of reason by the courts, absent specific guidelines as to the factors which should be considered, has not produced a problem. This writer contends that delineation of the factors to be considered could produce as much confusion as the lack thereof. However, it is really too early to make a value judgment. The courts simply have not been faced with any complex antitrust suits involving vertical restraints under section 1 of the Sherman Act since *Sylvania*.[187] As Alice more or less said to the Cheshire cat, it is not enough to get somewhere, you have to get somewhere that makes sense.[188]

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186. WHO'S WHO IN AMERICAN LAW (2d ed. 1977).
187. 15 U.S.C. § 1 (1974).
188. L. CARROLL, ALICE IN WONDERLAND 56 (Pocket 14th ed. 1951).