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THE NEW ROLE OF COERCION IN ANTITRUST

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With the ascendancy of the economic efficiency approach and its emphasis on competitive prices and output, coercion—the use of force or threats to compel another to act against one's will—seemingly no longer has a role to play in antitrust analysis. Professor Burns argues that coercion is indeed still relevant in antitrust analysis, though its role has changed from the central character it once played in the early antitrust cases. After analyzing the evolving role of coercion, Professor Burns concludes that the concept is still useful in vertical restraints and tie-ins in distinguishing between efficient restraints and inefficient ones and in evaluating the antitrust-injury standing requirement.

INTRODUCTION

COERCION has been an elusive presence in antitrust jurisprudence for years. At times it has been a dominant player, taking center stage in the determination of legality or illegality. At other times, it lurks in the background as just one more "factor," having some unspecified relevance but not determinative in itself. At still other times, it vanishes altogether.

During the past fifteen years, the Supreme Court has increasingly moved toward an economic-efficiency-based antitrust philosophy. Given the recent rise to prominence of this approach, the question naturally arises: What is the remaining role, if any, for coercion in antitrust doctrine? At first blush, the answer seems simple. Coercion appears to be an anachronism, a relic of the bygone days of "trader freedom" and "buyer autonomy." Under the economic efficiency approach, with its emphasis on competitive prices and output, coercion would seem to have no role whatsoever. Indeed, the proponents of economic efficiency theory tend to eschew any test for legality that turns on state of mind, particularly the state of mind of the defendant. Instead, they construct tests of legality that turn on "hard" facts like market definition and market power.[1]

This article does not join in the debate over whether the Supreme Court or lower courts should or should not adopt an economic efficiency approach. Enough volleys have already been launched in that battle.[2]

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1. *See infra* note 109 and accompanying text.

2. A sampling of the books and articles in this debate include: R. Bork, The Antitrust Paradox (1978); R. Posner, Antitrust Law: An Economic Perspective (1976) [hereinafter R. Posner, Antitrust Law]; Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 Wm. & Mary L. Rev. 787 (1989); Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 31 St. Louis U.L.J 349 (1987); DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 Harv. J.L. & Pub. Pol'y 205 (1991); Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140

Rather, this article starts with the premise that the ship has sailed, that the Supreme Court already has, by and large, come to view antitrust from an economic perspective. Given this reality, this article explores the questions: Assuming a continued adherence to an economic approach, can we eliminate coercion as a factor for consideration? And, if so, would this be a good result? Put another way, does coercion still have a helpful role to play in antitrust analysis?

This article concludes that while coercion does not have—and has never had—a role in horizontal restraints, it continues to play a significant role in vertical restraints and in tying. *What* that role is, however, has changed with the ascendancy of the economic efficiency approach. Part I of the article explores the role of coercion (or, more accurately, its non-role) in horizontal restraints. Part II of the article explores the very central role that coercion played in the early vertical pricing, territorial, and customer restraint cases. This Part demonstrates that evidence of coercion was intricately connected with the rationale for condemning certain vertical restraints, the "agreement" element, and standing. Part III of the article explores the vertical restraint cases after the ascendancy of the economic efficiency approach to antitrust. The first section of this part reviews the Supreme Court's seeming elimination of coercion from all aspects of vertical restraint analysis. The second section of Part III demonstrates, however, that coercion still has a role to play. It is no longer the *reason* for condemning vertical pricing, territorial, or customer restraints, but it is now *evidence* of just the sort of restraint that economic efficiency advocates condemn. Part IV of the article traces the role of coercion in the early tying cases and, like Part II, shows the pivotal role that coercion played.[3] Part V parallels Part III in exploring the evidentiary role that is left for coercion in tying analysis, assuming a continued adherence to an economic efficiency approach. Once again, the conclusion here is that while superficially coercion seems to have been eliminated from much of tying analysis, coercion *evidence*, in fact, is relevant as a way of assisting in sorting out economically efficient ties from inefficient ones. Next, Part VI responds to the skeptic's questions of

(1981); Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev. 936 (1987).

3. For ease, vertical restraints in the form of resale-price, territory, or customer limitations will be dealt with in Parts II and III, while tying arrangements will be considered in Parts IV and V. Vertical restraints (in the form of vertical pricing, territory, and customer restrictions) and tying arrangements are both vertical restraints in the sense that both affect (and usually limit) the freedom of choice of a party on another level of the distribution chain. They differ, however, in that tying arrangements, unlike purely vertical restraints, are also said to harm competitors on the tying seller's level—rivals in the tied market from whom customers can no longer buy. While a vertical price or territorial restraint may have harmful horizontal effects, *see infra* notes 66-67 and accompanying text, these harmful effects are borne by buyers and society at large, not rivals of the restraint-imposing manufacturer. Furthermore, while there is some overlap, the law governing these two types of restraint has taken largely different paths. For these reasons, tying restraints will be considered separately from the purely vertical restraints.

whether we really need to use coercion evidence and whether there might not be substantial dangers in reintroducing coercion as a factor in the antitrust calculus. Finally, this article concludes that, even under an economic efficiency approach, coercion does indeed have a useful role to play in antitrust analysis. A court wishing to adhere to an economically-based approach ought not throw out the baby of coercion with the bath water of the earlier, non-economic approach. Rather, courts need to recognize that the role of coercion has changed. Its new role is different but no less important.

I. Coercion in Horizontal Restraints

Although coercion has in the past often played a prominent role in antitrust cases, it has never played a part in purely horizontal restraints.[4] No part of the horizontal violation—the rationale for condemning the activity, the agreement element, or the plaintiff's standing—depends on the presence or absence of coercion.

The primary rationale for condemning horizontal agreements to fix prices or divide territories or customers is, of course, that such restraints permit otherwise competitive firms to raise prices or restrict output.[5] While the anti-competitive effect of the restraint is borne by the buyers, the coercion of the buyers plays no part in determining the legality or illegality of the activity.[6] A horizontal agreement to fix prices, for exam-

4. The garden-variety horizontal arrangement involves competitors on the same commercial level of different brands agreeing to prices to be charged or dividing territories or customers. In this section, I am using "horizontal restraint" to refer to such an interbrand restraint. While there can be intrabrand horizontal restraints (where, for instance, the dealers of the same brand of merchandise agree to fix prices), such an intrabrand arrangement will not (unless the particular brand has a monopoly position in the market) likely affect output in the interbrand market. *See* H. Hovenkamp, Economics and Federal Antitrust Law § 9.2, at 249-50 (1985) [hereinafter H. Hovenkamp, Economics]; Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 UCLA L. Rev. 1, 18-19 (1982). I am also excluding boycotts from "horizontal restraint." Boycotts may be purely horizontal, purely vertical, or partly horizontal and partly vertical. The role, if any, that coercion plays in boycott analysis depends largely on which type of boycott is involved. *See infra* notes 8, 10, 19 & 125.

5. This is, of course, assuming that the conspiring firms collectively have market power. Absent combined market shares that give rise to market power, the conspiring firms will be unable to raise prices or restrict output, because buyers will simply turn elsewhere for the product. For this reason, Richard Posner argues that the law ought not waste its time and resources trying to break up what will be futile horizontal restraints among firms that collectively lack market power. *See* R. Posner, Antitrust Law, *supra* note 2, at 41-42. *Contra* L. Sullivan, Handbook of the Law of Antitrust 192 (1977) ("it is now settled that in price fixing cases no question whatsoever is to be asked about the defendants' power if their purpose is to fix prices or if their conduct . . . will be to affect market price"). In FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), the Supreme Court seemingly rejected Posner's argument and stated that a showing of market power was not necessary to condemn a horizontal price-fixing agreement. *See id.* at 434-36. The Court's statement in *Trial Lawyers*, however, was arguably dicta because in that case there was some showing of actual *effect* on the market, which would be possible only if the combining lawyers had market power. *See id.* at 419-20.

6. Since 1927, the Supreme Court has treated horizontal price-fixing as *per se* illegal.

ple, is illegal even if some or all buyers willingly pay the higher prices.[7] Rather, the illegality of the horizontal activity depends wholly on the acts of the conspiring parties and not on the resistance or nonresistance of the buyers.[8]

See United States v. Trenton Potteries Co., 273 U.S. 392, 396-401 (1927). The rule remains the same today. *See Trial Lawyers*, 493 U.S. at 432-36; Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648-49 (1980) (per curiam). The Court has similarly held horizontal territorial divisions to be *per se* illegal. *See* Palmer v. BRG of Georgia, Inc., 111 S. Ct. 401, 402-03 (1990) (per curiam); United States v. Topco Assocs., Inc., 405 U.S. 596, 606-08 (1972); United States v. Sealy, Inc., 388 U.S. 350, 356-58 (1967).

A horizontal restraint may escape *per se* condemnation and be judged under the rule of reason if the firms can show a pro-competitive reason for coordinating their pricing or other market activity. In so holding, however, the Supreme Court has indicated that what it is looking for is evidence that the horizontal restraint *lowers* prices or *increases* output. *See* NCAA v. Board of Regents, 468 U.S. 85, 107-08, 114-15 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979). Under this approach, the state of mind of the buyer/victim plays no part in the rule of reason analysis (other than in the obvious assumption that all buyers want lower prices).

7. *See, e.g.*, Columbia Broadcasting Sys. v. American Soc'y of Composers, 620 F.2d 930, 935 (2d Cir. 1980) ("even customer preference cannot save some practices from illegality under the antitrust law"), *cert. denied*, 450 U.S. 970 (1981); *In re* Mid-Atlantic Toyota Antitrust Litig., 560 F. Supp. 760, 786 n.40 (D. Md. 1983) ("consumers' injury arises not from an 'unwanted' purchase of the [product]"). In one sense, anyone who buys does so willingly. Those persons who are unwilling to pay the higher price will switch to substitutes or forego the product altogether. *See* VII P. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1451a (1986); Slawson, *A New Concept of Competition: Reanalyzing Tie-In Doctrine After* Hyde, 30 Antitrust Bull. 257, 270-75 (1985).

8. A boycott can take a number of configurations. A completely horizontal boycott, where the boycotting parties are on the same commercial level as the victim, *see, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963) (boycotting firms were members of stock exchange and victims two over-the-counter broker-dealers); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing, 472 U.S. 284 (1985) (boycotting cooperative comprised of retailers and victim former member of cooperative), is like a horizontal restraint in that the victim's state of mind plays no part in determining the legality or illegality of the concerted refusal to deal. Other boycotts involve horizontal boycotting firms but the "victim" of the boycott is on a different commercial level. *See, e.g.*, *Trial Lawyers*, 493 U.S. 411 (boycotting lawyers and victim District of Columbia government); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) (boycotting party dentists and victims insurers). Here again, the boycott functions like a garden-variety horizontal restraint in that the illegality stems from the anti-competitive activity of the boycotting firms and not from the resistance of the victim who, like the buyer from a horizontal cartel, is coerced in some sense.

On the other hand, coercion does play a role in the boycott offense when the boycott is partly vertical—such as when horizontally-conspiring boycotters are influencing an actor on a different commercial level (typically a supplier or customer) not to deal with a competitor of the boycotting group. *See, e.g.*, Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941) (garment and textile manufacturers boycotted retailers who sold garments made by competing "style pirating" manufacturers). Because unilateral action is legal under § 1 of the Sherman Act, coercion of the "tool" of the boycotters is relevant to the issue of legality. Put another way, if the purported tool of the boycotters has unilaterally chosen not to deal with the victim of the boycott, there is no illegality. *See, e.g.*, Consolidated Metal Prods., Inc. v. American Petroleum Inst., 846 F.2d 284, 291-92 (5th Cir. 1988) (no illegal boycott where buyers remain free to buy plaintiff's product or those of alleged boycotting competitors). For recent discussions of the boycott cases, see Bru-

Similarly, the agreement element in the horizontal restraint does not involve coercion for the simple reason that the horizontal scheme, if successful, benefits all participants.[9] All co-conspirators, whether they are fixing prices or dividing territories or customers, will realize supra-competitive profits through the horizontal plan.[10] Thus, the horizontal plan can truly be said to be a "common" plan, one in which all participants have a unity of purpose.[11] Further, precisely because all participating firms so obviously benefit from a horizontal restraint,[12] courts are unsympathetic to pleas of coercion from cartel members.[13] In the rare case

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net & Sweeney, *Integrating Antitrust Procedure and Substance After* Northwest Wholesale Stationers: *Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 Va. L. Rev. 1015, 1038-44 (1986); McQuinn, *Boycott Law After* Northwest Wholesale Stationers, 57 Antitrust L.J. 839, 840-45 (1989).

9. A horizontal cartel will also benefit non-conspiring rivals of the conspirators because the conspiracy will raise prices in the market and the non-conspiring rival will get the benefit of these higher prices. *See* Blair & Maurer, *Umbrella Pricing and Antitrust Standing: An Economic Analysis*, 1982 Utah L. Rev. 763, 764; Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1490 (1985) [hereinafter Page, *The Scope of Liability*]. Indeed, because of the benefit reaped by the non-conspiring rival, the latter likely lacks standing in the form of antitrust injury to challenge the cartel. *See* Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1900-01 (1990) (Stevens, J., dissenting); P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 340.2c (1991 Supp.).

10. By entering into a cartel, the conspiring firms combine their market power, thereby mimicking a monopolist and, like a monopolist, are able to restrict output and raise prices. *See* H. Hovenkamp, Economics, *supra* note 4, § 4.1, at 83. A horizontal or partly horizontal boycott functions similarly. The members of a boycott who are on the same commercial level will all benefit through the collective agreement not to deal with the victim. Although a party on another economic level, whether a victim or a tool of the boycotters, may well be coerced, the members of the boycotting group all benefit from the joint action. To the extent the plaintiff alleges a purely vertical boycott—a boycott in which the only "agreements" are between members of different economic levels—the boycott is more akin to a vertical restraint and the "agreement" may well be coerced. *See infra* note 125.

11. The Supreme Court described the agreement in a horizontal arrangement as "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). A key question in many horizontal cases is whether parallel action by competitors is a sign of a commitment to a common plan. *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939); Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954).

12. The participant in a horizontal conspiracy will certainly have a motive to cheat on the conspiracy (and may have to be coerced into not cheating). If a cartel member can secretly make sales at a price below the cartel price, that member will be able to sell more units (because his price is lower) and consequently increase his profits. Even the cheater, however, wants the other firms to continue to act in concert; only the existence of the cartel allows the cheater to make supra-competitive profits. Because of the temptation to cheat and the likely new market entrants, some commentators say a horizontal conspiracy carries the seeds of its own destruction. *See, e.g.*, H. Hovenkamp, Economics, *supra* note 4, § 4.1, at 91 ("[a]s a result of all these difficulties cartels do not last long"); R. Posner, Antitrust Law, *supra* note 2, at 51-55 (clandestine cartel contains "inheritable self-destructive tendencies").

13. *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948) ("There is some suggestion . . . that large exhibitors . . . fathered the illegal practices and forced them onto the defendants. . . . [A]cquiescence in an illegal scheme is as much a

in which a competitor alleges that he was coerced into joining a horizontal conspiracy, such coercion—the means of effecting the agreement—in no way negates the existence of the agreement or excuses the coerced firm's ultimate participation.[14]

The standing of a buyer to bring a private action is, likewise, unrelated to the issue of coercion in the purely horizontal restraint.[15] The buyer (who had no part of the horizontal conspiracy)[16] is not disqualified from being a plaintiff even though she voluntarily paid a higher price for the goods or services.[17] Rather, all buyers from cartel members are considered to be victims of the concerted action and are deemed injured through the payment of supra-competitive prices[18] without reference to

violation of the Sherman Act as the creation and promotion of one."); Duplan Corp. v. Deering Milliken Inc., 594 F.2d 979, 982 (4th Cir. 1979) ("it is no defense that [the defendants'] actions may have been reluctant or even coerced"), *cert. denied*, 444 U.S. 1015 (1980); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1321-22 (D. Conn. 1977) ("Court[s] have uniformly rejected any defense that an antitrust violation was 'forced' onto the defendant."); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 245 F. Supp. 889, 892 (N.D. Ill. 1965) ("economic coercion is not a legal defense to treble damage actions"). Courts have similarly held that it is no defense to a charge of horizontal price-fixing that coercion was *not* used on the participants. *See* American Column & Lumber Co. v. United States, 257 U.S. 377, 412 (1921); United States v. National Ass'n of Broadcasters, 536 F. Supp. 149, 163-64 (D.D.C. 1982).

14. Given the mutual benefits of a horizontal arrangement, the requirements for a firm claiming to have withdrawn from a cartel are similarly strict. To prove withdrawal, the defendant must show "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." United States v. United States Gypsum Co., 438 U.S. 422, 464 (1978); *see also* United States v. MMR Corp. (LA), 907 F.2d 489, 500 (5th Cir. 1990) (defendant's decision not to submit bid "hardly inconsistent" with goals of conspiracy), *cert. denied*, 111 S. Ct. 1388 (1991); Chiropractic Coop. Ass'n v. American Medical Ass'n, 867 F.2d 270, 274-75 (6th Cir. 1989) (although AMA's activities "could be construed . . . as withdrawal from the conspiracy [the evidence], even if uncontradicted, does not . . . firmly establish such a withdrawal"); United States v. Read, 658 F.2d 1225, 1231 (7th Cir. 1981) (defendant has burden of proving withdrawal from conspiracy); United States v. Gillen, 599 F.2d 541, 548 (3d Cir.) (burden of proving "affirmative acts inconsistent with the object of the conspiracy" is on defendant; plaintiff does not have to produce evidence of "continued overt acts"), *cert. denied*, 444 U.S. 866 (1979).

15. A non-conspiring rival of the conspirators may well lack standing to challenge the horizontal cartel. This lack of standing, however, stems from the fact that the rival benefits from the conspiracy and, therefore, lacks antitrust injury. *See supra* note 9. It has nothing to do with the presence or absence of coercion on any party.

16. Occasionally an erstwhile co-conspirator will be the victim/plaintiff of a horizontal arrangement, by claiming he would have been better off with competition. *See* NCAA v. Board of Regents, 468 U.S. 85, 95 (1984); P. Areeda & H. Hovenkamp, *supra* note 9, at ¶ 340.2c. As with the buyer/plaintiff, the state of mind of such a conspirator/plaintiff plays no part in determining the legality of the arrangement, the existence of an agreement, or the standing of the plaintiff.

17. *See supra* note 7.

18. There is a split among the lower courts concerning whether a buyer from a non-conspiring rival of the cartel has standing to sue members of the cartel for overcharges paid to the non-conspirator. *Compare* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 587 (3d Cir. 1979) (purchasers from competitors of price-fixers denied standing to sue for treble damages because "their damage is usually much more speculative and difficult to prove than that of [someone] who is an immediate victim of the

any individual buyer's actual state of mind.[19] Put another way, to the extent that coercion can be said to be a factor at all in the standing issue of horizontal restraints, it is *assumed* to be present whenever a buyer pays a price above the competitive price.

II. The Role of Coercion in The Early Vertical Price, Territory, and Customer Restraint Cases (The Law Before *Sylvania*)

In contrast to its non-role in the analysis of horizontal restraints, coercion played a key role in the vertical restraint caselaw before *Continental T.V., Inc. v. GTE Sylvania Inc.*[20] In particular, coercion came into play in three significant ways: (1) in the rationale for condemning vertical price, territory, or customer restraints; (2) in the definition of a vertical "agreement"; and (3) in the application of the *in pari delicto* defense.

Without analyzing why, the Supreme Court instinctively recognized in its early cases[21] that coercion was likely to be present where vertical pricing, territory, or customer restraints were at issue. Unlike the participants in a horizontal cartel who shared a common purpose, the two primary participants in the vertical arrangement—the manufacturer and the dealer—were likely, the Court saw, to be antagonistic with regard to pricing or other restraints.[22] The manufacturer seeking to impose such restraints, the Court noted, "restrict[s] the freedom of trade on the part of dealers who own what they sell";[23] he "constrains" and "forces" the

violation"); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 497 F. Supp. 218, 227 (C.D. Cal. 1980) (purchasers from non-conspirators may not recover amount of price differential caused by conspiracy) *with In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1166 n.24 (5th Cir. 1979) (plaintiffs who purchased beef from non-conspirators at prices affected by conspiracy have sufficient claim of injury under § 4 of Clayton Act), *cert. denied*, 449 U.S. 905 (1980); *In re* Arizona Dairy Prods. Litig., 627 F. Supp. 233, 236 (D. Ariz. 1985) (purchasers from non-conspirators may recover from conspirators); *In re* Uranium Antitrust Litig., 552 F. Supp. 518, 523-26 (N.D. Ill. 1982) (purchasers from non-defendants not barred from possible recovery against defendant-conspirators). The issue has also generated a fair amount of academic comment. *See* P. Areeda & H. Hovenkamp, *supra* note 9, at ¶ 337.3; Blair & Maurer, *supra* note 9, at 763; Page, *The Scope of Liability*, *supra* note 9, at 1490-92; Note, *Standing of Purchasers from Nonconspirators to Challenge Price-Fixing Conspiracy*, 93 Harv. L. Rev. 598 (1980); Note, *Monopsonistic Price Fixing and Umbrella Pricing as a Theory of Antitrust Standing: A New View of Illinois Brick*, 50 U. Cin. L. Rev. 52 (1981). The resolution of this issue, however, does not turn on the presence or absence of coercion.

19. The purchaser who is forced to pay more for a product because of a horizontal boycott similarly has standing even though, in some sense, the purchaser voluntarily paid the higher price. *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 421-25 (1990) (boycott was illegal even though government buyer agreed to higher price).

20. 433 U.S. 36 (1977).

21. *See infra* notes 23-29.

22. A vertical arrangement can be between a manufacturer and a dealer, a manufacturer and a wholesaler, or a wholesaler and a retailer. For ease of reference, vertical arrangements in this article will be referred to as being between a manufacturer and his dealer.

23. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-08 (1911). In the early cases, resale prices were regarded by the Court as a matter of concern pri-

dealer to maintain a suggested price or to sell in a specified territory or to specified customers.[24]

Moreover, although the Court saw that there could be horizontal implications in the imposition of vertical restraints,[25] the Court quickly seized upon the vertical effect—coercion of the dealer and consequent loss of dealer freedom—as an independent reason for condemning vertical restraints.[26] In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[27]

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marily for the dealer, not for the manufacturer. "[T]he advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the [manufacturer]." *Id.* at 407. To the extent the manufacturer was concerned about resale prices, the Court considered that concern to be outweighed by society's interest in preserving the dealer's freedom to trade. *See id.* at 407-08. Later in Albrecht v. Herald Co., 390 U.S. 145 (1968), the Court acknowledged that "a substantial number of manufacturers formulate and enforce complicated plans to maintain resale prices because they deem them advantageous [and that] it is not difficult to conceive of situations in which manufacturers would rightly regard minimum resale price maintenance to be in their interest." *Id.* at 151 n.7.

24. The language of "forcing," "coercion," and "constraining" runs throughout the Supreme Court decisions before *Sylvania*. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145, 152 (1968) (vertical restraints " 'cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgments' " (quoting Kiefer & Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951)); Simpson v. Union Oil Co., 377 U.S. 13, 21 (1964) ("By reason of the lease and 'consignment' agreement, [the] dealers are coercively laced into an arrangement" under which the defendant imposes the resale price.); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922) ("In its practical operation [the defendant's system] necessarily constrains the trader . . . to maintain the prices 'suggested' by [the defendant].").

25. In *Dr. Miles*, the Court analogized the manufacturer's vertical price setting to a horizontal dealer cartel. *See Dr. Miles*, 220 U.S. at 398-400. Because both eliminated competition among dealers, the Court concluded that the vertical restraint was illegal:

> [Dr. Miles] can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. . . . But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. . . . [Dr. Mile's] plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes.

Id. at 408 (citations omitted). Later in White Motor Co. v. United States, 372 U.S. 253 (1963), the Court backed off its assumption that vertical restraints always had the same effect as horizontal restraints. *See White Motor*, 372 U.S. at 263. At least with respect to vertical territorial restraints, the Court concluded that it did not "know enough of the economic and business stuff" regarding the vertical restraints to be certain they had the same "purpose or effect" as horizontal restraints. *See id.*

Commentators have argued that the Court was flatly wrong in *Dr. Miles* in assuming that all vertical restraints have the same anti-competitive effects as dealer cartels. In particular, they argue that manufacturer-imposed vertical restraints, unlike vertical restraints resulting from a dealer cartel, may have pro-competitive effects in the interbrand market. *See infra* notes 59-63 and accompanying text.

26. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145, 153 (1968) ("[T]he combination . . . to force [the plaintiff/dealer] to maintain a specified price for [the] resale . . . constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act."); *Simpson*, 377 U.S. at 17 ("a supplier may not use coercion on its retail outlets to achieve resale price maintenance"); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944) ("[A distributor] sells to its wholesalers at prices satisfactory to itself. Beyond that

the first vertical restraint case to reach it, the Court began its analysis with the premise that

> [t]he public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, . . . if there is nothing more, [is] contrary to public policy, and therefore void.[28]

A few years later the Court reiterated:

> The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged . . . in trade and commerce—in a word to preserve the right of freedom to trade.[29]

The notion of trader freedom, and the concurrent emphasis on coercion, also played an important role in the definition of an "agreement" in the vertical context. Because section 1 of the Sherman Act only condemns concerted action,[30] the Court needed to find an agreement be-

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point it may not project its power over the prices of its wholesale customers by agreement.").

Justice Harlan in his dissent in *Albrecht* objected to the majority's use of trader freedom as a basis for imposing *per se* liability under the Sherman Act.

> It has long been recognized that one of the objectives of the Sherman Act was to preserve, for social rather than economic reasons, a high degree of independence, multiplicity, and variety in the economic system. Recognition of this objective does not, however, require this Court to hold that every commercial act that fetters the freedom of some trader is a proper subject for a *per se* rule in the sense that it has no adequate provable justification.

Albrecht, 390 U.S. at 158 (Harlan, J., dissenting). Justice Harlan contended that the primary purpose of the antitrust laws was to prohibit the "much more significant evil of lessened competition" that comes from horizontal cartels rather than to protect trader freedom. *Id.* at 159 (Harlan, J., dissenting).

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

28. *Id.* at 406 (quoting Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., 1904 A.C. 565). The Supreme Court recognized that this statement of the law was a general rule subject to exceptions. "[R]estraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case." *Id.* at 406-07. In *Dr. Miles*, however, the Court rejected the manufacturer's proffered justification of "the importance of a standard retail price and . . . [a general allegation] that confusion and damage have resulted from sales at less than the prices fixed." *Id.* at 407.

29. United States v. Colgate & Co., 250 U.S. 300, 307 (1919). According to the Court, trader freedom actually had a two-fold importance—it preserved the dealers' "independent discretion," and it protected the "free and natural flow" of the competitive market. *See* United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99-100 (1920); *see also* Albrecht v. Herald Co., 390 U.S. 145, 152 (1968) (scheme to fix maximum prices "substitut[es] the perhaps erroneous judgment of a seller for the forces of the competitive market").

30. Section one of the Sherman Act states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1 (1988). While the Sherman Act uses the three terms "contract," "combination," and "conspiracy," it is generally recognized that there is no meaningful distinction among them. *See* VI P. Areeda, *supra* note 7, at ¶ 1403; 2 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 6.01[1] (1991); Note, *Alliterative Illegalities in Antitrust Law: Contract Combination and Conspiracy*, 15 Mem. St. U.L. Rev. 239, 239 (1985). For

tween the manufacturer imposing the vertical restraints and some other party in order to subject the vertical restraint to antitrust scrutiny.[31] The Court solved this problem by holding, in its early vertical cases, that the dealer could be the "other party" to a vertical agreement,[32] even when the dealer had been coerced into complying with the vertical restraint.[33] Thus, unlike the horizontal agreement, which involved a common plan that benefitted all participants, the agreement in the vertical context could and often did exist where the plan had, in essence, been crammed down the throat of one party to the arrangement.[34]

Not only was coercion *not* a barrier to the formation of a vertical agreement, it also became a pivotal factor in showing that a vertical agreement actually existed. In its famous *United States v. Colgate & Co.*[35] opinion, the Supreme Court held that where a manufacturer simply

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ease of reference, the term "agreement" will be used in this article to refer to the contract-combination-conspiracy element of the § 1 offense.

31. Absent an agreement, the manufacturer's imposition of pricing, territorial, or customers restraints on his dealer would be wholly legal. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

32. In its first vertical restraint case, *Dr. Miles*, the Court found the agreement element satisfied where the manufacturer entered into an express agreement with his wholesalers and retailers regarding resale prices. The Court in *Dr. Miles* did not consider whether, given the inherent two-party nature of any vertical arrangement, some explicit agreements might fall outside the ambit of § 1. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 411 (1911).

33. *See, e.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922) (agreement between manufacturer and dealer found where manufacturer's marketing system "constrains" dealer); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99-100 (1920) ("parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain . . . trade"); *see also* Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968) (dealer "could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price"); Simpson v. Union Oil Co., 377 U.S. 13, 21 (1964) (agreement between oil company and dealer found in coercive consignment and lease contracts). There could, of course, also be an agreement between a manufacturer and a willing (or, at least, noncomplaining) dealer. *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 394 (1911) (specific contracts between manufacturer and dealers fixing resale prices with no showing of any actual coercion). In its famous footnote six in *Albrecht* the Court noted: "[The plaintiff-carrier] might successfully have claimed that [the defendant-publisher] had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it." *Albrecht*, 390 U.S. at 150 n.6.

34. In *Albrecht*, the Court acknowledged that it was embracing a concept of a vertical agreement that involved coercion of one party to the agreement. The Court specifically rejected the "notion that there can be no agreement violative of § 1 unless that agreement accrues to the benefit of both parties." *Albrecht*, 390 U.S. at 152 n.8. Justice Harlan, in his dissenting opinion, argued that, by permitting an agreement to be found where one party to that agreement was coerced, the Court was, in reality, nullifying the agreement requirement of § 1 and saying "it is unlawful for one person to dictate [prices] to another; any pressure brought to bear in support of such dictation renders the dictator liable to any dictatee who is damaged." *Id.* at 162 (Harlan, J., dissenting). In contrast to the majority, Justice Harlan would not permit a finding of an agreement unless the dealer, like the manufacturer, was "economically interested" in the resale prices set. *See id.* at 163 (Harlan, J., dissenting).

35. 250 U.S. 300 (1919).

announced resale prices and refused to sell to those dealers who did not abide by the announced prices, the manufacturer was simply exercising *his* freedom to select his customers, and there was no "agreement" with the dealer[36] who unilaterally chose to comply with the manufacturer's wishes.[37] However, as later cases showed, if the manufacturer went beyond the simple *Colgate* scenario, an "agreement" could be found.[38] Coercion, in particular, was among the types of "further actions" that would take a manufacturer out of the *Colgate* safe harbor.[39] If the manufacturer, in negotiating with the dealer, used coercion to secure the dealer's acquiescence in the pricing (or territorial or customer) limitations, the arrangement fell outside the simple—and legal—*Colgate* cate-

36. *See id.* at 307. In *Colgate*, the Court's concern was principally with the *manufacturer's* freedom to deal with whomever he wished. The Court noted that the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.*; *see also* United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722 (1944) (business has "right to select its customers").

37. The Court in *Colgate* quoted the district court's observation:

> No suggestion is made that the . . . manufacturer attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase . . . or not sell it at all . . . .

Colgate, 250 U.S. at 305.

38. In United States v. Parke, Davis & Co., 362 U.S. 29 (1960), the Court stated:

> [A]n unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

Id. at 43. When the manufacturer went beyond *Colgate*, the dealer's "acquiescence is not . . . a matter of individual free choice prompted alone by the desirability of the product." *Id.* at 47. For a detailed discussion of the vertical restraint cases from *Dr. Miles* to *Parke, Davis*, see Levi, *The* Parke, Davis-Colgate *Doctrine: The Ban on Resale Price Maintenance*, 1960 Sup. Ct. Rev. 258.

39. Commentators have been virtually unanimous in denouncing the distinction drawn in *Colgate* and its progeny between unilateral and concerted action. *See, e.g.*, Baker, *Interconnected Problems of Doctrine and Economics In the Section One Labyrinth: Is* Sylvania *A Way Out?*, 67 Va. L. Rev. 1457, 1474 (1981) ("only a particularly artificial and restricted notion of concerted action could explain the distinction between *Colgate* and *Dr. Miles*"); Burns, *Rethinking the "Agreement" Element in Vertical Antitrust Restraints*, 51 Ohio St. L.J. 1, 18-19 (1990) ("Obviously, the distinction drawn by *Colgate* and its progeny between legal and illegal vertical arrangements was based on a highly strained and artificial interpretation of an agreement."); Piraino, *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 Notre Dame L. Rev. 1, 10-11 (1988) ("The distinctions set forth in cases between unilateral and concerted conduct is simply illogical."); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 686-87 (1962) ("a distinction between a program of resale price maintenance effected by contracts and 'agreements,' and one effected by threats of refusal to deal, is wholly untenable as a practical or logical matter").

Indeed, the Supreme Court itself acknowledged that the effect on the market was the same in the simple *Colgate* situation (which was deemed to be unilateral and therefore legal action) and the case in which a manufacturer took some additional steps (which was deemed to be concerted and therefore illegal action). *See Parke, Davis*, 362 U.S. at 44.

gory and was subject to antitrust attack.[40]

The third area in which coercion played a significant role in the early vertical restraint cases was in the *in pari delicto* defense.[41] This common law defense became relevant in the vertical context[42] precisely because

40. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968) ("each [franchise dealer] can clearly charge a combination between [the franchisor] and himself, as of the day he unwillingly complied with the restrictive franchise agreements . . . or between [the franchisor] and other franchise dealers, whose acquiescence in [the franchisor's] firmly enforced restraints was induced by 'the communicated danger of termination' " (citations omitted)); Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968) ("Under *Parke, Davis* [the plaintiff/dealer] could have claimed a combination between [Herald Co.] and himself, at least as of the day he unwillingly complied with [Herald's] advertised price."); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967) (agreement held to exist where Schwinn had been "firm and resolute" in insisting on vertical restraints and Schwinn's " 'firmness' . . . was grounded upon the communicated danger of termination"); Simpson v. Union Oil Co., 377 U.S. 13, 24 (1964) (oil company liable under § 1 where there was "an agreement for resale price maintenance, coercively employed"). Indeed, in *Parke, Davis*, Justice Harlan argued in his dissenting opinion that no agreement had been formed where the dealers' "acquiescence was not brought about by 'coercion' or 'agreement.' " *Parke, Davis*, 362 U.S. at 55 (Harlan, J., dissenting).

Similarly in lower court opinions, coercion came to be "a substitute for express agreement. Indeed, many lower courts came routinely to hold that unwilling compliance with another's demands in order to avoid termination creates an agreement." VII P. Areeda, *supra* note 7, ¶ 1451a, at 120; *see, e.g.*, Yentsch v. Texaco, 630 F.2d 46, 53 (2d Cir. 1980) ("While evidence of exposition, persuasion, argument, or pressure is alone insufficient to establish coercion . . . threats of termination, as long as they secure adherence to the fixed price, . . . trigger[] a finding of an illegal combination."); Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486, 495-96 (8th Cir. 1975) (evidence that "termination awaited the miscreant distributor who refused to adhere" supports finding of illegal combination). As a result of relying on coercion as a basis for finding an agreement, courts found it necessary to distinguish between coercion, on the one hand, and "exposition, persuasion and argument," on the other. The latter, the courts held, were not sufficient to give rise to a finding of agreement. *See, e.g.*, *Yentsch*, 630 F.2d at 53 ("evidence of exposition, persuasion, argument, or pressure is alone insufficient to establish coercion"); Arnott v. American Oil Co., 609 F.2d 873, 884-85 (8th Cir. 1979) (implying that testimony that defendant's calls were "mere suggestions" would, without more, bar finding of coercion), *cert. denied*, 446 U.S. 918 (1980); Gray v. Shell Oil Co., 469 F.2d 742, 747-48 (9th Cir. 1972) ("distinction between 'coercion' on the one hand and 'exposition, persuasion and argument' on the other, . . . is firmly embedded in the decisional law on vertical price-fixing"), *cert. denied*, 412 U.S. 943 (1973); *see also* VII P. Areeda, *supra* note 7, at ¶ 1440 (noting that persuasion/agreement distinction served function of letting manufacturer make helpful marketing suggestions to dealer).

41. *In pari delicto* means "of equal fault." The defense "is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985). For a discussion of the common law origins of the *in pari delicto* defense, see Handler & Sacks, *The Continued Vitality of* In Pari Delicto *As An Antitrust Defense*, 70 Geo. L.J. 1123, 1128-31 (1982).

42. The *in pari delicto* defense is occasionally asserted in a horizontal case where an erstwhile member of the cartel later seeks to sue the cartel. *See, e.g.*, General Leaseways, Inc. v. National Truck Leasing Ass'n, 830 F.2d 716, 720-24 (7th Cir. 1987) (association member could be barred from challenging location restrictions of association because plaintiff bears "substantially equal responsibility for the anti-competitive restrictions" as defendant); Southwest Marine, Inc. v. Campbell Indus., 732 F.2d. 744, 746 (9th Cir.)

one party was permitted to fill simultaneously the dual roles of co-conspirator and plaintiff/victim.[43] The *in pari delicto* defense posed the question: Is there a point at which the conspiring dealer was so actively involved in the vertical restraint that she should be wholly barred from suing as a plaintiff/victim? In *Perma Life Mufflers, Inc. v. International Parts Corp.*,[44] the Supreme Court indicated that the answer depended in part on whether the dealer had been coerced into accepting the restraints in question. Where the dealer did not voluntarily support the scheme but instead had the restraints "thrust" upon her,[45] the *in pari delicto* defense did not bar her suit.[46] Such a dealer, the Court noted, "may be subject to

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(judgment for plaintiff on *in pari delicto* issue because plaintiff was not substantially involved in formation of illegal cartel), *cert. denied*, 469 U.S. 1072 (1984); Board of Regents v. NCAA, 546 F. Supp. 1276, 1324-26 (W.D. Okla. 1982) (member schools not barred by *in pari delicto* defense from suing NCAA because schools were not active in creation of questioned restraints and only complied with restraints because of threats from NCAA), *aff'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984). This defense has even been asserted (unsuccessfully) against a buyer from an alleged horizontal cartel. *See* Burlington Indus. v. Milliken & Co., 690 F.2d 380, 387 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

43. It is possible for a consumer to be the plaintiff in a vertical case and sue the manufacturer and the complying (whether coerced or willing) dealer for violating the antitrust laws through their agreement. *See* P. Areeda & H. Hovenkamp, *supra* note 9, at ¶¶ 337.2e, 340.3a. The much more typical private vertical restraint case, however, involves a dealer/plaintiff who alleges that either she agreed with the manufacturer or her fellow dealers agreed with the manufacturer. *See* Salop & White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1005 (1986) (empirical study showed that dealers are the main parties who allege vertical price fixing). In *Albrecht*, the Supreme Court stated in dicta that either of these two dealer-manufacturer agreements would satisfy the conspiracy element of the vertical restraint case. *See Albrecht*, 390 U.S. at 150 n.6. The prevalence of dealer-plaintiffs is likely due, in large part, to the fact that dealers are a more knowledgeable and reliable class of antitrust plaintiffs than consumers in the vertical restraint area. *See* McArthur & Paterson, *The Effects of* Monsanto, Matsushita, *and* Sharp *on the Plaintiff's Incentive to Sue*, 23 Conn. L. Rev. 333, 344 (1991).

44. 392 U.S. 134 (1968). In *Perma Life*, the defendant franchisor argued that, given the franchise dealers' "enthusiastic" desire to acquire a Midas franchise and their "full knowledge" of all aspects of the contract, the dealers were wholly barred by the *in pari delicto* doctrine from bringing an antitrust suit based on restraints in the franchise agreement. *See id.* at 138.

45. *See id.* at 141. The Court noted that the dealers' participation in the restraints was "not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them." *Id.* at 139. Justice White, in his concurring opinion, echoed this point:

> These cases are enough to warrant reversal in this case, once it is concluded that the illegal arrangement . . . was thrust on [the dealers by Midas]. . . When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose [of the antitrust laws].

Id. at 143-45 (White, J., concurring).

46. The Court left open the question of whether a "truly complete involvement and participation in a monopolistic scheme could ever be a basis . . . for barring a plaintiff's cause of action." *Id.* at 140. Justice White stated in his concurring opinion that he "would deny recovery where plaintiff and defendant bear substantially equal responsibil-

some criticism for having taken . . . part in [the] allegedly illegal scheme," but her "participation was not voluntary in any meaningful sense."[47] The upshot of the *Perma Life* decision was that, once again, the dealer's state of mind was relevant—this time as a type of standing device to filter out some would-be plaintiffs.[48] By limiting plaintiff status to coerced dealers, the Court permitted private vertical lawsuits to be maintained[49] but avoided giving treble damages to an "undeserving"

ity" for the injury. *Id.* at 146 (White, J., concurring). Justice Fortas felt that if the dealer "originated and insisted upon" the restraints, he should not recover damages. *Id.* at 148 (Fortas, J., concurring) (emphasis omitted). Justice Marshall refined and combined the thoughts of Justices White and Fortas, by stating that he would bar a dealer's recovery where the dealer "actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault." *Id.* at 149 (Marshall, J., concurring). Later, in a securities law case, the Supreme Court stated that an *in pari delicto* defense is available where (1) the plaintiff bears at least substantially equal responsibility for the violation and (2) preclusion of the suit will not significantly interfere with the effective enforcement of the laws. *See* Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310-11 (1985).

47. *Perma Life*, 392 U.S. at 139. The Court also noted that "permitting the plaintiff to recover a windfall gain does not encourage continued violations by [dealers] since they remain fully subject to civil and criminal penalties for their own illegal conduct." *Id.* The potential civil liability would presumably be in a lawsuit initiated by a consumer who bought from a dealer that had acquiesced in the vertical restraints. *See supra* note 43.

48. As a standing device, *in pari delicto* works much like the Court's rules limiting antitrust plaintiffs to those directly injured. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) ("overcharged direct purchaser, and not others in chain of manufacture or distribution, is the party injured"). Each of these doctrines eliminates as plaintiffs persons who have actually been injured by the antitrust violation because of a competing policy reason (in the case of *Illinois Brick*, the desirability of avoiding duplicative recoveries and complex damage calculations, *see id.* at 730-33; in the case of *in pari delicto*, the desirability of not rewarding a wrongdoer).

After *Perma Life*, the lower courts, when confronted with the *in pari delicto* defense in a vertical context, have considered such factors as whether the dealer actively participated in creating the restraint and whether the dealer was coerced or pressured. *See, e.g.*, Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 715 (11th Cir. 1984) (*in pari delicto* defense rejected where dealer acquiesced in defendant's division of territories but there was "no evidence . . . of plaintiffs' truly complete involvement and participation in allegedly illegal arrangement"); Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 279 (9th Cir. 1976) ("plaintiff is barred from recovery only when the illegal conspiracy could not have been formed but for the plaintiff's participation"), *cert. denied*, 431 U.S. 938 (1977); Greene v. General Foods Corp., 517 F.2d 635, 646 (5th Cir. 1975) (considering whether injured party was willing participant in restraint against trade), *cert. denied*, 424 U.S. 942 (1976); Sahm v. V-1 Oil Co., 402 F.2d 69, 72 (10th Cir. 1968) (defense of *in pari delicto* insufficient to defeat plaintiff's claim where plaintiff coerced into agreeing to resale price maintenance scheme). For a discussion of the lower court cases, see Handler & Sacks, *supra* note 41, at 1140-48.

49. Throughout its opinion in *Perma Life*, the Court reiterated its concern for retaining an effective private right of action in antitrust. The Court noted that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat" and that even where that plaintiff is "no less morally reprehensible than the defendant . . . the law encourages his suit to further the overriding public policy in favor of competition." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). A contrary result would "threaten the effectiveness of the private action as a vital means for enforcing . . . antitrust policy." *Id.* at 136.

dealer.[50]

Thus, in contrast to its treatment of cases involving horizontal cartels, the Supreme Court quickly made the state of mind of one participant to the arrangement (usually the dealer) a key consideration when dealing with vertical restraints. The dealer's state of mind *qua* victim was central to the rationale for applying the antitrust laws; the dealer's state of mind *qua* co-conspirator became significant in determining whether an agreement existed.[51] Then, having thrust one party into the dual roles of plaintiff and co-conspirator, the Court used coercion as one factor in determining whether a particular plaintiff/co-conspirator should be permitted to sue.

III. THE ROLE OF COERCION IN THE CURRENT LAW ONVERTICAL PRICE, TERRITORY, AND CUSTOMER RESTRAINT

Beginning in the 1950s, there emerged what has been called the economic efficiency approach to antitrust analysis.[52] Adherents of this approach argue that the sole (or at least primary) goal of the antitrust laws should be economic efficiency—insuring that markets remain non-cartelized so that goods and services are offered to consumers at competitive prices and output expands to meet consumer demand.[53] These com-

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50. *See* Austin, *The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant*, 65 Calif. L. Rev. 1143, 1152 (1977) (discussing use of coercion or fault as similar filter in tying cases). The use of fault as a standing filter in vertical restraint cases has been criticized by William Page. *See* Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 501 (1980) [hereinafter Page, *Antitrust Damages*].

51. Both such uses of coercion are in sharp contrast to the horizontal-restraint caselaw where coercion played no part in the analysis. *See supra* Part I.

52. At the forefront of the economic efficiency approach was the Chicago School of antitrust analysis. For a brief summary of the key aspects of this approach, see Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979) [hereinafter Posner, *The Chicago School*]. For one of the earliest statements of the economic efficiency approach to vertical restraints, see Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960). In recent years, a number of commentators have adopted largely economic approaches to antitrust but have nonetheless staked out positions somewhat different from the Chicagoans. *See, e.g.*, Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. Rev. 1020, 1041-42 (1987) (discussing the sometimes conflicting policy implications of economic efficiency goal and consumer welfare goal); Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 40-41 (1989) (suggesting that even if economic efficiency is only goal of antitrust policy, model developed by Chicago School is unduly narrow in analysis); Markovits, *The Limits to Simplifying Antitrust: A Reply To Professor Easterbrook*, 63 Tex. L. Rev. 41, 49 (1984) (discussing role of consumer welfare in antitrust policy). No attempt will be made in this article to parse out the exact boundaries of each of these sub-theories. The economic approach presented here is, by and large, one ascribed to all commentators advocating an economically-based antitrust analysis.

53. *See* R. Bork, *supra* note 2, at 20-21; R. Posner, Antitrust Law, *supra* note 2, at 8-18; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 138-40 (1984) [hereinafter Easterbrook, *Vertical Arrangements*]; Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 Tex. L. Rev. 705, 715-16 (1982) [hereinafter Easterbrook, *Is There A Ratchet*]. The critics of the economic efficiency model argue that the model

mentators thus shift the emphasis of the antitrust laws away from concern for particular dealers or business rivals to concern for consumers and the market as a whole.[54] According to these commentators, the chief impediment to the competitive (economically efficient) market is the interbrand horizontal cartel, which allows would-be competitors to join market power and, like a monopolist, restrict output and reap supra-competitive profits.[55] The prevention of such horizontal activity is what the antitrust laws should seek.[56] These commentators argue that purely "social" concerns, such as a desire to preserve a dealer's "trader freedom" or a desire to protect small businesses are amorphous and have no economic significance.[57] Under this analysis, vertical restraints can be good or bad—economically efficient or inefficient—depending upon their

fails to take into account the other goals that the antitrust laws were intended to foster, such as trader freedom, the protection of small businesses, and the dispersion of power among many merchants. *See, e.g.*, Flynn, *The "Is" and "Ought" of Vertical Restraints After* Monsanto Co. v. Spray-Rite Service Corp., 71 Cornell L. Rev. 1095, 1137-39 (1986) (rejecting "neoclassical" concept of efficiency as sole goal of antitrust policy); Fox, *supra* note 2, at 1146-54, 1182 (arguing that values other than efficiency should demand equal attention in guiding antitrust policy, and that historical goals of power dispersion and economic opportunity continue to be respected); Piraino, *Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases*, 38 Emory L.J. 311, 336 (1989) (arguing that "the primary reasons for continuation of the per se rule appear not to be economic, but social and political") [hereinafter Piraino, *Sharp Dealing*].

54. This concern for the market as a whole is often termed as "protection of competition, not competitors." Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). Critics of the economic efficiency approach often object that unless competitors are protected, there will be no competition. *See* USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687, 696 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1884 (1990); Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. Rev. 1125, 1126 n.4 (1987). This objection misses the mark to some extent. The economic efficiency advocates are concerned with maintaining competitive markets and therefore would not permit horizontal cartels. What they are not concerned with is protecting specific members of a market. In particular, provided there are low entry barriers into the market, they are unconcerned about the loss of inefficient competitors. *See* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 297-304 (1981); Page, *The Scope of Liability*, *supra* note 9, at 1451-52, 1469-70.

55. *See* R. Bork, *supra* note 2, at 90-106; R. Posner, Antitrust Law, *supra* note 2, at 8-18; Easterbrook, *Vertical Arrangements*, *supra* note 53, at 140.

56. Most economic efficiency advocates would apply the antitrust laws beyond horizontal cartels. In particular, they would apply them to certain tying arrangements, to some exclusionary practices by monopolists, and to some mergers. *See* R. Posner, Antitrust Law, *supra* note 2, at 40-55, 96-97, 182-84, 188-89; Hovenkamp, *Merger Actions For Damages*, 35 Hastings L.J. 937, 940-42 (1984) [hereinafter Hovenkamp, *Merger Actions*]; Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 Mich. L. Rev. 2151, 2163-65 (1990) [hereinafter Page, *Optimal Antitrust Penalties*]. The common denominator in all these applications is that the antitrust laws would be used primarily where the conduct in question was likely to result in higher prices and restricted output in a market.

57. Richard Posner and Frank Easterbrook argue that even if Congress wanted to protect small businesses or trader freedom, the antitrust laws are ill-suited for furthering these goals. *See* R. Posner, Antitrust Law, *supra* note 2, at 19; Easterbrook, *Is There A Ratchet*, *supra* note 53, at 715-16; Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1703-05 (1986); *see also* VIII P. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1609 (1989) (discussing weakness of dealer au-

horizontal interbrand effects.[58]

According to economic theory, most vertical restraints are used by manufacturers as means of increasing interbrand competition and are, therefore, economically efficient and should be encouraged as pro-competitive.[59] The typical manufacturer imposes such restraints not to price-gouge the public or to provide his dealer with supra-competitive profits at the expense of the consumers.[60] Instead, the manufacturer is seeking to force his dealer to provide various services to the consumer.[61] By do-

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tonomy argument); R. Bork, *supra* note 2, at 54-56 (rejecting theory that attributes social and political purposes to antitrust legislation).

58. *See* H. Hovenkamp, Economics, *supra* note 4, at § 9.2; R. Posner, Antitrust Law, *supra* note 2, at 147-51; Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Calif. L. Rev. 933, 936-46 (1987).

Adherents to the economic efficiency approach argue that price and non-price vertical restraints function in the same way and should be treated the same under the antitrust laws. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.3, at 261-62; R. Posner, Antitrust Law, *supra* note 2, at 160; *see also* Liebeler, *supra* note 4, at 46-47 (arguing that many non-price restriction are used to maintain or stabilize price and all such restrictions would be judged under rule of reason). Even some commentators who are critical of some aspects of the economic efficiency approach argue that the price/non-price dichotomy is senseless. *See* Piraino, *supra* note 39, at 15, 26; Piraino, *Sharp Dealing*, *supra* note 53, at 334-36.

59. *See* Baxter, *supra* note 58, at 945-46; Easterbrook, *Vertical Arrangements*, *supra* note 53, at 146-49; Hay, *Vertical Restraints After* Monsanto, 70 Cornell L. Rev. 418, 437 (1985); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 22-23 (1981) [hereinafter Posner, *The Next Step*]; *see also* H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 252-54 (describing use of vertical restraints to increase interbrand sales).

60. Unless the manufacturer is a monopolist, any attempt to use vertical restraints for price gouging the public will fail for the simple reason that consumers will switch to different brands. For a similar reason, it is not in the manufacturer's best interest to use vertical restraints to give his dealers supra-competitive profits. From the manufacturer's perspective, the dealer's profits are in essence a cost of distribution that increases the overall cost of the manufacturer's product. Since a higher price to the consumer will result in lower sales volumes, the manufacturer will want to limit his dealer to making merely a competitive rate of return. *See* VIII P. Areeda, *supra* note 57, at ¶ 1622; R. Posner, Antitrust Law, *supra* note 2, at 147; Easterbrook, *Vertical Arrangements*, *supra* note 53, at 146-47; *see also* Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 528 (1st Cir. 1989) ("profit-maximizing dealer monopolist would set retail prices that, from the supplier's perspective, are too high and unduly restrict the product's sales").

61. According to economic theory, when the manufacturer fixes a resale price that exceeds costs, or assigns exclusive territories, the dealers will compete among themselves by providing services to the consumer (who, faced with a uniform price for the manufacturer's product, will go to the dealer providing the greatest services). *See* R. Posner, Antitrust Law, *supra* note 2, at 148. The dealer will continue providing services until her marginal cost of distribution meets the resale price, at which point she "will not be receiving any monopoly profits but will be furnishing services at the level desired by the manufacturer." *Id.*; *see* Easterbrook, *Vertical Arrangements*, *supra* note 53, at 147-48; *cf.* Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 B.U.L. Rev. 521, 524 (1984) (dealers subject to vertical price restraints "will compete in the amount of point-of-sale services they provide, and the competition will drive up the level of those services until the marginal cost to the dealer of selling [the product], including a reasonable profit, equals the maintained resale price") [hereinafter Hovenkamp, *Vertical Restrictions*].

Under the economic efficiency theory, the manufacturer cannot simply lower his ing so, the manufacturer can offer the consumer a package of product plus service[62]—a package that the manufacturer believes consumers want and that will be more competitive on the interbrand market than product alone.[63] Admittedly, the typical vertical restraint will deprive the dealer

wholesale price to his dealers and hope they will provide the desired services. Even if some dealers do provide the services, other dealers will "free ride"—they will charge a lower retail price to the consumer and "ride" on the services provided by other dealers. Eventually the full service (and higher priced) dealers will go out of business to the detriment of both the manufacturer (who loses distribution) and the consumer (who loses services). To avoid the free-rider problem, the manufacturer will impose the vertical restraints on all his dealers. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 252; R. Posner, Antitrust Law, *supra* note 2, at 149; Calvani & Berg, *Resale Price Maintenance After* Monsanto*: A Doctrine Still At War With Itself*, 1984 Duke L.J. 1163, 1181-82; Kelly, *The Role of the Free Rider In Resale Price Maintenance: The Loch Ness Monster of Antitrust Captured*, 10 Geo. Mason U.L. Rev. 327, 338-39 (1988); Telser, *supra* note 52, at 91-92.

Some critics of the economic efficiency approach dispute the validity of the free rider theory and argue that the manufacturer could achieve the same result without resale price maintenance by simply requiring his dealers to provide specified services. *See, e.g.*, L. Sullivan, Handbook of the Law of Antitrust 386 (1977) (by requiring that all dealers provide specific services, manufacturer prevents any dealer from selling for less than desired price); Flynn, *Which Past Is Prolog? The Future of Private Antitrust Enforcement*, 35 Antitrust Bull. 879, 932-33 n. 119 (1990) (arguing that free rider label is not functional legal concept but merely conclusion that assumes that decisions on marketing belong to manufacturer rather than dealer without explaining why this is so). The economic efficiency advocates respond that vertical restrictions are often the cheapest, most efficient way for the manufacturer to achieve his goal. *See* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 294 (1975) [hereinafter Posner, *Antitrust Policy*]; Posner, *The Next Step*, *supra* note 59, at 20.

62. Some commentators include in "services" items such as advertising, showrooms, shelf rentals, knowledgeable sales personnel, "certification" by "upscale dealers," and avoidance of use of the product as a loss leader. *See* Calvani & Berg, *supra* note 61, at 1186-87; Easterbrook, *Vertical Arrangements*, *supra* note 53, at 150; Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 Nw. U.L. Rev. 736, 738-48 (1984). They argue that some consumers must want these services, as proven by the fact that these consumers are willing to pay for the package that includes them. *See* Baxter, *supra* note 58, at 946; Marvel & McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & Econ. 363, 369-72 (1985); Piraino, *supra* note 39, at 19-23; Popofsky & Bomse, *From* Sylvania *to* Monsanto*: No Longer a "Free Ride,"* 30 Antitrust Bull. 67, 91-92 (1985); Posner, *The Chicago School*, *supra* note 52, at 926-30. Other commentators, while agreeing with the basic dealer-service theory, argue that not all such "services" are desired by the purchasing consumers. *See* VIII P. Areeda, *supra* note 57, at ¶ 1611; Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983, 990-92 (1985); Hovenkamp, *Fact, Value and Theory in Antitrust Adjudication*, 1987 Duke L.J. 897, 909-11; Levmore, *Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information*, 67 Iowa L. Rev. 981, 986-90 (1982); Weiss, *The Dealer-Services Rationale for Resale Price Maintenance: Does the Manufacturer Really Know Best?*, 30 St. Louis U.L.J. 517, 526-31 (1986).

63. Under this theory, vertical restraints are output enhancing in that, if the manufacturer is correct, the quantity of his product sold will increase because of the added dealer services. *See* Calvani & Berg, *supra* note 61, at 1182. If the manufacturer is wrong about consumer demand for the product and service package, sales will fall off and the manufacturer will make adjustments. *See* Baxter, *supra* note 58, at 945-46; Shores, *Vertical Price-Fixing and the Contract Conundrum: Beyond* Monsanto, 54 Fordham L. Rev. 377, 401 (1985).

of some of her marketing freedom and will also limit *intra*brand competition among dealers of the same brand. Under an economic efficiency approach, however, these effects are economically irrelevant and should not trigger the application of the antitrust laws.[64] Only if a vertical restraint has an effect in the horizontal *inter*brand market should it be a concern to the antitrust laws.[65] This will occur in the relatively rare instance[66] in which a vertical restraint is used to facilitate a manufacturer or dealer cartel.[67] Outside such limited situations, the law should neither impose liability nor give a private plaintiff treble damages.[68]

64. *See supra* note 57 and accompanying text. Some commentators argue that vertical restraints do not restrict intrabrand competition in an economic sense because there is no restriction of output in the intrabrand market. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.4, at 268-69; Liebeler, *supra* note 4, at 18-19.

65. *See* R. Posner, Antitrust Law, *supra* note 2, at 153; Hovenkamp, *Vertical Restrictions*, *supra* note 61, at 529-40; Liebeler, *supra* note 4, at 19.

66. Adherents to the economic efficiency rationale typically argue that manufacturer and dealer cartels are rare. *See, e.g.*, H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 250-52 (because retail cartel reduces output, manufacturer has no motive to participate in cartel); R. Posner, Antitrust Law, *supra* note 2, at 148-53 (discussing how typically vertical restraints are used to enhance interbrand competition); Baxter, *supra* note 58, at 941-45 (listing necessary conditions for cartel arrangements); Easterbrook, *Vertical Arrangements*, *supra* note 53, at 141-43 (discussing problems in forming dealer cartel and added problem of securing manufacturer compliance). Phillip Areeda, on the other hand, suggests that dealer cartels may be more prevalent than the Supreme Court and these commentators believe. *See* VIII P. Areeda, *supra* note 57, at ¶ 1604.

67. Both manufacturer and dealer cartels are anti-competitive because they are horizontal arrangements that permit would-be competitors to pool their individual market power and, thereby, mimic a monopolist. *See* R. Posner, Antitrust Law, *supra* note 2, at 153; Baker, *supra* note 39, at 1489; Marvel & McCafferty, *supra* note 62, at 365-69, 374. In the case of a manufacturer cartel, the manufacturers use the vertical restraints as a means of policing their cartel. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 252; Calvani & Berg, *supra* note 61, at 1184; Piraino, *supra* note 39, at 14. William Baxter argues that in order for manufacturers to use vertical restraints to facilitate a cartel, a number of conditions must exist, including a high market concentration, significant entry barriers, and participation of substantially all manufacturers. *See* Baxter, *supra* note 58, at 942. In the case of a dealer cartel, it is the dealers who use the vertical restraints to police the cartel. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 248-50; R. Posner, Antitrust Law, *supra* note 2, at 148; Baxter, *supra* note 58, at 944-45; Calvani & Berg, *supra* note 61, at 1184. Some commentators argue that for a dealer cartel to be successful, it must involve dealers of competing brands; if the dealers of a single, nonmonopoly brand cartelize and raise prices, consumers will switch brands. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 249-50; Baker, *supra* note 39, at 1489. Additionally, there must be entry barriers into the particular retailing field, or the manufacturer would simply switch retailers. *See* Easterbrook, *Vertical Arrangements*, *supra* note 53, at 142; Liebeler, *supra* note 4, at 19-23; Marvel & McCafferty, *supra* note 62, at 374.

68. The advocates of the economic efficiency approach stress the importance of standing as a means of guarding against an overuse of the antitrust laws. Such overdeterrence, they argue, is likely to suppress pro-competitive activity of firms. *See infra* notes 93-95 and accompanying text.

A. *The Application of the Economic Efficiency Approach to Vertical Restraints*

Since 1977,[69] the Supreme Court has moved steadily toward an adoption of this economic efficiency approach to vertical pricing, territorial, and customer restraints. As a result, a number of facets of vertical restraint law have changed, the first and foremost of which is the rationale for condemning some of these restraints. In addition, the Court has revised its definition of an "agreement" in the vertical context and has refined the standing doctrine. At first blush, these changes seem to eliminate coercion as a concern in the vertical restraint area, thereby bringing analysis of vertical restraints in line with that of horizontal restraints. A closer inspection, however, reveals that what has changed is only the *role* that coercion plays in vertical restraint antitrust analysis.

The shift in the Supreme Court's view concerning the rationale for condemning vertical restraints began in *Sylvania*[70] and culminated in *Business Electronics Corp. v. Sharp Electronics Corp.*[71] In these two opinions, the Court signalled that it was no longer adhering to the "trader freedom" rationale but rather was focusing on the horizontal effects and, more specifically, the horizontal interbrand effects of the vertical restraint. In *Sylvania*, a case involving vertical territorial restrictions, the Court acknowledged for the first time a basic tenet of the economic efficiency model—that although vertical restraints may reduce intrabrand competition, they may simultaneously "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."[72] In weighing this potential increase in interbrand competition against the loss of "autonomy of independent businessmen,"[73] the Court came down squarely on the side of economic

69. The shift in the vertical restraint area was first evident in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). In the same year, the Court issued its first decision on antitrust injury standing. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); *infra* notes 96-101 and accompanying text.

70. 433 U.S. 36 (1977).

71. 485 U.S. 717 (1988).

72. *Sylvania*, 433 U.S. at 54. The Court noted that "[e]conomists have identified a number of ways in which manufacturers can use [vertical] restrictions to compete more effectively against other manufacturers." *Id.* at 54-55. In particular, the Court stated:

> [N]ew manufacturers . . . can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. . . . Because of market imperfections such as the . . . "free rider" effect, these services might not be provided by retailers in a purely competitive situation . . . .

Id. at 55. The Court also recognized that a manufacturer prefers the lowest retail price possible and will, therefore, seek to minimize the dealer's profits, which are a cost of distribution for the manufacturer. *See id.* at 56 n.24; *supra* note 60.

73. *Sylvania*, 433 U.S. at 53 n.21.

efficiency.[74] Horizontal interbrand competition, the Court stated, "is the primary concern of antitrust law."[75] While vertical restrictions may impede dealer freedom, "an antitrust policy divorced from market considerations would lack any objective benchmarks."[76]

Similarly, in *Sharp*, the Court applied the same economic efficiency analysis to vertical pricing restraints.[77] Ignoring the potential coercive effect of the restraint and the loss of dealer freedom,[78] the Court looked to the "new wisdom" of economic analysis to interpret a "dynamic" Sherman Act.[79] The Court reiterated that the concern of the antitrust laws was with the "economic effects" of the restraint and, more specifically, with its tendency to facilitate horizontal interbrand cartels.[80] Ver-

74. Justice White in his concurring opinion noted that this was a marked change from the Court's earlier decisions. "[C]oncern for the freedom of the businessman to dispose of his own goods as he sees fit," Justice White stated, is a rationale that "runs through our case law in the area of distributional restraints." *Id.* at 67-68 (White, J., concurring).

75. *Id.* at 52 n.19.

76. *Id.* at 53 n.21. Given the potential pro-competitive benefits of vertical non-price restraints, the Court concluded that such restraints must be judged under the rule of reason rather than the *per se* rule. *See id.* at 58-59. In so holding, the Court overruled its earlier decision in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

A number of commentators have criticized the *Sylvania* decision for failing to give any meaningful guidance for applying the rule of reason to vertical non-price restraints. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.4, at 269; Posner, *The Next Step, supra* note 59, at 8, 14-18. Some commentators argue that a better approach than the rule of reason would be to regard all vertical restraints as *per se* or presumptively legal. *See* R. Bork, *supra* note 2, at 288; Baxter, *supra* note 58, at 947; Easterbrook, *Vertical Arrangements, supra* note 53, at 135; Piraino, *supra* note 39, at 19; Posner, *The Next Step, supra* note 59, at 23-28; *see also* H. Hovenkamp, Economics, *supra* note 4, § 5.4, at 144 (discussing view of Chicago School).

77. The issue in *Sharp* was whether an agreement to terminate a price-cutting dealer was an agreement to fix prices or, in other words, whether vertical "price fixing" requires the fixing of some specific price or price level. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 722-23 (1988).

78. Neither the majority nor the dissent in *Sharp* even alluded to dealer freedom as a possible ground for condemning a vertical restraint. The dissent's disagreement with the majority was, in part, over the economic harm stemming from the loss of *intra*brand competition. The dissenting justices, in contrast to the majority, thought the loss of intrabrand competition was a sufficient economic reason to condemn, *per se*, a vertical restraint.

> [A]lthough the majority neglects to mention it, fostering intrabrand competition has been recognized as an important goal of antitrust law, and although a manufacturer's efficiency-enhancing vertical nonprice restraints may subject a reduction of intrabrand competition only to a rule of reason analysis, a similar reduction without the procompetitive "redeeming virtues" of manufacturer-imposed vertical nonprice restraints . . . causes nothing but economic harm.

Sharp, 485 U.S. at 749 n.14 (Stevens, J., dissenting). The dissent also argued that the restraint in question was essentially horizontal since it was instigated by one dealer seeking to have another dealer terminated. *See id.* at 745-47 (Stevens, J., dissenting).

79. *See id.* at 732.

80. *See id.* at 726. At least to justify the imposition of *per se* illegality, the Court stated, there must be "demonstrable economic effect, such as the facilitating of cartelizing . . . ." *Id.* at 726. Throughout its opinion, the Court made clear that it regarded the horizontal interbrand cartel to be the chief (if not sole) evil that the antitrust laws were intended to prohibit. The majority reiterated the statement from *Sylvania* that "inter-

tical restraints, according to the Court, were *per se* illegal only when they were likely to have a horizontal "cartel-facilitating"[81] effect and, absent such an effect, a court should not condemn a vertical restraint[82] since it may have a "real potential to stimulate interbrand competition."[83]

At the same time the Court was eliminating coercion from the rationale for condemning vertical restraints, it also seemingly excised coercion

brand competition is the primary concern of the antitrust laws," *id.* at 726, and added that "a rule of *per se* illegality . . . [is] not needed or effective to protect *intra*brand competition." *Id.* at 725. Indeed, vertical price restraints had been treated as *per se* illegal because "there was support for the proposition that [such] restraints reduce *inter*brand price competition because they 'facilitate cartelizing.'" *Id.* at 725. In particular, vertical price fixing "might assist horizontal price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not pass on lower prices to consumers) or might be used to organize cartels at the retailer level." *Id.* at 725-26. Vertical non-price restraints were only subject to rule of reason scrutiny because "[s]imilar support for the cartel-facilitating effect of [these] restraints was and remains lacking." *Id.* at 726. Echoing the views of the economic efficiency advocates, the Court gratuitously added: "Cartels are neither easy to form nor easy to maintain." *Id.* at 727; *see supra* note 66.

81. The Court did not regard the purely vertical effect—the constraint on the dealer—as anti-competitive. The Court asserted that "all anti-competitive effects are by definition horizontal effects." *Sharp*, 485 U.S. at 730 n.4.

82. *See id.* at 726. The Court left open the question of whether a rule of reason challenge to a vertical restraint could be based on something other than a showing of economic inefficiency. *Cf.* Burns, *supra* note 39, at 28 n.190, 37-38 (arguing that logically it makes no sense to permit rule of reason challenge based on non-economic "goals" of antitrust laws).

83. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724 (1988). In dealing with the precise issue before it, the Court held that an agreement to terminate a price-cutting dealer without an agreement on subsequent resale prices was not a *per se* illegal price fixing agreement because it was unlikely that such an arrangement provided any significant assistance to cartelizing.

> Without an agreement with the remaining dealer on price, the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) and cannot as easily be used to organize and hold together a retailer-level cartel.

Id. at 727. The Court was also concerned that without a requirement for an agreement on a specific resale price to be charged, any non-price restraint could be portrayed as a price restraint.

> Any agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's "price cutting." . . . [P]rice cutting and some measure of service cutting usually go hand in hand. . . . [A]ll vertical restraints . . . have the potential to allow dealers to increase "prices" and can be characterized as intended to achieve just that.

Id. at 727-28. Here again, the Court was picking up on a point made repeatedly by the economic efficiency proponents—that price and non-price vertical restraints were simply two sides of the same coin. *See* Allison, *An Analysis of the Vertical Price-Nonprice Dichotomy*, 21 Akron L. Rev. 131, 163-65 (1987); Baker, *supra* note 39, at 1467; Hay, *supra* note 59, at 429-30; Posner, *The Next Step*, *supra* note 59, at 10.

Some commentators contend that although the Court in *Sharp* sought to adopt the economic efficiency approach, its holding—that specific prices must be set for there to be vertical price fixing—is illogical and conflicts with that very approach. *See* Burns, *supra* note 39, at 27-31; Liebeler, *Resale Price Maintenance and Consumer Welfare:* Business Electronics Corp. v. Sharp Electronics Corp., 36 UCLA L. Rev. 889, 895-96 (1989).

from the agreement element of the vertical arrangement. The change in the Court's view regarding the vertical agreement came about in *Monsanto Co. v. Spray-Rite Service Corp.*,[84] where a manufacturer had received complaints from some of its distributors about a discounting distributor and had subsequently terminated its relations with the discounter. In holding that such evidence by itself was insufficient for a jury to find an agreement between the manufacturer and complaining distributors,[85] the Court again echoed the view of the economic efficiency proponents that a manufacturer may have a "legitimate" and "strongly felt concern about resale prices."[86] Indeed, "in order to assure an efficient distribution system," the Court stated, "manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the customer persuasively and efficiently."[87] Complaints from distributors about other price-cutting distributors are a "natural" part of this exchange of information and by themselves "do not indicate concerted action."[88] In order for an agreement to be shown, the Court

84. 465 U.S. 752 (1984). *Monsanto* was the Supreme Court's first decision dealing squarely with the "agreement" element of a vertical restraint since Albrecht v. Herald Co., 390 U.S. 145 (1968). The Court had been able to sidestep the agreement issue in *Sylvania* because the parties there stipulated to the presence of an agreement. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 40 n.8 (1977). Later in *Sharp* (which came down four years after *Monsanto*) the Court was able to avoid confronting directly the agreement issue because the jury had found an agreement existed and Sharp did not challenge this particular finding on appeal. *See Sharp*, 485 U.S. at 722. The Court's rationale in *Sharp*, however, has implications for the agreement element and is fundamentally at odds with the *Monsanto* decision. *See* Burns, *supra* note 39, at 29-31; *infra* note 129 and accompanying text.

85. Although the Court held that the evidence of complaints and subsequent action was by itself insufficient as a matter of law to support the jury's finding of an agreement, *see Monsanto*, 465 U.S. at 763-64, the Court also held that sufficient additional evidence had been presented so the jury's finding of agreement could stand. *See id.* at 765-68. A number of commentators have suggested that the two parts of the Court's opinion are in conflict. *See, e.g.*, Calvani & Berg, *supra* note 61, at 1193-97 (Court's treatment of evidence in *Monsanto* as sufficient is inconsistent with "tenor of its rhetoric"); Floyd, *Vertical Antitrust Conspiracies After* Monsanto *and* Russell Stover, 33 U. Kan. L. Rev. 269, 285-87 (1985) (*Monsanto* Court relied on "admittedly ambiguous evidence of communication of agreement by distributors").

86. *Monsanto*, 465 U.S. at 762-63. In particular, a manufacturer may be "attempt[ing] to further a particular market[ ] strategy by means of agreements [with his distributors] on often costly nonprice restrictions." *Id.* at 762. In describing such a situation, the Court adopted, in large part, the economic efficiency view of the typical vertical restraint.

> The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesman or demonstrating the technical feature of a product, and will want to see that 'free riders' do not interfere.

Id. at 762-63; *see supra* note 61.

87. *Monsanto*, 465 U.S. at 763-64.

88. *Id.* at 763. Similarly, the manufacturer's action in response to dealer complaints could be simply "management's exercise of its independent business judgment." *Id.* at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). The Court in *Monsanto* thus characterized the communications between the manufacturer and its dealers as "unilateral action"

stated, the plaintiff must show "something more" than complaints and conforming action.[89] In particular, a vertical arrangement amounted to an "agreement" when there was "a conscious commitment to a common scheme."[90] Specifically, the Court, quoting from a horizontal conspiracy case, held that the "[c]ircumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' "[91] As if to underscore the fact that it was now looking for a non-coercive agreement in the vertical context, as it did in the horizontal context, the Court noted that a dealer acted unilaterally if she grudgingly complied with a manufacturer's demands in order to avoid termination.[92] Thus, just as *Sylvania* and *Sharp* had shown that coercion of the dealer *qua* buyer/victim was not an adequate rationale for condemning a vertical restraint, so too *Monsanto* indicated that coercion of the dealer *qua* co-conspirator would not be evidence of an agreement.

The third area in which the Supreme Court seemingly removed, or at least limited, the role of coercion was in its development of the antitrust-injury component of standing. As with the shift in rationales, this development also reflected the Court's continued adoption of an economic efficiency approach to antitrust analysis. According to economic theory, a particular activity can have simultaneously both pro-competitive and anti-competitive effects.[93] Antitrust awards need to be limited to those damages that can be traced to an inefficient aspect of the activity.[94] Applying the antitrust laws more broadly, the argument goes, will result in

under *Colgate*. *See supra* note 36 and accompanying text. One commentator has noted that the *Monsanto* decision may have "breathe[d] more life into *Colgate* than it had even in 1918." Hay, *supra* note 59, at 434; *see also* Floyd, *supra* note 85, at 273-85 (criticizing Court for misapplying *Colgate* in *Monsanto*); Shores, *supra* note 63, at 398-400 (same).

89. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984). The evidence of complaints was some probative evidence, but "the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy." *Id.* at 764 n.8.

90. *Id.* at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

91. *Monsanto*, 465 U.S. at 764 (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)). Applying this test in the vertical context meant "more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at 764 n.9.

92. Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demands in order to avoid termination.

Id. at 761.

93. A merger, for instance, might be harmful in that it increases market power and, at the same time, be beneficial in creating efficiencies. For an economic analysis of standing to challenge mergers, see Hovenkamp, *Merger Actions*, *supra* note 56. Alternatively, practices that look superficially identical can be economically efficient or inefficient depending upon the surrounding circumstances. Resale price maintenance, for instance, would be pro-competitive if established by a manufacturer wishing to enhance his position in the interbrand market but would be anti-competitive if established by manufacturers in order to facilitate a cartel. *See supra* notes 61-67 and accompanying text.

94. *See* Page, *Antitrust Damages*, *supra* note 50, at 471-76; Page, *The Scope of Liabil-*

overdeterrence—businesses will be discouraged from undertaking the economically efficient practices that robust competition needs.[95]

In its 1977 decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[96] the Supreme Court began constructing a standing doctrine that would avoid just such overdeterrence.[97] In *Brunswick*, a merger case, the Court held that a private antitrust plaintiff could not recover merely by showing an antitrust violation and injury to himself.[98] In addition, the plaintiff must show "antitrust injury"—that he was injured by "that which makes defendants' acts unlawful."[99] Without such a standing limit,[100] the Court stated, damage recovery under the antitrust laws would be "entirely fortuitous" and "divorce[d] . . . from the purposes of the antitrust laws."[101]

Recently, in *Atlantic Richfield Co. v. USA Petroleum Co.*,[102] the

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ity, *supra* note 9, at 1452-53, 1460-64; Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155, 1160 (1982).

95. *See* Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 655 (1983); Page, *The Scope of Liability*, *supra* note 9, at 1451-53; Page, *Optimal Antitrust Penalties*, *supra* note 56, at 2151.

96. 429 U.S. 477 (1977).

97. The *Brunswick* decision, authored by Justice Marshall, was to some extent foreshadowed by Justice Marshall's concurring opinion in *Perma Life*. Justice Marshall agreed that the *in pari delicto* doctrine should not bar a dealer who "did not actively seek out or support all the anti-competitive restraints embodied in the franchise." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 149 (1968) (Marshall, J., concurring). Justice Marshall, however, was troubled about permitting recovery to the extent a restraint benefitted the dealer. "I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress . . . ." *Id.* at 151 (Marshall, J., concurring).

98. In *Brunswick*, three bowling center operators brought a suit for damages against Brunswick, a large bowling equipment company which had acquired a number of failing bowling centers. The plaintiffs alleged that these acquisitions were illegal under § 7 of the Clayton Act and claimed as damages the profits that they would have made had the acquired centers been allowed to go out of business. The jury found a violation of § 7 and awarded damages. *See Brunswick*, 429 U.S. at 479-82.

99. *Id.* at 489. According to the Court, the antitrust injury requirement came from § 4 of the Clayton Act which limits treble damages to "a person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws." *Id.* at 488 (emphasis added).

100. The antitrust-injury standing requirement was in addition to the other antitrust standing requirements, such as a showing of proximate causation. *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 529-38 (1983); Blue Shield v. McCready, 457 U.S. 465, 477 (1982); Blair & Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1551 (1989); Polden, *Antitrust Standing and the Rule Against Resale Price Maintenance*, 37 Clev. St. L. Rev. 179, 204-205 (1989).

101. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487 (1977). The antitrust injury requirement thus serves the same purpose that the zone-of-interest requirement serves in other areas of standing law—it limits standing to those persons who can show that their injury was the type the statute was meant to prohibit. In Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986), the Court applied the antitrust injury requirement to a private plaintiff seeking to enjoin a merger.

102. 110 S. Ct. 1884 (1990). In *USA Petroleum*, an independent marketer of gasoline sued a gasoline producer for allegedly conspiring with the producer's dealers to fix maximum (but non-predatory) resale prices. The plaintiff, a competitor of the conspiring dealers, alleged that it lost profits as a result of the lower prices set by the defendant gasoline

Supreme Court applied the same reasoning to vertical restraints. Noting that even actions that are *per se* illegal "may nonetheless have *some* procompetitive effects," the Court explained that the antitrust injury requirement ensures "that a plaintiff can recover only if the loss stems from an [sic] competition-*reducing* aspect or effect of the defendant's behavior."[103]

The antitrust injury requirement, when viewed in conjunction with the Court's shift in rationales for condemning vertical restraints,[104] acts as a significant refinement of and limitation on the Court's statements in *Perma Life*.[105] *Perma Life* had suggested that if the dealer alleged a violation and coercion, the dealer could get her case into court and overcome any *in pari delicto* defense. The only other requirement seemed to be a showing of some causal connection between the dealer's injury and the vertical restraint.[106] *Brunswick* and *USA Petroleum* taken together add an important caveat—they tell the dealer that the antitrust laws do not provide a remedy for all injuries that are causally connected to substantive violations, and that while coercion may get the dealer past the *in pari delicto* bar, coercion will not necessarily ensure that the dealer fulfill the antitrust-injury standing requirement.[107] Coercion, while perhaps

producer and its dealers. For discussions of the question of competitor standing in maximum resale price maintenance cases, see Blair & Harrison, *supra* note 100, at 1552-56; Polden, *supra* note 100, at 213-26.

103. *USA Petroleum*, 110 S. Ct. at 1894. The Court noted that even *per se* illegal conduct "may have three effects, often interwoven: in some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition." *Id.*

The Court in *USA Petroleum* was noticeably less concerned than the Court had been in *Perma Life* about preserving the private right of action, *see supra* note 49.

> We decline to dilute the antitrust injury requirement because we find that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price-fixing. If such a scheme causes the anti-competitive consequences detailed in *Albrecht*, consumers and the manufacturers' own dealers may bring suit.

USA Petroleum, 110 S. Ct. at 1895. The dissenting justices, however, lamented that "barring competitor standing leaves enforcement of the 'vast majority of unlawful maximum resale price agreement' in the hands of 'an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement.'" *Id.* at 1903 n.20 (Stevens, J., dissenting).

104. *See supra* notes 70-83 and accompanying text. The antitrust injury requirement looks to whether the harm alleged "corresponds to the rationale for finding a violation of the antitrust laws in the first place . . . ." *USA Petroleum*, 110 S. Ct. at 1893. By doing so, this standing requirement incorporates the Court's teachings regarding the reason for condemning a particular activity.

105. *See supra* notes 44-50 and accompanying text.

106. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 140 (1968).

107. While *USA Petroleum* dealt specifically with the right of a competitor to challenge maximum resale prices, the reasoning of the case applies equally to the garden-variety vertical lawsuit in which a dealer complains that she was forced by her own manufacturer to abide by vertical restraints. Indeed, noting the expansive implications of the antitrust-injury standing requirement, one critic of the economic efficiency approach commented that the standing doctrine is "growing like a noxious weed" in antitrust and is a confusing

showing that the dealer did not instigate the restraint, does not necessarily indicate the presence of a horizontal interbrand cartel—the rationale, according to *Sylvania* and *Sharp*, for making a vertical restraint illegal.[108]

The Supreme Court's apparent elimination of coercion from the rationale, agreement, and standing elements of vertical restraints is consistent with another, often implicit, aspect of the economic efficiency approach—the avoidance of subjective facts in determining the legality of a restraint. Mistrusting the ability of a jury to assess subjective facts (such as whether the dealer was coerced), economic efficiency adherents tend to construct tests of legality that turn on seemingly "hard" facts like market definition and market power.[109] Increasingly, the Supreme Court has shown a similar reluctance to allow antitrust determinations to turn on a jury's assessment of a party's motivation or state of mind.[110]

B. *Coercion's New Role in Vertical Restraints*

In light of the Court's recent decisions, coercion appears to be largely eradicated from vertical restraints. But can coercion be so easily dismissed? And should it be? Put another way, even assuming a continued adherence to the economic efficiency approach, has the Supreme Court mistakenly thrown out the baby of coercion with the bath water of trader freedom? Two interrelated factors combine to show that coercion does indeed still have a role to play in vertical restraints.[111] The first is the

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doctrine that allows a court to make decisions on the merits of a case and the meaning of the substantive law without saying so. *See* Flynn, *supra* note 61, at 902.

108. *See supra* notes 70-83 and accompanying text. In *USA Petroleum* the Court also put to rest the suggestion in the early vertical restraint cases that disruption of the market might be a sufficient rationale for condemning such activity. *See supra* note 29. In *USA Petroleum* the Court noted:

> The antitrust injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity. Although all antitrust violations . . . "distort" the market, not every loss stemming from a violation counts as antitrust injury.

USA Petroleum, 110 S. Ct. at 1892 n.8.

109. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.4, at 271; Easterbrook, *Vertical Arrangements*, *supra* note 53, at 157-68; Hay, *supra* note 59, at 441-42.

110. In *Sharp*, for instance, the Court stated that "[i]n the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation [in terminating a dealer] was to ensure adequate services. . . . Accordingly a manufacturer that agrees to give one dealer an exclusive territory and terminates another dealer . . . exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter." Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 727-28 (1988). Similarly, in City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1351 n.5 (1991), the Court expressed doubt as to whether "a jury composed of citizens of the vicinage" would be able to distinguish between independent and concerted action by a municipality. In his *Sharp* dissent, Justice Stevens was not so pessimistic about the jury's ability to discern the motive of the manufacturer: "Proof of motivation is another commonplace in antitrust litigation of which the majority appears apprehensive, but as we have explained or demonstrated many times, . . . in antitrust, as in many other areas of the law, motivation matters and factfinders are able to distinguish bad from good intent." *Sharp*, 485 U.S. at 753-54 (Stevens, J., dissenting).

111. Some might say that worrying about the refinements of a vertical-restraints law-

need, under an economically-based approach, to sort out efficient (and pro-competitive) vertical restraints from inefficient (and legally objectionable) ones.[112] The second related factor is the antitrust-injury doctrine, which incorporates the economic efficiency rationale and limits standing to those persons harmed by an inefficient aspect of the restraint.[113] In sorting out efficient from inefficient vertical restraints, a court must keep in mind that, according to economic theory, a manufacturer typically acts alone, and often without consultation with his dealer, in making the decision to impose a vertical restraint.[114] The dealer, being on a different level of the distribution chain, may well have a conflicting economic interest[115] and may be pleased with or opposed to the vertical restraint depending on the circumstances.[116] Specifically, with a manufacturer-

suit today is a little like rearranging the deck chairs on the *Titanic*. After *Monsanto* and *Sharp*, fewer such cases are likely to be brought. *See* McArthur & Paterson, *supra* note 43, at 343-47. One antitrust practitioner has noted that when plaintiffs come to his office with prospective vertical restraint cases, "we give them a cold cup of coffee, validate their parking, and get them out pretty quickly." 60 Antitrust & Trade Reg. Rep. (BNA) No. 1512, at 533 (Apr. 18, 1991) (quoting Maxwell M. Blecher). However, until and unless the Supreme Court declares all vertical restraints to be *per se* legal (or presumptively so), vertical cases will continue to be brought. With that in mind, it is still worthwhile to consider what type of evidence is pertinent to establishing an illegal vertical restraint. The lower courts have shown particular confusion as to what role, if any, coercion is to play after *Monsanto*. *See* Belfiore v. New York Times Co., 826 F.2d 177, 182 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988); Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 909-10 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986); World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1476-77 (10th Cir.), *cert. denied*, 474 U.S. 823 (1985).

112. The courts could avoid this sorting-out process, of course, if the Supreme Court adopted Richard Posner's suggestion that vertical restraints be treated as *per se* legal. *See supra* note 76. So far, however, the Supreme Court has not indicated that it is willing to take that step.

113. For a discussion of the fundamental differences between the horizontal and vertical restraints, see Burns, *supra* note 39, at 10-16.

114. Indeed, both proponents and critics of the economic efficiency model agree that typically vertical restraints are imposed by a manufacturer acting in his own self-interest and are often thrust upon unwilling dealers. *See, e.g.*, Hay, *supra* note 59, at 422 (manufacturer benefits when retail margins are kept to minimum sustainable; manufacturer imposes vertical restraints because they benefit him); Easterbrook, *Vertical Arrangements*, *supra* note 53, at 146-48 (noting that manufacturer wants to keep his cost of distribution down in order to sell more units); Posner, *The Next Step*, *supra* note 59, at 11-12 (noting that manufacturer imposes vertical restraints to induce dealers into providing greater services to consumers and to eliminate free-riding by discounting dealers); Flynn, *supra* note 53, at 1144 (arguing that vertical price-fixing impairs "the independence of traders to set their own price and the concomitant public interest in receiving the benefit of one's individual effort"); Weiss, *supra* note 62, at 526-31 (arguing that resale price maintenance agreements do not achieve optimal price-service combinations as would competitive market). The two camps disagree, however, over whether such manufacturer-imposed vertical restraints benefit consumers or society.

115. In imposing the vertical restraint, the manufacturer acts to increase his own revenues but not necessarily those of the dealers. While the manufacturer will want the dealer to be profitable, he will want to limit the dealer to a competitive return. *See supra* note 60.

116. *See* Burns, *supra* note 39, at 13-16.

imposed vertical restraint,[117] there are five possible scenarios:

(1) the manufacturer imposed the restraint to increase interbrand sales, and the dealer agreed to the restraint because the dealer saw the wisdom of selling a package of product plus service;[118]

(2) the manufacturer imposed the restraint to increase interbrand sales, but the dealer resisted the restraint because the dealer disagreed with the manufacturer's assumption that consumers want and will pay for service in addition to product;[119]

(3) the manufacturer imposed the restraint to increase interbrand sales, but the dealer resisted the restraint because the dealer wanted to free ride on full-service dealers;[120]

(4) the manufacturer imposed the restraint to facilitate a manufacturer cartel, but the dealer objected because the dealer will receive none of the monopoly profits;[121] and

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117. Four corresponding scenarios are possible if there is a dealer-inspired vertical restraint. The dealers are (1) acting to increase interbrand sales, and the manufacturer agrees with the marketing strategy; (2) acting to increase interbrand sales, but the manufacturer resists because he disagrees with the marketing strategy; (3) acting to facilitate a dealer cartel, but the manufacturer resists because the manufacturer will receive none of the monopoly profits; or (4) acting to facilitate a dealer cartel, and the manufacturer agrees because the manufacturer has been bought off by the cartel.

118. The dealer in this situation expects to benefit not by getting monopoly profits but by selling more units (with a competitive rate of return on each unit). *See* H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 248-49; R. Posner, Antitrust Law, *supra* note 2, at 156-57; Liebeler, *supra* note 4, at 25. Because both the manufacturer and dealer prosper (at competitive returns) when vertical restraints are set to maximize the product's standing on the interbrand market, Richard Posner contends that coercion of the dealer is less frequent than the Supreme Court decisions suggest. *See* R. Posner, *supra* note 2, at 156-57.

119. If the manufacturer, for instance, sets the resale price too high and consumers in fact do not want the added service, sales in the interbrand market will decline and the dealer will suffer. Dealers who are faced with what they believe to be poorly-planned vertical restraints thus have a legitimate and pro-competitive reason for resisting the restraints and making their views known. *See* Liebeler, *supra* note 4, at 25. The Supreme Court recognized this point in *Monsanto*. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762-64 (1984); *see also* Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 593 (8th Cir. 1987) ("The distributor may have a better understanding than his supplier of which intrabrand restraints will most significantly enhance the interbrand competitiveness of the supplier's goods at the retail level."), *cert. denied*, 484 U.S. 1010 (1988). The manufacturer who sets the resale price too high will also suffer (through lost sales) and will eventually adjust the resale price and the mix of product and service he is offering. *See supra* note 63.

120. According to economic theory, the dealer's resistance here is inefficient. *See supra* note 63. To the extent consumers want the product alone without the service (and therefore at a cheaper price) they can switch to other brands that are competing on price alone.

121. The members of the cartel, whether on the manufacturer or dealer level, reap the monopoly profits from the cartel. The party on the non-cartelized level will not typically benefit from the cartel and can, therefore, be expected to resist the restraints. *See* VIII P. Areeda, *supra* note 57, ¶ 1603, at 36; Baxter, *supra* note 58, at 938; Calvani & Berg, *supra* note 61, at 1184; Marvel & McCafferty, *supra* note 62, at 374-77; *see also* Easterbrook, *Vertical Arrangements*, *supra* note 53, at 142 ("A manufacturer that helps dealers form a cartel is doing itself in. It will sell less, and dealers will get the monopoly profits.").

(5) the manufacturer imposed the restraint to facilitate a manufacturer cartel, and the dealer agreed because the dealer had been bought off by the cartel.[122]

Under the economic efficiency approach, vertical pricing, territorial, and customer restraints are anti-competitive (and a concern for the antitrust laws) only in the fourth and fifth scenarios—where there is a cartel at one level of the distribution chain.[123] Furthermore, only dealers in the fourth scenario (and those in the fifth who refused to be bought off) have standing in the sense of antitrust injury, because only they have been injured by that which justifies making vertical restraints illegal in the first place—a cartel.[124]

What also becomes immediately evident from this list is that the presence or absence of coercion will be some indication of whether the restraint is actionable under the antitrust laws. In the case of a lawsuit brought by a dealer, the absence of coercion is particularly significant. Specifically, where there is no coercion and the dealer freely agreed to the restraint, there are only two explanations, neither of which will give rise to a viable dealer lawsuit. The first (and more likely) explanation is that the situation could be within scenario #1—the vertical restraint was one that both the manufacturer and the dealer saw as enhancing the product's ability to compete on the interbrand market.[125] Such an efficient,

122. Some commentators argue that cartelizing dealers cannot buy the manufacturer's cooperation because the manufacturer can keep all the monopoly profits to itself by getting new dealers or by vertically integrating. *See* H. Hovenkamp, Economics, *supra* note 4, § 9.2, at 250; E. Sullivan & J. Harrison, Understanding Antitrust and Its Economic Implications 159 (1988); Marvel & McCafferty, *supra* note 62, at 374-76.

123. *See supra* notes 65-67 and accompanying text. In the case of dealer-inspired vertical restraints, the restraints are similarly inefficient when used to facilitate a cartel. *See* scenarios #3 and #4, *supra* note 117.

124. *See supra* notes 102-08 and accompanying text. The dealer would have to show that she lost business because of the presence of the manufacturer cartel. The dealer could not, however, sue for a cut of the monopoly profits made by the cartelizing manufacturers; rather, the dealer's recovery would be the difference between projected profits under a competitive market and her actual profits under the cartelized market. *See, e.g.*, Local Beauty Supply, Inc. v. Lamaur Inc., 787 F.2d 1197, 1202-03 (7th Cir. 1986) (discounting dealer who alleges minimum resale price maintenance cannot recover damages that assume continuation of allegedly illegally-set resale prices).

Similarly, in the case of a dealer-inspired vertical restraint, a plaintiff manufacturer would need to show that he resisted the cartel (in other words, he was within scenario #3, *supra* note 117) and that his damages were traceable to the presence of the dealer cartel. Like the dealer, the manufacturer could not sue for a piece of the monopoly profits.

125. Similarly, in the purely vertical boycott (where, for instance, a dealer persuades a number of different manufacturers not to deal with a competing dealer but there is no agreement among the manufacturers) the agreement between each manufacturer and the complaining dealer is likely to be coerced. Additionally, evidence of an absence of coercion will likely show a manufacturer who has acted unilaterally and therefore legally. *See* Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1581-82 (11th Cir. 1988). Indeed, a number of courts have recently held that such a purely vertical boycott is, in essence, a vertical non-price restraint and should be analyzed as such. *See, e.g.*, Thurman Indus. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1373-74 (9th Cir. 1989) (where plaintiff-retailer

pro-competitive restraint obviously should not be subject to antitrust attack. Indeed, the complying dealer lacks standing to challenge it because she will be unable to trace any alleged injury to an economic inefficiency.[126] The only other explanation for an agreeing-dealer situation—scenario #5, the bought-off dealer—would similarly produce a dealer without antitrust-injury standing. Here, there would be a manufacturer cartel (and therefore an inefficient vertical restraint), but having benefitted from the cartel by receiving a part of the monopoly profits, the dealer could not show injury traceable to that inefficiency.[127] Instead, the dealer who can show an economically inefficient vertical restraint and injury linked to that inefficiency is likely to be a dealer who was *coerced* into accepting the restraint[128] (scenario #4 or #5).[129]

Saying this does not mean that coercion resumes the pivotal position that it once had. Not only is coercion no longer evil in itself, but evidence of coercion is also not always indicative of an economically-inefficient restraint—namely, one used to facilitate a cartel. In particular, evidence of simply a dealer's own *individual* coercion will rarely reflect a manufacturer cartel. On the contrary, individual coercion is likely symptomatic of either an honest disagreement over marketing strategies or a dealer's desire to free-ride (scenario #2 or #3), neither of which indicates an inefficient vertical restraint.[130] Individual coercion will be con-

alleges that competing retailer pressured suppliers into not dealing with plaintiff, plaintiff must put forth full rule-of-reason case); Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 640-41 (10th Cir. 1987) (vertical boycott subject to rule-of-reason analysis); Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 590-92 (8th Cir. 1987) (same).

126. Similarly, in the case of a dealer-inspired vertical restraint, the manufacturer who agreed to the vertical restraint because he concurred in the dealers' marketing strategy, *see* scenario #1, *supra* note 117, would lack standing to challenge this pro-competitive restraint.

127. So too, the manufacturer who was bought off by a dealer cartel, *see* scenario #4, *supra* note 117, lacks standing for the same reason.

128. Once again, the situation is the same with a dealer-inspired vertical restraint. The manufacturer who can show a dealer cartel and injury stemming from that cartel will likely be a manufacturer who was coerced into accepting the restraint. *See* VII P. Areeda, *supra* note 7, at ¶ 1457; VIII P. Areeda, *supra* note 57, at ¶ 1603; Baxter, *supra* note 58, at 944; scenario #3, *supra* note 117.

The only other economically inefficient vertical pricing restraint is a *maximum* resale price set below cost by a manufacturer in order to engage in predatory pricing. Here too, coercion of the dealers is likely to be present if the dealers will be incurring losses on their sales. *See, e.g.*, Rebel Oil Co. v. Atlantic Richfield Co., 1990-2 Trade Cas. (CCH) ¶ 69,258, at 64,950 (D. Nev. 1990) (competing dealer alleges that oil company coerced its dealers into charging maximum prices which were also predatory).

129. Thus, the economic efficiency rationale, which the Supreme Court embraced in *Sylvania* and *Sharp*, is in flat contradiction to the *Monsanto* Court's condemnation of "common plan" agreements. The vertical arrangement that the economic efficiency proponents paint as the most clearly pro-competitive (scenario #1) will typically involve the very agreement that *Monsanto* condemns. Conversely, most economically inefficient vertical restraints (scenario #4), moreover, involve a coerced agreement. Put simply, *Monsanto* is wrong. *See* Burns, *supra* note 39, at 29-31, 33-34.

130. Similarly, evidence of a single manufacturer's resistance to dealer-inspired vertical

sistent with an inefficient restraint only in the unlikely situation where there is a manufacturer cartel that has bought off most dealers but not the plaintiff-dealer (a modified scenario #5).[131] This does not mean, however, that coercion evidence has no value at all. Evidence of *widespread* dealer coercion does provide some indication of the presence of a manufacturer cartel (scenario #4).[132] Additionally, the dealer who offers evidence of *both* widespread dealer coercion and her own resistance has shown some indication of an inefficient restraint and her own standing.[133]

Yet even the use of widespread coercion evidence needs further refinement. Such evidence is neither sufficient in itself nor always necessary to show that manufacturers are using a vertical restraint to facilitate a cartel. It is not sufficient because widespread dealer coercion could also be consistent with scenario #2—where dealers disagree with the manufacturer's marketing strategy. Moreover, if the manufacturer's marketing strategy is wrongheaded, the manufacturer might well meet with resistance from some, or even most, dealers.[134] Yet widespread resistance in this situation is in no way reflective of a manufacturer cartel and, under the economic efficiency theory, the restraint ought not be subject to antitrust attack.[135]

Nor is widespread coercion evidence always necessary to prove the presence of a cartel. In particular, it will be unnecessary in some instances in which a consumer, as opposed to a dealer, brings the lawsuit.[136] In most consumer lawsuits involving inefficient vertical

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restraints is likely reflective of nothing more than an honest disagreement over marketing strategy. *See* scenario #2, *supra* note 117.

131. If manufacturer or dealer cartels are rare, *see supra* note 66, then cartels in which parties on another level of distribution are bought off are likely to be even rarer. *See supra* notes 121-22. If we then look for a manufacturer cartel with bought-off dealers but a morally righteous (but fiscally crazed) dealer who refuses to be bought off, we are searching for a rare bird indeed.

132. Similarly, evidence that manufacturers of different brands have received requests from their respective dealers for vertical restraints and evidence of widespread manufacturer resistance to such restraints would be strong evidence of a dealer cartel.

133. The dealer's own individual resistance is evidence that she was not bought off by the cartelizing manufacturers.

134. *See supra* note 119. Theoretically, widespread dealer coercion could also be reflective of a desire on the part of a number of dealers to free ride (scenario #3). As a practical matter, however, this is not likely. If the manufacturer-suggested vertical restraint is likely to increase sales, most dealers should welcome it. *See supra* note 118. It will likely only be the occasional dealer who seeks to free ride. Indeed, successful free riding requires that other dealers provide the full range of services. *See supra* note 61.

135. Widespread manufacturer coercion is harder to explain away. The likelihood that (1) different manufacturers of different brands would receive similar requests for vertical restraints from their dealers, *and* (2) coincidentally there be resistance from most manufacturers, *and* (3) that the resistance would in each case stem from an honest disagreement over marketing strategy, is remote.

136. The consumer lawsuit may become increasingly important in the vertical restraint area. Even assuming there is a manufacturer cartel, the dealer is limited in his lawsuit by the fact that he cannot sue for a cut of the monopoly profits. *See supra* note 127. The consumer, on the other hand, is injured to the full extent of the overcharge. *See supra*

restraints, widespread coercion *will* be present because the party on the non-cartelized level (be it the manufacturer or the dealer) will resist the vertical restraint (scenario #4).[137] Unlike a plaintiff-dealer, however, a consumer will also have standing to sue in all cases where there was no coercion because the cartelizing manufacturers bought off the dealers (scenario #5).[138] Even without widespread coercion of the dealers, the consumer is still injured by paying more than a competitive price because of the cartel.

Technically, a no-coercion, explicit-resale-price restraint, like that in *Dr. Miles*, also remains a violation of the antitrust laws after *Monsanto* and *Sharp*.[139] Absent a cartel, however, it is hard to see how anyone, dealer or consumer, will have standing to sue for such a "violation"—because, absent a cartel, no one will be injured by that which makes this arrangement a violation of the antitrust laws.[140]

Does the varying and inconclusive nature of coercion evidence mean that it should be excluded? Not at all. Frequently a party uses evidence that is insufficient by itself to prove a point.[141] However, because coer-

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note 7. Unlike a dealer-plaintiff, however, a consumer complaining of a manufacturer cartel may be met with the argument that the consumer is an indirect purchaser from the manufacturer and barred from suing under *Illinois Brick*. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977). The consumer can avoid the *Illinois Brick* indirect-purchaser bar by alleging that the dealer from whom the consumer bought was a co-conspirator. *See* California v. Standard Oil Co., 691 F.2d 1335, 1342 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984); New York v. Dairylea Coop. Inc., 570 F. Supp. 1213, 1215-16 (S.D.N.Y. 1983).

137. *See supra* note 121 and accompanying text. In the case of an alleged manufacturer cartel and coerced dealers, the consumer may face a formidable *Illinois Brick* hurdle. To overcome the indirect-purchaser bar, the consumer will have to allege that the dealers, although coerced, were nonetheless co-conspirators. *See supra* note 136. To the extent that the dicta in *Monsanto* really mean that coerced compliance is not the equivalent of an agreement, *see supra* note 92 and accompanying text, this may be impossible.

138. A consumer would also have standing where the cartelizing dealers bought off manufacturers. *See* scenario #4, *supra* note 117. In these instances, where the dealers had been bought off or were themselves cartelizing, there would be no *Illinois Brick* bar to the consumer's lawsuit, provided the dealers were named as co-conspirators. *See supra* note 136.

139. If the holdings of *Monsanto* and *Sharp* are followed, the prototype illegal vertical restraint case is the much-maligned *Dr. Miles*—where there was an explicit agreement on specific resale prices. *See* Burns, *supra* note 39, at 31.

140. *See supra* notes 102-08 and accompanying text. Ironically, when *Monsanto*, *Sharp*, and *USA Petroleum* are read together, the result is an antitrust "violation" (the *Dr. Miles* situation, *see supra* note 139) for which no one has standing to sue. In addition, the very showing of a cartel, satisfying the antitrust injury requirement of demonstrating harm flowing from that which makes the arrangement illegal under the antitrust laws, is likely to involve a coerced arrangement, not the agreed-upon restraint that *Monsanto* calls for.

141. For instance, in a horizontal restraint case, the plaintiff may introduce evidence of conscious parallelism to show an agreement. While proof of conscious parallelism is by itself insufficient to show an agreement, *see* Theatre Enters. v. Paramount Distrib. Corp., 346 U.S. 537, 541 (1954), that does not make evidence of conscious parallelism inadmissible. It merely means that to get his case to the jury, the plaintiff must show something in addition to the evidence of conscious parallelism. *See* Michelman v. Clark-Schwebel Fi-

cion evidence, particularly individual coercion evidence, can be consistent with both efficient and inefficient restraints, certain preliminary questions must be asked when a party seeks to introduce such evidence. First, what party wants to use coercion evidence and against whom? There are three basic possibilities: (i) a plaintiff-dealer wants to use coercion evidence against a defendant-manufacturer;[142] (ii) a plaintiff-consumer wants to use coercion evidence against a defendant-manufacturer and/or defendant-dealer; or (iii) a defendant-manufacturer wants to use the absence of coercion against a plaintiff-dealer or a plaintiff-consumer.[143] Next, is the cartel one that allegedly (i) encountered resistance from the dealers or (ii) bought off the dealers? The answers to these questions indicate the type of coercion evidence that the court should permit.

1. *The Plaintiff-Dealer.* Where there is a plaintiff-dealer alleging a manufacturer cartel resisted by dealers (scenario #4), the plaintiff who wants to use coercion evidence should be required to introduce evidence of *widespread* dealer coercion. A court should not permit a showing of only individual coercion evidence in this context. Rather, given the ambiguous nature of individual coercion evidence, it should be allowed, if at all, only where a plaintiff-dealer alleges a manufacturer cartel that bought off other dealers but not the plaintiff herself (a modified scenario #5). Even here, however, caution is warranted. This latter situation is an unlikely occurrence,[144] and individual coercion is equally consistent with two, more likely, pro-competitive scenarios—scenarios #2 and #3. Thus, a court may wish to condition the introduction of individual coercion evidence upon a showing of some other evidence of a manufacturer cartel.

ber Glass Corp., 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309, 1314 (3d Cir. 1975). Similarly, in *Monsanto*, the Court held that evidence of dealer complaints by itself was not sufficient to show a vertical agreement had been formed. The Court, however, specifically noted that the complaints would be *some* evidence of such an agreement. *See supra* note 89.

142. Theoretically, there can also be the flip-side of this category—where a plaintiff-manufacturer is seeking to use coercion against a defendant-dealer. Peter Cartensen and Richard Dahlson suggest, for instance, that in the beer industry cartelizing wholesalers may pressure manufacturers into using territorial restraints, which help the wholesalers maintain their cartel. *See* Cartensen & Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition*, 1987 Wisc. L. Rev. 1, 20, 41-54. As a practical matter, however, most vertical restraint cases are brought by dealers or by consumers (or states acting on behalf of their consumer citizens). Furthermore, the evidentiary requirement for the plaintiff-manufacturer will be the same as for a plaintiff-dealer.

143. Critics of the use of state of mind evidence often suggest that such evidence may be misapplied by the jury to the detriment of the defendant. *See supra* note 110 and accompanying text. Under current law, however, the defendant may well want to use the absence of coercion as evidence of a pro-competitive restraint. *See infra* notes 221-38 and accompanying text (regarding use of such evidence by defendant-manufacturer in tying case).

144. *See supra* note 131.

2. *The Plaintiff-Consumer.* Where a plaintiff-consumer is alleging a manufacturer cartel that was resisted by the dealers (scenario #4), the consumer wishing to use coercion evidence is in the same position as a plaintiff-dealer and should be required to offer evidence of *widespread* dealer coercion.[145] Here again, evidence of isolated instances of coercion does not distinguish between efficient and inefficient vertical restraints. If, however, the consumer is alleging that the cartelizing manufacturer bought off his dealers (scenario #5), the plaintiff needs no evidence of coercion, individual or widespread. Nor, as explained below, should the absence of coercion be available as a defense.

3. *The Defendant-Manufacturer.* A defendant-manufacturer may well want to use the absence of coercion as some evidence of a pro-competitive vertical restraint.[146] In a suit brought by a plaintiff-dealer, a showing by the manufacturer of *widespread* dealer agreement with the vertical restraint is significant evidence that the restraint is within scenarios #1, #2, or #3 and, therefore, economically efficient and not subject to attack under the Sherman Act. Furthermore, evidence of widespread agreement tends to refute the plaintiff-dealer's allegation of a manufacturer cartel within scenario #4. In the event that the manufacturer is faced with a charge of participating in a cartel that bought off dealers (scenario #5), moreover, the manufacturer can use evidence of the *individual* plaintiff-dealer's agreement and lack of resistance to show an absence of standing.

In a suit brought by a plaintiff-consumer, the manufacturer's right to use evidence of dealer agreement will depend on whether the consumer is alleging a cartel that dealers resisted (scenario #4) or a cartel that bought off dealers (scenario #5). In the former case, a showing by the manufacturer of widespread dealer agreement is directly relevant to the issue of whether a cartel existed. In the latter case, however, evidence of dealer agreement, whether widespread or not, is irrelevant to the existence of the antitrust offense and to the consumer's standing and, therefore, should be precluded.

Thus, the adoption of the economic efficiency approach to vertical restraints has not eliminated coercion from the analysis of these arrangements; it has simply changed the role that coercion plays. Coercion, and, more specifically, widespread coercion, is now relevant as some evidence of a manufacturer's or a dealer's use of a vertical restraint to facilitate a cartel. Conversely, the presence of widespread agreement—or lack of coercion—is indicative of a pro-competitive vertical restraint and potentially important evidence for a defendant-manufacturer. That such evidence will not alone prove or disprove the plaintiff's case (and in some consumer cases may be wholly irrelevant) does not mean that the evidence should be ignored altogether. With careful scrutiny from the trial

145. The plaintiff-consumer alleging a manufacturer cartel will also have to overcome the *Illinois Brick* indirect-purchaser bar. *See supra* notes 136-37.

146. *See supra* note 125.

court regarding the type of coercion or agreement evidence permitted, and with appropriate jury instructions,[147] this evidence is directly relevant to the central question: Is this an economically efficient vertical restraint?

IV. THE ROLE OF COERCION IN THE EARLY TYING CASES (THE LAW BEFORE *JEFFERSON PARISH*)

The second major area in which coercion has a new role is in tying analysis.[148] In the early tying cases, as with vertical pricing, territory, and customer restraints, coercion was present in the rationale for condemning certain tie-ins, in determining the agreement element, and in the *in pari delicto* defense.

In its early decisions,[149] the Supreme Court quickly displayed a visceral dislike of almost all tying arrangements. A tie-in, the Court announced on more than one occasion, "serves hardly any purpose beyond suppression of competition."[150] The primary rationale for condemning tie-ins in these early cases was the leverage theory, which asserted that a seller with market power[151] in one product (the tying product) could use a tying arrangement to acquire market power in a second, usually complementary product (the tied product).[152] The evil of such a tie-in was

147. A jury will, for instance, have to be instructed that a showing by a plaintiff-dealer or plaintiff-consumer of widespread dealer coercion is not, by itself, proof that there was a manufacturer cartel.

148. In simple terms, tying is the conditioning of the purchase of one commodity on the purchase of another. *See* Nothern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

149. For a historical review of the tying cases, see Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 Minn. L. Rev. 1013 (1985).

150. Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949). The Court has reaffirmed its position in subsequent cases. *See* Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 498 (1969) ("Fortner I"); United States v. Loew's Inc., 371 U.S. 38, 44 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953). The Court in *Fortner I* added: "[T]ying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way." *Fortner I*, 394 U.S. at 503.

151. How *much* market power was necessary in the tying market was not altogether clear in the early cases. In *Times-Picayune*, the Court suggested that monopoly power or at least "market dominance" was necessary. *See Times-Picayune*, 345 U.S. at 611. In subsequent cases, however, the Court diluted the market power requirement. In *Northern Pacific*, "sufficient economic power" was said to be enough, *see Northern Pacific*, 356 U.S. at 6; in *Fortner I*, the Court stated that a seller's "unique economic advantage" sufficed, *see Fortner I*, 394 U.S. at 505. Additionally, in the early cases, the Court held that market power in the tying market could be inferred from the product's distinctive or unique attributes. *See, e.g.*, *Loew's*, 371 U.S. at 45 (copyrighted films as tying products); *Northern Pacific*, 356 U.S. at 7-8 (land as tying product); International Salt Co. v. United States, 332 U.S. 392, 395 (1947) (patented product as tying product).

152. *See, e.g.*, *Loew's*, 371 U.S. at 45 ("A tie-in contract may have . . . undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item."); *Northern Pacific*, 356 U.S. at 11 ("the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another"); *Times-Picayune*, 345 U.S. at 611 ("the essence of illegality in tying agreements is

said to be twofold. First, it injured the buyer of the tied package by eliminating his freedom to buy whatever product he wanted in the tied market.[153] Second, it harmed "competition on the merits" in the tied market.[154] While never precisely defined, this second injury focused on the disruption of the tied market[155] and particularly on the foreclosure of rival competitors in the tied market, who could no longer sell to the buyers who bought the tied package.[156]

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the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next").

153. *See, e.g.*, *Northern Pacific*, 356 U.S. at 6 ("buyers are forced to forego their free choice between competing products"); *Fortner I*, 394 U.S. at 512 ("[The] distortion [produced by tying] injures the buyers of the [tied] product, who because of their preference for the seller's brand of the [tying product,] are artificially forced to make a less than optimal choice in the second.") (White, J., dissenting).

154. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958) ("competition on the merits with respect to the tied product is inevitably curbed"); *see also* United States v. Loew's Inc., 371 U.S. 38, 44-45 (1962) ("[Tie-ins] are an object of antitrust concern for two reasons—they may force buyers into giving up the purchase of substitutes for the tied product . . . and they may destroy the free access of competing suppliers of tied product to the consuming market." (citation omitted)); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953) ("By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stress of the open market.").

155. Kenneth Dam characterizes the Court's concern with "competition on the merits" and "disruption" of the tied market as an atomistic view of competition. The atomistic view, Dam explains, "is that competition is distorted if each product does not have its price." Dam, Fortner Enterprises v. United States Steel: *"Neither A Borrower Nor A Lender Be,"* 1969 Sup. Ct. Rev. 1, 30; *see also* Pearson, *Tying Arrangements and Antitrust Policy*, 60 Nw. U.L. Rev. 626, 636 (1965) (questioning whether having each product "compete on its own merit" is desirable or possible, and, if so, whether it should be concern of antitrust laws). The Court's use of such an atomistic philosophy is perhaps best seen in United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) ("The practice [of block booking movies] tends to equalize rather than differentiate the reward for the individual copyrights. . . . Each stands not on its own footing but in whole or in part on the appeal which another film may have.").

156. The Court's concern for rivals in the tied market runs throughout the early cases. In *International Salt*, for instance, the Court spoke of the tie-in as "clos[ing] this market for [the tied product] against competition," and concluded that it is "unreasonable, *per se*, to foreclose competitors from any substantial market." International Salt Co. v. United States, 332 U.S. 392, 396 (1947); *see also Northern Pacific*, 356 U.S. at 6, 8 ("[Tie-ins] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." The tying firm's "purpose obviously was to fence out competitors, to stifle competition."); *Times-Picayune*, 345 U.S. at 605 ("[T]he effect [of a tie-in] on competing sellers attempting to rival the 'tied' product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace."); United States v. Griffith, 334 U.S. 100, 107 (1948) ("[T]he use of monopoly power, however lawfully acquired to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."); Fortner Enters. v. United States, 394 U.S. 495, 509 (1969) ("Fortner I") ("[Tie-ins] crippl[e] other companies that are equally, if not more, efficient in producing their own products.") Even Justice White in his dissent in *Fortner I* agreed that "tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter the

Coercion played a significant, albeit somewhat unsteady, role under this view of tying arrangements. To the extent that the Court emphasized buyer freedom, coercion was central to the very rationale for condemning the activity, just as it had been a key part of the rationale for condemning vertical price, territory, or customer restraints.[157] On the other hand, to the extent that the Court stressed the potential harm to competitors in the tied market, coercion of the buyer played a lesser role in the rationale for condemning tying arrangements. In the latter instance, there was no need to show that buyers actively resisted buying the tied product from the defendant. Even if buyers were indifferent to being required to buy the tied product from the defendant, competitors in the tied market were nonetheless foreclosed from selling to those buyers.[158]

Furthermore, as with vertical pricing, territorial, and customer restraints, coercion was no bar to finding an agreement in a tying arrangement.[159] Provided there was a completed sale or lease,[160] the Supreme Court assumed without discussion that an "agreement" existed for purposes of section 1 of the Sherman Act,[161] even though that agreement

market." *Fortner I*, 394 U.S. at 513 (White, J., dissenting). Dam notes that, ironically, in *Fortner I* the Court stressed the harm to rivals in the tied market as a justification for condemning a tie-in, even though in that case the plaintiff was a buyer, not a rival. *See* Dam, *supra* note 155, at 37.

157. Indeed, the Court suggested that a tie could be illegal even if only *some* buyers were restrained by it. *See Fortner I*, 394 U.S. at 503 ("an appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all buyers in the market"). This concern for *some* buyers can also be seen as a concern for foreclosure of even a small number of rivals in the tied market. *See* Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1244 (1980) [hereinafter Baker, *The Supreme Court*].

158. *See Fortner I*, 394 U.S. at 512-13 (White, J., dissenting); Austin, *supra* note 50, at 1176; Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50, 60-61 (1958); Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 Vand. L. Rev. 755, 792 (1977).

159. *See* United States v. Loew's Inc., 371 U.S. 38, 40 (1962). A tying arrangement can be challenged under either § 1 of the Sherman Act or § 3 of the Clayton Act. If the challenge is brought under § 1, an agreement is necessary. *See supra* note 30. If suit is brought under § 3, there must be a sale or lease. *See* 15 U.S.C. § 14 (1988). Because § 3 of the Clayton Act is limited to leases and sales of goods, many tying cases are brought under § 1 of the Sherman Act or under both statutory provisions. Indeed, in his historical analysis of the tying cases, Victor Kramer notes that most tie-ins reviewed by the Supreme Court after *International Salt* in 1947 have involved tying claims under § 1 of the Sherman Act. *See* Kramer, *supra* note 149, at 1037.

160. An attempted agreement is insufficient for § 1 of the Sherman Act, and an attempted sale is typically insufficient for § 3 of the Clayton Act. *See* Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 523-24 (8th Cir. 1987); Ron Tonkin Gran Turismo v. Fiat Distribs., 637 F.2d 1376, 1388-89 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); E.T. Barwick Indus. v. Walter E. Heller & Co., 692 F. Supp. 1331, 1338 (N.D. Ga. 1987), *aff'd*, 891 F.2d 906 (11th Cir. 1989); VII P. Areeda, *supra* note 7, at ¶ 1460c. A buyer may have standing to challenge a tie-in, however, where the buyer wanted to buy the tying product without the tied product and other sales of the tying package occurred. *See* Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11th Cir. 1991).

161. *See supra* note 30. The Court's assumption that a completed sale was an "agreement" for purposes of a tying allegation under § 1 was consistent with the Court's as-

typically involved an unwilling, coerced buyer.[162] Thus, as with vertical restraints, the Court thrust the buyer in the tying case into the dual roles of coerced victim and co-conspirator.

Insofar as the *in pari delicto* bar was concerned, coercion played exactly the same role in tying cases that it played in the vertical restraint cases.[163] The *Perma Life* case itself, which set the bounds of the *in pari delicto* defense, involved claims of tying as well as allegations of vertical pricing and territorial restraints.[164] The upshot was that by showing coercion, a buyer in a tying case could escape the *in pari delicto* bar and be a plaintiff/victim as well as a co-conspirator.[165]

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sumption that an express agreement on resale prices satisfied the § 1 agreement element in a vertical price fixing charge. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 398 (1911). For a criticism of this assumption in *Dr. Miles*, see Burns, *supra* note 39, at 16-17. The only case in which the Supreme Court touched specifically on the issue of the agreement element in a tie-in case was *Perma Life*, a case involving allegations of vertical pricing and territorial restrictions as well as tying allegations. *See supra* note 44. In *Perma Life*, the Court noted: "[E]ach [franchise dealer] can clearly charge a combination between [the franchisor] and himself, as of the day he unwillingly complied with the restrictive franchise agreements." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968).

162. Although tying involves a sales or lease agreement between the tying seller and the buyer, the Supreme Court assumed, in many of its cases, that the buyer had the tied sale thrust upon him. Whether finding a "coerced sale" under § 3 of the Clayton Act or a "coerced agreement" under § 1 of the Sherman Act, the Court implicitely recognized that tying is actually an exertion of unilateral seller power. *See supra* note 153; VII P. Areeda, *supra* note 7, at ¶ 1441h. However, while coercion was not a barrier to finding an agreement in a tying arrangement, coercion was not used in tying, as it had been with other vertical restraints, to *prove* the existence of the agreement. *See supra* notes 39-40. In the tying arrangement, the completed sale or lease provided an obvious "agreement."

163. Coercion played an additional role in the standing analysis in tying cases—it established causation in fact on the part of a plaintiff buyer. Even assuming a seller is illegally tying two products, a buyer who would have bought the tied product from the defendant even without the tie lacks standing because he personally has not been injured by the tie-in. *See, e.g.*, Murphy v. Business Cards of Tomorrow, Inc., 854 F.2d 1202, 1204 (9th Cir. 1988) (franchisee's tying claim fails when unable to show that they or other franchisees did not voluntarily buy equipment from franchisor); Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1219-24 (3d Cir. 1976) (plaintiff-buyer in tying case must show he did not accept tied product voluntarily). Coercion can thus be used as a tool to eliminate those persons who would freely buy the tied product from the defendant with or without the tying arrangement. *See* Hovenkamp, *Tying Arrangements and Class Actions*, 36 Vand. L. Rev. 213, 226 (1983) [hereinafter Hovenkamp, *Tying Arrangements*]. Arthur Austin suggests that courts use coercion in this sense to avoid giving a "windfall" to an "undeserving" plaintiff. *See* Austin, *supra* note 50, at 1152. Some commentators argue that the state of mind of the buyer ought not be considered; once the plaintiff/buyer shows power in the tying market, coercion should be assumed. *See id.* at 1168; Note, *supra* note 158, at 784-85.

164. *See supra* notes 41-50 and accompanying text.

165. In tying cases, it is especially important that a plaintiff-buyer be able to be both a victim and a co-conspirator. Unlike the dealer faced with vertical resale price maintenance, a buyer in a tying arrangement cannot generally rely on the defendant's sales to *other* buyers to establish the necessary agreement. "That rival dealers . . . patronize rival suppliers does not ordinarily interfere with the ability of competing dealers to . . . refrain from dealing with other suppliers." VII P. Areeda, *supra* note 7, ¶ 1460e, at 211.

V. THE ROLE OF COERCION UNDER CURRENT TYING ANALYSIS

Just as they do in analyzing vertical restraints, proponents of the economic efficiency approach dispense with coercion as a rationale for condemning tie-ins.[166] Instead, they begin with the premise that a tying arrangement should be objectionable from an antitrust standpoint only when it results in an increase in prices or a reduction in output in the tied market or is otherwise economically inefficient.[167] Absent such a monopolistic effect in the tied market (or other economic inefficiency),[168] a tie is economically unobjectionable, regardless of any coercion of the buyer or exclusion of rival sellers from the tied market.[169] Furthermore, contrary to the Supreme Court's early suspicion of almost all ties, the economic efficiency advocates argue that only rarely will a tie have such an economically harmful effect. In particular, they contend that the leverage theory is an inadequate explanation of why a seller would use a tie-in and

166. The concept of coercion, they note, has been the source of much confusion in tying law. *See, e.g.*, H. Hovenkamp, Economics, *supra* note 4, § 8.10, at 237 (coercion has become "a bugbear in tie-in analysis" and has been used by courts to mean four different things); Baker, *The Supreme Court*, *supra* note 157, at 1274, 1317-18 ("history of the coercion requirement is one of confusion and tortured distinctions"; coercion in the sense of buyer freedom should be eliminated from tying analysis just as it was dismissed in *Sylvania* from analysis of vertical territorial and customer restraints); Pearson, *supra* note 155, at 632 ("Of all the claims of alleged evils of tying arrangements, [buyer coercion] has the least merit, for the charge is really nothing more than that the seller has made the best deal he can.").

167. *See* Baker, *The Supreme Court*, *supra* note 157, at 1268; Markovits, *Tie-Ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 Tex. L. Rev. 1363, 1429-44 (1980). Some commentators argue that even a tie that enables the seller to gain a monopoly in the tied market is not necessarily anti-competitive because the tying seller's success in the tied market may result from his providing the buyers with a package they want. Rather than condemn such conduct, these commentators argue, the law should encourage firms to compete in meeting consumer demands. *See* Jones, *The Two Faces of* Fortner: *Comment On A Recent Antitrust Opinion*, 78 Colum. L. Rev. 39, 45-47 (1978).

168. *See infra* note 178.

169. Just as coercion of the buyer is, by itself, an economically insufficient basis for condemning a tie, so too, the economic efficiency proponents argue, exclusion of rivals in the tied market, in and of itself, is not necessarily inefficient. The tying seller may be excluding rivals because he is offering the consumer a desirable package at a desirable price. *See* Baker, *The Supreme Court*, *supra* note 157, at 1267-68; Jones, *supra* note 167, at 45-47; Pearson, *supra* note 155, at 635-38; Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. Chi. L. Rev. 506, 509 (1974). On the other hand, some critics of the economic efficiency approach argue that buyer coercion should continue to be an independent basis for condemning a tying arrangement. *See, e.g.*, Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 Vand. L. Rev. 283, 288-91 (1980) ("coercion of the buyer . . . should be enough to satisfy the injury requirement of a tying arrangement"); Slawson, *supra* note 7, at 264-65 ("tie-ins reduce competition by limiting buyer options"). Additionally, other critics contend that the economic efficiency proponents fail to give adequate weight to the harm that tying arrangements can do to rivals in the tied market. *See, e.g.*, Slawson, *supra* note 7, at 266-69 (rivals are harmed because entry barriers are raised and competition is reduced); Strasser, *An Antitrust Policy for Tying Arrangements*, 34 Emory L.J. 253, 283-84 (1985) ("these arrangements can interfere with the populist goal of preserving individual entrepreneurial opportunity").

an improper basis for condemning most ties.[170] They argue that there are other, more likely reasons that a seller might use a tying arrangement and that these wholly or partially pro-competitive uses of tie-ins were either overlooked or given insufficient weight in the early Supreme Court decisions. A seller might, for instance, be using a tie-in as a way of safeguarding the goodwill or quality of the tying product.[171] Or, there may be economies of scale achieved by the joint production or joint sale of the two products, with the resulting cost of the package being lower than the cost of the component parts.[172] Or, the seller may just be offering the

170. Economic efficiency advocates point out that unless the tying seller has monopoly power in the tying market, buyers who do not want both products will simply turn to another seller. Moreover, even a seller *with* monopoly power in the tying market will typically be unable to create a new monopoly in the tied market; rather, buyers will simply regard the tie-in as the effective equivalent of a price increase for the tying product and the monopolist's sales in the tying product will decline as they would with any price increase. *See* R. Posner, Antitrust Law, *supra* note 2, at 173-74; Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 20-27 (1957); Markovits, *Tie-ins, Reciprocity, and the Leverage Theory Part II: Tie-ins, Leverage, and the American Antitrust Laws*, 80 Yale L.J. 195, 197-205 (1970). Indeed, some commentators argue that without market power, a seller cannot use a tying arrangement in an economically inefficient, and therefore objectionable, way. *See, e.g.*, H. Hovenkamp, Economics, *supra* note 4, § 8.3, at 219 ("A forced package sale by a seller without market power must be efficiency creating or else the seller could not successfully sell its product this way."); Goldberg, *supra* note 62, at 751-55 (manufacturer without market power may use tie-in of products as just one of number of means of negotiating with dealer over shelf space and display of "representative" line of manufacturer's product). Some critics of the economic efficiency approach, on the other hand, would condemn certain tie-ins even when the tying seller does not have market power in the tying market. *See, e.g.*, Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U.L. Rev. 661, 671-81 (1982) (suggesting that some tying arrangements where seller lacks market power be handled as consumer protection issues); Slawson, *supra* note 7, at 259 (stating that all tie-ins decrease competition).

171. *See* Bowman, *supra* note 170, at 29; *see also* Sidak, *Debunking Predatory Innovation*, 83 Colum. L. Rev. 1121, 1136-37 (1983) (noting that seller's interest in safeguarding quality control is especially important when buyer has limited understanding of the tied product or when seller is facing potential product liability expense). In International Business Machines Corp. v. United States, 298 U.S. 131 (1936), the Supreme Court recognized the possibility of a goodwill or quality control defense. The Court suggested, however, that such a defense would be available only if the tie-in was the least restrictive means of achieving such quality control. *See id.* at 139-40. Several commentators have criticized the Court's least-restrictive-alternative requirement on the ground that it fails to take into account the cost and efficiency of alternatives. Often, tying may be the least costly method of guaranteeing goodwill or quality, and disallowing tying may therefore result in higher prices for the consumer. *See* R. Posner, Antitrust Law, *supra* note 2, at 175; Baker, *The Supreme Court*, *supra* note 157, at 1250-51; Klein & Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & Econ. 345, 352-54 (1985); Sidak, *supra*, at 1137-40.

172. *See* H. Hovenkamp, Economics, *supra* note 4, § 8.9, at 233-35; R. Posner, Antitrust Law, *supra* note 2, at 180-81; Bowman, *supra* note 170, at 29. Some courts address this concern by finding a cost-cutting package to be "one product." *See* H. Hovenkamp, *supra* note 4, § 8.9, at 233-35; E. Sullivan & J. Harrison, *supra* note 122, § 5.02, at 198-202. On the other hand, some critics of the economic efficiency approach question whether tie-ins are essential for the achievement of economies of scale. *See, e.g.*, Strasser, *supra* note 169, at 262-65 (argument that tie-ins create economies is less persuasive; economies ultimately result from increased sales of tied goods).

consumer another choice through the tie.[173] Economic efficiency proponents argue that in such situations the law ought not sacrifice the interests of buyers in order to protect lazy rivals in the tied market.[174] Rather, competitors faced with such tie-ins should be spurred on to compete.[175]

The economic efficiency advocates concede that there are other, superficially less honorable reasons why a seller might be using a tie-in. The seller might, they readily admit, be using a tying arrangement for price discrimination, metering, or evasion of price controls.[176] This does not mean, however, that all such ties-ins are inefficient.[177] Under certain circumstances, even some of these tying arrangements can be pro-competitive.[178] The seller using a metering tie, for instance, may buy the tied

173. The economic efficiency proponents argue that rather than restricting the buyer's choices, a tying arrangement actually *increases* the choices by letting the buyer choose a package if he so desires. *See* Will v. Comprehensive Accounting Corp., 776 F.2d 665, 673-74 (7th Cir. 1985) (opinion by Judge Frank Easterbrook), *cert. denied*, 475 U.S. 1129 (1986); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 542 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); Jones, *supra* note 167, at 44-45; Pearson, *supra* note 155, at 635-37.

174. A number of commentators have noted that the consumer's interest may be an especially important reason for permitting tie-ins in the franchise area. In franchises, the franchisor in effect provides the use of its brand name and a standardized product to the franchisee dealer; it is just this standardization that the consumer is looking for when he patronizes a franchise. A franchisee who does not depend on return business, however, has a strong incentive to provide less-costly, lower-quality ingredients or services. Such a franchisee, in effect, free rides on the majority of franchisees who observe the quality controls. Such free riding harms not only the franchisor but also the consumer who is misled and often pays full price for a product of lesser quality. The franchisor, faced with such cheating franchisees, may find tying an easier and less costly way of avoiding the free-riding franchisee than product specification and inspection. Disallowing tying will only result in higher prices for consumers. *See* Baker, *The Supreme Court*, *supra* note 157, at 1277-78; Goldberg, *supra* note 62, at 746; Klein & Saft, *supra* note 171, at 349-53; Mathewson & Winters, *The Economics of Franchise Contracts*, 28 J.L. & Econ. 503, 510 (1985).

175. *See* Jones, *supra* note 167, at 40-43 (competitors should be told: "Go ye and do likewise!"). Some commentators also argue that tying may serve the pro-competitive purpose of destabilizing a monopolistic market by introducing a new type of competition, and tying may indeed be a sign that the market is moving from monopoly to competition. *See* Baker, *The Supreme Court*, *supra* note 157, at 1272.

176. *See* H. Hovenkamp, Economics, *supra* note 4, §§ 8.6-8.8, at 226-33; Bowman, *supra* note 170, at 21-29; Markovits, *supra* note 167, at 1378-1410.

177. The tie used for price discrimination, for example, enables the seller to extract higher profits from his monopoly in the tying market; such a tie rarely forecloses rival sellers in the tied market to the extent that the tying seller can raise prices and reduce output in that market. *See* R. Posner, Antitrust Law, *supra* note 2, at 174-75; Bowman, *supra* note 170, at 21-24; Markovits, *supra* note 167, at 1416-25; Sidak, *supra* note 171, at 1132-44. Similarly, while a price-control-evading tie may allow a seller to exploit his existing monopoly in the tying market, the tie does not necessarily lead to the creation of a new monopoly in the tied market. *See* Bowman, *supra* note 170, at 21-23. In some instances, however, a seller may be able to gain a monopoly in the tied market through such a tying arrangement. *See* H. Hovenkamp, Economics, *supra* note 4, § 8.6, at 226-27.

178. The economic efficiency proponents are not of one mind regarding the economic efficiency of price discrimination ties. Some commentators argue that price discrimination is likely to result in a greater output in the tying product market and therefore the

product from other firms in the tied market and thereby help these firms;[179] or, the seller may be using the metering tie as a way of offering the buyer a different risk allocation.[180] Even a price-control-evading tie may be beneficial to the buyer if it is used to cut prices in a regulated industry.[181] What a court applying the antitrust laws must do, here again, is distinguish between efficient restraints and inefficient ones.

Finally, the economic efficiency proponents argue that the same antitrust-standing analysis applied to mergers and vertical restraints must also be applied in tying cases.[182] In particular, only those plaintiffs—whether buyers or rival sellers in the tied market—who can show they have been injured by an anti-competitive effect of the tie should have standing to sue.[183]

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practice is actually economically efficient. *See* Sidak, *supra* note 171, at 1144. Others contend that although price discrimination does not often lead to foreclosure in the tied market, there is still an economic objection to it—increasing the gains of the monopolist would encourage a firm to expend greater resources to obtain and keep a monopoly. *See* R. Posner, Antitrust Law, *supra* note 2, at 177; Posner, *The Chicago School*, *supra* note 52, at 935. Saying this, however, does not mean that tying law is the proper vehicle for regulating price discrimination. *See* R. Posner, Antitrust Law, *supra* note 2, at 178-80.

Critics of the entire economic efficiency approach argue that the economic efficiency theory fails to give sufficient weight to the societal harm flowing from a monopolist's *use* of monopoly power, even where that use does not result in new monopoly power. *See* Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515, 520-25 (1985); Strasser, *supra* note 169, at 274.

179. *See* R. Posner, Antitrust Law, *supra* note 2, at 175.

180. Metering may allow the buyer to pay less for the tying product that the buyer may consider a risky investment.

> [I]f the manufacturer is less averse to risk than his customers tie-ins can function as a risk-sharing device: the manufacturer of the new product system bears the risk that the system will fail to meet the customer's needs and expectations; if so, the dissatisfied customer can cut his losses by not buying any more of the . . . tied product.

Sidak, *supra* note 171, at 1135; *see also* Austin, *supra* note 50, at 1171-72; Baker, *The Supreme Court*, *supra* note 157, at 1280. The Department of Justice Vertical Restraint Guidelines make the same point. *See Antitrust Policies and Guidelines—Federal and State*, 4 Trade Reg. Rep. (CCH) ¶ 13,105, at 20,586-87 (Mar. 1, 1989). In addition, those buyers who pay a lower total fee because of the price discrimination will benefit from such a tie-in. *See* Hovenkamp, *Tying Arrangements*, *supra* note 163, at 244; *Antitrust Policies and Guidelines—Federal and State*, *supra*, at 20,587.

181. *See* H. Hovenkamp, Economics, *supra* note 4, § 8.6, at 226-28; Markovits, *supra* note 170, at 226-27.

182. The first step would be to determine what type of tie-in was being used—a price-discrimination tie or a price-control-evading tie. Then, the plaintiff, whether a buyer or rival in the tied market, would have to show that he was hurt by an economic inefficiency of the tie. A buyer who paid a lesser price because of price discrimination, for instance, would lack antitrust injury. *See* Hovenkamp, *Tying Arrangements*, *supra* note 163, at 224-27.

183. A buyer/plaintiff in a tying case would also have to show standing in the causation sense—that he did want to buy the tied product. *See* Hovenkamp, *Tying Arrangements*, *supra* note 163, at 221-25. In this sense, even proponents of the economic efficiency rationale agree that coercion has a role in tying analysis. *See supra* note 163.

A. *The Application of the Economic Efficiency Approach to Tying*

In its most recent tying decision, *Jefferson Parish Hospital District No. 2 v. Hyde*,[184] the Supreme Court went a substantial way toward adopting an economic efficiency approach to tying analysis. Justice Stevens, writing for the Court's majority,[185] acknowledged that although some ties may be anti-competitive, other ties will be pro-competitive.[186] Further, in accord with the economic efficiency approach, Justice Stevens stressed that the evil of an illegal tie comes in its effect on competition in the tied market[187]—in particular, its effect on price, quantity, or quality in that market.[188] Coercive effect on the buyer alone, Justice Stevens specifically noted, is not sufficient to prove an illegal tie.[189]

184. 466 U.S. 2 (1984). In *Jefferson Parish*, an anesthesiologist who was denied admission privileges sued the hospital and claimed that the hospital illegally tied the hospital's operating rooms to the hospital's anesthesiological services. *See generally* Bern, Jefferson Parish Hospital District No. 2 v. Hyde: *Return to Reality in Economic Power Analysis in Tying Cases*, 53 UMKC L. Rev. 145 (1985) (analyzing opinion); Slawson, *supra* note 7 (same); *see also* Kramer, *supra* note 149, at 1049-63 (analyzing opinion and concurrence).

185. Five justices joined in the majority decision written by Justice Stevens; four justices joined in a concurring decision written by Justice O'Connor.

186. In particular, the Court noted that where a seller *without* market power in the tying market uses a tie-in, the "seller's decision to offer such packages can merely be an attempt to compete effectively" by offering the buyer an attractive package sale. *See Jefferson Parish*, 466 U.S. at 12.

187. The majority acknowledged that, in order for a tie-in to have an effect on the tied market, the defendant must, at least in *per se* cases, have market power in the tying market. *See id.* at 12-14. According to the majority opinion, such market power could be shown through a patent which gave rise to a presumption of market power, through a showing of a high market share, or through a demonstration that "the seller offers a unique product that competitors are not able to offer." *Id.* at 17. In addition, the majority was willing to consider, but rejected, "market imperfections" that might allow a seller without a substantial market share nonetheless to exert market power. *See id.* at 27; *see also* Klein & Saft, *supra* note 171, at 357 (arguing that Court correctly rejected "market imperfection" theory given facts of *Jefferson Parish*).

The Court left open the possibility that a plaintiff could prove an illegal tie-in under the rule of reason without proving the defendant seller had power in the tying market. In such a case, the plaintiff could prevail only by showing an actual effect on competition in the tied market. *See Jefferson Parish*, 466 U.S. at 17-18.

188. Echoing some economists' search for creation of "new" market power in the tied market, *see supra* notes 165-67 and accompanying text, the Court noted that "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other." *Jefferson Parish*, 466 U.S. at 14. In the second instance, the Sherman Act may be implicated because competition in the tied market may be impaired. "This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product." *Id.* Specifically, the Court indicated that it was looking for evidence that the price, quality, or supply of the tied product had been adversely affected by the tying arrangement in question. *See id.* at 30 n.49.

Additionally, the Court noted that the effect on competition in the tied market must be substantial. "If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." *Id.* at 16.

189. As in earlier cases, the majority continued to regard the tying arrangement as having two effects—an effect on rival sellers in the tied market and one on buyers who

Although the majority of the Court in *Jefferson Parish* stopped short of a wholehearted adoption of the economic efficiency approach to tying,[190] the four concurring justices would have gone even further.[191] Justice O'Connor, who authored the concurring opinion, recommended that tie-ins be analyzed under the rule of reason[192] and, in particular, that a plaintiff be required to make a threshold showing of (1) market power in the tying market;[193] (2) two distinct products;[194] and (3) "a substantial

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purchase the tying package. *See id.* at 14-16. The Court's concern, however, was primarily with the effect in the tied market. Thus, while the Court was willing to consider the possibility of an illegal tie even though the buyers, because of ignorance or other market imperfections, might not feel "forced" to take the tied product, the Court was not willing to consider a tie illegal when the *only* effect was coercion of the buyer. "[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." *Id.* at 16.

While Justice Stevens' opinion is replete with talk of "forcing" of buyers, the context indicates that he was using "forcing of buyers" as a short-hand way of referring to the need to show the defendant had market power in the tying product. For instance, Justice Stevens states:

> Only if patients are forced to purchase [anesthesiological] services as a result of the hospital's market power would the arrangement have anti-competitive consequences. . . . The question remains whether this arrangement involves the use of market power to force patients to buy services they would not otherwise purchase.

Id. at 25-26. The only reference that Justice Stevens makes to coercion of the buyer as an evil in itself is in a quote from Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953) (quoted at 466 U.S. at 12-13).

190. The majority did adopt an economic approach to the question of whether one or two products were presented. They noted: "[N]o tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22 (1984). The majority, however, was unwilling to dispense with the *per se* label for tie-ins. "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*.' " *Id.* at 9. Additionally, the majority continued to regard leverage as a realistic danger, *see id.* at 14, and it continued to treat quality control as a defense that was subject to the least-restrictive-alternative requirement. *See id.* at 26 n.42. Victor Kramer concludes that the majority opinion returns tying law to its 1947 *International Salt* position. *See* Kramer, *supra* note 149, at 1049.

191. Victor Kramer asserts that the concurring justices would have returned tie-in law to its status in *United Shoe I. See* Kramer, *supra* note 149, at 1049.

192. Justice O'Connor noted that typically *per se* rules are applied without proof of market power or anti-competitive effects but that tying cases, although designated *per se*, involve just such "an elaborate inquiry into the economic effects of the tying arrangement." *Jefferson Parish*, 466 U.S. at 34 (O'Connor, J., concurring). At the same time, tying analysis lost the advantage of a rule-of-reason approach—namely, consideration of the economic benefits that the tie may have. *See id.* at 34-35 (O'Connor, J., concurring). Furthermore, use of the rule of reason would bring the analysis of tying arrangements in line with the analysis of vertical non-price restraints which, Justice O'Connor asserted, were "largely indistinguishable from tie-ins." *Id.* at 35 n.2 (O'Connor, J., concurring).

193. Justice O'Connor asserted that absent power in the tying-product market, "tying cannot conceivably have any adverse impact in the tied-product market, and can be only

threat that the tying seller will acquire market power in the tied-product market."[195] If these showings were made, a court would then balance the economic harms of the tying arrangement[196] against the economic benefits the agreement.[197] Such a careful analysis was necessary, according to Justice O'Connor, because a tying arrangement potentially pro-

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procompetitive in the tying-product market." *Id.* at 37 (O'Connor, J., concurring). Furthermore, Justice O'Connor, unlike the majority, would not allow a presumption of market power based on a patent or copyright, a unique product, or a high market share. "While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power . . . ." *Id.* at 37 n.7 (O'Connor, J., concurring).

194. Justice O'Connor's test for two products differed from the majority's. While the majority looked at "the character of the demand for the two items," *id.* at 19, Justice O'Connor framed the question as whether the tied product is one that consumers might wish to purchase separately from the tying product. *See id.* at 39 (O'Connor, J., concurring). She argued that her test provided a more "coherent economic basis" for analysis because "[w]hen the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together." *Id.* at 39 (O'Connor, J., concurring).

195. *Id.* at 38 (O'Connor, J., concurring). A determination of illegality, Justice O'Connor wrote, "should depend upon the demonstrated economic effects of the challenged agreement." *Id.* at 41 (O'Connor, J., concurring). No threat to the tied market exists "if the tied-product market is occupied by many stable sellers who are not likely to be driven out by the tying, or if entry barriers in the tied-product market are low." *Id.* at 38 (O'Connor, J., concurring).

196. Justice O'Connor saw two fundamental types of harm that could flow from a tying arrangement. First, there could be "a demonstrable exclusionary impact in the tied-product market," that is, "in the rare cases where power in the market for the tying product is used to create *additional* market power in the market for the *tied* product." *Id.* at 35-36 (O'Connor, J., concurring). Second, the tying arrangement could "abet the harmful exercise of market power that the seller possesses in the tying product market." *Id.* at 35 (O'Connor, J., concurring). Justice O'Connor gave two examples of the latter type of tie-in—ties used to evade price regulations in the tying market and ties used for price discrimination. *See id.* at 36 n.4 (O'Connor, J., concurring). The majority of the Court had similarly recognized that tying could be used to facilitate price discrimination, "thereby increasing monopoly profits over what they would be absent the tie," *id.* at 15, or "to evade price controls in the tying product." *Id.* at 28 n.47 (quoting Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 513 (1969) (White, J., dissenting) ("Fortner I")).

197. Justice O'Connor quoted Justice White's statement in *Fortner I* describing the potential pro-competitive uses of tie-ins:

> [Tie-ins] may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. . . . They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction. . . . And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution.

Id. at 41 (O'Connor, J., concurring) (quoting *Fortner I*, 394 U.S. at 514 n.9 (White, J., dissenting)). Some commentators criticize Justice O'Connor's balancing approach on the ground that she fails to explain *how* this balancing of apples and oranges is to be done. *See, e.g.*, Kramer, *supra* note 149, at 1061 ("This balancing approach is analogous to deciding whether a particular rose smells as sweet as a . . . peach tastes and, therefore, . . . leaves the rule of reason without any content.").

duces "substantial" economic benefits[198] and only in "rare cases" will it be used to leverage power into a second market[199] or produce other economically harmful effects.[200]

Because a number of years have passed since the Supreme Court's decision in *Jefferson Parish*,[201] one cannot be certain exactly how the Court would analyze a tying case today.[202] In light of the Court's recent decisions involving vertical restraints,[203] however, a continued movement toward an economically-based analysis is to be expected. More particularly, in any future tying case, the Court will likely be looking for:[204] (1) evidence that will help it distinguish an inefficient tie-in—one that produces higher prices and restricted output in the tied market[205] or has some other anti-competitive effect[206]—from an economically beneficial tie;[207] and (2) evidence showing that the plaintiff, whether a buyer or a

198. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 40 (1984) (O'Connor, J., concurring).

199. *See id.* at 36 (O'Connor, J., concurring).

200. *See id.* at 36 n.4 (O'Connor, J., concurring).

201. During these seven years, two members of the majority in *Jefferson Parish* (Justices Brennan and Marshall) and two members who joined Justice O'Connor's concurring opinion (Justices Burger and Powell) have left the Court. They have been replaced by Justices Scalia, Kennedy, Souter, and Thomas.

202. The Court has recently granted certiorari in another tying case. *See* Image Technical Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2823 (1991).

203. *See supra* Part III A.

204. This is obviously not an exhaustive list of the factors the Court might have to consider in a future tying case. As in *Jefferson Parish*, the Court might have to determine if two distinct products are being linked and if the tying seller has power in the tying market.

205. How *much* effect must be shown in the tied market depends upon how far down the economic efficiency road the Court goes. Justice Stevens in the majority opinion in *Jefferson Parish* suggested a "substantial" volume of commerce must be affected in the tied market. *See Jefferson Parish*, 466 U.S. at 16. Some advocates of the economic efficiency approach seek, like Justice O'Connor in her concurring opinion, a showing that there is a "substantial threat" that the tying seller will acquire market power in the tied product market. *See id.* at 38 (O'Connor, J., concurring); *see also* Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 235 (7th Cir. 1988) ("plaintiff must show the defendant has enough market power, present or prospective, in [the tied] market to make the tie-in a threat to competition") (Posner, J., dissenting), *cert. denied*, 110 S. Ct. 141 (1990); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 674 (7th Cir. 1985) (threshold requirement of substantial danger that tying seller would acquire market power in tied-product market) (opinion by Judge Frank Easterbrook), *cert. denied*, 475 U.S. 1129 (1986).

206. Both the majority and concurring justices recognized that there can be harmful effects from ties used for price discrimination or evasion of price controls, even though these uses of tying arrangements will not always have a monopolistic effect in the tied market. *See supra* note 196. Some economic efficiency proponents acknowledge that a price-discrimination or price-control-evading tying arrangement can be inefficient even if it does not result in new monopoly power in the tied market. *See supra* note 178.

207. This is not to say that a future Court will accept Justice O'Connor's suggestion that the economic harms be balanced against any economic benefits. The Court may well continue to consider economic benefits as a defense to a charge of illegal tying. What is reasonably certain is that alleged economic benefits *will* be considered somewhere in the tying analysis.

rival in the tied market, has been injured by an anti-competitive aspect of the tie.[208]

B. *The New Role of Coercion in Tying*

Assuming a continued adherence to an economic approach, the rationale for condemning tying arrangements obviously will no longer be based on coercion of the buyer alone. Just as trader freedom has been rejected as a ground for condemning vertical price, territory, and customer restraints, so too the Court in *Jefferson Parish* made clear that buyers' freedom of choice will not be regarded as an adequate basis for striking down a tying arrangement.[209]

Even in *Jefferson Parish,* however, the Supreme Court did not suggest the wholesale eradication of coercion from tying analysis as it had with vertical restraints. Some uses of coercion evidence arise from the nature of the tie-in offense itself, and neither the Court nor proponents of the economic efficiency approach have questioned the continued use of such evidence. For example, coercion of buyers can be used to show linkage of two products,[210] power in the tying product market,[211] or injury to a

208. Although the economic efficiency proponents look primarily to the effect on the buyer or consumer to determine the economic efficiency of a restraint, *see supra* notes 167-75 and accompanying text, they have not suggested that rival sellers in the tied market cannot in certain circumstances have standing to sue. Indeed, *Jefferson Parish* itself involved a plaintiff who was a rival in the tied market, *see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 5 (1984); and, in Blue Shield v. McCready, 457 U.S. 465 (1982), the Supreme Court specifically recognized that, in antitrust cases, there may be more than one category of plaintiffs with standing to challenge a practice, *see Blue Shield,* 457 U.S. at 478-84. In the tying area, the rival seller's standing may be particularly important where the consumer is unaware of the injury. *See* Key Enters. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990).

209. *See supra* note 189; *accord* Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc., 806 F.2d 953, 958 (10th Cir. 1986).

210. Absent a showing of linkage, there is, of course, no tie-in. "[W]here the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." Northern Pac. Ry. v. United States, 356 U.S. 1, 6 n.4 (1958). The most direct way to show linkage is through evidence of an explicit contractual arrangement. When evidence of a contractual requirement is unavailable, however, a plaintiff (whether a buyer or rival) may seek to show linkage through evidence of coercion. *See* Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1415-16 (11th Cir. 1987); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 540-42 (9th Cir. 1983), *cert. denied,* 465 U.S. 1038 (1984); Austin, *supra* note 50, at 1156-68; Matheson, *Class Action Tying Cases: A Framework for Certification Decisions,* 76 Nw. U.L. Rev. 855, 866-73 (1982). Because coercion is an individual issue with each buyer, the use of such coercion evidence to show linkage frequently results in class actions being unavailable. *See* Austin, *supra* note 50, at 1144-45; Hovenkamp, *Tying Arrangements, supra* note 163, at 218; Matheson, *supra.*

211. *See Northern Pacific,* 356 U.S. at 6 ("where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint . . . would obviously be insignificant at most"). As with linkage, market power in the tying market can be shown in ways *other* than through evidence of coercion of buyers. A plaintiff can, for instance, put on evidence of the relevant market and the defendant's market share to show market power, *see, e.g.,* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (market power shown

plaintiff-buyer resulting from the tie-in.[212]

In addition, even assuming the ascendancy of the economic efficiency approach (and despite the language of *Monsanto*[213]), the "agreement" between the tying seller and the buyer will continue to be, in many cases, a coerced one.[214] To the extent the tying seller successfully uses the tie-in to leverage into a position of market power in the tied market, the tie will result in higher prices for the tied product,[215] which the buyer obviously will not willingly pay.[216] Similarly, a buyer will object to a price-control-

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through defendant's market share), or the plaintiff might be entitled to a presumption of market power because of the defendant's control of a patent or copyright, *see, e.g.*, United States v. Loew's Inc., 371 U.S. 38, 45-46 (1962) (when tying product patented or copyrighted, there is presumption of market power). Evidence of coercion of buyers is simply another type of evidence of power in the tying product market. *Cf.* H. Hovenkamp, Economics, *supra* note 4, § 8.10, at 237-39 (noting that coercion is not identical with market power in that seller could well have market power in tying market and not be coercing anyone; for example, monopolist in shoe industry might "tie" left and right shoes but this may well be tie that virtually all consumers want); Matheson, *supra* note 210, at 870-73 (coercion evidence is often used when other evidence of market power is unavailable or rebutted). In *Jefferson Parish*, the Court's use of "forcing" was primarily in the context of showing market power. *See supra* note 189.

Coercion can similarly be used to show market power in a boycott case where the victim or tool is on a different commercial level from the boycotters. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 451 (1990) (Brennan, J., concurring in part and dissenting in part).

212. *See supra* note 163.

213. *See supra* notes 84-92 and accompanying text.

214. In the tying area, a number of lower courts have implicitly recognized that *Monsanto* is wrong and have taken the position that *Monsanto*'s requirement of a "common plan" agreement cannot possibly apply to tying cases. *See, e.g.*, Image Technical Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 619 (9th Cir. 1990) (application of *Monsanto* agreement test would place all tying arrangements beyond reach of Sherman Act), *cert. granted*, 111 S. Ct. 2823 (1991); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669-70 (7th Cir. 1985) (coerced buyer of tied product can be plaintiff in tying case; this holding of *Perma life* survives *Monsanto*, which has "nothing to say about the meaning of the joint action requirement in a tying case") (opinion by Judge Frank Easterbrook), *cert. denied*, 475 U.S. 1129 (1986); Black Gold, Ltd. v. Rockwool Indus., 732 F.2d 779, 780 (10th Cir.) (*Monsanto* does not retreat from those cases holding that agreement may be found in tying case when buyer acquiesced because of danger of termination), *cert. denied*, 469 U.S. 854 (1984). *Contra* Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 523 (8th Cir. 1987) (requiring *Monsanto* showing of conscious commitment to common scheme). The only way to avoid the "coerced agreement" paradox in tying cases is to consider tying as a unilateral action of a monopolist subject to antitrust attack under § 2 of the Sherman Act, if at all. Even Richard Posner acknowledges that given the legislative history of § 3 of the Clayton Act, this is an unlikely development. *See* R. Posner, Antitrust Law, *supra* note 2, at 182-83.

215. The purpose of leveraging into a position of market power in the tied market is to enable the seller, as a monopolist in this second market, to raise prices and obtain a supracompetitive profit.

216. The buyer faced with a leveraging tie is in the same position as a buyer faced with horizontally-fixed prices. In one sense, the buyer willingly pays the higher price in that the buyer could always walk away from the product altogether. *See* Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 795 (1st Cir. 1988); Austin, *supra* note 50, at 1176-77; Slawson, *supra* note 7, at 270-75. In another sense, no buyer willingly pays more than the competitive price for the product; instead the buyer pays the monopoly

evading tie that is used to exact a higher price for the tying product.[217] Additionally, the buyer who is required to pay more than other buyers because of a price-discrimination tie will not have a "common plan" or "unity of purpose" with the tying seller.[218]

Furthermore, as with vertical restraints, the ascendancy of the economic efficiency approach in some ways increases the evidentiary roles for coercion. Once again, coercion evidence—whether offered in the plaintiff's case in chief or by the defense[219]—can assist the trier of fact in sorting out good (economically efficient) ties from bad (economically inefficient) ones. Further, here too this evidence may have a direct bearing on whether the particular plaintiff has standing in the form of antitrust injury to challenge the restraint.

As with vertical restraints, the most useful coercion evidence will be evidence of *widespread* buyer coercion or *widespread* buyer agreement. This evidence will be directly relevant to whether a tying arrangement is economically efficient and, consequently, whether anyone has antitrust injury standing to challenge it. For instance, where a defendant claims that his tying arrangement is economically efficient in producing economies of production or distribution, or in otherwise offering a desirable package to buyers,[220] a key question will be whether most buyers did in fact want this package.[221] To the extent the defendant can show that the majority of buyers did want the package and were not coerced into taking it,[222] the defendant has shown some (although not necessarily conclu-

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price only because the seller is the only show in town. *Cf. supra* note 7 (buyer unwilling to pay higher prices will switch to substitutes).

217. Buyers faced with a price-control-evading tie that increases prices are also in a position analogous to that of buyers faced with a horizontally-fixed price. No buyer wants to pay a price higher than the controlled price for the tying product. If the price-control-evading tie is used to *cut* prices, however, buyers will be pleased with the tying arrangement. *See infra* note 231.

218. Buyers who pay *less* because of a price discrimination tie will, however, be pleased with the tying arrangement. *See infra* note 236 and accompanying text.

219. After *Jefferson Parish* it is not clear whether evidence of a tying arrangement's economically beneficial results will be addressed in the plaintiff's case in chief or by way of a defense. The majority suggested that arguments that ties were used for goodwill and quality control would be defenses. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26 n.42 (1984). The concurring justices, on the other hand, suggested that any pro-competitive aspects of the tying arrangement should be considered in the plaintiff's case in chief. *See id.* at 41.

220. Buyers may find the package attractive for reasons other than low cost. There may, for instance, be what some call efficiencies in product selection. That is, the buyer may prefer the package over the component parts because the buyer prefers having the seller, who possesses greater expertise, select the tied product. *See* Craswell, *supra* note 170, at 681-82.

221. An economically efficient tie-in is one that is beneficial to most consumers. There may be some buyers who do not want left and right shoes in packages, but a seller will often be able to achieve economies of scale by using a tie-in for all sales. *See* H. Hovenkamp, Economics, *supra* note 4, § 8.2, at 216.

222. This is not to say that evidence of widespread consumer desire for the package is the only method of showing an economies-of-scale tying arrangement. A defendant

sive) evidence of an economically efficient tie.[223] Moreover, even though rival sellers in the tied market may have been harmed by such a tying arrangement (in that it drew sales away from them) and some buyers may be unhappy, neither the rivals nor the buyers will have standing in the sense of antitrust injury to challenge the tying arrangement.[224] On the other hand, to the extent the plaintiff, whether a rival seller or buyer, shows widespread coercion of buyers, suspicion is cast on any economies-of-scale assertion.[225]

Similarly, evidence of widespread buyer coercion will be relevant to a tying seller's contention that the tie is necessary to maintain the quality, integrity, or goodwill of the tying product.[226] Here again, one expects that if the defendant's claim is true and the tied product does indeed provide a technological or other advantage in the use of the tying product, then knowledgeable buyers as a group will want the tied product.[227] Buyers as a whole will likely object, however, if the seller's goodwill or technological reason is invalid—that is, if use of the tied product does not enhance use of the tying product in a way superior to alternatives.[228] So

could, of course, also offer evidence of cost and price reduction. *See* R. Posner, Antitrust Law, *supra* note 2, at 181.

223. *See* Bowman, *supra* note 170, at 29. Evidence of an absence of buyer coercion will not necessarily be conclusive proof of an economies-of-scale benefit of the tie-in. Buyers may, because of market imperfections, be ignorant of the higher price or poorer quality of the tied product. *See, e.g.*, Key Enters. v. Venice Hosp., 919 F.2d 1550, 1557 (11th Cir. 1990) (consumers unable to assess lesser quality of tied product—home medical equipment).

224. Neither the rival sellers nor the disgruntled buyer will have been injured because of any economic inefficiency of the tie. To the contrary, each will be harmed by the efficiency of the tie, by the fact that most consumers want the package and the defendant is meeting that desire.

225. A showing of widespread buyer coercion may not always negate an economies-of-scale defense. Theoretically, a tying seller could achieve economies of scale but not pass the savings on to the buyers.

226. *See supra* note 171.

227. Indeed, both advocates and critics of the economic efficiency approach agree on this point. *See, e.g.*, Bowman, *supra* note 170, at 28 (if buyer uses non-tied product of sub-standard quality, "it might impair the operation or usefulness of the principal product"); Strasser, *supra* note 169, at 262 ("when a buyer understands the interdependence, he has a strong incentive to comply with the seller's technological specifications"). Here too, however, evidence of willing buyers will not be conclusive evidence of an efficient tie-in, because there is always the possibility of duped or uninformed buyers.

In addition, there is a temporal aspect that must be considered whenever a claim is made that a tie is economically efficient because it serves a quality-control purpose. Buyers may agree with the seller's quality-control claim when the tying product is first introduced into the market and buyers are unfamiliar with its use. As buyers' sophistication increases, however, their desire for the packaged sale may lessen. Thus, in judging buyers' wishes, historical preferences may be of limited usefulness.

228. A distinction has to be drawn between tying arrangements where the consumer is the direct buyer and those in which a franchisee is the direct buyer from the tying seller. In the franchise situation, a franchisee may want to avoid a valid quality-control tie in order to cut costs and free ride on the quality image maintained by the other franchisees. *See supra* note 174. Even here, however, the free-riding franchisee wants the *other* franchisees to continue to buy the tied product or service. Only if most franchisees do so will the public continue to see the franchise as a quality image. The free-riding franchisee is

too, where a metering tie is claimed to be pro-competitive in providing a form of risk allocation for buyers,[229] the question arises as to whether there is widespread buyer support for this tying arrangement (which tends to support the claim that the tie is economically efficient in providing the buyers a desirable risk-allocation package),[230] or whether there is widespread buyer opposition to the tie (in which case the risk-allocation claim is less likely valid).[231] Additionally, in each of these cases, if the evidence indicates there is an economically efficient tie, rival sellers, and any disgruntled buyers, will lack standing to challenge it.[232]

Evidence of *individual* coercion or individual agreement will also be relevant in some tying cases. Unlike widespread coercion, evidence of individual coercion will not be helpful in sorting out efficient from inefficient ties; it will, however, be relevant in determining a plaintiff-buyer's standing in some cases in which the buyer successfully shows an *inefficient* tie.[233] While all buyers suffer antitrust injury when there is a tie-in used successfully by the tying seller to leverage himself into a position of power in the tied market,[234] price-discrimination ties do not necessarily

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thus in a position analogous to the firm that has joined a horizontal cartel but now wishes to cheat on that cartel. Cheating only works if the other firms maintain the higher price. *See supra* note 12.

229. While there is some debate even among proponents of the economic efficiency approach about price discrimination and metering ties, this debate focuses on whether a price discrimination tie that does not lead to *new* monopoly power in the tied market involves greater societal harms than benefits and, if so, whether antitrust tying law is the proper means for policing such tie-ins. *See supra* note 178. There is agreement, however, that a metering tie will be pro-competitive when it operates as a form of risk allocation that the majority of buyers want. *See supra* note 180.

230. As with ties used to insure goodwill or quality control, there is a temporal aspect to a claim that buyers favor a metering tie because it allocates risk in a way that they like. Buyers preferences in this regard may change over time, and that possibility must be taken into consideration when a party seeks to use evidence of the presence or absence of coercion. *See supra* note 227.

231. In a similar fashion, evidence of widespread buyer coercion or widespread support could conceivably be used where the tying seller admitted to employing a tie-in to evade price controls but argued that, in doing so, he was surreptitiously cutting prices, not padding them. While the tying seller obviously could (and no doubt would) present direct evidence of the price cuts, he could also present evidence that the majority of buyers saw the package as a desirable alternative. Such a tying arrangement, by effectively increasing competition in the tying product market and lowering prices to consumers, would be economically efficient. It might violate a price-control law or regulation, but it would not violate the antitrust laws and would not be subject to antitrust attack by rival sellers who were injured through loss of customers.

232. *See supra* note 224.

233. The decision on the plaintiff's standing, particularly in the sense of antitrust injury, can be made at the outset of the case, after discovery, or even after evidence has been taken at trial. Indeed, the decision on antitrust injury was made in *Brunswick* only after the trial on the merits. *See supra* notes 96-101 and accompanying text.

234. Assuming a tie was successfully used to leverage into a position of monopoly power in the tied market, all buyers would suffer antitrust injury in that all would pay a monopolistic price for the tied product. *See* Hovenkamp, *Tying Arrangements*, *supra* note 163, at 227. The buyers are thus in a position analogous to persons who buy from a horizontal price-fixing cartel. *See supra* note 7.

injure all buyers. Even if a particular price discrimination tie is deemed to be socially harmful—in allowing a monopolist to exact greater monopoly profits—and even if this harm is considered a form of antitrust injury,[235] the buyer who gets a *lower* price because of the price discrimination certainly has not suffered antitrust injury.[236] Similarly, there may be instances in which a tying seller cannot show widespread buyer support for a goodwill tie or a metering tie but can show that the tying arrangement benefitted this particular plaintiff-buyer.[237] In each of these cases, evidence of the presence or absence of coercion—in this case, *individual* coercion—can help determine whether the plaintiff-buyer has herself been injured by the economically-inefficient aspect of the tie.[238]

Thus, as with vertical price, territory, and customer restraints, evidence of the presence or absence of coercion continues to have an important role in the analysis of tie-ins, even with the ascendancy of the economic efficiency approach. Evidence of widespread coercion or widespread agreement is directly relevant to a claim that the tying arrangement is economically efficient in offering a desirable package or risk allocation to buyers, or in providing valid goodwill protection for the tying product. Furthermore, evidence of individual coercion is relevant to the issue of a buyer's standing in certain cases where the tie-in is deemed inefficient.

VI. THE POTENTIAL PROBLEMS OF INTRODUCING COERCION EVIDENCE

Even assuming that under an economic efficiency approach coercion evidence will be relevant in the analysis of vertical restraints and tying arrangements, a skeptic may still ask: Should we reopen Pandora's box and encourage a jury to consider an intangible factor such as coercion?[239]

235. *See supra* note 178.

236. Unless he can show an exclusionary effect on himself stemming from the price discrimination, a rival seller in the tied market would also lack antitrust injury standing. *See* Page, *Antitrust Damages*, *supra* note 50, at 495-96.

237. There may, for instance, be metering or goodwill ties that, when originally imposed, had widespread buyer support but whose support has dropped off because buyers as a whole have become more sophisticated or the business climate has changed. *See supra* notes 227, 230. The particular plaintiff-buyer, however, may be a member of the dwindling minority of buyers who still wanted the tied package. In this case the plaintiff would suffer no antitrust injury even if the tying arrangement was deemed illegal. In these instances, the lack of antitrust injury is similar to a lack of causation standing. *See supra* note 163.

238. The buyer alleging an inefficient tie is also going to have to show damages attributable to the illegal tie-in. This can be difficult when the buyer has paid a premium price for the tied product but, at the same time, a lower price for the tying product. *See* VII P. Areeda, *supra* note 7, at ¶ 1459; P. Areeda & H. Hovenkamp, *supra* note 9, at ¶ 340.4; *see also* Crossland v. Canteen Corp., 711 F.2d 714, 722-23 (5th Cir. 1983) (tying claim fails where plaintiff buyer does not show he could have bought tied product cheaper elsewhere).

239. The question of whether the plaintiff has shown antitrust injury is presumably, like all standing decisions, a matter for the court rather than the jury to decide. *But see*

The fear is two-fold. First, there is the danger that the jury, despite instructions to the contrary, will have a natural tendency to equate coercion with guilt. Having heard testimony from dealer after dealer that, for instance, a manufacturer coerced them into accepting a vertical territorial restriction, the jury might well conclude that the manufacturer was indeed "guilty" of the non-crime of coercion and jump from that conclusion to a finding of an antitrust violation with its treble damages.[240] The second fear of the skeptic is that if we allow coercion evidence to be used, we are inevitably back to the old problem of asking the jury to delve into a party's state of mind, and possibly that of non-parties, and to make hair-splitting distinctions such as whether the acts constitute coercion or merely vigorous persuasion.[241]

While these are legitimate concerns, there are answers to them. With respect to the first fear—the runaway jury—this is a possibility in any lawsuit. The use of carefully crafted jury instructions and special jury interrogatories may reduce the danger to a large extent. Furthermore, state-of-mind evidence will not inevitably be a plaintiff's tool. The *defendant* may well wish to introduce evidence of widespread agreement and lack of coercion to show an efficient vertical restraint or tie-in.

With respect to the second fear—the jury's alleged inability to discern mental states—one obvious response is that juries make these sorts of determinations all the time, in all kinds of litigation.[242] The real question is whether our discomfort with state-of-mind evidence in antitrust cases[243] is sufficient to justify the wholesale exclusion of this clearly rele-

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Rebel Oil Co. v. Atlantic Richfield Co., 1990-2 Trade Cas. (CCH) ¶ 69,258 (D. Nev. 1990), at 64,951 (suggesting that antitrust injury question might be question for jury). To the extent a party used evidence of the presence or absence of coercion to reflect on the standing issue, the judge rather than the jury would, thus, be called upon to delve into a party's state of mind.

240. Phillip Areeda notes that following the Supreme Court's decision in *Parke, Davis*, many judges wrote as if coercion were the gravamen of the § 1 vertical offense. *See* VIII P. Areeda, *supra* note 57, at ¶ 1623.

241. The Eighth Circuit has specifically noted that a dealer-*inspired* vertical restraint may have different economic significance than a dealer-*coerced* one. The dealer-inspired restraint "may be fully consistent with a supplier's efforts to develop an efficient marketing strategy. . . . On the other hand, where the dealer forces upon an unwilling supplier more restrictive intrabrand restraints than the supplier would have imposed in serving his own interest in efficient distribution, there is a greater likelihood that the dealer is seeking an anti-competitive advantage." Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 594 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). Indeed, the Eighth Circuit acknowledged that in the latter situation "a presumption of anticompetitive effects . . . might be justified." *Id.* Nonetheless, the court concluded that "as an administrative matter this distinction would be very difficult to draw; the trier of fact would need to distinguish between a dealer's strong suggestion and outright demand, and between a supplier's willing acceptance and grudging acquiescence." *Id.*

242. In tort and criminal cases, for instance, juries are frequently called upon to determine if a party acted willfully, recklessly, or negligently.

243. A key difference between antitrust cases and tort cases is that antitrust liability leads to treble damages. On the other hand, tort liability can result in punitive damages and a criminal conviction can lead to imprisonment, either of which could be considered at least as serious as treble damages.

vant evidence.[244] In answering that question, moreover, we should not assume that evidence of coercion or agreement will necessarily be "soft" evidence about how a person's stomach felt when asked to do something. Instead, evidence of coercion or agreement is often found in internal memoranda, correspondence between the parties, or testimony reporting a party's response to a grievance or complaint.[245] We also need to remember that, even if a court were to exclude coercion or agreement evidence offered to show the presence or absence of a cartel or an efficient or inefficient tie-in, a jury might still be called on to make subtle state-of-mind distinctions, such as whether one party coerced (as opposed to persuaded) another party.[246] Finally, in assessing the jury's ability to judge mental states, one must ask whether this task is really more difficult than asking a jury of laypersons to determine such "hard facts" as what the proper market is, whether a party has market power in that market, and whether loss of intrabrand competition is outweighed by an increase in interbrand competition.[247] When all these factors are considered, coer-

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244. Under the Federal Rules of Evidence, relevant evidence may be excluded only if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

245. Phillip Areeda suggests, for instance, that dealer coercion of a manufacturer might be shown by evidence such as: (1) the relative power of the respective parties; (2) dealer initiatives; (3) the scope and form of the restraint; and (4) the intentions of the respective parties. *See* VIII P. Areeda, *supra* note 57, at ¶ 1604g; *see also* Tire Sales Corp. v. Cities Serv. Oil Co., 637 F.2d 467, 473-74 (7th Cir. 1980) (discussing type of evidence that can be used to show coercion in tying case), *cert. denied*, 451 U.S. 920 (1981).

246. As long as the Supreme Court adheres to its *Monsanto* decision, juries will actually have to distinguish three states of mind: (1) coerced compliance (which is not an "agreement" and therefore not subject to antitrust attack); (2) persuasion (which is similarly considered unilateral action and therefore legal); and (3) agreement (which is illegal). *See supra* notes 84-92 and accompanying text; *see also* Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1163-64 (7th Cir. 1987) (unwilling compliance not enough for agreement, but dealer need not show contractual-type agreement) (opinion by Judge Richard Posner), *cert. denied*, 486 U.S. 1005 (1988); McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323, 328 (8th Cir. 1986) (discussing type of circumstantial evidence that might be sufficient to show that manufacturer was not acting independently), *cert. denied*, 486 U.S. 1005 (1988). The persuasion/agreement dichotomy is not a new one. Even before *Monsanto*, courts uniformly held that persuasion (without coercion) was not an "agreement" for purposes of vertical restraints. *See supra* note 40.

In tying arrangements, moreover, courts and juries frequently have to make a persuasion/coercion distinction in determining if the two products are linked. *See* Murphy v. Business Cards Tomorrow, Inc., 854 F.2d 1202, 1204 (9th Cir. 1988); Unijax, Inc. v. Champion Int'l., Inc., 683 F.2d 678, 685-86 (2d Cir. 1982); General Motors Corp. v. Gibson Chem. & Oil Corp., 661 F. Supp. 567, 570 (E.D.N.Y. 1987); *supra* note 210.

247. All of these questions must be answered by a jury trying a rule of reason case that involves a non-price vertical restraint. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 (1977); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334-37 (7th Cir. 1986); Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1568-69 (11th Cir. 1983). Indeed, some commentators have questioned whether, given the complexity of the rule of reason case for non-price vertical restraints, a jury is capable of making the determination. *See, e.g.*, Easterbrook, *Vertical Arrangements*, *supra* note 53, at 153-55 ("It is fantastic to suppose that judges (and juries) could carry out the evaluation entailed in such a search."); Gerhart, *The "Competitive Advantages"*

cion or agreement evidence, which may be relevant to the plaintiff's case or to the defense, is simply not so amorphous or malleable that it should be excluded altogether.

A skeptic might also legitimately ask: Why bother with coercion evidence? Why not require, in the case of vertical restraints, direct proof of a horizontal interbrand cartel, and, in a tying case, direct proof of a monopoly in the tied market (or some other economic inefficiency)? The answer is that while such direct proof is certainly preferable, it is not always readily available. Either the plaintiff or the defendant may find it easier to muster a showing of widespread dealer coercion or widespread dealer agreement as some circumstantial evidence to support its case.[248] Furthermore, as long as the Supreme Court continues to treat vertical antitrust violations as separate and distinct from horizontal restraints (and tying claims as separate from monopolization and attempted monopolization claims),[249] as is likely, a plaintiff ought not be required to prove the existence of a cartel[250] or that a new monopoly has been created. The issue is whether the plaintiff has shown an economically inefficient restraint—an issue on which coercion evidence may be directly relevant.

CONCLUSION

Coercion has had an uneven influence in antitrust analysis. It has never played a part in any aspect of the analysis of horizontal restraints, but it had a central role in the early vertical restraint and tying cases. Coercion was key to the rationale for condemning these restraints; it factored prominently into the agreement element, even providing proof of an agreement in vertical restraints; and, it guaranteed a plaintiff standing in the *in pari delicto* sense. Since 1977, however, all that changed when

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Explanation For Intrabrand Restraints: An Antitrust Analysis, 1981 Duke L.J. 417, 438-39 ("the rule-of-reason standard generally applied gives the jury wide discretion to arrive at its own assessment of competitive effects"); Posner, *The Next Step*, *supra* note 59, at 15 ("The vagueness of the [rule-of-reason] standard might not be an insuperable objection . . . if antitrust cases were decided by highly experienced and knowledgeable judges specializing in antitrust cases. They are not, however. They are decided by juries consisting of laymen . . . ."); *see also* Roszkowski, *The Sad Legacy of* GTE Sylvania *and Its "Rule of Reason": The Dealer Termination Cases and The Demise of Section 1 of the Sherman Act*, 22 Conn. L. Rev. 129, 156-60 (1989) (arguing that rule-of-reason standard is incapable of judicial application). In a tying case the jury is potentially asked equally difficult questions concerning the "hard" facts, such as: Has the defendant shown a dollar savings by producing and marketing the two products as a package? In what way will the quality of the tying product be enhanced by the requirement that the buyer take the tied product? Does this metering tie in fact produce an advantageous allocation of risks for the buyer?

248. The coercion or agreement evidence might not be sufficient by itself to prove or disprove the plaintiff's case. *See supra* notes 134, 223.

249. *See supra* notes 112, 213.

250. A plaintiff-consumer, for instance, may introduce widespread coercion evidence showing that dealers engaged in group activity that, while not sufficient to be caught by the horizontal rules, had a cartel-like effect and resulted in inefficient vertical restraints. *See* VIII P. Areeda, *supra* note 57, at ¶ 1604e.

the Supreme Court began moving toward an economic efficiency approach to antitrust. Having concluded that the *horizontal* effects of vertical restraints and tie-ins were the economically inefficient ones, the Court began applying a horizontally-based analysis in vertical and tying arrangements. In particular, the Court jettisoned the old trader-freedom rationale for judging these restraints and, in doing so, seemingly discarded coercion altogether from the antitrust calculus of vertical restraints and severely curtailed it in tying arrangements. The Court redefined the vertical agreement in horizontal "common plan" terms, and it developed an antitrust injury standing requirement that incorporated the new non-coercive rationale for judging restraints.

In its haste to move from the trader-freedom rationale to an economic efficiency approach, however, the Court made a fundamental mistake—it wrongly assumed that if coercion were eliminated from the *rationale* for condemning vertical and tying restraints, then, as in horizontal arrangements, coercion would have no role whatsoever to play in the legal analysis of these restraints. What the Court overlooked was that vertical restraints are fundamentally different from horizontal ones. The two-level nature of vertical and tying restraints makes coercion an inevitable factor in many of these arrangements. Despite the Court's suggestion to the contrary, evidence of the presence or absence of coercion in vertical and tying arrangements cannot and should not be disregarded merely because the trader-freedom rationale has been replaced with an economic efficiency approach. While coercion is no longer the reason for condemning these restraints, the presence of coercion or agreement—particularly widespread coercion or agreement—can be important evidence in sorting out efficient restraints from inefficient ones. Additionally, with both vertical restraints and tying arrangements, coercion can be useful in casting light on the plaintiff's claim to antitrust injury standing.

This does not mean that coercion evidence is relevant in all vertical restraint and tying cases. As outlined in this article, a court needs to consider what party is seeking to use coercion evidence and what type of claim is being asserted or defended against. In some instances, coercion or agreement evidence will be irrelevant; in other instances, it will be relevant but not conclusive in and of itself. That, however, is no reason to discard such evidence altogether. Frequently, coercion or agreement evidence will be directly relevant to the fundamental issue in the case: Is this an economically efficient restraint? Both the plaintiff and the defendant should have the opportunity to use this evidence.