Comment

BUSINESS ELECTRONICS CORP. v. SHARP ELECTRONICS CORP.—A NEW LINE IS DRAWN: SUPREME COURT CREATES DISTINCTION BETWEEN RESALE PRICE MAINTENANCE AND PRICE STABILIZATION

I. INTRODUCTION

The antitrust concept of "resale price maintenance" or "vertical price fixing" refers to an agreement involving persons at different levels of the market structure establishing the resale price or price range of products or services.[1] In 1911, the Supreme Court, in the case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[2] held that agreements between suppliers and distributors fixing resale prices constitute a per se[3] violation of section one of the Sherman Act.[4]

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1. ABA, ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 56 (2d ed. 1984).

2. 220 U.S. 373 (1911).

3. The theory of per se illegality was defined and explained by the Supreme Court in *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) as follows:

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

Id. at 5. *See also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343-44 (1982) (stating that such a rule promotes predictability and avoids the significant costs a rule of reason analysis entails).

4. *Dr. Miles*, 220 U.S. at 408-09. Section 1 of the Sherman Act provides that:

> [e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if

A long recognized exception to the per se rule against resale price maintenance was articulated in the landmark case of *United States v. Colgate & Co.*,[5] where the Supreme Court held that suppliers can lawfully refuse to deal with distributors who fail to adhere to their suggested resale prices.[6] This "unilateral" refusal to deal is permissible because the manufacturer was charged with acting individually with its retailers, and section one of the Sherman Act is applicable only to "agreements" in restraint of trade.[7]

In *Business Electronics Corp. v. Sharp Electronics Corp.*,[8] the Court departed from well-established case law by holding that a manufacturer's termination of a discount retailer, in an effort to stabilize resale prices, was not illegal per se.[9] The Court based its decision on the absence of an explicit price fixing agreement between the conspiring parties. Prior to *Business Electronics Corp.* (*BEC*), no relevant distinction between "resale price maintenance" and "price stabilization" was recognized.[10] Thus, the Supreme Court has created a dichotomy between resale price maintenance and price stabilization. The Court now requires an explicit price fixing agreement prior to a finding of per se illegality in the resale price maintenance context.

Business Electronics Corp. may be characterized as a distributor termination case in which a price cutting distributor was terminated by its supplier following complaints by a competing distributor.[11]

> a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, 15 U.S.C. § 1 (1982).

5. 250 U.S. 300 (1919).

6. *Id.* at 307. The relevant language, known as the "Colgate Doctrine," reads in pertinent part:

> In 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.

7. *Id.* at 306.

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

9. *Id.* at 1523. Note, *Antitrust:* Business Electronics Corp. v. Sharp Electronics Corp.—*A Better Rule for Vertical Restraints, But is it Legal?*, 1987 B.Y.U. L. REV. 1035, 1035 n.3 (1987).

10. Note, *supra* note 9, at 1035-36 n.3.

11. These types of distributor terminations are known as "cat's paw" cases. "A supplier or manufacturer acts as a 'cat's paw' for its distributors when it restricts a 'free-riding' distributor for the purpose of maintaining the retail prices of full-

While it has long been held that these types of cases warrant summary condemnation,[12] the Court's holding in *Business Electronics Corp.* implies that distributor terminations which reduce intrabrand competition[13] and stabilize resale prices without explicitly fixing them, be judged under the rule of reason.[14] The distinction drawn by the Court in this case reverses decades of Sherman Act interpretation. Since *Dr. Miles*, no distinction was recognized between resale price maintenance and price stabilization. This apparent rejection of *Dr. Miles'* rationale may, in large part, be due to the Court's growing sentiment toward departure from summary condemnation in Sherman Act section one cases.

Ultimately, consumers are the real losers in *Business Electronics Corp.* Agreements explicitly fixing resale prices are arguably analogous to agreements aimed at price stabilization. The effects of such agreements are virtually identical and designed to remove intrabrand price

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price/full-service distributors." Note, *supra* note 9, at 1036 n.4 (citing Illinois Corp. Travel, Inc. v. American Airlines, Inc., 806 F.2d 772, 726 (7th Cir. 1986)). *See* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 6-10 (1977) (discussing "free rider" concept).

12. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968) (terminated dealer offered reinstatement on promise to obey price restrictions—arrangement held to be per se illegal); United States v. General Motors Corp., 384 U.S. 127 (1966) (scheme declared illegal whereby manufacturer elicited promises from distributors not to deal with discounters).

13. This term implies competition within one brand of a particular product. This is distinguished from interbrand competition to which the Act is directed.

14. In *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918), Justice Brandeis articulated what is considered to be the classic statement of the rule of reason test.

> 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.

Id. at 238.

Many legal scholars contend that vertical restraints should be evaluated under the rule of reason standard. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966) (attributing the chaos surrounding the Sherman Act to the Court's fondness for broad per se rules); Hay, *Vertical Restraints After* Monsanto, 70 CORNELL L. REV. 418, 436-44 (1985) (suggesting that vertical restraints are not anticompetitive); Posner, *supra* note 11 (proposing a three-stage rule of reason inquiry to determine the legality of both price and non-price distribution restrictions).

competition. Thus, the distinction drawn by the Court in *Business Electronics Corp.* will have an adverse effect on intrabrand price competition, and eventually consumers.

This comment examines the state of resale price maintenance prior to *Business Electronics Corp.*, the factual circumstances and holding of the case itself, and analyzes the distinction created by the Court. This comment also includes a discussion of the problems solved by the new rule, as well as a brief examination of the per se rule in general, after *Business Electronics Corp.*

II. BACKGROUND

A. *Historical Basis of Liability in the Resale Price Maintenance Context*

Section one of the Sherman Act states that every contract, combination, or conspiracy in restraint of trade is unlawful.[15] At face value, this section seemingly prohibits all commercial agreements because all such agreements restrain trade to some degree.[16] The Supreme Court, however, has long held that only "unreasonable" restraints of trade are to be deemed illegal under the Sherman Act.[17] Pursuant to this position, the Court has developed two different standards under which a particular restraint will be examined: the rule of reason and the per se rule.

Under the rule of reason standard, the court will conduct an in-depth inquiry into the factual circumstances surrounding the challenged restraint.[18] Such an inquiry is designed to determine the restraint's effect upon competition.[19] The court must then decide whether the challenged restraint regulates and promotes competition, or whether it suppresses or even destroys competition.[20] Due to the broad analysis required under the rule of reason test, such inquiries are apt to be extremely expensive and time consuming.[21] Moreover,

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15. *See supra* note 4 (text of § 1).

16. *Chicago Bd.*, 246 U.S. at 238.

17. Standard Oil Co. v. United States, 221 U.S. 1, 58-59 (1911). The Court in *Standard Oil* found that Congress did not intend to prohibit all contracts or even all contracts that resulted in some form of a restraint of trade. The Court also found that Congress meant to prohibit only those agreements that "unreasonably" restrain trade. *Id.*

18. *See supra* note 14 (definition and application of rule of reason).

19. *Chicago Board of Trade*, 246 U.S. at 238.

20. *Id.*

21. *Maricopa County Medical Soc'y*, 457 U.S. at 343.

courts often lack the expert knowledge necessary to evaluate such an in-depth market analysis in determining the challenged restraint's effect upon competition.[22] Because of the nature of this rule, its test leads to holdings that are limited by the particular facts of a case and leaves doubt as to the legality of the challenged restraint under different circumstances.

The per se rule, in contrast, condemns "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 caused or the business excuse for their use."[23] The per se rule promotes predictability and avoids the significant costs a rule of reason analysis entails.[24] Although restraints involving resale price maintenance have historically been deemed as per se violations of section one of the Sherman Act,[25] the Supreme Court, by creating the distinction between resale price maintenance and price stabilization, appears to have recognized competitive virtues inherent in such restraints.[26]

B. Supreme Court Treatment of Vertical Price Restraints Prior to Business Electronics Corp.

1. Early Per Se Treatment and Recognized Exceptions

Dr. Miles Medical Co. v. John D. Park & Sons Co.[27] is recognized as the seminal case in the law of vertical price restraints. Dr. Miles

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22. *Id.* (stating that courts often lack expert understanding of industrial market structures in determining the effect of a challenged restraint on competition) (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 (1972)).

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

24. *Maricopa County Medical Soc'y*, 457 U.S. at 343-44.

25. *See* Comment, *Vertical Restraints and Distributor Termination, A Standard of Proof:* Monsanto Co. v. Spray-Rite Service Corp., 9 DEL. J. CORP. L. 399 (1984). Reviewing the *Monsanto* case, the commentator states:

> The Supreme Court held there could not be a "reasonable" arrangement whereby a manufacturer could require its distributors to agree to sell at a certain price without resulting in significant restraint of trade. Therefore, all agreements between manufacturers and distributors to set prices were declared illegal under the [Sherman Act].

Id. at 403.

26. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 32-33, 288-98 (1978). *Cf.* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 135, at 386 (1977).

27. 220 U.S. 373 (1911).

Medical Co. was a manufacturer of proprietary medicines.[28] The company maintained a system of contracts between itself, its wholesalers, and retailers to fix the prices at which they could resell the medicine.[29] Park & Sons, a wholesaler, obtained Dr. Miles medicine from its distributors at prices below those suggested and subsequently resold them below the fixed retail price.

After examining the contracts, the Supreme Court concluded:

> [t]hat these agreements restrain trade is obvious. That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists . . . of the country," and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear. . . . And where commodities have passed into the hands of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not determined by the circumstance . . . . The complainant having sold its product at prices satisfactory to itself the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.[30]

The *Dr. Miles* Court reasoned that restrictions on resale prices violated the common law rule against restraints on alienation.[31] The Court reasoned further that fixing minimum resale prices by a manufacturer eliminated price competition among its distributors just as a horizontal agreement among its distributors would.[32] While the Court's holding and rationale have not gone without criticism,[33] the Court has held tightly to its per se prohibition of vertical price restraints at least until the *Business Electronics Corp.* case.[34]

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28. *Dr. Miles*, 220 U.S. at 374.

29. *Id.* at 375-76 (Statement of the Case).

30. *Id.* at 408-09 (citations omitted).

31. *Id.* at 404-08.

32. *Id. See* Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitors' Complaints*, 49 BROOKLYN L. REV. 677, 681 (1983) (noting that there are vigorous economic arguments in favor of the rule of reason despite the Court's adherence to *Dr. Miles*).

33. *Id.* at 681-82.

34. *See* Comment, *A Functional Rule of Reason Analysis for the Law of Resale Price Maintenance and its Application to* Spray-Rite v. Monsanto, 1984 WISC. L. REV. 1205, 1231 (1984). This comment argues that the Court in *Dr. Miles* never explicitly articulated a per se rule against resale price maintenance. It further argues that

Only eight years after its decision in *Dr. Miles*, the Court decided *United States v. Colgate & Co.*[35] Pursuant to its resale price maintenance scheme, Colgate solicited information from its dealers on other dealers' price cuts. If a dealer was cutting resale prices, Colgate would terminate them and only after a dealer promised to adhere to Colgate's suggested rules would it be reinstated.[36] Unlike Dr. Miles, Colgate did not use contracts.[37] It was on this basis that the *Colgate* Court distinguished the *Dr. Miles* case.[38]

The indictment in *Colgate*, however, did not charge that the defendant "acted other than with his customers individually."[39] The Court concluded that no violation of the Sherman Act was presented.

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a 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.[40]

Colgate's resale price maintenance scheme was, therefore, upheld on the basis of individual right, i.e., the freedom to deal with whom one chooses. This ruling created an obvious tension in subsequent resale price maintenance cases.[41] If agreements between suppliers

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the *Dr. Miles* Court never precluded inquiry into the procompetitive aspects of resale price maintenance. *See also* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 147-66 (1976) (arguing that the *Dr. Miles* Court misunderstood the case and erroneously applied the law) (citing R. BORK, *supra* note 26, at 33, 280).

> Bork and Posner, have challenged the economic rationality of the per se rule [against resale price maintenance]. They assert that if a manufacturer desires the most efficient distribution of its products, it will not impose any restraints that will reduce the quantity demanded by the consumer. Under their theory, any vertical price restriction imposed by a manufacturer to further its interests will also be in the interests of consumers because it will increase sales. Therefore, Bork and Posner contend, the restraint should be legal.

Comment, *supra* note 34, at 1206.

35. 250 U.S. 300 (1919).
36. *Id.* at 303.
37. *Id.*
38. *Id.* at 307-08.
39. *Id.* at 306.
40. *Id.* at 307.
41. *See* L. SULLIVAN, *supra* note 26, at 395 n.1 (citing Levi, *The* Parke, Davis-Colgate *Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258).

and distributors fixing resale prices are per se unlawful, how may suppliers *lawfully* refuse to deal with distributors who fail to adhere to their suggested retail prices? When the distributor *agrees* to sell at the suggested price, there is an *agreement*.[42]

The result of this tension was a narrowing of the *Colgate* doctrine and an expansion of the rule articulated in *Dr. Miles*. The first case to examine the issue after *Colgate* was *United States v. A. Schrader's Son, Inc.*[43] The district court had the difficult task of reconciling the *Colgate* doctrine with the *Dr. Miles* case and stated:

> Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between [*Dr. Miles* and *Colgate* cases]. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement . . . .[44]

The district court stated that in the absence of an express purpose to create and maintain a monopoly, there was no violation of the Sherman Act.[45] The Supreme Court reversed, holding that proof of a tacit agreement to fix resale prices is enough to establish a violation of the Sherman Act.[46]

How would the Court reconcile this resale price maintenance menagerie? While the *Colgate* defense is still available,[47] anything beyond the "mere announcement of [the circumstances under which

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42. *See generally* Seltzer, *When Suppliers Tell Distributors What to Do and Where to Go*, 47 BROOKLYN L. REV. 671, 681-84 (1981) (discussing cases distinguishing lawful unilateral conduct and unlawful concerted action).

43. 264 F. 175 (N.D. Ohio 1919), *rev'd*, 252 U.S. 85 (1920).

44. *Id.* at 183.

45. *Id.* at 185.

46. *Schrader*, 252 U.S. at 99-100.

47. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). The *Monsanto* Court distinguished between concerted action of the manufacturer and other distributors, and independent action of the manufacturer. The holding of *Colgate*, according to *Monsanto*, allows a manufacturer to announce resale prices in advance and subsequently refuse to deal with those who fail to comply. *Id. See also* Comment, *The* Colgate *Doctrine: Its Past and Present*, 12 HOUS. L. REV. 409, 425-31 (1975).

the manufacturer will refuse to deal followed by the refusal] to deal"[48] will not merit *Colgate* protection.[49] Thus, it is evident that the first step toward reconciling *Dr. Miles* and *Colgate* was to limit the scope and breadth of the *Colgate* defense.[50]

Two decades later *Dr. Miles* was expanded from prohibiting explicit resale price fixing to prohibiting concerted action aimed at price stabilization. In *United States v. Socony-Vacuum Co.*,[51] the Court held:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.[52]

Although *Socony* was a horizontal price fixing case, it can be argued that the preceding passage applies to vertical price tampering conspiracies as well.[53] As the Court stated, "[T]he machinery employed by a combination for price-fixing is immaterial. Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[54] Again, although this case arose in the context of horizontal price fixing, the principle expressed in *Socony* would seem equally applicable to vertical combinations as well. Therefore, it is evident that the Court had somewhat resolved the inconsistencies of *Schrader* by limiting the *Colgate* defense and expanding the *Dr. Miles* principle.

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48. United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960).

49. *See* L. SULLIVAN, *supra* note 26, at 393-95.

50. *See generally* George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960) (proposition that the *Colgate* defense has been markedly limited).

51. 310 U.S. 150 (1940).

52. *Id.* at 221. This language implies, if not declares, that any combination, horizontal or vertical, should be treated similarly.

53. *See* Note, *supra* note 9, at 1043 (arguing that *Socony* is applicable to all conspiracies affecting price—whether horizontal or vertical).

54. *Socony*, 310 U.S. at 223. *See also* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) ("[A]n agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face."). *Id.* at 692 (quoting United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969)).

2. The Rationale for Per Se Condemnation

Prior to *Business Electronics Corp.*, the per se rule against resale price maintenance had been recognized for over three-quarters of a century. Of course, the rule has not gone unchallenged.[55] The arguments in favor of continued per se treatment in this context are essentially threefold and based upon economic theory and analysis.[56]

First, it has been argued that any procompetitive aspects of vertical price fixing can usually be accomplished by less anticompetitive means.[57] This is especially true when the so-called "free-rider" effect is advanced as a justification for abandoning the per se rule in the resale price maintenance context.[58] Rather than impose resale price restrictions on distributions in an effort to promote dealer services, the supplier may simply incorporate such services into the distributorship agreement.[59] Such an arrangement would allow market forces to set the price of a good. This type of policy is certainly less anticompetitive than the imposition of a resale price, and at the same time achieves the supplier's desired result.

Another less anticompetitive mean is implementation of a reward system for dealers who provide desired services or promotional activities.[60] The reward could be in the form of monetary compensation or some other form of assistance. In short, such policies would be just as likely to ensure that services are performed and would achieve the desired result by less anticompetitive means.

Second, it has been argued that vertical price fixing can impair interbrand, as well as intrabrand, price competition.[61] Indeed, widespread use of resale price maintenance may tend to stabilize interbrand prices at all levels of competition.[62]

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55. *See generally supra* note 34 (sources cited therein).

56. *See* L. SULLIVAN, *supra* note 26, §§ 133-136, at 379-88; Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis*, 1981 DUKE L.J. 417, 431-36.

57. *See, e.g.*, L. SULLIVAN, *supra* note 26, § 135, at 385-87.

58. Note, *supra* note 9, at 1048. *See infra* notes 68-71 and accompanying text (discussing the "free-rider" problem as a basis for challenging the per se rule in this context).

59. *See, e.g.*, Jacobson, *supra* note 32, at 686 n.33.

60. *Id.*

61. *Id.* at 684-85 n.30 (citing *Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong. 1st Sess. 175 (1975)).

62. *See* White Motor Co. v. United States, 372 U.S. 253, 268-72 (1963) (Brennan, J., concurring) (discussing the effects of vertical price fixing on interbrand competition at the distributor and supplier levels).

Finally, it has been shown that prices are substantially higher, and output substantially lower, when resale price maintenance restrictions are imposed.[63] "Chicago School" theorists have often argued that vertical price fixing does not result in higher prices.[64] The actual data, however, tend to show the Chicago School theory to be incomplete.[65] Where resale price maintenance is allowed, consumers pay higher prices.[66] This lends "credence to the theory that the impetus for minimum resale prices most often comes from distributors and retailers, rather than their suppliers, and that 'vertical' resale price maintenance is usually a disguise for horizontal price stabilization at the downstream level."[67]

Generally speaking, the goals of resale price maintenance can usually be accomplished by less anticompetitive means. If the goal

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63. *See, e.g.*, Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 849-73 (1955). *See also* Note, *supra* note 9, at 684.

64. *See, e.g.*, Bork, *supra* note 14, at 397-405. *See generally* Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (analysis of theories and policies advanced by the Chicago School of antitrust analysis). Jacobson argues that:

> [m]uch of the economic opposition to the per se rule against resale price maintenance comes from adherents to the "Chicago School" of antitrust analysis. . . . It is a fair generalization to say that Chicago School theory depends in large measure on two related assumptions: that business firms will act in an economically rational manner, and that if they do not, market forces will mete out sufficient punishment to deter the conduct involved without the added sanctions imposed by the antitrust laws. In the vertical price fixing context, these assumptions produce the argument that suppliers will impose resale price floors only to improve distributional efficiency, rather than for any anticompetitive purpose; if the supplier's judgment is wrong, the argument goes, the market will impose an adequate penalty. The problem with the argument is that the assumptions do not hold. If a supplier is acting in an economically rational manner, i.e., if he is seeking to maximize his profits, he will want distributors to provide the combination of services and resale prices that will result in the greatest sales of the product involved. Accordingly, if it were true that market forces will inevitably tend to induce economically rational behavior, the empirical data should demonstrate that resale price maintenance increases sales. But the actual data show that the reverse is true.

Jacobson, *supra* note 32, at 683 n.28.

65. *See* H.R. REP. No. 341, 94th Cong., 1st Sess. 3 (1975) (cited in Jacobson, *supra* note 32, at 684-85 n.30) (stating that "[w]hatever the exact figure, it is beyond dispute that resale price maintenance increases the cost of products to consumers").

66. *Id.* (noting examples of the impact of resale price maintenance agreements on the price of consumer goods).

67. Jacobson, *supra* note 32, at 684-85. Indeed, according to Justice Stevens, the precise scenario is presented in *Business Electronics Corp. See infra* text accompanying notes 129-30 and section IV(D) (discussing the horizontal characteristics present in *Business Electronics Corp.*).

of antitrust law truly is to protect competition, and not competitors, market forces should be the only factors involved in setting the price of a good. Resale price restrictions have the effect of eliminating price competition and protecting those who impose them. Viewed in this light, the per se rule against resale price maintenance is supported by sound logic and reasoning.

3. The "Free Rider" Problem as a Basis for Non-Liability

As mentioned previously, the "free-rider" problem has been advanced as a basis for abandoning the per se rule and turning to a rule of reason approach in analyzing resale price maintenance agreements. "A free-rider is a distributor who avoids providing product services in order to discount the retail price, while benefiting from the services provided by other dealers selling the same product."[68] This problem arises when consumers obtain the necessary product information from a full service dealer and then purchase the product from a discounter who provides no services.[69] According to the free-rider theory, resale price maintenance eliminates the free-rider by preventing the discounter from underselling the full service dealer. This argument "recognizes that dealers will be willing to sustain the costs of furnishing services only if they can recapture their cost through increased sales."[70]

Granted, there are a wide variety of products that require extensive dealer services. New cars, computers, and other "high-tech" goods would certainly fall into this category. When viewed in this light, the free-rider argument certainly is persuasive. Full service dealers, in this context, should be rewarded for providing this costly effort. As discussed in the preceding section, however, there are many, less anticompetitive means than resale price maintenance agreements to achieve this end.

The problem with the free-rider argument as a basis for abandoning the per se rule against resale price maintenance is that it is over broad. There are many products on the market which do not

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68. Note, *supra* note 9, at 1048.

69. Comment, *supra* note 34, at 1215.

70. Weiss, *The Dealer Services Rationale for Resale Price Maintenance: Does the Manufacturer Really Know Best?*, 30 ST. LOUIS U.L.J. 517, 524 (1986). *See generally* T. PETERS & R. WATERMAN, IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST RUN COMPANIES 157-71 (1982) (citing examples of how companies benefit from providing extensive dealer services).

require extensive dealer services and selling effort. As one legal scholar argues:

> [T]hink for a moment about the product areas in which resale price maintenance has appeared—boxed candy, pet foods, jeans, vitamins, hair shampoo, knit shirts, men's underwear. What are the services we are talking about in these cases? Take jeans. What services does Saks Fifth Avenue provide that K-Mart does not? In both stores, the jeans are laid on the table, customers take them to a dressing room, try them on, and buy them. Is it really plausible that Jordache is fixing the resale price at $32 and denying the product to K-Mart in order to induce Saks to promote services on jeans? I think not.[71]

It is evident that an across-the-board abandonment of the per se rule in this context would tend to legitimize plainly anticompetitive conduct. We are left with a situation where on one hand, the free-rider argument appears valid; and on the other hand, the argument provides no plausible basis for rejecting continued application of the per se rule. A line of demarcation need be drawn.

C. Lower Court Treatment of Vertical Price Restraints

Legal scholars have not been the only ones to wrestle with the pros and cons of the per se rule against resale price maintenance. Lower courts have worked to reconcile the competing arguments as well. While a complete examination of lower court holdings is beyond the scope of this note, it is important to mention that lower courts have applied the per se rule to vertical price fixing conspiracies.

In *Cernuto, Inc, v. United Cabinet Corp.*,[72] Cernuto, a discount retailer of the defendant's kitchen cabinets, filed a complaint in district court alleging that he was terminated at the request of another dealer due to price cutting practices.[73] The defendant moved for a summary judgment based on Cernuto's failure to contend or offer to prove "that United advised its distributors that they must adhere to any resale prices."[74] In granting the defendant's motion, the court found

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71. Pitofsky, *Why "Dr. Miles" was Right*, 8 REG. 27, 29 (1984).
72. 595 F.2d 164 (3d Cir. 1979).
73. Cernuto Inc. v. United Cabinet Corp., 448 F. Supp. 1332, 1335 (W.D. Pa. 1978).
74. *Id.*

that in order to establish a vertical price fixing agreement that constitutes a violation of section one of the Sherman Act, the plaintiff must show, "(1) a manufacturer suggesting to his retailers resale prices for his products, and (2) the manufacturer taking steps beyond a mere refusal to deal in order to enforce a resale price policy."[75]

The Third Circuit, reversing the district court stated: "If the purpose and effect of the challenged conduct is to restrain price movement and the free play of market forces, it is then illegal *per se*."[76] "Judge Adams reasoned that where both the supplier and distributor are motivated by a desire to insulate the distributor from the competition of price cutters, the concerted action in terminating the price cutter is the equivalent of a horizontal combination at the distributor level."[77]

The Fourth Circuit, in *Bostick Oil Co. v. Michelin Tire Corp.*,[78] reached the similar conclusion. In *Bostick*, a price cutting tire dealer was terminated for taking advantage of company discounts for quantity purchases, thus enabling it to sell for lower prices. On appeal, the circuit court concluded that a termination resulting from competitors' desires to eliminate a price cutter would warrant per se condemnation.[79] Moreover, the appeals court noted that the existence of a conspiracy could be "inferred from a course of dealing or other circumstances."[80]

It is interesting to note that neither of these courts required an explicit agreement to set the resale price before imposing per se prohibition. In essence, these courts have applied the per se rule to conspiracies which merely "stabilized" price levels. As noted by the

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75. *Id.* (citing United States v. Colgate & Co., 250 U.S. 300 (1919); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)).

76. *Cernuto*, 595 F.2d at 169.

77. Jacobson, *supra* note 32, at 688.

78. 702 F.2d 1207 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983).

79. *Id.* at 1215. *See* Zidell Exploration Inc. v. Conval Int'l, Ltd., 719 F.2d 1465, 1471 (9th Cir. 1983) (holding that if termination is primarily for the purpose of eliminating price competition among distributors, a per se standard is appropriate). *See also* Jayco Sys., Inc. v. Savin Business Machs. Corp., 777 F.2d 306, 317-18 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 73 (1986); Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466 (8th Cir. 1985); Malley-Duff & Assoc., Inc. v. Crown Life Ins., Co., 734 F.2d 133, 140-41 (3d Cir.), *cert. denied*, 469 U.S. 1072 (1984); JBL Enters., Inc. v. Jhirmack Enters., Inc., 698 F.2d 1011, 1015 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983); Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982).

80. *Bostock*, 702 F.2d at 1213 (quoting United States v. Parke, Davis & Co., 362 U.S. 29, 42-43 (1960)).

Cernuto court, such holdings find support in the "horizontal conspiracy" theory, namely, that the purpose and effect of the vertical restraint is horizontal in nature.[81] In *Cernuto*, the distributors were, in effect, able to implement a horizontal price fix by using the manufacturer.[82] The Supreme Court, in *Business Electronic Corp.*, has seemingly laid to rest these competing notions by holding that an explicit agreement to set the resale price is necessary to merit per se prohibition. In doing so, the Court has departed from well-established case law.

III. THE *BUSINESS ELECTRONICS CORP.* CASE

A. The Facts

Respondent Sharp Electronics Corporation (Sharp) manufactured, *inter alia*, electronic calculators.[83] In 1968, petitioner Business Electronic Corporation (BEC), a discount retailer, became the exclusive retailer of respondent's calculators in the Houston, Texas area. In 1972, respondent added a second retailer, Gilbert Hartwell (Hartwell), in the Houston area. There was conflicting evidence as to whether or not BEC was "free-riding" on Hartwell's provision of presale educational and promotional services; and whether or not BEC provided inadequate services itself.

Neither BEC nor Hartwell was obligated to charge a specific retail price under the written dealership agreement. Although Sharp published a list of suggested minimum retail prices, BEC often sold goods at prices below the suggested minimum, and at prices below Hartwell's. Evidence was also presented that Hartwell had on occasion sold goods at prices below the suggested minimum as well.

Hartwell repeatedly complained to Sharp about BEC's price cutting. In June, 1973, Hartwell threatened to terminate his dealership within thirty days if Sharp continued to deal with BEC. In July 1973, Sharp terminated BEC's dealership.

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81. *Cernuto*, 595 F.2d at 168. *See also* Comment, *Vertical Agreement on Horizontal Restraint:* Cernuto, Inc. v. United Cabinet Corp., 128 U. PA. L. REV. 622, 624 (1980). *Buf cf.* Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *A Way Out?*, 67 VA. L. REV. 1457, 1518-20 (1981) (noting that substantial procompetitive effects result from a vertical agreement whereas horizontal agreements do not usually produce any such benefits).

82. *Cernuto*, 595 F.2d at 168.

83. The facts of this case are set forth in *Business Elecs. Corp.*, 108 S. Ct. at 1517-18.

B. Procedural Posture

1. The District Court Decision and Jury Verdict

BEC brought suit in the United States District Court for the Southern District of Texas alleging that Sharp and Hartwell had conspired to terminate BEC, and that such conspiracy was a per se violation of section one of the Sherman Act.[84] Sharp contended that the termination was a result of BEC's free-riding on Hartwell's investment in product promotion and other sales-related services.[85] Indeed, Hartwell testified that he was not concerned about BEC's price cutting, but that the customers he developed through pre-sale services would eventually buy from BEC at lower prices.[86]

The district court submitted the case to the jury and asked whether "there was an agreement or understanding between Sharp Electronics Corporation and Hartwell to terminate [BEC] because of [BEC's] price cutting."[87] The district court then instructed the jury as follows:

> The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.
>
> If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer yes to Question Number 1.
>
> . . . .
>
> A combination, agreement or understanding to terminate a dealer because of his price cutting unreasonably restrains trade and cannot be justified for any reason. Therefore, even though the combination, agreement or understanding may have been formed or engaged in . . . to eliminate any alleged evils of price cutting, it is still unlawful. . . .

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84. *Id.* at 1518. *See supra* note 4 (text of § 1).

85. Business Elecs. Corp. v. Sharp Elecs. Corp., 780 F.2d 1212, 1215 (5th Cir. 1986).

86. *Id.*

87. *Business Elecs. Corp.*, 108 S. Ct. at 1518.

> If a dealer demands that a manufacturer terminate a price cutting dealer, and the manufacturer agrees to do so, the agreement is illegal if the manufacturer's purpose is to eliminate the price cutting.[88]

The jury awarded petitioner $600,000 in damages. The district court denied respondent's motion for judgment notwithstanding the verdict or a new trial, and entered judgment for petitioner for treble damages plus attorney's fees.[89]

2. The Court of Appeals' Decision

The Fifth Circuit reversed the district court's decision and held that:

> in order for a manufacturer's termination of a distributor to be illegal *per se*, it must be pursuant to a price maintenance agreement with another distributor. That distributor must expressly or impliedly agree to set its prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever prices it chooses.[90]

In so holding, the Fifth Circuit rejected the rule articulated by *Cernuto* and its progeny;[91] namely, that "if a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a *per se* violation of the antitrust laws."[92] The Fifth Circuit therefore created a split between resale price maintenance and price stabilization.

"The [F]ifth [C]ircuit was the first to require an explicit price fixing agreement before holding a cat's paw distributor termination unlawful on its face. Other courts have not drawn a distinction between price fixing and price stabilization for purposes of applying the per se rule."[93]

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88. *Id.*
89. *Id.*
90. *Business Elecs. Corp.*, 780 F.2d at 1218.
91. *See supra* notes 72-81 and accompanying text.
92. *Business Elecs. Corp.*, 780 F.2d at 1217 (quoting *Zidell*, 719 F.2d at 1469). *See also* Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207 (4th Cir. 1983) (terminating a price cutter is illegal per se if done at the behest of a competing dealer).
93. Note, *supra* note 9, at 1039.

In support of its holding, the Fifth Circuit placed great reliance on *Monsanto v. Spray-Rite Services Corp.*[94] The issue in *Monsanto* concerned the standard to be applied in distinguishing concerted action from unilateral conduct.[95] The Court held that a plaintiff can survive a motion for a directed verdict if he shows:

> something more than evidence of complaints. . . . There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently [the plaintiff must show] direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[96]

The Fifth Circuit in *Business Electronics Corp.* cited its approval of the *Monsanto* holding by stating, "[T]o allow evidence of termination following or in response to complaints to serve as the sole basis for the award of treble damages to the terminated dealer would tend to discourage legitimate dealer complaints and legitimate manufacturer action in the face of such complaints."[97]

The rationale for statements such as the preceding is that it is difficult for a jury to determine the motivation for a dealer termination; namely, whether the termination was designed to eliminate free-riding, or designed to reduce price competition. Termination of a price cutting free-rider is legitimate. Termination of a price cutter for price cutting is illegal (when in response to dealer complaints).

The Fifth Circuit stated that "[n]othing in *Monsanto* suggests that liability can be found without any evidence of a price fixing agreement. Rather, the language of *Monsanto* can only indicate the Court's belief that a price fixing agreement is a requirement for *per se* liability in distributor-termination cases."[98] It would appear that the Fifth Circuit's reliance on *Monsanto* is misguided. The issues in *Monsanto* were concerned with the adequacy of the evidence necessary to establish a conspiracy.[99] The Court was not concerned with the

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94. 465 U.S. 752, *reh'g denied*, 104 S. Ct. 1464 (1984).

95. *See, e.g.*, Comment, *supra* note 34, at 1208.

96. *Monsanto*, 104 S. Ct. at 1471 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

97. *Business Elecs. Corp.*, 780 F.2d at 1217.

98. *Id.* at 1218.

99. *See, e.g.*, Comment, *supra* note 34, at 1208.

issues of resale price maintenance. In fact, the Court did not reach the resale price maintenance issue.[100]

In summary, the Fifth Circuit created a split between resale price maintenance and price stabilization, and a conflict among the circuits as well.[101] The Supreme Court granted certiorari to resolve this conflict.[102]

C. *The Supreme Court's Decision*

The Supreme Court affirmed the judgment of the Fifth Circuit and held that, "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels."[103] The Court agreed that "the line drawn[104] by the Fifth Circuit is the most appropriate one."[105] It is evident that before the per se rule against resale price maintenance will be applied, it must be shown that the vertical restraint employed includes some agreement on price or price levels.

IV. ANALYSIS

The "new" rule articulated by the Court is clear and unambiguous. The "new" rule may be easily applied. Without an agreement on price or price levels, the vertical restraint will be analyzed under the rule of reason standard. The *Business Electronics Corp.* opinion, however, is not as clear. Indeed, the opinion contains a variety of troubling aspects. First and foremost, although the new rule seems to violate decades of Sherman Act precedent, the Court claimed that *Dr Miles* and its progeny did not apply.[106] Whether or not *Dr. Miles* is still good law, is not clear. Secondly, the Court's

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100. *Monsanto*, 752 U.S. at 761 n.7.

101. *See Business Elecs. Corp.*, 108 S. Ct. at 1517 n.1.

102. *Id.* at 1517.

103. *Id.* at 1525.

104. The "line drawn" is apparently that between resale price maintenance and price stabilization. The Court expressed concern

> that departure from [the rule of reason standard] must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*.

Id. at 1520-21. The "line" will separate tacit agreements from the per se treatment applicable to explicit resale price agreements.

105. *Id.* at 1521.

106. *Id.* at 1524.

economic analysis does not fully recognize the impact of the challenged restraint. Finally, and most troubling, is the Court's characterization of the restraint employed as a "nonprice" vertical restriction, and as "ancillary" to any agreement between Sharp and Hartwell.

A. Dr. Miles *Not Explicitly Overruled*

Although the Court drastically altered the per se rule against resale price maintenance, the *Dr. Miles* case was not overturned. The Court began its discussion of *Dr. Miles*, or lack thereof, with a review of the common law context within which the case arose. The Court sought to determine "whether the common law of restraint of trade ever prohibited as illegal *per se* an agreement of the sort made here [in *Business Electronics Corp.*], and whether our decisions under §1 of the Sherman Act have ever expressed or necessarily implied such a prohibition."[107] This determination would then lend insight into the weight to be accorded to the authority of *Dr. Miles*. "Though [*Dr. Miles*] was an early Sherman Act case, its holding that a resale price maintenance agreement was *per se* illegal was based largely on the perception that such an agreement was categorically impermissible at common law."[108] Thus, the resale price restriction was held to have been an unlawful restraint on alienation.

> *Dr. Miles* . . . decided that under the general law the owner of movables . . . could not sell the movables and lawfully

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107. *Id.* The Court chose not to ignore common law precedent surrounding the definition of "restraint of trade," but also declined to give this early precedent dispositive effect. *Id.* at 1523. The Court went on to state that:

> [t]he term "restraint of trade" in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term "restraint of trade" was well recognized at the time the Sherman Act was enacted. *See* Gibbs v. Consolidated Gas Co., 130 U.S. 396, 409 (1889) (noting that English case laying down the common law rule that contracts in restraint of trade are invalid "was made under a condition of things, and a state of society, different from those which now prevail, [and therefore] the rule laid down is not regarded as inflexible, and has been considerably modified").

Id. at 1523. The court then went on to cite *Dr. Miles*, 220 U.S. at 406, for further support regarding the modification of the term "restraint of trade" in response to changing times. *Id.*

108. *Business Elecs. Corp.*, 108 S. Ct. at 1524 (quoting *Dr. Miles*, 220 U.S. at 404-08).

> by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another.[109]

At common law, once the goods were sold and changed hands, the original seller could not lawfully dictate the price at which the goods would be resold.[110]

The Supreme Court, however, effectively sidestepped the argument that *Dr. Miles* should control. The Court found that *Dr. Miles* did not apply because "no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury."[111]

As the court of appeals noted, however, there was evidence to support an inference that Sharp and Hartwell impliedly agreed to set resale price levels.[112] Arguably, BEC was terminated because its prices were too low. In fact, Sharp remonstrated with BEC about the latter's pricing before Hartwell became a Sharp dealer.[113] If one dealer is terminated because it charges low prices, and the complaining dealer remains, it is logical to assume that Sharp was satisfied with the complaining dealer's pricing policies. This acquiescence implies agreement regarding pricing.

The Supreme Court chose not to apply *Dr. Miles* because the jury did not find an agreement on price or price levels between Sharp and Hartwell.[114] The jury did not do so because it was not charged as such.[115] The district court judge did not ask the jury to determine this question. It appears evident that the Court chose to disregard this evidence. Moreover, there was no need to find an explicit agreement regarding price levels. Hartwell was the sole remaining dealer after BEC's termination. Hartwell would now be able to raise its prices, with interbrand competition the sole remaining check. If Sharp was satisfied with Hartwell's prices prior to BEC's termination, the inference may be drawn that Sharp would be satisfied

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109. *Id.* (quoting Boston Store v. American Graphophone Co., 246 U.S. 8, 21-22 (1918)).

110. Gibbs v. Consolidated Gas Co., 130 U.S. 396 (1889).

111. *Business Elecs. Corp.*, 108 S. Ct. at 1524.

112. *Business Elecs. Corp.*, 780 F.2d at 1219.

113. *Id.*

114. *Business Elecs. Corp.*, 108 S. Ct. at 1524.

115. *See supra* text accompanying note 93 (jury instructions).

with Hartwell's prices after BEC's termination. In short, *Dr. Miles* does apply. The will of the seller (Sharp) was imposed on BEC. If BEC had raised its prices, it would not have been terminated. For purposes of continuing analysis, however, it will be assumed that there was no agreement on price or price levels between Sharp and Hartwell.

B. Economic Impact of the Challenged Restraint

The Supreme Court claimed "that departure from [the rule of reason] standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing . . . ."[116] The Court stated, "There has been no showing here that an agreement between a manufacturer and a dealer to terminate a 'price cutter' without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and decreases output."[117] This statement appears facially valid when viewed in the context of "manufacturer imposed" price restrictions. The *Business Electronics Corp.* case, however, is more properly viewed as a "dealer imposed" price restriction.

In the present case, dealer complaints led to the termination of BEC. The means used to achieve the end are analogous to a situation involving three dealers as opposed to two. If Hartwell had conspired with a third dealer to coerce Sharp, there is no doubt that such an arrangement would warrant summary condemnation.[118] The result is the same. The dealer has used its market power to impose its will on the manufacturer.[119] "In contrast [to manufacturer imposed price restraints], price restrictions imposed by dealers upon a manufacturer will reduce competition between dealers, raise the product price and reduce the quantity demanded by consumers, ultimately lowering consumer welfare. Therefore, dealer induced restraints should remain *per se* illegal."[120]

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116. *Business Elecs. Corp.*, 108 S. Ct. at 1520-21.

117. *Id.* at 1521.

118. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 108 S. Ct. 1515 (1988) (Stevens, J., dissenting).

119. *Cf. id.* at 1521 n.2 (majority points out that dominant retail power is rare and should not be assumed but proved and this case was not tried on that theory).

120. Comment, *supra* note 34, at 1206 (citations omitted). *See also Dr. Miles*, 220 U.S. at 407-08.

The agreement between Sharp and Hartwell to terminate BEC most certainly had the pernicious effect of restricting competition. The anti-competitive nature of the agreement is readily apparent.

> Before the agreement was made, there was price competition in the Houston retail market for respondent's products. The stronger of the two competitors was unhappy about that competition; it wanted to have the power to set the price level in the market and therefore it complained to respondent on a number of occasions about petitioner's prices."[121]

Arguably, a primary function of the agreement was to eliminate price competition.

Of course, if the agreement between Sharp and Hartwell were to be viewed as a "nonprice vertical restraint," and "ancillary" to an agreement between the parties to enable Hartwell to provide better services, the analysis would be different. This is precisely what the Court did.

C. Majority Views Agreements as a Nonprice Vertical Restraint

Principle authority for the assertion that the majority opinion viewed the agreement in the present case as a "nonprice" vertical restriction may be found in the following passage: "The dissent erects a much more complex analytic structure, which ultimately rests, however, upon the same discredited premise that the only function this *nonprice vertical restriction* can serve is the restraint of dealer-level competition."[122] The contention advanced by the majority appears erroneous as "this is not a case in which the manufacturer is alleged to have imposed any vertical nonprice restraints on any of its dealers."[123]

Pursuant to this characterization of the agreement, the majority discussed the virtues of nonprice vertical restraints at length. Citing the case of *Continental T.V. Inc. v. GTE Sylvania Inc.*,[124] the majority

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121. *Business Elecs. Corp.*, 108 S. Ct. at 1530 (Stevens, J., dissenting).

122. *Id.* at 1522 (emphasis added).

123. *Id.* at 1527 (Stevens, J., dissenting).

124. 433 U.S. 36 (1977). Manufacturer imposed a location restriction on franchisees limiting the number of retail franchises in an area and prohibiting sales of other than the manufacturer's products from the franchise locations. Franchisor sued under § 1 of the Sherman Act. The Court held that vertical restrictions should be judged by the rule of reason, thereby overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

stated that nonprice vertical restraints "had real potential to stimulate interbrand competition, 'the primary concern of antitrust law.'"[125] The Court then went on to discuss the economic advantages surrounding the imposition of nonprice vertical restraints.

> [N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products . . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free-rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.[126]

The Court then expressed concern that the doctrine of *Sylvania* would be eroded by the scope of the per se rule against vertical price fixing articulated by the district court. "Any agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's 'price cutting'."[127] The Court expressed doubt as to whether a jury would be able to determine whether the motivation behind a dealer termination was the dealer's pricing policy, or its failure to provide adequate services.[128] But as the dissent so aptly recognizes:

> [T]he majority exhibits little confidence in the judicial process as a means of ascertaining the truth. The majority fails to consider that manufacturers such as respondent will only be held liable in the rare cases in which the following can

125. *Business Elecs. Corp.*, 108 S. Ct. at 1519 (quoting *Sylvania*, 433 U.S. at 52 n.19).
126. *Id.* at 1519-20 (quoting *Sylvania*, 433 U.S. at 55).
127. *Id.* at 1521.
128. *Id.*

> be proved: First, the terminated dealer must overcome the high hurdle of *Monsanto Co. v. Spray-Rite Services Corp.* A terminated dealer must introduce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."
>
> . . . .
>
> Second, the terminated dealer must prove that the agreement was based on a purpose to terminate it because of its price cutting. . . . [M]otivation matters and factfinders are able to distinguish bad from good intent.
>
> Third, the manufacturer may rebut the evidence tending to prove that the sole purpose of the agreement was to eliminate a price cutter by offering evidence that it entered the agreement for legitimate, nonprice-related reasons.[129]

Indeed, the jury in the present case was able to make the necessary distinctions, and declared that Sharp terminated BEC because of the latter's price cutting—not because of poor sales performance on the part of BEC.

If viewed as a nonprice vertical restraint, the agreement in the present case is properly analyzed under the rule of the reason. In this case, however, no nonprice vertical restraints were imposed on either dealer. In fact, Sharp advanced the theory of unilateral conduct as a defense. "Respondent had denied that any agreement had been made and asked the jury to find that it had independently decided to terminate petitioner because of its poor sales performance, but after hearing several days of testimony, the jury concluded that this defense was pretextual."[130]

In sum, the agreement is more properly viewed as a horizontal price restraint, as suggested by the dissent.

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129. *Business Elecs. Corp.*, 108 S. Ct. at 1534-35 (Stevens, J., dissenting) (citations omitted).

130. *Id.* at 1533.

The Court instructed the jury:

> Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' poor sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer "no" to question number 1.

Id. at 1533 n.15.

D. *The Dissenting Opinion*

Justice Stevens began his analysis by demonstrating how the agreement was unlike others commonly encountered in antitrust litigation.[131] "As I shall demonstrate, the restraint that results when one or more dealers threatens to boycott a manufacturer unless it terminates its relationship with a price-cutting retailer is more properly viewed as a 'horizontal restraint.'"[132] Thus, in his view the case did not involve imposition of nonprice vertical restraints, and therefore was distinguishable from *Sylvania*. "The case is one in which one of two competing dealers entered into an agreement with the manufacturer to terminate a particular competitor without making any promise to provide better or more efficient services and without receiving any guarantee of exclusivity in the future."[133]

Justice Stevens also believed that the agreement in the present case did not "involve a typical vertical price restraint."[134] His position places importance on the manner in which the restraint was imposed. For example, this case does not involve the usual situation where an actor at one level of the distribution chain systematically imposes a resale price schedule on its distributors. In fact, a second dealer objected to the pricing policies of the first and the manufacturer fell to this coercion and terminated the price cutting dealer.

Justice Stevens also noted that the case did not involve unilateral conduct.[135] "The termination was motivated by the ultimatum that respondent received from Hartwell and that ultimatum, in turn, was

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131. *Id.* at 1527.

132. *Id.* at 1526.

> When a manufacturer responds to coercion from a dealer, instead of making an independent decision to enforce a predetermined distribution policy, the anticompetitive character of the response is evident. As Professor Areeda has correctly noted, the fact that the agreement is between only one complaining dealer and the manufacturer does not prevent it from imposing a 'horizontal' restraint. If two critical facts are present—a naked purpose to eliminate price competition as such and coercion of the manufacturer—the conflict with antitrust policy is manifest.

Id. at 1530-31 (citing 7 P. AREEDA, ANTITRUST LAW § 1457, at 166-68, 174-75 (1986)).

133. *Id.* at 1528.

134. *Id.* "As the Court of Appeals noted, there is some evidence in the record that may support the conclusion that respondent and Hartwell implicitly agreed that Hartwell's prices would be maintained at a level somewhat higher than petitioner had been charging before petitioner was terminated." *Id.* (citation omitted).

135. *Id.*

the culmination of Hartwell's complaints about petitioner's competitive price cutting."[136]

As the preceding passages demonstrate, the agreement in question is simply not vertical in nature. Rather, the mechanism involved to achieve the desired result, in this case coercion, is "vertical" in nature. The purpose of such action is "horizontal": to reduce competition at the dealer level of distribution.

Justice Stevens felt that the uniqueness of the agreement allowed no exact precedent to control the decision.[137] To demonstrate this uniqueness he altered the facts in order to elucidate the controlling legal rules.[138] Justice Stevens posited that "if it were clear that respondent had acted independently and decided to terminate petitioner because respondent, for reasons of its own, objected to petitioner's pricing policies, the termination would be lawful."[139] Indeed, it is apparent that such action would merit *Colgate* protection.[140]

> On the other hand, it is equally clear that if respondent had been represented by three dealers in the Houston market instead of only two, and if two of them had threatened to terminate their dealerships [unless respondent terminated petitioner], an agreement to comply with the ultimatum would be an obvious violation of the Sherman Act.[141]

Justice Stevens expressed his understanding of the issue presented by the case by stating, "The question then is whether the two-party agreement involved . . . is more like an illegal three-party agreement

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136. *Id.*

> When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer level.

Id. at 1528 n.4 (quoting *Cernuto*, 595 F.2d at 168).

137. *Id.* at 1529.

138. *Id.*

139. *Id.*

140. *See supra* notes 40-41 and accompanying text.

141. *Business Elecs. Corp.*, 108 S. Ct. at 1529 (Stevens, J., dissenting). *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

or a legal independent decision."[142] For Justice Stevens, the answer was clear. "[The agreement] fits squarely within the category of 'naked restraints of trade with no purpose except stifling of competition.'"[143]

Having characterized the situation as more "like an illegal three-party agreement," Justice Stevens then labeled the agreement a "group boycott."[144]

> Indeed, since the economic consequences of Hartwell's ultimatum to respondent are identical to those that would result from a comparable ultimatum by two of three dealers in a market—and since a two-party price-fixing agreement is just as unlawful as a three-party price-fixing agreement—it is appropriate to employ the term "boycott" to characterize this agreement.[145]

With this characterization of the present agreement in mind, Justice Stevens then declared that the Court's decision in *United States v. General Motors Corp.*[146] should control the outcome and, therefore, the agreement should be per se illegal.[147]

In *General Motors*, a group of Chevrolet dealers (actors at one level of the distribution scheme), conspired with General Motors (the manufacturer) to discontinue sales to price cutting dealers.[148] This agreement was held to be per se unlawful.[149] The same means were employed to achieve the same ends in *General Motors* as in the present case.[150] Commenting on the similarities of *General Motors* and *Business Electronics Corp.*, Justice Stevens stated:

> The difference between the two cases is not a difference between horizontal and vertical agreements—in both cases the critical agreement was between market actors at the retail level on the one hand and the manufacturer level on

142. *Business Elecs. Corp.*, 108 S. Ct. at 1529.
143. *Id.* at 1530 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).
144. *Id.* at 1531-32.
145. *Id.*
146. 384 U.S. 127 (1966).
147. *Business Elecs. Corp.*, 108 S. Ct. at 1532 (Stevens, J., dissenting).
148. *General Motors*, 384 U.S. at 131.
149. *Id.* at 145.
150. *Business Elecs. Corp.*, 108 S. Ct. at 1532 (Stevens, J., dissenting).

> the other. Rather, the difference is simply a difference in the number of conspirators.[151]

The only difference between *General Motors* and *Business Electronics Corp.* was the number of conspirators, and as such the same result should be reached.

Although not explicitly articulated, the analytical approach taken by Justice Stevens seems to be that the substance of an agreement or transaction takes precedence over its form. In both cases, identical means were employed to reach identical ends. The only difference between the two involves the number of actors. The forms of the transactions were at odds. This inconsequential aspect of the conspiracy, however, should not be held to dictate the outcome—substance takes precedence over form.

In sum, the approach taken by dissenting Justice Stevens appears to be better reasoned. Justice Stevens has accomplished what the majority had only claimed to do; that is, employ sound economic analysis and *stare decisis* in reaching a conclusion.

V. THE LAW OF RESALE PRICE MAINTENANCE AFTER *Business Electronics Corp.*

The *Business Electronics Corp.* decision represents a major change in the law of resale price maintenance. Subsequent cases in this areas of the law are apt to shape the scope and breadth of the *Business Electronics Corp.* holding. In the meantime, a few practical effects of the decision may be clearly identified. First, it is evident that the per se rule against vertical price fixing has been seriously eroded. While this aspect of the holding has solved the evidentiary problem surrounding dealer termination cases, the continued validity of the *Dr. Miles* decision has been brought into question. Secondly, and most unfortunately, this case is bound to have an adverse affect on consumers. Finally, the decision further demonstrates the growing sentiment toward departure from summary condemnation in Sherman Act section one cases.

A. *The Effect of a Dichotomous Split Between Price Stabilization and Resale Price Maintenance*

In order for the per se rule against resale price maintenance to apply, there must be evidence that the parties to an agreement

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151. *Id.*

conspired to set prices or price levels.[152] This aspect of the Court's holding recognizes that vertical price agreements are not without procompetitive virtue. It has long been argued that vertical restrictions be judged according to their impact on competition.[153] The Court's creation of a split between resale price maintenance and price stabilization is apt to lead to a reduction of dealer termination litigation. Manufacturers will be careful to avoid agreement on resale price or price levels. Practically speaking, however, the Court's recognition of this split has removed the evidentiary problems claimed to have been resolved in *Monsanto*.

1. Evidentiary Problem Solved

The majority opinion in *Business Electronics Corp.* recognized the evidentiary problem surrounding dealer termination cases. As the majority declared, "Any agreement between a manufacturer and a dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealers 'price cutting'."[154] The evidentiary problem is created when evidence of dealer complaints is held sufficient to create a jury question on the conspiracy issue. The jury must then determine whether the termination was motivated by price or nonprice considerations. "In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price cutting and some measure of service cutting usually go hand in hand."[155]

The first step, however, is to get to the jury. Prior to *Monsanto*, there was conflict among the circuits concerning the evidentiary showing necessary to reach this goal.[156] On one side, evidence of dealer complaints followed by termination was held sufficient to create a jury question on the conspiracy issue.[157] On the other hand, some

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152. *Id.* at 1525.

153. *See* R. BORK, *supra* note 26; Hay, *supra* note 14; Baker, *supra* note 81.

154. *Business Elecs. Corp.*, 108 S. Ct. at 1521.

155. *Id.*

156. *See* Comment, *supra* note 25.

157. *See Bostick Oil Co.*, 702 F.2d at 1215, *cert. denied*, 464 U.S. 894 (1983). *See also General Motors*, 384 U.S. at 127 (citing *Parke, Davis & Co.*, 362 U.S. at 44-45).

courts held such evidence insufficient to support a factual finding of concerted action.[158]

This conflict among the circuits was to be resolved by the Supreme Court in *Monsanto*. The question presented in *Monsanto* was whether distributor complaints about another distributor's price cutting constituted sufficient evidence of a price fixing conspiracy and were, therefore, per se illegal under the Sherman Act.[159] Unfortunately, the Court's holding failed to adequately resolve the conflict. The Court held that in order to take the case to a jury, the plaintiff must show:

> something more than evidence of complaints. . . . There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[160]

This holding left doubt and created confusion as to exactly what evidence is necessary to get to the jury. Moreover, the holding left considerable uncertainty as to the evidentiary showing necessary to prove a price fixing conspiracy.

The *Business Electronics Corp.* Court removed the cloud of uncertainty, and resolved the evidentiary problem. The Court held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels."[161] Without evidence tending to

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158. *See Edward J. Sweeney & Sons*, 637 F.2d at 110, *cert. denied*, 451 U.S. 911 (1981); Oreck Corp. v. Whirlpool Corp., 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981).

In *Sweeney*, for example, the evidence showed that Texaco terminated Sweeney after receiving complaints about Sweeney's pricing policies from other distributors. The evidence also showed, however, that Sweeney failed to meet Texaco's standards for cleanliness and service, was guilty of various "credit card irregularities" and was delivering non-Texaco gasoline to Texaco stations in Texaco trucks. The Third Circuit held that based on the facts, no reasonable juror could conclude that Sweeney was terminated as a result of concerted action between Texaco and the complaining dealers "without resorting to guesswork or conjecture." *Sweeney*, 637 F.2d at 116. The court reasoned that basing liability on receipt of complaints alone would encourage treble damage suits. *Id.* at 111 n.2.

159. *Monsanto*, 465 U.S. at 758.

160. *Id.* at 764 (quoting *Sweeney*, 637 F.2d at 111).

161. *Business Elecs. Corp.*, 108 S. Ct. at 1525.

prove that the conspiring parties agreed to set the resale price or price levels, the challenged restraint will not be deemed illegal per se. While the Court was able to resolve the evidentiary problem, in doing so it fostered uncertainty of another breed; namely, the continued validity of the *Dr. Miles* principle.

2. What is Left of *Dr. Miles*?

As mentioned previously, *Dr. Miles* was decided under the common law view that a resale price restriction was an unlawful restraint on alienation.[162] In the present case, the Supreme Court quickly disposed of *Dr. Miles* by claiming that the case did not apply. Since "no agreement on resale price or price level, and hence no restraint on alienation was found by the jury,"[163] the Court concluded that *Dr. Miles* was inapplicable to the case at bar. In reaching this conclusion, the Court removed the sting of *Dr. Miles*.

Since *Dr. Miles*, no distinction has been recognized between resale price maintenance and price stabilization.[164] Additionally, the procompetitive aspects of vertical price agreements have never been considered a justification for departure from summary condemnation in this context.[165] Indeed, a closer examination of the resale price contracts in *Dr. Miles* will show that the agreements were imposed to promote interbrand competition by protecting full service dealers.[166] The *Dr. Miles* Court did not give weight to this justification.[167]

In sum, the *Dr. Miles* principle has been so severely eroded that the Supreme Court should have expressly overruled the case.[168] The Court has, for all practical purposes, removed *Dr. Miles'* precedential value. *Business Electronics Corp.* represents the new law in the vertical price restraint context. There must now be evidence showing that

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162. *See supra* text accompanying notes 30-32.

163. *Business Elecs. Corp.*, 108 S. Ct. at 1524.

164. *See* Note, *supra* note 9, at 1045.

165. *Id.* at 1064.

166. *Id.* As the Court stated, "[T]he minimum price scheme at issue in *Dr. Miles* was designed to promote interbrand competition by protecting service oriented druggist." *Id.*

167. *Dr. Miles*, 220 U.S. at 408.

168. The distinction between resale price maintenance and price stabilization drawn from the Court in *Business Electronics Corp.* is tenuous. As one commentator suggests, "It is really only a clever way of dismantling the *Dr. Miles* rule without overruling higher authority." Note, *supra* note 9, at 1064 (arguing further that the Court should have taken the opportunity to overrule *Dr. Miles*). *Id.* at 1065.

the conspiring parties either expressly or impliedly agreed to set the resale price or price levels.

B. The Consumer's Perspective

The *Business Electronics Corp.* decision can be viewed as anti-consumer.

> The decision is a green light for high-markup retailers, which now can pressure manufacturers to cut off their lower-priced competitors. And that likelihood increases because of the ongoing consolidation of upscale department store chains. The probable result is that prices will be higher. That's what happened in Dallas when Perry Ellis Ltd. cut off Burlington Coat Factory Warehouse Corp. stores after receiving complaints from full-price competitors. Today, Dallas consumers can buy Perry Ellis menswear only from the three competitors that complained, and at higher prices.[169]

Certainly, the same is now true of electronic calculator buyers in the Houston area. Hartwell is now the sole remaining dealer. He may now charge higher prices for his goods with interbrand competition the only obstacle.[170]

The free-rider argument was advanced as a justification for the *Business Electronics Corp.* holding. "The guts of the argument is that higher prices benefit consumers because they will lead to better service. But anyone who believes that hasn't been shopping lately."[171] Intrabrand price competition has been dealt a severe blow. If consumers do not want the upscale services provided by high-markup retailers, they should not be forced to pay for them.

Consumers, however, are not out of luck. Legislation is currently pending before the Congress which would, in effect, overturn the *Business Electronics Corp.* decision. H.R. 585, The Freedom from Vertical Price Fixing Act of 1987, has been passed by the House

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169. *A Ruling That Doesn't Do Discounters Justice*, Bus. Wk., May16, 1988, at 146.

170. Many legal scholars argue that interbrand competition is sufficient to keep prices from skyrocketing. *See generally supra* note 14 and sources cited therein; R. POSNER, *supra* note 34. Indeed, as mentioned by the Court in *Business Electronics Corp.*, interbrand competition is the primary concern of the antitrust laws. *Business Elecs. Corp.*, 108 S. Ct. at 1520.

171. *A Ruling that Doesn't Do Discounters Justice*, *supra* note 169.

and is currently pending before the Senate.[172] The legislation criticizes the Fifth Circuit decision in the present case and states "plainly and unequivocally that *all forms* of resale price maintenance are illegal *per se* under the antitrust laws," including "where a conspiracy exists between a supplier and distributor to terminate or cut off supply to a second distributor because of the second distributor's pricing policies."[173] "If the legislation survives a threatened Presidential veto, consumers will have the freedom of choice and price competition that antitrust laws are supposed to ensure."[174] This legislation, however, may not survive as there has been a growing sentiment toward departure from summary condemnation in Sherman Act section one cases.[175]

C. *What is Left of the Per Se Rule?*

While a detailed examination of what remains of the per se rule, in general, is beyond the scope of this note, it is important to mention that the rule has been increasingly abandoned in recent years.

In *Continental T.V. v. GTE Sylvania, Inc.*,[176] the Supreme Court eliminated application of the per se rule against nonprice vertical restraints in favor of a rule of reason analysis. This marked the first time the Court had lifted per se prohibition in an area of trade restraint. The decision was a product of the Court's growing awareness that the scope of the per se rule was overbroad. "[D]eparture from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[177] Moreover, the decision reflected the Court's concern that some agreements which formerly received per se prohibition, lacked the requisite "anticompetitive effect."

In *Broadcast Music, Inc. v. CBS*,[178] the Supreme Court reconsidered application of the per se rule against "horizontal" price fixing.

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172. *Business Elecs. Corp.*, 108 S. Ct. at 1533 n.14 (Stevens, J., dissenting).

173. *Id.* (quoting H.R. REP. No. 100-421, 100th Cong., 1st Sess. 23, 28 (1987)).

174. *Id.*

175. *See infra* text accompanying notes 106-51 [Sec IV].

176. 433 U.S. 36 (1977).

177. *Id.* at 58-59.

178. 441 U.S. 1 (1979). Prompted by declining market share, GTE adopted a new franchise plan which called for a phasing out of its wholesale distributors. The purpose of the plan was to decrease the number of competing GTE retailers and replace them with a more competent and aggressive group.

This case represented a marked departure from the Court's position in earlier price fixing cases.[179] For the first time, efficiency enhancing arguments removed a price fixing agreement from blanket prohibition. The Court looked to the "effect" of the agreement in determining the applicability of per se analysis.

> [I]n characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . .[180]

Thus, the effect on competition, and economic efficiency were held to be variables upon which per se analysis was to depend.

The Court later confirmed this position in the 1984 case of *NCAA v. Board of Regents of the University of Oklahoma*.[181] The Court again examined the effect of the agreement as it found that the case involved an industry, namely, intercollegiate football telecasts, in which horizontal restraints on competition were necessary if the product was to be made available at all. "Our decision not to apply the *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved."[182] The Court was now considering procompetitive justifications for agreements previously held per se unlawful.[183] Historically, the *NCAA* case represents an illegal price fixing agreement falling outside the per se rule.

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[184] the Supreme Court re-examined the per se rule against group boycotts. In *Northwest*, the Supreme Court departed from its longstanding condemnation of concerted refusals to deal as per se un-

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179. *See* United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940) (illustrating the Court's handling of price fixing cases prior to *Broadcast Music*).

180. *Broadcast Music, Inc.*, 441 U.S. at 19-20.

181. 468 U.S. 85 (1984). Petitioner, the NCAA, adopted a new plan for televising college football games. The purpose of this plan was to reduce the adverse effect of live television on game attendance.

182. *Id.* at 117.

183. *See generally Socony*, 310 U.S. at 150.

184. 472 U.S. 284 (1985).

lawful, and held that "absent a showing of market power among the conspirators, or denial of an essential facility necessary for effective competition, the *per se* rule did not apply [to wholesale cooperatives] and that the applicable standard was the rule of reason test."[185] Although the holding was seemingly limited to wholesale cooperative situations, the better reasoned argument favors application of the *Northwest* case to all concerted refusals to deal.

Sylvania, *BMI*, *NCAA*, *Northwest*, and now *Business Electronics Corp.* represent the increased sensitivity of the Supreme Court with respect to the scope of the per se rule in general. These cases reflect the Court's awareness that some agreements, while appearing facially anticompetitive, may not have adverse effects on competition and may even enhance competition. The anticompetitive impact of the challenged restraint will now have to be examined. If the restraint will always, or almost always tend to restrict competition and decrease output, the agreement will be presumed unreasonable. Efficiency will also play a role in the per se characterization scheme. If the restraint imposed is necessary to the marketing of the product, or will tend to increase competition or economic efficiency, the agreement will be scrutinized under the rule of reason standard.

Business Electronics Corp. represents another nail in the per se coffin. As recent case law demonstrates, the per se rule is being applied with less and less frequency. A laundry list of exceptions to summary condemnation is calling into question the continued viability of the rule. As one commentator puts it, the per se rule is vastly becoming "an almost meaningless relic within the body of antitrust law."[186]

VI. CONCLUSION

The *Business Electronics Corp.* decision represents a major change in the law of resale price maintenance. The Supreme Court has created a split between resale price maintenance and price stabilization. In order for a vertical price fixing agreement to be deemed per se unlawful, the conspiring parties must expressly or impliedly

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185. *Id.* at 288.

186. Likens, *Antitrust*—FTC v. Indiana Federation of Dentists: *The Per Se Sword No Longer Reigns Supreme Over the Boycott Battlefield*, 17 MEMPHIS ST. U.L. REV. 279, 291 (1987) (contending that imposing various limitations on the per se rule will result in so few applications as to render it a meaningless relic within the body of antitrust law).

agree to set resale prices or price levels. The Court's holding violates years of Sherman Act interpretation, thus calling into question continued application of the rule articulated in *Dr. Miles*. Moreover, the decision represents a striking blow to consumer welfare. Consumers will likely be faced with higher prices in the marketplace as a result of the Court's holding. The case also calls into question continued application of the per se rule in general. In recent years the Court has declined to summarily condemn agreements previously considered facially invalid. Only time, and additional case law, will serve to shape the scope and breadth of the *Business Electronics Corp.* holding. Perhaps Congress will see fit to overturn this case by passing the Freedom from Vertical Price Fixing Act.

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