# The Role of Power in the Rule of Reason

Mark R. Patterson
*Fordham University School of Law*, mpatterson@law.fordham.edu

# THE ROLE OF POWER IN THE RULE OF REASON

MARK R. PATTERSON*

## I. INTRODUCTION

In the *California Dental Association* proceedings before the Federal Trade Commission,[1] the commissioners differed strongly on whether the association had market power.[2] The market power issue was not central, however, to any of the opinions from the Supreme Court.[3] To some extent, the difference can be explained by the more limited nature of the Court's inquiry. Whereas the Commission was deciding whether the Association's rules were an anticompetitive restraint, the Court was deciding only the standard under which those rules should be assessed. But the Supreme Court's slighting of the market power issue was consistent with the Court's prior jurisprudence, which lends the decision greater significance.

The Supreme Court's use of market power under Sherman Act Section 1 has been quite sensitive to the context of its cases.[4] The Court

---

* Associate Professor of Law, Fordham University School of Law. The Fordham University School of Law provided valuable financial assistance.

[1] California Dental Ass'n, FTC Docket No. 9259 (1996).

[2] *Compare* California Dental Ass'n, Opinion of the Commission at 36 ("We therefore conclude that CDA [California Dental Association] possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services.") *with* California Dental Ass'n, Dissenting Opinion of Commissioner Mary L. Azcuenaga at 26 ("I agree with the finding of the Administrative Law Judge that CDA lacks market power."). Commission Starek objected to the Commission's use of market power in its truncated rule of reason analysis. *See* California Dental Ass'n, Opinion of Commissioner Roscoe B. Starek, III, concurring in part and dissenting in part, at 26.

[3] The majority did not discuss the Association's market power at all. Justice Breyer, in his dissent, made market power the last of the four questions that he said the rule of reason comprises, and he only "assumed" that the FTC was required under the rule of reason to prove market power. California Dental Ass'n v. FTC, 119 S. Ct. 1604, 1618–20 (1999) (Breyer, J., concurring).

[4] In this article, I will assume the usual, broad definition of market power: "the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981). Under this definition, any ability to charge supracompetitive prices is market power. Thus, market power includes not just the power to restrict output

has never required a showing of market power in a rule of reason case—indeed, the Court has said explicitly that no such showing is necessary when anticompetitive effects are shown[5]—and when it has required a showing of market power in per se cases, the Court has tailored the requirement to the nature of the power at issue in those cases. Nevertheless, some lower courts have required a showing of market power in rule of reason cases, and it is sometimes claimed that the requirement is a general one.[6] Moreover, the lower courts often equate market power with market share, regardless of the nature of the particular case before them.[7]

This contrast prompts two questions. First, why have the lower courts made so much, and so indiscriminate, use of market power in the absence of any Supreme Court direction to do so? In part, the reliance on power (or its absence) is no doubt a result of the persistent advocacy of such an approach by followers of the Chicago School.[8] Indirectly, though, the Supreme Court probably also played a role. It did so by focusing to some extent on market power in horizontal cases, and even more in merger cases, without suggesting that the role of power should differ with the nature of the alleged restraint.[9] Although the role of market power in general, and market share in particular, is relatively straightforward in horizontal cases, the extension of that role to vertical cases is fraught with problems.

Second, what should be the proper role of market power in rule of reason cases? In this article, I follow others in contending that the proper role of power in the analysis depends on the nature of the power that is relevant to the challenged restraint.[10] I focus particularly on two sorts

---

but also the power to exclude competitors and the power to increase demand beyond the competitive level. *See infra* text accompanying notes 44–45.

[5] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 461 (1986).

[6] *See, e.g., The Supreme Court, 1997 Term: Leading Cases,* 112 HARV. L. REV. 293, 303 n.43 (1998) ("Indeed, in many circuits a showing of market power or market share is a threshold requirement for rule of reason cases.") (citations omitted). I have shown elsewhere that this requirement is not as general or as unequivocal as such statements would suggest. Mark R. Patterson, *The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History,* 37 SAN DIEGO L. REV. 1 (2000).

[7] *See, e.g.,* Michael L. Denger & M. Sean Royall, *Vertical Price, Customer and Territorial Limitations, in* 39TH ANNUAL ANTITRUST LAW INSTITUTE 723, 797 (PLI Corp. Law & Practice Course Handbook Series No. B-1049, 1998) ("To establish that the supplier imposing the restrictions has the market power to bring about the required adverse effect on competition, courts have increasingly required plaintiffs to make a threshold showing that the supplier's market share (used as a proxy for market power) is sufficiently high that the overall market could be impacted.") (citations omitted)).

[8] *See* Patterson, *supra* note 6, at 13–24.

[9] *See infra* text accompanying notes 34–37.

[10] For citations to other commentary that has taken this position, see *infra* notes 42 & 43.

of power that are not well suited to the usual sort of market analysis. One is informational power: the power that sellers may have to influence the information that consumers have about the sellers' products. The ability to control the information available in the market is not closely related to common measures of market power, such as the sellers' market shares, as *California Dental Association* illustrates.[11]

The other focus here is retailer market power, which has been important both in the FTC's recent proceedings against Toys "R" Us[12] and in several other recent cases.[13] In some retailer cases, as when retailers collude, traditional market-share measures of power may be appropriate. In other cases, though, the competitive harm alleged is exclusion, either of other retailers or of manufacturers that sell through the retailers. In those cases, market shares may not capture the actual competitive significance of the restraint. Instead, an evaluation of market power may require an inquiry into the relationship between retailers and manufacturers.[14]

The article begins by describing briefly the differing views of the Supreme Court and lower courts on the role of market power in the rule of reason. The article then discusses some of the more novel applications of market power principles in recent cases. These cases appear to be adopting a more context-specific use of market power, one that accepts the arguments that power plays very different roles in different contexts. Finally, the article suggests an approach to the use of market power that uses an allocation of burdens of proof to explicitly incorporate these contextual issues.

## II. MARKET POWER IN RULE OF REASON CASES

### A. THE SUPREME COURT

The Supreme Court has always treated market power as only one factor among many to be considered in rule of reason cases. In *Chicago Board of Trade*,[15] for example, it set out a number of factors that are relevant under Section 1,[16] and among those factors then, and in subsequent

---

[11] *See infra* text accompanying notes 50–54 & 82–84.

[12] Toys "R" Us, Inc., FTC Docket No. 9278 (1998). This decision was recently affirmed in Toys "R" Us, Inc. v. FTC, 2000 U.S. App. LEXIS 18304 (7th Cir. 2000).

[13] *See infra* text accompanying notes 56–65.

[14] *See infra* Parts III.B. & IV.B.

[15] Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

[16] *Id.* at 244 ("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

statements of the rule of reason, were several related to market power.[17] But the focus of the Court in Section 1 cases has always been on conduct rather than structure—on determining "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."[18]

Moreover, the Court's failure to impose a more specific role for market power appears to be no accident. In two cases, the Court has rejected arguments that a showing of market power should be required.[19] In the most recent of those cases, *FTC v. Indiana Federation of Dentists*,[20] the Court said explicitly that a showing of market power is not necessary when anticompetitive effects have been shown. The Court explained that because "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"[21]

To the extent that the Court has mandated a role for market power, it has done so only in particular contexts. Under Section 1, the Court has required proof of power only in two categories of per se cases, those involving tying arrangements[22] and those involving exclusions of

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.").

[17] For example, in the list of factors that the Court provides in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), the reference to "the percentage of business controlled," *id.* at 527, and perhaps also that to "the strength of the remaining competition," *id.*, point to factors that are usually considered important in evaluating market power.

[18] 246 U.S. at 244.

[19] Those who argue that the Court would support such a requirement often cite an observation that the Court made in *Sylvania*: "when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977). There are three reasons, however, why reading this statement as an endorsement of a market power requirement would be incorrect. First, it is dictum; the Court made it only in a footnote defining interbrand competition. Second, *Sylvania* did not involve an application of the rule of reason, but a determination of whether the rule of reason or per se rule was the proper standard. Third, and most important, the crucial question is not whether market power is important in theory—it clearly is, as the Court's observation acknowledges—but whether proof of it should be required in litigation—a question on which the Court's observation sheds no light.

[20] 476 U.S. 447 (1986).

[21] *Id.* at 460–61 (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986); citing Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 577 (1986)).

[22] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–14 (1984) (stating that the Court has condemned tying arrangements per se "when the seller has some special

competitors from joint ventures.[23] And in these cases, the nature of the power the Court required was tailored to the nature of the cases. In *Jefferson Parish,* where the issue was tying market power, the Court said that "[t]his type of market power has sometimes been referred to as "leverage,"[24] and in *Northwest Stationers* the Court said that per se treatment turned on whether the defendant "possesse[d] market power or exclusive access to an element essential to effective competition."[25] George Hay has noted that the latter part of this test—"exclusive access to an element essential to effective competition"—seems to be a description of a particular kind of market power.[26]

These cases suggest that the role the Court sees for market power in Section 1 cases has two aspects. First, the role of market power is subsidiary to the basic analysis of conduct. This view comes out not only in *Indiana Federation of Dentists,* but in the Court's use of power as one factor among many in evaluating competitive conduct. Second, the role of market power should be tailored to particular sorts of cases, not applied as an indiscriminate screen to all Section 1 cases.[27] One can see this in the Court's requirement of power in the two kinds of per se cases discussed above. The application of the per se rule in those cases can be viewed as the ultimate truncated rule of reason: for *particular* sorts of restraints, the proof of *particular* sorts of power is (or substitutes for) proof of anticompetitive effect under the rule of reason.

## B. THE COURTS OF APPEALS

The lower courts have made market power a much more central part of the inquiry in rule of reason cases than has the Supreme Court, and

---

ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market) (citations omitted).

[23] *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296 (1985) (considering whether the per se rule or the rule of reason was the appropriate analysis for the expulsion of a member of a joint venture cooperative, and concluding that the per se rule was inappropriate "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition").

[24] 466 U.S. at 14 n.20. The Court went on to say that "'[l]everage' is loosely defined here as a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of the second product." *Id.* (quoting 5 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 1134a, at 202 (1980)).

[25] 472 U.S. at 296.

[26] *See* George A. Hay, *Market Power in Antitrust,* 60 ANTITRUST L.J. 807, 812 (1992).

[27] Another indication that the Court favors specific conceptions of market power in its per se rules can be found in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977). In *Sylvania* the Court had an opportunity to rely on market power in deciding when the per se rule would apply to nonprice vertical restraints. Justice White, relying primarily on *Northern Pacific Railway Co. v. United States,* 356 U.S. 1 (1958), said that "[i]n other areas

they have done so particularly in vertical cases. Indeed, in its recent appeal before the Federal Trade Commission, Toys "R" Us, Inc. stated that "[i]n vertical nonprice cases, most courts of appeals have required a plaintiff to make a threshold showing that the defendant imposing the restrictions had market power in order to establish the required adverse effect on competition."[28] In fact, only two of the circuits continue to require, or say that they continue to require, the plaintiff to show market power in a rule of reason case,[29] but it is certainly true that market power plays a prominent role in rule of reason cases in the lower courts.[30]

One wonders why this is so, in light of the Supreme Court's more limited and context-sensitive use of market power. One possibility[31] is the combination in the early 1980s of three factors. First, it was at that time that Judges Posner and Easterbrook were making a persistent effort to make an absence of market power dispositive in vertical cases.[32] They were aided in this effort by a second factor, the advocacy by followers of the Chicago School of a more economic approach to antitrust. This

---

of antitrust law, this Court has not hesitated to base its rules of *per se* illegality in part on the defendant's market power." 433 U.S. at 65 (White, J., concurring). The Court, however, approached the question not by reference to the importance of market power, or by reference to Sylvania's very small market share, but by reference to the variety of circumstances in which vertical restraints can be procompetitive. *See id.* at 55.

[28] Appeal of Toys "R" Us, Inc. to the Federal Trade Commission (Public Record Version) at 49, FTC Docket No. 9278 (filed Nov. 20, 1997) (citing Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1231 (8th Cir. 1987); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986); Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1568 (11th Cir. 1983)).

[29] *See* Patterson, *supra* note 6, at 24–38.

[30] Indeed, several appeals court decisions have elevated market power to a privileged position in another way, by allowing proof of power alone to meet the plaintiff's initial burden. *See* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) ("The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services. Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct. Accordingly, courts typically allow proof of the defendant's 'market power' instead.") (citations omitted); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367–68 (3d Cir. 1996). This is surely incorrect, given that sellers can possess market power without using it anticompetitively.

[31] Another possibility is the frequently made point that market power is necessary for anticompetitive effect. But this statement, though true, is not at issue. The real question is whether using evidence of market power is the most effective way for fact finders to reach accurate assessments of anticompetitive effect. If instead the focus on market power leads fact finders to neglect more probative evidence of actual competitive effects, or if it devolves into a focus on market share and causes the disregard of other forms of power that may be more relevant, it will be counterproductive.

[32] Patterson, *supra* note 6, at 19–24.

advocacy culminated in the adoption of the 1982 Horizontal Merger Guidelines,[33] which made market power the central issue in merger cases.

These two factors, though placing market power before the courts, might not have resulted in widespread use of market power beyond the Seventh Circuit were it not for a third factor. Although the Supreme Court said in *National Collegiate Athletic Association v. Board of Regents* (*NCAA*)[34] and in *Indiana Federation of Dentists* that proof of market power was not necessary, it did emphasize, even if it did not rely on, the defendants' possession of power in those cases. And, at around the same time, the Court decided one of its few merger cases specifically on the basis of the defendants' lack of power.[35] It would be possible, therefore, to read the Court's cases to approve a focus on market power.

Such an extrapolation, however, would neglect the specific context in which these cases were decided. In merger cases, of course, there is usually no conduct to evaluate; therefore, a focus on market structure, and particularly on market power, is inevitable. But it is also critical that the non-merger rule of reason cases in which the Supreme Court has discussed market power have been horizontal ones.[36] The form of market power to which courts often turn—market share—is the relevant one in horizontal cases, where the anticompetitive effect is a restriction of output. But the harm in vertical cases is generally the product of exclusion or product differentiation.[37] Therefore, even if it might be sensible to focus on market power in horizontal cases, it would not be appropriate to translate the same approach to every vertical case.

Interestingly, in some of the early lower-court cases that made market power the central inquiry in rule of reason cases, the harm alleged was also horizontal, in this restriction-of-output sense. In these cases, the usual vertical explanations for the restraints were not at issue. For example, in *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, [38] the plaintiff, a

---

[33] U.S. Department of Justice, Merger Guidelines (1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102, at 20,532.

[34] 468 U.S. 85 (1984).

[35] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[36] That possibility is, in fact, consistent with the Supreme Court's limited uses of market power in per se cases, where the forms of power on which the Court has relied have been horizontal. That is true not only in the joint venture context of *Northwest Stationers*, but also in the tying context, where the sort of coercive power on which the Court has focused is generally a function of market share, not of product differentiation.

[37] *See* Peter M. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis*, 1981 DUKE L.J. 417, 441–43 (describing how the relevant source of market power in vertical restraints is product differentiation).

[38] 678 F.2d 742 (7th Cir. 1982), *later proceeding*, 822 F.2d 656 (7th Cir. 1987).

terminated distributor, alleged a conspiracy between two other distributors to seek its termination; the defendant, a liquor importer, did not defend by pointing to the elimination of free riding or to any other vertical consideration, but merely said that it sought to reduce the number of its distributors. *General Leaseways, Inc. v. National Truck Leasing Association*[39] was similar, in that although the defendant argued that its rules were intended to eliminate free riding, Judge Posner rejected that argument and instead characterized the arrangement as a cartel. And in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,[40] the justification offered was the elimination of free riding, but the free riding was not among intrabrand competitors, but between individual moving companies operating within the brand and without it.

Thus, the lower courts' development of a general use of market power in rule of reason cases was made both against a backdrop of Supreme Court discussion of market power in horizontal cases and in cases that, though formally vertical, presented issues that were substantively horizontal.[41] Little attention was paid to the appropriateness of extending this reliance on market power to more truly vertical cases. There has, however, been a significant amount of commentary advocating a more contextual approach to the rule of reason in vertical cases. Thomas Krattenmaker and Steven Salop, in their "raising rivals' costs" article, proposed structural rules that were tailored to the particular nature of various forms of vertical exclusion.[42] And Robert Steiner and Warren Grimes have argued for similarly contextual treatment of vertical distribution restraints.[43] These arguments have seen little adoption in the courts, but recent developments suggest their time may be coming.

---

[39] 744 F.2d 588 (7th Cir. 1984).

[40] 792 F.2d 210 (D.C. Cir. 1986).

[41] That is, the justifications for the restraints were not those usually made in vertical cases. Thus, even though Justice Scalia was, in a sense, correct in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), when he said that even with a vertical restraint, "all anticompetitive effects are by definition horizontal effects," *id.* at 730 n.4, the point here is that even the plausible procompetitive benefits were horizontal ones. A similar distinction was drawn by the Seventh Circuit in its recent affirmance of the FTC's *Toys "R" Us* decision. Toys "R" Us, Inc. v. FTC, 2000 U.S. App. LEXIS 18304 (7th Cir. 2000). After discussing the evidence offered by the FTC to show that Toys "R" Us had orchestrated an agreement among toy manufacturers, the court concluded: "That is a horizontal agreement." *Id.* at *20. In support of that conclusion, it added that the agreement "has nothing to do with enhancing efficiencies of distribution from the manufacturer's point of view," *id.* at *20–*21, thus looking to the justifications for the agreement in order to help characterize it.

[42] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

[43] Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407 (1997); Warren S. Grimes, *Brand Marketing,*

## III. MARKET POWER AND THE NATURE OF PARTICULAR RESTRAINTS

Truly vertical restraints, when they are anticompetitive, generally have one of two purposes, neither of which is to restrict the output of the sellers that are parties to the restraint. First, the restraint may be intended to raise the costs, and therefore the prices, of competitors of the parties to the restraint.[44] Second, it may be intended to increase the demand for the products of the parties to the restraint.[45] In either case, the parties to the restraint gain market power, but the nature of the market power is not due to a restriction of output by the participants, and therefore is not effectively measured by their market share.

Below I discuss two types of cases in which traditional market share-based measures of market power have been used, but which actually present more difficult problems for the use of market power in the rule of reason. My intent in discussing each of these examples is not to reject market power as a factor to be considered in the rule of reason inquiry. It is instead to suggest that a simple focus on a traditional measure of the market power of the defendant or defendants is not always appropriate. This point is not entirely novel; as I indicated above, several commentators have argued for antitrust analyses that focus on the particular nature of the restraint at issue.[46] My goal here, though, is to make this point with the particular focus on market power, since that is the central issue for most courts in these cases.

### A. INFORMATIONAL POWER[47]

In most cases, buyers obtain information about a product in a transaction separate from the ultimate purchase of the product. Consequently,

---

*Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints,* 64 ANTITRUST L.J. 83 (1995); Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited,* 80 CAL. L. REV. 815 (1992).

[44] *See* Krattenmaker & Salop, *supra* note 42.

[45] *See* Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law,* 66 ANTITRUST L.J. 1 (1997).

[46] *See supra* notes 42 & 43.

[47] The informational power that is the subject of this section is power that is the product of a particular restraint. In that respect, it is arguably different from the informational power that was the central issue in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). In *Kodak* the Supreme Court said that a lack of information about parts and service costs for expensive copiers and micrographic equipment could prevent those costs from being reflected in the decisions of purchasers of the equipment. Therefore, the equipment manufacturer could charge supracompetitive prices, i.e., could exercise market power.

In the Court's view, the manufacturer's power was a pre-existing characteristic of the market, rather than the product of a restraint imposed by the manufacturer. I have argued the information transaction can be viewed as taking place in a market separate from, but vertically related to, the ultimate product market.[48] In some informational cases, the possession of power in the information market is easy to identify. This was so in most of the cases in which the Supreme Court has considered restraints on information, from the agreement not to provide dental X-rays in *Indiana Federation of Dentists* to the agreement not to bid competitively in *National Society of Professional Engineers.* In each of these cases, it was clear that buyers sought the information at issue, so the sellers' ability to deny the information was evidence of their power in the information market.[49]

In cases where it is less clear that buyers want information, sellers' failure to provide it is less persuasive. This point was the Court's implicit focus in *California Dental Association,* where its view was that consumers might find the suppressed information of no value.[50] If consumers do not want, or perhaps if fully informed consumers *would* not want, the information that sellers agree not to provide, it is not clear that the sellers must have power to suppress the information.

Even when a restraint suppresses information that is valuable, and that therefore is, or would be, desired by consumers, the power inquiry may not be a simple one. One might think that it would be more difficult to effect a restriction in the output of information than to effect a similar restriction in other goods, since information can be supplied more cheaply. However, in Justice Breyer's *California Dental Association* discussion of market power (which he "assume[d]" the FTC was required to show), he did not focus on the capacity to produce advertising. Instead,

---

elsewhere, however, that *Kodak* can be analyzed by recognizing that the tie that Kodak imposed might itself have increased the uncertainty in the market. Mark R. Patterson, *Product Definition, Product Information, and Market Power:* Kodak *in Perspective,* 73 N.C. L. REV. 185, 213–31 (1994).

[48] Another way to look at this issue is to recognize that information about a supplier's product is the sort of marketing service that is often provided by retail distributors of the product. Thus, although the members of the California Dental Association did not use independent retailers to market their services, the association's restraint on information could be viewed as a vertical distributional restraint rather than as a horizontal restriction on output.

[49] One might argue that in each case the buyers wanted the information for free, so the sellers' failure to provide it was due simply to the buyers' unwillingness to pay the competitive price. This might be a compelling argument in instances where there is a cost to providing the information, but in these cases the sellers had produced the information as a byproduct of their other activities.

[50] 119 S. Ct. at 1614 ("The existence of such significant challenges to informed decision-making by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.").

he emphasized consumers' willingness to respond to it: "Restrictions on advertising price discounts in Palo Alto [an area in which the association dentists had a 90% share] may make a difference because potential patients may not respond readily to discount advertising by the handful (10%) of dentists who are not members of the Association."[51] The focus here appears not to be the capacity to provide dental services or information about dental services, but consumers' willingness to respond to information provided only by a minority of dentists.

Thus, the proper focus of a market power inquiry in an informational case may be less a traditional examination of market share than an inquiry into consumer responsiveness like that used in consumer protection cases. That is, the power inquiry becomes, or at least potentially includes, a wide-ranging exploration into the effectiveness of various advertising techniques. Antitrust has traditionally focused on supply-side issues, but the informational issues in these cases depend on the information available to consumers, which affects demand.[52] Because demand-side effects are not so much an exploitation of market power as a means of creating it, the issue for an informational restraint will often be not whether the defendants have the power to impose a restraint, but whether the restraint they have imposed has (anticompetitively) created power.

Moreover, the fact, noted above, that consumers may not want the information denied means that a market power inquiry may provide no litigation economies. To determine whether a denial of information is evidence of market power requires an assessment of whether fully informed consumers would have wanted the information denied, which, in turn, requires an assessment of whether consumers would have benefited from the information. But that inquiry is simply an assessment of the competitive effect of the denial, so that the power inquiry collapses into an evaluation of ultimate competitive effect. This problem is illustrated in *California Dental Association.* The majority viewed the restraint as having had the (procompetitive) potential to reduce misleading infor-

---

[51] *Id.* at 1621 (Breyer, J., dissenting).

[52] Informational issues also arise in antitrust on the supply side, as in the many cases alleging information exchanges among sellers that facilitate price fixing. *See, e.g.*, United States v. Container Corp. of Am., 393 U.S. 333 (1969); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). Information is also sometimes at issue on the supply side in vertical contexts. *See, e.g.*, Competitive Impact Statement, United States v. AT&T Corp., No. 94-01555 (D.D.C. filed Aug. 5, 1994), 59 Fed. Reg. 44,158, 44,166 (1994) (stating that the merger of AT&T Corp. and McCaw Cellular Communications, Inc., would have "[d]ecreas[ed] competition in the market for cellular infrastructure equipment by providing AT&T with access to competitively sensitive and proprietary information of McCaw's principal equipment supplier, L.M. Ericsson").

mation, while Justice Breyer viewed the restraint as having had the (anticompetitive) effect of suppressing useful advertising.[53] That is, the justices looked directly to the competitive effect of the restraint, without focusing on the defendants' power to impose such an effect.[54]

## B. RETAILER MARKET POWER

The crucial characteristic of vertical restraints is the interaction of effects in two related markets. Robert Steiner has argued, however, that antitrust often "employ[s] a 'single-stage' framework, in which the market downstream from the consumer goods maker tacitly is assumed to be inert and perfectly competitive."[55] I would prefer to say that antitrust treats the downstream retailing markets as purely derivative of upstream manufacturing ones, so that power in the downstream markets is only possible where there is power in the upstream markets. And antitrust takes this position, though presumably no one would say that power in manufacturing markets is only possible where there is power in retailing markets.

In fact, retailing markets are becoming increasingly significant in themselves. Retailing has seen much worldwide consolidation in recent years.[56] The increased market concentration has resulted in divestiture requirements in many retailing mergers in the United States. For example, the merger of Exxon and Mobil required "the largest retail divestiture in [Federal Trade] Commission history," of more than 2000 gasoline stations.[57] And the planned grocery merger of Ahold and Pathmark was

---

[53] *See supra* note 50; 119 S. Ct. at 1618 (Breyer, J., dissenting) ("As implemented, the ethical rule reached beyond its nominal target, to prevent truthful and nondeceptive advertising."), *id.* at 1619 (Breyer, J., dissenting) ("If the customer does not know about a lower price, he will find it more difficult to buy lower price service."), *id.* at 1620 (Breyer, J., dissenting) ("To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services.").

[54] William J. Kolasky, California Dental Association v. FTC: *The New Antitrust Empiricism*, ANTITRUST, Fall 1999 at 68, 71 ("The Court is less interested in CDA's market share, than in the likely qualitative effects of the restraint on competition.").

[55] Steiner, *supra* note 43, at 408.

[56] *See* OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, Buying Power of Multiproduct Retailers 279 (July 21, 1999) <http://www.oecd.org/daf/clp/Roundtables/buying.pdf> (noting that "with the exception perhaps of two countries, there has been a significant concentrating trend in retail sectors"). For an empirical study of retailing mergers, see John David Simpson & Daniel Hosken, Are Retailing Mergers Anticompetitive? An Event Study Analysis (FTC Working Paper Jan. 1998) <http://www.ftc.gov/be/workpapers/wp216.pdf>.

[57] Press Release, Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges; Settlement Requires Extensive Restructuring and Prevents Merger

abandoned, at least in part due to the companies' inability to satisfy FTC concerns.[58] In Europe, too, enforcement in this area has been vigorous, with the European Commission recently suing successfully to block a merger of two grocery chains.[59]

Even more significant, perhaps, is the increased recognition, again a worldwide one,[60] that different means of retailing can constitute relevant antitrust submarkets. In the United States, the most prominent retailing enforcement action has been the FTC's successful challenge of the Staples/Office Depot merger.[61] There, the FTC argued successfully for a market defined as "the sale of consumable office supplies through office superstores."[62] Even more to the point, in its recent non-merger action against Toys "R" Us, the Commission challenged Toys "R" Us's attempt to disadvantage "a new type of competition in toy retailing posed by wholesale clubs."[63] Similarly, in *Pepsico, Inc. v. Coca-Cola Co.*[64] the court tentatively accepted a market defined as "sales of fountain-dispensed soft drinks distributed through independent foodservice distributors," relying on *Staples*, among other cases.[65]

Retailer market power complicates the analysis of vertical restraints in two ways, both of which reduce the value of antitrust's traditional use of the manufacturer's market power as a rule of reason screen.[66] Broadly

of Significant Competing U.S. Assets, Nov. 30, 1999 <http://www.ftc.gov/opa/1999/9911/exxonmobil.htm>.

58 *See* CNNfn, Bitter end to Pathmark deal: Ahold blames FTC for failure of deal, Pathmark blames Ahold (Dec. 16, 1999) <http://cnnfn.com/1999/12/16/companies/pathmark/> (quoting James Fishkin, "the FTC's lead attorney on the Pathmark deal," as saying that "[t]he degree of overlap [of stores] was quite high compared to other deals").

59 Press Release, The Commission orders KESKO OY to divest the daily consumer goods business of TUKO OY, Feb. 19, 1997 <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=-IP/97/135 0 AGED&lg=EN>; *see also* John J. Curtin, Jr. et al., *The EC's Rejection of the Kesko/Tuko Merger: Leading the Way to the Application of a "Gatekeeper" Analysis of Retailer Market Power Under U.S. Antitrust Laws*, 40 B.C. L. REV. 537 (1999).

The United Kingdom's Office of Fair Trading has also done considerable investigation into retailing power. *See, e.g.*, Office of Fair Trading, Research Paper 13, Competition in Retailing (Sept. 1997) <ftp://ftp.open.gov.uk/pub/docs/oft/comp-ret.pdf>.

60 OECD, *supra* note 56, at 280 (referring to "the increasing trend of segmentation in retail formats").

61 FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

62 *Id.* at 1073–81.

63 Toys "R" Us, Inc., FTC Docket No. 9278 (1998), Opinion of the Commission at 1, <http://www.ftc.gov/os/1998/9810/toyspubl.pdf>.

64 1998 U.S. Dist. LEXIS 13440 (S.D.N.Y. 1998).

65 *Id.* at *2, *24–*25.

66 *See* OECD, *supra* note 56; Office of Fair Trading, Research Paper 16, The Welfare Consequences of the Exercise of Buyer Power (Sept. 1998) <ftp://ftp.open.gov.uk/pub/docs/oft/oft239.pdf>.

speaking, the problems can be characterized as exclusion in the retailer market and exclusion in the manufacturer market. In the first case, the retailer uses its power to force the manufacturer to exclude another retailer. This was the FTC's theory in *Toys "R" Us*.[67] The claim was that Toys "R" Us used its power as the dominant toy retailer to force manufacturers to exclude competing retailers from the most popular toys. In this case, the absence of manufacturer power makes the anticompetitive effect more likely, in that the manufacturer will have little ability to resist the retailer.

The second possibility is that the manufacturer can use a retailer's power to exclude another manufacturer. This is the effect that has been alleged in *Pepsico, Inc. v. Coca-Cola Co.*[68] The allegation in that case is that Coca-Cola has used exclusive-supply arrangements to foreclose a substantial share of the fountain soft-drink market from competitors like Pepsi. Coca-Cola presumably has market power, but a manufacturer without market power could achieve a similar result if it were willing to commit to sharing the resulting benefits with the retailers. Thus, the sort of harm alleged in this case could occur regardless of whether the manufacturer had power.

In each of these cases—whether the retailer exercises its power over manufacturers, or a manufacturer uses the retailer's power—the relevant power is that which the retailer possesses over manufacturers or suppliers.[69] This power, in turn, is related to, but is not entirely dependent on, its power over consumers. The Federal Trade Commission made this point in its decision in *Toys "R" Us*. Although the Commission said that Toys "R" Us (TRU) had a large market share of the retail toy market, it said that TRU's share of that downstream market underrepresented its upstream power over manufacturers: "TRU purchases such a great share of all toys and of each toy manufacturer's output that no other retailer could make up for lost sales volume should TRU decide to terminate its relationship with the supplier."[70]

Thus, the power of foreclosure is measured by the lost profits imposed on the foreclosed seller. This is not a direct *market* effect, but is an effect

---

[67] FTC Docket No. 9278 (1998) <http://www.ftc.gov/os/1998/9810/toyspubl.pdf>.

[68] 1998 U.S. Dist. LEXIS 13440 (S.D.N.Y. 1998).

[69] That is not to say that retailers cannot also exercise power directly over consumers. The sorts of exclusion discussed here, however, depend on retailers' power over manufacturers.

[70] The Commission also said that "without TRU's support, many toy manufacturers will not pay for an effective advertising campaign, because the manufacturers believe they cannot attain the necessary volume of sales if products are not sold at TRU." *Toys "R" Us*, Opinion of the Commission at 69.

based on the *relationship* between the two parties.[71] It is dependent on market effects, though. Specifically, the power that a retailer possesses over a supplier is determined by two factors: (1) the extent to which consumers seek the manufacturer's product from that retailer, and (2) the extent to which they will go elsewhere for the product if it is unavailable at the retailer. The first of these factors is a relatively straightforward instance of product differentiation: one retailer may be more frequently used for certain products or for certain manufacturers than is another retailer.[72]

The second factor is somewhat more complicated. It is related to market power, but is defined by the cross-elasticity of demand for a manufacturer's product at a particular retailer. When the retailer can provide another product that is almost as attractive as the excluded manufacturer's, such elasticity may be great, as the FTC said in *Toys "R" Us*:

> [O]f great importance in explaining why TRU was so successful in organizing its boycott, is that TRU, as a very large multi-brand retailer, has the ability to amplify its own market power by playing favorites—

---

[71] The concept was described in a recent OECD paper:

> [A] retailer is defined to have buyer power if in relation to at least one supplier it can credibly threaten to impose a long-term opportunity cost (harm or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long-term opportunity cost to itself. Otherwise put, buyer power is defined as situations where there is a fundamental difference in negotiating power between the parties.

OECD, *supra* note 56, at 281.

The relationship element is emphasized in that the retailer may have the power to foreclose distribution avenues beyond those in the market directly affected by the restraint. This possibility is illustrated in the Justice Department's recent challenge to the merger of Aetna Inc. and Prudential Insurance Company of America. In addition to the typical merger issues, the government considered the additional impact provided by Aetna's power, when a dispute arose with physicians regarding coverage under a particular health plan, to foreclose the physician from additional plans:

> A physician's ability to replace, in a timely manner, such lost business is significantly diminished when a large number of patients need to be replaced. Because of Aetna's "all products clause"—which requires a physician to participate in all of Aetna's health plans if he or she participates in any Aetna plan—a physician would lose patients from all Aetna plans if he or she rejects the rates or other terms of any one Aetna plan. Thus, the cost of replacing Aetna patients will be greater when Aetna plans collectively account for a larger share of a physician's total revenue.

United States v. Aetna Inc., Revised Competitive Impact Statement, 1999 WL 1419046, *16 (N.D. Tex. Dec. 7, 1999).

[72] Of course, in that case, the market could be defined as that particular niche, in which case the retailer would in fact have power. But such market definitions are rare, the recent *Staples* and *Coca-Cola* cases notwithstanding. *See* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); PepsiCo, Inc. v. Coca-Cola Co., 1998 U.S. Dist. LEXIS 13440 (S.D.N.Y. 1998).

> or even threatening to play favorites—among its suppliers. This is a source of market power that is not available to single-brand retailers (*e.g.*, an Exxon station or Whirlpool distributor). With multi-brand dealers, a rejected or disfavored product's shelf space will be given to that product's closest substitute with little (if any) loss to the dealer. As a result, the manufacturing firm suffers a significant loss of sales and may lose even more in relative terms because its competitors will prosper as a result.[73]

A crucial point is that neither of these factors—the share of a manufacturer's sales that are made through a particular retailer, or the elasticity of demand for those sales at that retailer—can be assessed by examining the manufacturer's market share. Each is a product of retailer power, but they also cannot necessarily be measured by examining the retailer's market share. Instead, the particular retailer power that is relevant is the retailer's power with regard to a particular manufacturer's products. Evaluation of that power may require an inquiry into marketing effectiveness that is not dissimilar from that which, as discussed above, is required for assessment of informational power.[74]

Moreover, just as an assessment of informational power may best be made through a direct evaluation of competitive effects, the evaluation of this sort of retailer power requires the same sorts of inquiries as are required in evaluating the competitive effects of the restraint that the retailer would impose through the use of that power: Has a retailer favored by consumers denied access to a manufacturer's goods? Has the manufacturer been able to make its goods available through alternative retailing avenues without imposing significant costs on consumers? Because the answers to these questions are found through a direct inquiry

---

[73] *Toys "R" Us*, Opinion of the Commission at 69–70 (citing 8 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1648c, at 535–37 (1989)). Moreover, the manufacturer may have little power to affect this sort of substitution. Particularly where multi-brand retailers are used, consumers may have developed relationships with those retailers that are stronger than their relationships with any particular manufacturer:

> Consumers would have to be particularly attached to a certain brand to be willing to switch stores because that brand is de-listed, hence a de-listed manufacturer will usually suffer a loss of turnover. This is corroborated by a recent INSEE study showing that for about 60 percent of consumers, the absence of a preferred brand simply results in a substitution of a stocked substitute. Only about 20 percent of consumers will go to another store to find the missing product.

OECD, *supra* note 56, at 283.

A similar point was made in *Aetna. See* United States v. Aetna Inc., Revised Competitive Impact Statement, 1999 WL 1419046, *16 (N.D. Tex. Dec. 7, 1999).

[74] *See* Wayne D. Collins, *Rethinking the "Quick Look": California* Dental Association *and the Future of Rule of Reason Analysis*, ANTITRUST, Fall 1999, at 54, 59 (noting that problems are more difficult "as the challenged conduct moves away from simple restraints on prices or output to more complicated ones involving product differentiation, information, or innovation.").

into competitive effects, it is not clear that in this context a preliminary inquiry into market power would be helpful.

## IV. MARKET POWER AND BURDENS OF PROOF

The plaintiff has the initial burden under the rule of reason, and the Supreme Court has set out three ways in which that burden can be met, at least in horizontal cases.[75] First, the plaintiff can show that the restraint is a naked restriction on price or output. Second, the plaintiff can show actual anticompetitive effects. The third possibility is one that the Court has established only by implication: the plaintiff can show market power and conduct that presents the potential for anticompetitive effects. The "potential" for anticompetitive effect that the plaintiff must show under this third approach presumably does not require that "the likelihood of anticompetitive harm is evident," because that could justify condemning the restraint after only a quick look (i.e., without a showing of market power).[76]

The defendant's options are simpler: after the plaintiff has met its burden, the defendant must show some sort of procompetitive effect. In a sense, this is odd, because even if the requirement is interpreted somewhat flexibly, the defendant will have the same basic burden whether the plaintiff has shown actual anticompetitive effects or only the potential for such effects. Of course, one might say that it would be easier for the defendant to contest the latter burden, which in effect would lessen the defendant's burden. But the courts appear to require, even if the plaintiff shows only a potential for anticompetitive effect, that the defendant show a countervailing procompetitive effect, not that the anticompetitive potential has gone unrealized.[77]

---

[75] *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986). The third possibility is only implicit because, though the Court says that the purpose of an inquiry into market power "is to determine whether an arrangement has the potential for genuine adverse effects on competition," *id.*, it does not say what evidence the plaintiff must introduce in addition to the proof of market power. Some courts appear to state that the plaintiff must prove *only* market power. *See* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (observing that because proof of actual effects is not always possible, "courts typically allow proof of the defendant's 'market power' instead") (citations omitted)). It seems likely, however, that the Supreme Court would require some evidence of anticompetitive conduct.

[76] Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors 4 (Apr. 7, 2000) <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> [hereinafter Competitor Collaboration Guidelines] ("[W]here the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.").

[77] *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) ("If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-

This peculiarity may arise from a rule of reason scheme that is based on horizontal cases. With most horizontal cases, the harm, if any, is caused by a reduction in output, and the potential for such harm is created by a straightforward combining of market shares. In such cases, once a significant market share and an agreement that could facilitate a reduction in output are shown, there is no way to show that the reduction in output did not in fact occur without knowing what the market would have looked like in the absence of the agreement (which might show that the agreement did not in fact reduce output). Because this is impossible, the defendant must show a countervailing procompetitive benefit.

Vertical cases are different. Because two related markets are involved, one may constrain any anticompetitive potential in the other. In the analysis of a distribution restraint, this is the rationale for relying on an absence of market power in the interbrand market to conclude that the restraint can have no anticompetitive effect in the intrabrand market. The question is which party should have the burden of proving market power, or its absence, in the interbrand market. As noted above, although it is sometimes said that under current law the plaintiff has the burden of showing market power, that is not generally the case. Nor should it be, in that the Supreme Court has said that the plaintiff in a rule of reason case need only prove the *potential* for anticompetitive effect.

The defendant, however, should have the option of showing that any anticompetitive potential of the challenged restraint cannot be realized, by showing the absence of the relevant form of market power.[78] This is true not only in traditional vertical cases, but in quasi-vertical cases, like the information restraint in *California Dental Association.* In all of these cases, though, the relevant evidence should differ with the nature of the restraint alleged. For that reason, allocation of burdens of proof, and

competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective."). This approach appears to be affirmed by Justice Breyer in *California Dental Association,* where he discusses the plaintiff's burden of showing "the potential for genuine adverse effects on competition," 119 S. Ct. at 1619 (Breyer, J., dissenting), and the defendant's burden of "establishing a procompetitive justification," *id.* at 1621.

[78] The defendant should also be permitted to show that any harm is balanced by a procompetitive benefit. Even though this option makes conceptual sense in that, for example, a procompetitive interbrand benefit could outweigh an anticompetitive intrabrand harm, balancing the two effects is likely to be impossible. The balancing involved in a horizontal case at least is done in a single market; in a vertical case it requires balancing benefits in one market against harms in another. In any event, a benefit to interbrand competition is rarely actually shown, let alone shown to outweigh the harm to intrabrand competition. Instead, the existence of interbrand competition is taken as evidence that intrabrand competition could not actually have been injured—that the potential for intrabrand harm either does not exist or is not realized.

particularly of burdens of proof on the market power issue, should be tailored to the particular harm alleged by the plaintiff.

The discussion below of some specifics of how this approach might work illustrates, however, that a more realistic approach to market power can require an extensive inquiry into the competitive effects of a restraint. For that reason, a preliminary inquiry into market power may not provide the litigation efficiencies in vertical cases that it can in horizontal ones. In vertical cases, therefore, it may be more appropriate to forgo the market power inquiry entirely and inquire directly into the competitive effect of the challenged restraint. As Andrew Gavil has recently pointed out, the Supreme Court appears to have established a rule that direct evidence of anticompetitive effects cannot be rebutted by more circumstantial evidence of a lack of market power, such as that produced by market share evidence.[79]

### A. RESTRAINTS ON INFORMATION

Traditional horizontal cases, which involve explicit restraints on output, and even exclusion cases like *Northwest Stationers*, which involve the raising of rivals' costs, share one important characteristic: they both involve reductions in industry supply. That is not true for an informational case like *California Dental Association*:

> If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices.[80]

"Horizontal" activity that alters demand cannot be analyzed in the same way as other horizontal activities.[81] The collectivity of the activity is not always the source of its competitive impact, at least not directly; power in this context can be more subtle. If the purpose of the restraint is to restrict the availability of information, the power to do so is deter-

---

[79] *See* Andrew I. Gavil, Copperweld *2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87, 95–102 (2000).

[80] 119 S. Ct. at 1616.

[81] *Cf.* Kolasky, *supra* note 54, at 68 (noting that *California Dental Association* "draws into question" Joel Klein's "stepwise" approach to horizontal restraints, but "accords well" with Douglas Melamed's approach to vertical restraints). Kolasky is referring to two speeches by Justice Department officials: Joel I. Klein, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Speech Before the ABA Antitrust Section Semi-Annual Fall Policy Program (Nov. 7, 1996) <http://www.usdoj.gov/atr/public/speeches/jikaba.htm>; and A. Douglas Melamed, Exclusionary Vertical Agreements, Speech Before the ABA Section of Antitrust Law (Apr. 2, 1998) <http://www.usdoj.gov/atr/public/speeches/1623.htm>.

mined by the participants' willingness to conform to the restriction, by consumers' willingness to act without the information, and by competitors' inability to respond. These considerations can be connected to measures of power, though they are not necessarily the traditional measures of market power.

The implications of these points for plaintiffs' and defendants' burdens of proof can be illustrated by considering two superficially similar cases, *Indiana Federation of Dentists* and *California Dental Association.* The organizations suppressing information in these two cases were quite different, as were their means of suppressing that information. Consequently, it would have been appropriate to allow the plaintiffs in the two cases to meet their burdens of showing a potential for anticompetitive effect in different ways. (In the Supreme Court's view, the FTC in *Indiana Federation of Dentists* proved anticompetitive effect directly, so that there was no need to consider how the Commission might have shown a potential for such effect, but here the focus will be on the full rule of reason.)

Considering *Indiana Federation of Dentists* first, it is critical that the Indiana Federation of Dentists (IFD) was an organization formed specifically to impose the restraints that the FTC challenged. The organization was a convenient vehicle for a pre-existing agreement to suppress information, rather than an independent source of power for that suppression. Hence, it was the pre-existing agreement that should have been the focus, not the organization itself (making the Supreme Court's "quick look" approach appropriate). The power of the agreement to restrict information, like that of other agreements to restrict output, was a function of the collective market share of its participants, making market share the relevant source of anticompetitive potential.

The California Dental Association (CDA) was a very different organization, however. As the FTC discussed,[82] the CDA provided its members

---

[82] *See* California Dental Ass'n, Opinion of the Commission 32–34 (Mar. 25, 1996), (examining "whether the association has the ability successfully to impose the restriction on its members" and observing that "dentists place a high value on the benefits of membership in CDA, whether because of its insurance and educational programs or the reputational advantage that membership may confer").

The Indiana Federation of Dentists, in contrast, was formed despite the existence of a traditional dental association. The Indiana Dental Association had itself opposed the insurers' cost-containment programs, but fears of antitrust liability, and an FTC action, caused it to cease its organized opposition. 476 U.S. at 449–50. Subsequently, the Indiana Federation of Dentists was formed, with a more focused mission:

> The leaders of the new organization believed that their mandate was to intensify the IDA boycott campaign. In a report to IDA's Board of Trustees on IFD's formation, IFD's first President explained:

with valuable services, so that a member of the CDA might have disagreed strongly with its restraint, but still complied because it was unwilling to sacrifice the other services that the organization provided.[83] In addition, the CDA, as a respected institution, might have had power to convince consumers (or, say, state regulators who might have objected to its restraint) that it was not in the consumers' best interests to rely on the discount advertising that it sought to suppress.[84] Indeed, this sort of persuasive power might have contributed to dentists' unwillingness to violate the CDA's rules.

Thus, the CDA had sources of power that could have enabled it to suppress information even in the absence of a large market share. For that reason, a plaintiff challenging the restraints of such an organization should not be required to show power in the form of market share if it can show power of some other kind. Even without a large market share, the organization may have the power to suppress information from its members, and that power may deny information to the consumers of those members, and may even, due to the respect with which the organization and its members are held, cause consumers not to rely on what information is provided by competitors. To be sure, the plaintiff should be required to provide evidence of these alternative sources of power if it chooses to rely on them, but such evidence should be sufficient to meet its burden of proof.

How, then, should defendants respond? In a case like *Indiana Federation of Dentists*, where market share is the relevant measure of power, the defendants would likely respond with their own market share or market definition evidence.[85] They would offer this evidence not to show that

---

> [A]bout 80–90% of dentist practices in the Anderson area [IFD headquarters] is covered by one insurance carrier; therefore, the dentists there believe they need more muscle than organized dentistry can give them. They found that via a union they could go beyond dental association activities. In their opinion the union movement will not weaken the IDA but will supplement it.

Brief for the Federal Trade Commission at 7, FTC v. Indiana Federation of Dentists, No. 84-1809 (U.S. filed Dec. 6, 1985); *see also* 476 U.S. at 450–51.

[83] There was direct evidence of such power, in that some member dentists wanted to provide the information but were prevented from doing so.

[84] Indeed, the CDA, instead of establishing rules, could have advertised its views regarding advertising, in which case its views would have been entitled to at least some First Amendment protection. Had it chosen this approach, its credibility would have been even more important than it was in the rule-making approach that the CDA in fact took. In most cases, a consumer that receives no information will not know by whom the information was restricted (or even *if* it was restricted, since no restriction would be necessary if no one sought to communicate it), whereas a consumer that receives information will often know its source.

[85] Alternatively, it could respond by showing some procompetitive benefit that would balance the potential for anticompetitive harm.

their competitors could counter the potential for anticompetitive effect, but to contest the existence of such potential. That is so, as discussed above, because in a market share case the potential for anticompetitive harm is the same as the absence of an ability of competitors to counter the harm. In a case like *California Dental Association,* however, where various forms of power are at work, the defendant would have more options. With an informational restraint, even if the defendants possess power sufficient to suppress information that would otherwise be available in the market, others may possess power that is also sufficient to counter any anticompetitive effect.

For example, there may be sufficient competitors offering the information not offered by the defendants, so that those consumers who seek the information have access to it. Market share is not likely to be especially relevant here. In *California Dental Association,* for example, even if the dentists who agreed to restrict their use of certain forms of price and quality advertising made up a large share of the dentists in a particular market, the small number of other dentists might still have been able to counter the restraint. If only a small share of consumers relied on the advertising information in choosing a dentist (which is plausible, in that it is probably true that many consumers use such information only in their initial selection of a dentist), it is possible that the dentists who were not bound by the restraint could have met the needs of those information-sensitive consumers.[86] On the other hand, as Justice Breyer

---

[86] On the other hand, although it is possible that only a small share of dentists could counter the lack of information created by the CDA's restraint, it is not certain that they *would* counter it. *Cf.* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 474 (1992) ("Kodak acknowledges the cost of information, but suggests . . . that customer information needs will be satisfied by competitors in the equipment markets. It is a question of fact, however, whether competitors would provide the necessary information. . . . Even if competitors had the relevant information, it is not clear that their interests would be advanced by providing such information to consumers."). Moreover, in some instances, because the exposure of deception is informational, a competitor who produced such exposure might not itself reap all the benefits. That is, other competitors might also benefit from the exposure, and would thus be tempted to free ride on the exposure. For that reason, a competitor might be more likely to invest in such exposure if its own share were large, because then it would reap a large portion of the resulting benefits. (Where the informational issue is not deception, but simply suppression, as in *California Dental Association,* this may not be true. In that case, a dentist who advertises his or her discounts or quality is likely to receive all of the business attributable to the advertisements.)

In any event, such a response, because it would be a result of the competing dentists' decision making, not of their "production" capacity, would probably depend more on the number of competitors than on their market share. An analogous point is made of markets for research and development, which are also informational, in the recent joint venture guidelines of the FTC and Justice Department: "When the competitive concern is that a limitation on independent decision making or a combination of control or financial interests may yield an anticompetitive reduction of research and development, the Agencies typically frame their inquiries more generally, looking to the strength, scope, and number pointed out, consumers might be skeptical of information offered only by a small subset of dentists.[87]

Alternatively, an organization like the CDA could argue that in suppressing the information it is acting as the agent of consumers. In a sense, this was the view taken by the majority in *California Dental Association,* and it is similar to the Court's approach to standard setting.[88] This argument can be understood in either of two ways. First, it could be interpreted as a claim that the organization's rule is, in fact, procompetitive. That seems to be the approach adopted by the Court in *California Dental Association,* though it is one the Court has rejected in other cases.[89] Alternatively, it could be interpreted as saying that the organization has no power over consumers, but merely responds to consumers' desires.[90] In that form, it is an argument that the organization lacks market power.[91]

### B. Vertical Restraints with Retailer Market Power

It is useful to distinguish two sorts of power possessed by retailers. Each corresponds to a service provided by retailers to consumers. First, retailers often provide consumers with pre- and post-sale services in connection with a particular manufacturer's (or several manufacturers') products. Such services may include a showroom, service facilities, and the like. Second, many retailers serve as multibrand shopping centers for consumers. That is, retailers provide consumers with a place where

---

of competing R&D efforts and their close substitutes." Competitor Collaboration Guidelines, *supra* note 76, at 17 n.43.

[87] 119 S. Ct. at 1621 (Breyer, J., dissenting).

[88] The Court has observed that privately developed standards often have a great influence on the codes of cities and states, and even can be routinely adopted into law. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570 (1982). The Court has also emphasized that it is important that statements emanating from standard-setting organizations "carry with them the assurance that persons in the affected industries [can] reasonably rely upon their apparent trustworthiness." *Mechanical Engineers, id.* at 567.

[89] *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

[90] In that sense, it is somewhat similar to a manufacturer's reliance, in a vertical restraint case, on its lack of market power.

[91] An interesting question is whether if, as in *Indiana Federation of Dentists,* the plaintiff can show that some consumers who sought information have been denied access to it, the defendants should be able to argue that this is not an actual anticompetitive effect but only a potential one and respond that the potential would not be realized. For example, the Court could sensibly have viewed the true consumers as the insureds, rather than the insurers. In that case, the Court could possibly have concluded that receiving the information would have caused the insurers to decline reimbursement for treatments that would have been beneficial (and cost-effective) for their insureds. This approach would be consistent with the Court's view in *California Dental Association* that more information is not always better.

they can compare the products of various manufacturers and with a source of information about those products.

Generally, manufacturers have no interest in allowing retailers to exercise any market power they may have in the first of these markets, for pre- and post-sale services. To the extent that a manufacturer is able, then, it will seek to constrain retailers in this respect. The second sort of market power, however, in product selection services, can be useful for manufacturers as well as for retailers. Indeed, even if a retailer has no market power in providing this service, in that any attempt to "steer" customers will cost the retailer some of those customers, a manufacturer that is the beneficiary of such steering may be able to use some of its resulting profits to provide the retailer with sufficient compensation to make such steering profitable.

In any event, as Thomas Arthur has discussed,[92] the argument that manufacturers will constrain retailer power is reminiscent of the defendant's argument in *Kodak* that its lack of market power in the equipment market prevented it from exercising power in the parts and service aftermarkets. Consequently, it presents problems similar to those that caused the Supreme Court to reject the argument in *Kodak.* That is, whether a lack of power in one market will constrain the exercise of power in another market is a factual question, and often a difficult one. Therefore, where power exists in one market—the parts aftermarket in *Kodak,* or the retailing market for a vertical restraint—a court should only accept a defendant's argument that the power cannot be exercised if the defendant can show, as a matter of fact, that such a constraint actually exists.

Thus, it cannot generally be said that manufacturers will seek to constrain any exercise of retailer power, even where they have the power to do so.[93] Consequently, the role of power in vertical restraints will

---

[92] *See* Thomas C. Arthur, *"Formalistic Line Drawing": Exclusion of Unauthorized Servicers from Single Brand Aftermarkets After* Kodak *and* Sylvania, 24 J. CORP. L. 603 (1999).

[93] The usual argument made for manufacturer control of vertical restraints is somewhat different. It relies on an absence of manufacturer power, and contends that if manufacturers have no power, they will be forced to constrain their retailers' power, or buyers will not purchase their products (because of the overpriced retailers' services). But this is not necessarily true. It might be, for example, that *all* retailers are charging supracompetitive prices. Or, in a more likely scenario, a multibrand retailer could steer customers to a particular manufacturer's products, and the steering itself could both provide the manufacturer with market power and give it the incentive to cooperate with the steering retailer. Douglas Melamed made this point in his speech on exclusionary agreements:

> If the manufacturer expects to gain or preserve market power by the exclusion of its rivals, it can endeavor to induce the distributors to go along with the exclusionary scheme by sharing with them a portion of the anticipated supracompetitive profits. The sharing of supracompetitive profits could take the form

differ with the nature of the potential harm of the restraint. That is true of power in both of the markets involved, the market in which the harm is alleged and that in any vertically related market that has the potential to constrain the harm. Moreover, depending again on the nature of the harm alleged, the relevant source of power in either market will not necessarily be market share. Hence, a plaintiff should be able to meet any burden it has of proving market power by proving the particular form of power that is relevant to the harm it alleges, and the defendant should be able to respond by showing that its competitors have the power to counter the potential harm. As the discussion below illustrates, this is not always how the cases proceed.

### 1. *Exclusion from Retailing Markets*

Consider first *Toys "R" Us.* The FTC claimed that Toys "R" Us agreed with toy manufacturers that the manufacturers would not sell their most popular toys to Toys "R" Us's new competitors, the warehouse clubs, in the same form in which they sold them to Toys "R" Us.[94] The FTC's theory was that this differentiation of the products sold by Toys "R" Us and by the clubs made price comparisons by consumers difficult. This difficulty in price comparison, in turn, reduced pricing pressures on Toys "R" Us, and gave it market power, or maintained its existing power.

Market share is of no relevance to this form of power, at least directly.[95] Instead, the FTC might have shown one of several things (listed in order

---

> simply of a high price paid for distribution services, or it could be part of the consideration paid to the distributors in more subtle or complex commercial arrangements.
>
> If the supracompetitive profits available to the distributor are large enough, the distributor can be induced to agree to the restraint, even if it is inefficient. In other words, even if the manufacturer cannot induce the distributor to make the exclusionary promise by sharing efficient fruits of the transaction, it can do so by sharing a portion of the supracompetitive profits created or preserved by the restraint

Melamed, *supra* note 81.

[94] This sort of problem has been explored by Robert Steiner. *See* Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?* 65 ANTITRUST L.J. 407 (1997). The exclusion of new forms of retailing can prevent those new, more competitive retailing approaches from taking hold, and in the meantime, older, less efficient forms of retailing can persist. And until one manufacturer begins to use the new retailers, the others will have no incentive to do so. This shows that it is interbrand retailing competition, not intrabrand competition, that is at issue. Whether the same situation could apply after one or more of the manufacturers have begun to distribute their products through the new retailers is unclear.

[95] It may be relevant indirectly, to the extent that Toys "R" Us's market share makes it an essential retailing avenue for toy manufacturers. Note, however, that even a large retailing avenue might not be important to manufacturers if it the manufacturer made little profit on sales through that avenue (and the avenue provided no other benefits, such as marketing visibility).

from those that would constitute something approaching a showing of "actual" harm to those that would constitute only the "potential" for harm): (1) that Toys "R" Us entered into an agreement effecting the differentiation and that it then raised its prices; (2) that Toys "R" Us entered into an agreement effecting the differentiation and that the differentiation did in fact make price comparisons difficult (which the Commission might have proved through survey evidence); (3) that Toys "R" Us entered into an agreement effecting the differentiation (which would have a potential for making comparisons difficult); or (4) that Toys "R" Us had considerable power over manufacturers (which would give it the potential for forcing the product differentiation).

With the first possibility, where higher prices are shown, there would be no need to show any sort of market power, because the higher prices would themselves be the anticompetitive effect. The next two possibilities directly address the informational issue. In those instances, the FTC would not show harm directly, but would show the potential of that harm, in the form of the product differentiation.[96] The fact of the product differentiation, not market share, would be the source of market power. In the final possibility, the showing would not be of the fact of differentiation, but of the potential for it. This showing, unlike the others, could focus on market share. Evidence of market share alone should not be sufficient, however, because it would not be tied to any particular theory of harm.

The FTC did, in fact, introduce evidence on the first three points, but a significant amount of attention in the case was devoted to market definition and to Toys "R" Us's market share. (Given that the sale of different products to different retailers was a form of exclusivity, and thus a distribution restraint, the usual focus would have been on the manufacturers' shares.) To a large extent, this was because Toys "R" Us chose to make a share-based argument. The FTC initially defined the market generally, stating that "the relevant product market is all traditional toys."[97] Toys "R" Us argued that the warehouse clubs that its actions were alleged to have injured "account[ed] for no more than an estimated 1.9%" of this market,[98] so that any harm to them could not have injured consumers.

---

[96] In another sense, a showing of retailing market power, or an increase in such power, is only a showing of potential harm because retailing market power can benefit competition in the manufacturer market. *See Sylvania*, 433 U.S. at 51–52 (vertical restraints have "potential for a simultaneous reduction in intrabrand competition and stimulation of interbrand competition").

[97] Toys "R" Us, Opinion of the Commission at 68, FTC Docket No. 9278 (1998) <http://www.ftc.gov/os/1998/9810/toyspubl.pdf>.

[98] *Id.* at 82.

It is not clear to what aspect of the FTC's case this argument was addressed. It does not deny that the products sold by the two retailers were differentiated, nor does it deny that the differentiation made price comparisons difficult. It seems to be the sort of de minimis argument that was made, and rejected by the Supreme Court, in *Klor's*.[99] It certainly was not an argument that the warehouse clubs' customers did not care about price, in that the clubs' marketing strategy is based on price, so one would expect their customers to be more, not less, price-sensitive than average.

Since the FTC's theory was informational, it seems that to contest it Toys "R" Us should have tried to show that the warehouse clubs were able successfully to demonstrate to consumers, through advertising or otherwise, that their prices were lower. The clubs presumably advertised to try to attract Toys "R" Us customers, and perhaps Toys "R" Us could have shown that, even after the differentiation of the products, consumers were aware that the clubs' prices were lower.[100] Alternatively, perhaps Toys "R" Us could have shown that it did not, in fact, constitute such a significant share of any manufacturers' profits that it had power to dictate the terms on which the manufacturer dealt with it.[101]

Antitrust's traditional focus in vertical restraint cases on market share is no doubt in part responsible for Toys "R" Us's approach.[102] As noted above, antitrust also does not generally recognize explicitly that the defendant in a rule of reason case should be able to offer evidence that any potential for anticompetitive harm proved by the plaintiff can be countered by the defendant's proof that others have the power to counter that harm. Instead, antitrust focuses on showing countervailing procom-

---

[99] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). The FTC responded, as one would expect, that the customers of the clubs were entitled to antitrust protection:

> The boycott orchestrated by TRU reduced the range of choices available to consumers and eliminated forms of competition that consumers desired and would have been able to enjoy absent TRU's policy. Club shoppers were not able to buy the products they wanted at the clubs. They either had to buy their second-choice goods (*e.g.*, custom or combo packs of goods) at their first-choice stores (warehouse clubs) or their first-choice goods (*e.g.*, individually packaged branded toys) at their second-choice stores (TRU, Wal-Mart, Target).

[100] If this were true, Toys "R" Us might also have been required to show that consumers were not harmed by being required to purchase the toys in the forms in which they were sold in warehouse clubs to get the lower prices, at least if the FTC alleged such harm. *See infra* note 110.

[101] Given that the focus of the case was on popular toys, in which manufacturers presumably had the balance of power, one might think that this would have been an effective approach for Toys "R" Us. But the FTC alleged that Toys "R" Us's power was based on threats to carry fewer of the manufacturers' less-popular toys.

[102] It also may be that Toys "R" Us had no satisfactory evidence to offer on more pertinent points.

petitive benefits. Even when a defendant can show such benefits, and can show that they could not be achieved any other way,[103] balancing the benefits against anticompetitive harms like those alleged in Toys "R" Us is probably impossible.[104]

The restraints alleged in *Toys "R" Us* were intrabrand distribution restraints, and the points made here apply more broadly to other such restraints. That is, if the plaintiff presents a particular theory of harm, it should be able to show whatever form of power will create the potential for that harm. In addition, the defendant should be required to address that particular theory of harm, if it chooses to argue that the anticompetitive potential will not be realized.[105] In many cases, though, the plaintiff

---

[103] Toys "R" Us tried to show such benefits by arguing that the clubs were free riding on its advertising investments, which lessened its incentive for such investments, and that the incentive could be restored by requiring the clubs to sell different products, for which free riding would be impossible. The FTC pointed out that Toys "R" Us's advertising was in large part paid for by the toy manufacturers.

[104] *See* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason,* 60 ANTITRUST L.J. 67, 68 (1991) ("Courts, and indeed economists, are ill equipped to carry out the Supreme Court's instruction to balance the conflicting effects that economic theory attributes to vertical restraints, much less to determine whether the net result of a particular restraint is on balance to impede or to promote competition."); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.) (observing that the weighing of effects on interbrand competition and intrabrand competition is difficult). It has also been noted that courts rarely actually do this, regardless of how the rule of reason is usually described. *See* Ginsburg, *supra* (showing that courts in fact use several other approaches to avoid the balancing task).

[105] For example, a terminated retailer might argue that a manufacturer's creation of an exclusive territory could increase the remaining dealer's incentive to deceive customers regarding the manufacturer's product because the retailer would not have to share the resulting profits with competing retailers. The defendant could respond to such a claim by arguing that retailers for competing manufacturers' product could easily counter the deception; if the defendant introduced evidence to that effect, its defense would respond directly to the plaintiff's theory. A response based on manufacturer market shares would have a much more attenuated relationship to the plaintiff's theory of harm.

Warren Grimes made a similar point in his presentation of the Classic Car Wax story as an example of anticompetitive product promotion. *See* Grimes, *supra* note 43, at 832–33. Grimes pointed out the lack of relationship between the harm he describes (resale price maintenance) and market power:

> Vertical restraints are frequently harmful to competition. And that harm is often unrelated to the market share of the producer or retailer. Indeed, the pure monopolist or producer with a secure market niche is unlikely to engage in vertical price-fixing: such a producer will be able to gain maximum return by encouraging the narrow retailer margins associated with vigorous intrabrand price competition.
>
> Vertical price restraints are far more likely to be associated with producers such as Classic Car Wax, which lacked upstream or downstream marketing power. When such producers are unable or unwilling to compete on price, vertical price restraints become a viable option for buying a loyal dealer network. Up to a point, this marketing strategy will work to increase the producer's sales, albeit at the likely cost of consumer demand quality. But as more competing producers

challenging a vertical distribution restraint simply points to the restraint and argues that it will cause harm, without specifying what sort of harm. In that case, courts are correct to allow the defendant more freedom in its response. For example, if the plaintiff is a terminated dealer, and simply claims that its termination reduces competition in the retailer market, the defendant generally is permitted to argue that, due to a lack of power at the manufacturer level, the anticompetitive potential will be constrained.

### 2. *Exclusion from Manufacturing Markets*

The use of retailer power by a manufacturer to exclude competing manufacturers is a traditional exclusive dealing agreement, and it is sometimes said that market share is particularly relevant in evaluating these agreements.[106] In a sense, that is true: the key question is the fraction of the market foreclosed, which would seem to implicate market share. But as the discussion of *Toys "R" Us* above suggests, the ultimate question, for either consumers or competitors, is not a restriction of output. Consequently, the market share threshold that is relevant should not be assumed to be the same as in traditional horizontal cases.

Generally, this issue is addressed through careful market definition. Consider *Pepsico,* discussed above. The court there accepted a tentative market definition as "sales of fountain-dispensed soft drinks distributed through independent foodservice distributors." The court focused on the position of fountain sellers, observing that as a practical matter they were required to use the independent foodservice distributors; to do otherwise would be to incur additional costs.[107] Interestingly, though, fountain sellers were neither the ultimate consumers nor the foreclosed manufacturers.

From the perspective of the ultimate consumers, beverage drinkers, the issue was one of choice:[108] if they wanted a fountain soft drink (or a soft drink in a fountain atmosphere), how difficult would it be to get

---

> adopt the same marketing strategy, welfare costs mount and output increases for individual producers are diluted.

*Id.* at 853–54.

[106] Professor Hovenkamp has observed that in some circumstances, notably "foreclosure" offenses, "[t]he real 'power' basis of the offense . . . is market share, not market power as such." HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 82 (1994).

[107] The plaintiff alleged that distribution through foodservice distributors was the "lifeblood of competitive efficiency in the restaurant business . . . and other businesses that depend upon delivery through foodservice distributors to remain logistically efficient." 1998 U.S. Dist. LEXIS 13440 at *48; *see* text *supra* note 64.

[108] *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law,* 65 ANTITRUST L.J. 713 (1997).

that drink? We have probably all had the experience of going from retailer to retailer, looking for a particular manufacturer's product. In some of the classic exclusive dealing cases, such as *Standard Stations,*[109] the cost of this search was not large because it was clear which retailers carried which products. But with the rise of large, multi-brand retailers, the cost of exclusion of certain brands or products can be significant.[110] Antitrust analysis has not yet developed an approach to dealing with this problem.

In part, antitrust has not focused on the consumer perspective because its focus in exclusive dealing cases has been on the excluded manufacturers. For those manufacturers also, though, it is not restriction of output that is at issue. The manufacturer's concern is with the restriction of profits: it would prefer to be excluded from a larger, but less profitable, market than from a smaller but more profitable one.[111] As retailers become larger and more efficient, they will be better able to extract price concessions from manufacturers, and the manufacturers may be more willing to sacrifice sales through the large retailing avenues. If so, this will exacerbate the consumer choice issue just discussed.

All of this suggests that a more explicit approach to consumer choice issues may be required as retailer power increases. Given the informational aspects of choice, it is probably no accident that more cases are being brought making informational claims. In addition to *Toys "R" Us,* discussed above, which involved retailer exclusion, the effects on manufacturer exclusion of such practices as slotting allowances have given rise to recent concern.[112] As I have suggested elsewhere, one way to approach these cases would be to require the plaintiff to show that the exclusionary arrangement has reduced the value of the retailers' services to consumers.[113] The retailer's power to remain profitable while providing less valuable services to consumers would be evidence that it is receiving compensation (in some form) from a manufacturer in

---

[109] Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949).

[110] *See supra* note 99.

[111] Of course, if economies of scale are significant, a larger market is more likely to be profitable than is a smaller one.

[112] *See* Willard K. Tom, Slotting Allowances and the Antitrust Laws, Testimony Before the Committee on the Judiciary, U.S. House of Representatives (Oct. 20, 1999) <http://www.ftc.gov/os/1999/9910/slotting991020.htm>.

[113] *See* Patterson, *supra* note 45, at 55–59. *Cf.* McCormick & Co., FTC File No. 961-0050 (2000), Analysis of Proposed Consent Order to Aid Public Comment, (noting that "McCormick's supply agreements with customers commonly include provisions that, as is sometimes seen with slotting allowances, restrict supermarket customers' ability to deal in the products of competing spice suppliers") <http://www.ftc.gov/os/2000/03/mccormickanalysis.htm>.

exchange for the exclusion, which, in turn, would be evidence that the exclusion is creating market power.[114]

Admittedly, this approach would require evaluation of difficult information effects, effects which are currently not addressed explicitly by the courts.[115] A recent litigated example was *R.J. Reynolds Co. v. Philip Morris Inc.*,[116] in which Philip Morris was enjoined from providing dealers with incentives to display cigarettes in a way that made it difficult for consumers to find its competitors' cigarettes. In that case, the court stated that "[w]hile visibility and advertising are important in most if not all product categories in the retail store environment, they are uniquely critical in the cigarette industry."[117] The court's analysis, however, did not focus particularly on informational issues, but instead on share measures, both in the cigarette market and in advertising space.[118]

A better analysis would try explicitly to use a more appropriate measure of point-of-sale advertising "share," which would presumably depend on how such advertising is perceived by consumers. The factors that would be important in assessing those perception issues would include not only the form of the advertising, but its source. For example, with regard to information about product *A*, are consumers likely to find that information most credible when it comes from the manufacturer of *A*, from retailers of *A*, or from competing manufacturers or retailers?[119] Answer-

---

[114] Note that this point is consistent with the argument often made that slotting allowances allow retailers to bear some of the risk of the introduction of new products. The potential payoff from the risk taken will go to the manufacturer, not to the retailer, so the retailer is paid to bear the risk.

[115] It is easy, therefore, to be sympathetic to the concerns that motivate Thomas Arthur's proposal that the evaluation of vertical restraints be conducted only by the Federal Trade Commission. *See* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337 (2000). But the costs that must be considered in evaluating alternative schemes of antitrust enforcement include not just the costs of incorrect decisions in cases that are brought, but the costs of anticompetitive effects in cases that are *not* brought, and it is not clear whether the FTC is likely to have sufficient resources to police vertical restraints.

[116] 60 F. Supp. 2d 502 (M.D.N.C. 1999).

[117] *Id.* at 505.

[118] *Id.* at 510–11. The decision, however, was on a motion for a preliminary injunction. The FTC's analysis of its recent consent order with McCormick & Co., Inc. also emphasized share measures, observing that McCormick's discount policies sometimes required stores to devote 90% of their shelf space to McCormick products. McCormick & Co., FTC File No. 961-0050 (2000), Analysis of Proposed Consent Order To Aid Public Comment, <http://www.ftc.gov/os/2000/03/mccormickanalysis.htm>. But the FTC's primary concern was McCormick's price discrimination, not the informational issues.

[119] The importance of the source of the information is illustrated by the fact that when the defendant alleged to have used false advertising to violate § 2 in *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 108 F.3d 1147 (9th Cir. 1997), distributed fliers making false statements about the plaintiff,

ing questions like this would take antitrust analysis far from its product-market-share roots, but without the answers, it will be difficult for antitrust to use market power appropriately in analyzing informational restraints.

## V. CONCLUSION

I have suggested in this article that the role of market power in the rule of reason is ripe for change. Legally, the possibility for change exists because the Supreme Court has never established a clear role for power in the rule of reason, nor have most of the courts of appeals. Factually, change seems likely because of changes in the nature of competition. Competition among retailers is becoming increasingly important as compared to competition among manufacturers, antitrust's traditional concern. And informational forms of competition have been the focus of several recent Supreme Court decisions. Informational competition is likely to become more important with the further development of electronic commerce.

In these areas, and in other vertical contexts, the role of market power is not captured by antitrust's traditional focus on market share. In these contexts the appropriate use of power in antitrust litigation requires a greater sensitivity to the particular form of power at issue. In some cases, with that sensitivity to context, market power may still be a useful part of the rule of reason. In other cases, though, the analysis of market power may require the assessment of the same facts that determine the ultimate competitive effect of the restraint at issue. When that is the case, a particular focus on market power will add little in the way of either accuracy or efficiency to the broader rule of reason inquiry.

---

its competitor, the fliers were anonymous. *Id.* at 1150, 1151–52. *See also* National Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 907–08 (2d Cir. 1988) (antitrust defendant sent letter to pharmacists, which was regarded by the Food and Drug Administration as false and misleading, over the signature of "Marvin A. Heuer, M.D.").