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Vertical Restraints, Efficiency, and the Real World

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In this Article, Professor Burns addresses the rise of economic efficiency in anti-trust jurisprudence. She argues that the theory is incomplete in that it fails to address "noneconomic" concerns, such as dealer fairness, intraband competition, and business ethics, which society wishes addressed. Societal concern, she argues, is evidenced by the rise of dealer fairness remedies outside the realm of antitrust law. In addition, she argues that the public regards the economic efficiency theory as out of touch with reality as evidenced by the vocal opposition of sophisticated consumer groups to modern Chicago-School-influenced antitrust jurisprudence. She concludes by voicing support for a more fact-specific antitrust jurisprudence—a trend exemplified by the recent Eastman-Kodak decision—for legislation returning antitrust to the pre-Chicago status quo ante, and for the retention of dealer remedies outside of antitrust as an outlet for fairness concerns.

INTRODUCTION

In light of the ascendancy of the economic efficiency approach in antitrust, vertical restraint law appears to be all but dead.1 Led by the Chicago School,2 economic efficiency advocates have been teaching, with
increasing success in the courts, that most vertical restraints are benign, if not beneficial, for consumers. They assert that vertical restraints of any sort—whether territorial restrictions, bans on discounting, or tie-ins—give consumers more product-mixes from which to choose in the interbrand market. Concerns for dealer autonomy, fairness, or intrabrand competition, the argument goes, are "noneconomic" and not legitimate parts of antitrust analysis.

Although critics of the Chicago School object to the dismissal of "noneconomic" concerns (and some argue that these concerns are actually economically based), the economic efficiency approach is, without a doubt, seductive in its internal consistency and logic and has led to an

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3. The key aspects of the economic efficiency approach to vertical restraints are summarized infra at notes 50-59 and accompanying text.

4. Vertical restraints in the form of pricing, territorial, or customer restraints differ from tie-ins in that the latter not only restrict the buyer but also restrain the supplier's competitors in the tied product market who can no longer sell to the buyer. See Posner, supra note 1, at 6-7. This distinction, however, has no bearing on the developments discussed in this paper. For purposes of this paper, tie-ins will be treated together with other vertical restraints.

5. One of the principal changes brought about by the economic efficiency approach has been a recognition that vertical restraints may well have procompetitive effects in the interbrand market. See William H. Page, The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency, 75 Va. L. Rev. 1221, 1231-37 (1989); Richard A. Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 283-85 (1975); see also infra note 53 and accompanying text.


7. See Flynn, supra note 1, at 1138 (Congress did not "envision the enshrinement of the abstract and unrealistic neoclassical concept of efficiency as the sole goal of antitrust policy"); Fox, supra note 6, at 1146 (economic and noneconomic goals are complementary and both should be accommodated); Herbert Hovenkamp, Antitrust Policy After Chicago, 84 Mich. L. Rev. 213, 245-47 (1985) (economic and noneconomic concerns cannot be separated from one another); Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 67, 68 (1982) (primary concern of antitrust laws was the transfer of wealth from consumers to firms with market power); Pitofsky, supra note 6, at 1051 ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. Noneconomic goals should be used as tie-breakers."); Louis B. Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076, 1076 (1979) (noneconomic goals should be used to shift burden of persuasion to defendant).

8. See Hovenkamp, supra note 7, at 217-26; Herbert Hovenkamp, The Sherman Act and the Classical Theory of Competition, 74 Iowa L. Rev. 1019, 1021-26 (1989) [hereinafter...
increasingly tidy antitrust law of vertical restraints. Previously, courts routinely grappled with amorphous concepts like trader freedom and fairness and attempted to balance effects in the interbrand and intrabrand markets. Under the economic efficiency approach, in contrast, courts analyze all vertical restraints by asking: Does this activity hinder inter-brand competition? If not, there is no reason to restrict it because competition in the interbrand market will inevitably act as a check on the supplier, who in furthering his own interests also protects the consumer. Under this approach, the procedure for handling antitrust cases

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1. See infra notes 74 and 75 and accompanying text. Herbert Hovenkamp notes that "[o]ne of the greatest achievements of Chicago School antitrust policy... is a claim to consistency that cannot be made by any alternative approach that requires the 'balancing' of competing interests." Hovenkamp, supra note 7, at 234. Conversely, the economic efficiency approach has led to a somewhat less tidy law of horizontal restraints. Whereas previously virtually all horizontal cartels were held to be per se illegal, the economic efficiency approach—with its emphasis on banning only those practices that raise prices or restrict output—has led to an increasing number of horizontal restraints being reviewed under the rule of reason. See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 297 (1985) (rule of reason analysis may be necessary to judge a member's expulsion from a joint buying co-operative); NCAA v. Board of Regents, 468 U.S. 85, 103 (1984) (rule of reason used to evaluate the competitive significance of a restraint of trade by sports association); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 24-25 (1979) (blanket licensing agreement should be analyzed under the rule of reason); see also Richard S. Wirtz, Rethinking Price-Fixing, 20 Ind. L. Rev. 591 (1987) (discussing when a horizontal case falls into rule of reason analysis).

10. The economic efficiency advocates soundly criticized this approach precisely because the inclusion of such factors resulted in a messy, sometimes confusing body of law. See, e.g., Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 280 (1978) ("The law of resale price maintenance and vertical market division is not only at war with sound antitrust policy but is decidedly peculiar even on its own terms."); Richard A. Posner, Antitrust Law: An Economic Perspective 164 (1976) (Vertical cases "are an intellectual failure of imposing dimensions."); Tyler A. Baker, Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?, 67 Va. L. Rev. 1457, 1457 (1981) (The vertical restraint rules "are a jumble of pieces that simply do not fit together."); Baxter, supra note 1, at 933 ("The vertical rules have had a chaotic, an anti-intellectual, and in some senses, a belated development.").

11. Courts can, to be sure, misapply the economic efficiency theory by purporting to protect interbrand competition but, in actuality, applying a test or criterion that fails to further that goal. See, e.g., Jean W. Burns, Rethinking the "Agreement" Element in Vertical Antitrust Restraints, 51 Ohio St. L.J. 1, 27-31 (1990) (the Supreme Court's requirements for a vertical conspiracy are at odds with its purported economic efficiency approach); C. Douglas Floyd, Vertical Antitrust Conspiracies After Monsanto and Russell Stover, 33 Kan. L. Rev. 269 (1985) (disparity between Monsanto test and Court's application of test to facts); Wesley J. Liebeler, Resale Price Maintenance and Consumer Welfare: Business Electronics Corp. v. Sharp Electronics Corp., 36 UCLA L. Rev. 889, 897 (1989) (criticizing Supreme Court for adopting formalistic rules not necessarily linked to injury to interbrand market); Posner, supra note 1, at 10 (court erred in establishing different rules for vertical price and nonprice restraints).

12. See infra notes 52, 54 and 59 and accompanying text. The economic efficiency theory is based on fairly elementary principles of economics such as the laws of supply and demand. The economic bases are laid out in Bork, supra note 10, at 90-115; Posner, supra note 10, at 8-22. Lurking behind the entire Chicago School theory is an assumption...
has also been simplified. Courts are now able to dismiss many vertical antitrust cases on preliminary motions under standing doctrines,\(^1\) ever stricter \textit{per se} rules,\(^4\) and a rule-of-reason analysis that focuses on "hard" factors such as market share and market power.\(^15\)

While there is no denying the tidiness and consistency of the economic efficiency theory, recent developments indicate that it suffers from two fatal flaws. First, there is growing evidence that it is incomplete, in the sense of ignoring issues that society wants considered.\(^16\) Second, consumers are increasingly indicating that they simply do not believe the theory.\(^17\)


13. \textit{See infra} notes 77-79 and accompanying text.
14. \textit{See infra} note 81 and accompanying text.
15. \textit{See infra} note 82 and accompanying text.
16. \textit{See infra} part II.
17. \textit{See infra} part III.
19. One recent, although small, survey found a steep decline in the number of purely antitrust lawsuits being filed but an increase in the number of cases alleging both antitrust and state tort claims. See Harvey I. Saferstein, \textit{The Ascendancy of Business Tort Claims in Antitrust Practice}, 59 Antitrust L.J. 379, 383-84 (1991).
receiving consideration.\textsuperscript{20} State legislatures and courts are requiring case-by-case inquiries into dealer fairness and general business ethics and, in effect, circumventing the simplicity and logic of the "new" antitrust learning.\textsuperscript{21}

The second flaw in the economic efficiency approach, its perceived lack of connection with the real world, is evident in the growing public criticism of the economic theory and vertical restraints in particular.\textsuperscript{22} Sophisticated consumer groups, the popular press, and elected officials are all increasingly indicating that, contrary to economic theory, they regard dealer protection and intrabrand competition as vital for market efficiency and low prices.\textsuperscript{23} Rather than supporting the economic efficiency theory, which purports to be pro-consumer, consumer lobbies are working to undo its effects.\textsuperscript{24} In the past, some antitrust scholars have, to be sure, questioned the validity of the economic approach.\textsuperscript{25} What is new, however, is the widespread skepticism now being expressed by sophisticated consumer groups.

This Article explores these dual flaws in the economic efficiency approach and their ramifications. Part I briefly reviews the ascendancy of economic theory in vertical antitrust law and the concurrent dismissal of all noneconomic concerns. Part II explores the incompleteness of current antitrust jurisprudence and the emergence of other legal theories focusing on the noneconomic concerns banished from antitrust. Part III surveys the public perception that the economic approach is unrelated to reality. Part IV discusses the ramifications of these two developments on current and future vertical restraint law.

This Article argues that the law cannot ignore the public's sense of incompleteness and unreality regarding the economic efficiency approach. The emergence of the new dealer remedies outside of antitrust indicates that society wants the law to take into account noneconomic concerns. While antitrust may be responding to society's desire for economic efficiency,\textsuperscript{26} the emergence of noneconomic concerns in other ar-

\begin{itemize}
\item \textsuperscript{20} See infra part II.
\item \textsuperscript{21} Proponents of the economic efficiency theory admit that their approach is new in that it is a change from traditional antitrust theory, but they argue that antitrust jurisprudence must be refined and adjusted as economic learning advances. See Bork, supra note 10, at 418-25; Frank H. Easterbrook, \textit{Is There a Ratchet in Antitrust Law?}, 60 Tex. L. Rev. 705, 706 (1982); Posner, supra note 5, at 282, 287.
\item \textsuperscript{22} See infra part III. This article explores only consumer reaction to the economic efficiency theory of vertical restraints. It is beyond the scope of this article to canvass the public's reaction to current antitrust analysis of horizontal restraints, mergers or monopolies.
\item \textsuperscript{23} See infra notes 151-62 and accompanying text.
\item \textsuperscript{24} See infra notes 162-76 and accompanying text.
\item \textsuperscript{25} See supra notes 7 and 12. See also authorities cited infra note 145.
\item \textsuperscript{26} The economic efficiency theory \textit{may be} an internally accurate theory in the sense of drawing logically correct conclusions from certain given premises. It is beyond the scope of this article either to (1) assess the accuracy of the original premises or (2) assess whether the conclusions have been correctly drawn. Scholars have previously considered both of these issues. See authorities cited supra note 12. The questions raised by this
eas of the law demonstrates that the economic efficiency model is not providing a complete answer to society's concerns. Additionally, the new remedies reflect the public's skepticism toward basic premises of the economic approach. This Article argues that given these developments, the new dealer remedies cannot and should not be curtailed. Instead, courts should reconsider their almost total reliance on the economic efficiency approach in analyzing vertical restraints under the antitrust laws. No theory, no matter how internally logical, consistent, or simplifying, will long survive if that theory is not believed and does not suit society's needs.

I. THE ECONOMIC EFFICIENCY APPROACH TO VERTICAL RESTRANETS

The very nature of vertical restraints requires that the law make a series of difficult choices and accommodations. First is the question of how to assess the economic effect of the restraint which lessens intrabrand competition between dealers of the same brand but arguably increases interbrand competition by enabling a supplier to offer consumers a package of product plus service. The law must determine which result has greater competitive impact and how to balance, if at all, losses in one market with gains in the other. Second is the issue of whose

article are whether this theory excludes matters that are of concern to society and whether this theory is seen by consumers as comporting with marketplace reality.

27. In the past years, scholars have debated whether the noneconomic goals ought to be disregarded based on the legislative history of the antitrust laws. This article argues that, in an important sense, this debate is moot. The newly emerging dealer remedies and public outcry against vertical restraints show that society currently wants noneconomic matters considered. See infra notes 241-42 and accompanying text.

28. Because of their fundamentally different nature, horizontal restraints do not involve these same choices and accommodations. The Supreme Court categorized horizontal restraints as per se illegal by 1927, United States v. Trenton Potteries Co., 273 U.S. 392, 397-400 (1927), and viewed them as "'plainly anticompetitive,'" Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 646 (1980) (quoting National Soc'y of Eng'rs v. United States, 435 U.S. 679,692 (1978)). For a discussion of the elemental differences between horizontal and vertical restraints and the effect of those differences on antitrust jurisprudence, see Burns, supra note 11, at 7-16.

29. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-52 (1977) ("The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."). According to economic efficiency theory, a consumer who does not like a particular product-service package being offered by one seller will simply purchase a package offered by another seller in the interbrand market. See Herbert Hovenkamp, Economics and Federal Antitrust Law § 9.2, at 252-54 (1985); Baxter, supra note 1, at 944-45; Easterbrook, supra note 1, at 144-45; Hay, supra note 1, at 437; Posner, supra note 1, at 22-23; see infra note 53. But see Carstensen & Dahlson, supra note 12, at 41-42 (arguing that for consumers who are brand loyal, intrabrand competition is essential for low prices); Grimes, supra note 1, at 848 (arguing that intrabrand competition is an economically significant way of attaining low consumer prices); Piraino, supra note 12, at 328 (arguing that intrabrand competition benefits consumers by reducing prices and encouraging efficient and innovative retailing).

30. Professor Liebeler, an economic efficiency advocate, argues that there are no in-
marketing decisions should trump—the supplier's or the dealer's? Whereas all members of a horizontal cartel benefit from the cartel's higher prices, the two principal parties in a vertical "agreement" frequently disagree about the restraint, with each claiming a property right in the product being marketed and each claiming to represent the interests of the consumer. Finally, there is the problem of how, if at all, to accommodate the so-called noneconomic concerns. Specifically, if one assumes that a court is able to evaluate the mixed interbrand-intrabrand consequences of a vertical restraint, should the economic consequences be determinative or should the court also consider matters like trader freedom, fairness, and business ethics?

31. All co-conspirators in a horizontal cartel realize supra-competitive profits through concerted action which allows them to charge monopolistic prices. See Burns, supra note 18, at 383. Thus, the horizontal plan can truly be said to involve "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). Each participant in the horizontal cartel has an incentive to cheat on the conspiracy (by selling more units at a below-cartel price), but even the cheater wants the other firms to continue acting in concert to keep industry prices high. See Hovenkamp, supra note 29, § 4.1; Posner, supra note 10, at 51-55.

32. The vertical agreement is, thus, a conceptual oddity: it is an agreement that is often forced on one party, usually the dealer. See Burns, supra note 11, at 13-16. This author has argued elsewhere that the Supreme Court has ignored the fundamental differences between the horizontal agreement and the vertical agreement and has erroneously tried to transplant concepts from the former into the latter. See id. at 16-25.

33. The supplier claims that included within his right not to sell his property at all is a right to sell subject to resale restrictions. The dealer, on the other hand, argues that any attempt by the supplier to set resale terms contravenes the common law doctrine of alienation which says that once property has been sold, the seller cannot restrict the buyer's right to resell. See Grimes, supra note 12, at 1293. For an analysis of vertical restraints as a tension between property rights and competition, see Peritz, supra note 1, at 516-17, 544-54.

34. The supplier contends that he is protecting the consumer by invigorating interbrand competition through vertical restraints. On the other hand, the dealer contends that her marketing freedom aids the consumer by creating intrabrand competition.

35. In contrast, the horizontal restraint does not require a court to choose among competing concerns. Because the horizontal cartel restrains interbrand competition, it is economically inefficient in allowing participating firms to act as a monopolist with supra-competitive prices and restricted output. See Hovenkamp, supra note 29, § 4.1, at 83; Posner, supra note 2, at 960. In addition, the horizontal restraint meets the other goals of the antitrust laws: it intrudes on the individual marketing decisions of each participating firm; it coerces buyers into paying higher prices; and it leads to a concentration of economic and political power. See Burns, supra note 11, at 7-8; Fox, supra note 6, at 1183. With respect to the role of coercion in horizontal restraints, see Burns, supra note 18, at 381-85.

36. If one accepts the economic efficiency argument that most vertical restraints enhance efficiency by spurring on interbrand competition, see infra note 53, then there is inevitably a head-on collision between economic efficiency and concern for dealer freedom. See Burns, supra note 11, at 6-7. A vertical restraint may well deprive a dealer of
The history of antitrust vertical restraint law can be seen as an attempt to answer these questions. Many commentators (including this one)\(^{37}\) have reviewed this history in detail and, for present purposes, a brief summary of overall trends will suffice.

Up until the mid-1970s, the Supreme Court achieved a wobbly, sometimes inconsistent, accommodation of competing interests in its analysis of vertical restraints under the antitrust laws.\(^{38}\) The Court credited intrabrand competition with providing some economic benefit but also recognized the supplier's potential use of vertical restraints to increase interbrand competition.\(^{39}\) In addition, out of concern for trader freedom, some or all of her marketing freedom regarding a product but, absent a manufacturer or dealer cartel, it may nonetheless be procompetitive (and hence economically efficient) in the interbrand market.


38. Many scholars criticize the early antitrust law of vertical restraints as being a confusing compilation of conflicting policies and theories. See, e.g., Burns, supra note 11, at 1 (case law is "full of Byzantine twists and turns and hairsplitting distinctions"); Hay, supra note 1, at 418 (Supreme Court has used a "piecemeal approach" to vertical restraints); M. Laurence Popofsky & Stephen V. Bomse, From Sylvania to Monsanto: No Longer a "Free Ride", 30 Antitrust Bull. 67, 68 (1985) ("[D]ecisions reflect a struggle to deal with an emerging economic consensus while attempting . . . to preserve competing political values.").

39. In the area of vertical nonprice restraints, the mixed economic results were cited as one reason to use a rule of reason analysis. See United States v. Sealy, Inc., 388 U.S. 350, 359-60 (1967) (Harlan, J., dissenting) ("With respect to vertical restrictions, it has long been recognized that in order to engage in effective interbrand competition, some limitations on intrabrand competition may be necessary. . . . For these reasons [vertical] territorial limitations . . . should be tested by the rule of reason."); White Motor Co. v. United States, 372 U.S. 253, 268 (1963) (Brennan, J., concurring) ("While territorial restrictions may indirectly have a[n] . . . effect [similar to that of vertical price restraints] upon intra-brand competition, the effect upon inter-brand competition is not necessarily the same as that of resale price maintenance."). Even when the Court opted to place some vertical nonprice restraints in the per se illegal category (those involving sales to dealers), the Court left similar restraints (in consignment situations) under the rule of reason precisely because the interbrand-intrabrand consequences of the restraints were uncertain. See United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378-81 (1967). In dealing with vertical pricing restraints, the Court quickly moved to a per se illegal rule, see United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452-53 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210-11 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99 (1920), but even so, the Court acknowledged that the manufacturer may be imposing such restraints as a way of creating nonprice interbrand competition. See Albrecht v. Herald Publishing Co., 390 U.S. 145, 151 n.7 (1968) ("Maintaining minimum resale prices would benefit manufacturers when the total demand for their product would not be increased as much by the lower prices brought about by dealer competition as by some other nonprice, demand-creating activity.").
the Court simultaneously protected the dealer's marketing decisions and guaranteed a supplier the right to choose dealers and assert some resale controls. By doing so, the Court gave weight to both economic interests in increased competition and noneconomic factors such as trader independence. The upshot was an unartful body of case law that recognized some marketing freedom (albeit limited) for the supplier.

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40. The Supreme Court regarded trader freedom, especially for the dealer, as having two-fold importance: (1) it preserved the dealer's "independent discretion," United States v. Colgate & Co., 250 U.S. 300, 307 (1919); and (2) it protected the "free and natural flow" of the competitive market, Schrader's 252 U.S. at 99-100. See also Albrecht, 390 U.S. at 152 (a vertical maximum price fixing scheme "substitut[es] the perhaps erroneous judgment of a seller for the forces of a competitive market.").

41. The result was the uneasy coexistence of decisions like Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), with its emphasis on dealer independence, along side of Colgate, 250 U.S. at 307, which attempted to safeguard the supplier. In Dr. Miles, the Court noted that the manufacturer seeking to impose a vertical restraint "restrict[s] the freedom of trade on the part of dealers who own what they sell," and, as such, is contrary to the "[public] interest in every person's carrying on his trade freely . . . . All interference with individual liberty of action in trading . . . if there is nothing more, are contrary to public policy, and therefore void." 220 U.S. at 406-08. The Supreme Court repeated this concern for trader freedom in a number of subsequent decisions. See, e.g., Albrecht, 390 U.S. at 152 (vertical restraints "'cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' ") (quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951)); Simpson v. Union Oil Co., 377 U.S. 13, 17 (1964) ("A supplier may not use coercion on its retail outlets to achieve resale price maintenance."); Bausch & Lomb, 321 U.S. at 721 (A distributor "sells to its wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement."). In contrast, the Supreme Court, in Colgate, was concerned with the manufacturer's freedom to deal with whomever he wished and held that where a manufacturer announced resale prices and then simply refused to sell to those who did not abide by those terms, there was no Sherman Act violation. See Colgate, 250 U.S. at 307. 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 Bausch & Lomb 321 U.S. at 728-29 (business has "right to select its customers").

42. The Dr. Miles decision, for instance, rested on both the trader-freedom rationale and a view that a vertical restraint, by eliminating competition among dealers, acted analogously to a horizontal restraint. See Dr. Miles, 220 U.S. at 407-08. Similarly in its early tie-in cases, the Court looked to both economic consequences on other sellers in the inter-brand tied-product market and the coercive effect on the buyer to justify condemning some restraints. See, e.g., 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 the tied product to the consuming market."); Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958) (Tie-ins "deny competitors free access to the market for the tied product" and "buyers are forced to forego their free choice between competing products."); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953) ("By [tying products] a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market.").

43. The Supreme Court used the agreement element of the §1 violation to try to distinguish between legal and illegal vertical arrangements. Provided the supplier stayed within the Colgate guidelines, see supra note 41, there was said to be no agreement and hence no §1 violation. See Colgate, 250 U.S. at 307. If, however, the supplier went beyond the simple Colgate scenario and conditioned his sale to dealers on an understand-
protected the dealer from coercive, as opposed to persuasive, pressure from a supplier, gave weight to both the interbrand and intrabrand economic consequences of vertical restraints, and acknowledged some relevance for noneconomic concerns.

ing that they would resell on specified terms, used others to enforce his terms, or coerced the dealer, then an agreement and a section one violation were present. See Albrecht v. Herald Co., 390 U.S. 145, 149-50 & n.6 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 36-47 (1960). Scholars have been virtually unanimous in denouncing the Supreme Court’s unilateral action versus agreement distinction as artificial and formalistic. See Baker, supra note 10, at 1474 (“[O]nly a particularly artificial and restricted notion of concerted action could explain the distinction between Colgate and Dr. Miles.”); Burns, supra note 11, at 18-19 (“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 agreement.”); Thomas A. Piraino, Jr., The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution, 63 Notre Dame L. Rev. 1, 10-11 (1988) (“The distinction . . . between unilateral and concerted conduct is simply illogical.”); Donald F. 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.”).

44. Over time coercion of the dealer became an increasingly important factor in justifying the application of the antitrust laws to vertical restraints, in determining the existence of an agreement and in assessing a co-conspirator/dealer’s standing. For a detailed discussion of the role of coercion in early vertical restraint and tie-in cases, see Burns, supra note 18, at 385-93, 414-17. Professor Hovenkamp argues that this concern with coercion was part of the classic economic model that saw buyers and sellers as “in competition” with one another and regarded any restraint on individual freedom as anticompetitive. See Hovenkamp, The Sherman Act, supra note 8, at 1026-27.

45. In the years following Colgate, lower courts distinguished between persuasion (which was held not to give rise to an agreement) and coercion (which did give rise to an agreement) in determining the legality of a manufacturer’s action in imposing vertical restraints. See, e.g., Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1263 (9th Cir.) (holding that dealer complaints occurring before termination of another dealer do not on their own raise the inference of an unlawful combination; rather there must be a showing of direct coercion or a “causal nexus” between the complaints and termination), cert. dismissed, 464 U.S. 956 (1983); Yentsch v. Texaco, Inc., 630 F.2d 46, 53 (2d Cir. 1980) (requiring a showing of coercion); Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486, 495-96 (8th Cir. 1975) (same), cert. denied, 423 U.S. 1055 (1976); Gray v. Shell Oil Co., 469 F.2d 742, 747 (9th Cir. 1972) (same), cert. denied, 412 U.S. 943 (1973). See 7 Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1440(a) (1986) (persuasion vs. coercion distinction served the function of letting supplier make marketing suggestions to dealer). A similar distinction was necessary in tying cases because a buyer who was persuaded (as opposed to coerced) into taking both the tied and tying products was held to lack standing to challenge 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 did not voluntarily buy equipment from franchisor), overruled by Townsend v. Holman Consulting Corp., 914 F.2d 1136 (9th Cir. 1990); Ungar v. Dunkin’ Donuts of Am., Inc., 531 F.2d 1211, 1219-25 (3d Cir.) (plaintiff-buyer in tying case must prove individualized coercion), cert. denied, 429 U.S. 823 (1976). See Herbert Hovenkamp, Tying Arrangements and Class Actions, 36 Vand. L. Rev. 213, 226 (1983). Arthur Austin suggests that courts use coercion in this sense to avoid giving a windfall to an “undeserving” buyer in a tying sale. See Arthur D. Austin, The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant, 65 Cal. L. Rev. 1143, 1152 (1977).

46. See supra note 39.
47. See supra notes 40 & 42.
In the mid-1970s, the Chicago School's economic efficiency approach to vertical restraints began gaining prominence in the courts. Briefly, the hallmarks of this approach are the following tenets. First and foremost, adherents argue that economic efficiency should be the sole goal of antitrust. Second, they dismiss all other concerns as economically irrelevant. Third, they emphasize interbrand, as opposed to intrabrand, competition as the key to insuring low prices and efficiency. Fourth, they view the vast majority of vertical restraints as economically efficient ways of offering consumers different product-service choices. Fifth,

49. The economic efficiency theory of vertical restraints has been described in detail elsewhere. See, e.g., Easterbrook, supra note 1 at 140-53; Page, supra note 5, at 1229-43; Posner, supra note 5, at 283-94.
50. See Bork, supra note 10, at 20-21; Posner, supra note 10, at 19-20; Baxter, supra note 6, at 693; Easterbrook, supra note 1, at 138-40; Page, supra note 5, at 1238.
51. See Bork, supra note 10, at 54-56 (rejecting the argument that the antitrust laws include social or political purposes); Posner, supra note 10, at 19 ("antitrust enforcement is an inappropriate method of trying to promote the interests of small business"); Baxter, supra note 1, at 693 (arguing that to the extent noneconomic concerns are inconsistent with economic efficiency, the former "have no part in the objectives of antitrust law"); Easterbrook, supra note 21, at 715-16 (arguing that even if Congress wanted to protect small businesses or trader freedom, the antitrust laws are ill-suited for furthering these goals). The economic efficiency advocates similarly dispense with coercion as a rationale for condemning tie-ins. See Baker, supra note 10, at 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); Richard N. Pearson, Tying Arrangements and Antitrust Policy, 60 Nw. U. L. Rev. 626, 632 (1965) ("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."). Indeed, one economic efficiency advocate has warned that those who fail to use this approach "will soon find themselves mired in a morass of standardless subjectivity." Wesley J. Liebeler, What Are The Alternatives To Chicago?, 1987 Duke L.J. 879, 880.
52. See Posner, supra note 10, at 147-51; Baxter, supra note 1, at 936-46; Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 13 (1984). With respect to tie-ins, see Baker, supra note 10, at 1268 (arguing that a tie-in should be objectionable only when it results in an increase in prices or reduction in output in the tied market or is otherwise economically inefficient).
53. The typical supplier imposes such restraints, the argument goes, not to price-gouge the public or to provide his dealer with supra-competitive profits but to force the dealer to provide services to the community. Using vertical restraints to give dealers excess profits would be counter-productive because the result would be higher retail prices and, consequently, lower sales. See Bork, supra note 10, at 290 ("No manufacturer ... will ever use ... resale price maintenance ... for the purpose of giving the resellers a greater-than-competitive return."). See also Posner, supra note 10, at 152-53 (asserting that the profits generated by the minimum retail price may be an advantage to the consumer); Easterbrook, supra note 1, at 146-47. Instead, the supplier is seeking to force his dealer to provide a variety of services to the consumer, including advertising, showrooms, and "certification" by upscale dealers. See Easterbrook, supra note 1, at 150; Victor P. Goldberg, The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services, 79 Nw. U. L. Rev. 736, 738-48 (1984). Through vertical restraints, the argument goes, the supplier offers the consumer a package of product plus service—a package that the supplier believes will be more competitive on the interbrand market than that product alone. If the consumer does not want this package, she will simply choose a
they contend that the supplier’s marketing choices must prevail over those of the dealer if consumer welfare is to be maximized. Sixth, the theory characterizes the discounting dealer as a renegade free rider who effectively steals from the supplier and other dealers. Finally, the eco-

different product-service package in the interbrand market. See Baxter, supra note 1, at 945-46; Easterbrook, supra note 1, at 146-50; Posner, supra note 1, at 22-23; Posner, supra note 2, at 926-30. Adherents to the economic efficiency approach argue that price and nonprice vertical restraints function in the same way and should be treated the same under the antitrust laws. See Posner, supra note 10, at 160; Easterbrook, supra note 52, at 14. Under this theory, a vertical restraint will be economically inefficient only if it is imposed by a supplier or dealer cartel. See infra note 58.

Economic efficiency advocates similarly regard the vast majority of tie-ins as economically efficient ways of offering the buyer another “package” from which to choose. See William K. Jones, The Two Faces of Fortner: Comment On A Recent Antitrust Opinion, 78 Colum. L. Rev. 39, 40-45 (1978) (competitors should be told: “Go ye and do likewise!”); Pearson, supra note 51, at 635-37. Alternatively, these advocates believe that tie-ins may safeguard the goodwill or quality of the tying product. See Ward S. Bowman, Jr., Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19, 29 (1957); Joseph G. 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 faces potential product liability exposure). Economic efficiency advocates also believe that tie-ins allow the manufacturer to take advantage of economies of scale in joint production or joint sale of two products. See Posner, supra note 10, at 180-81; Bowman, supra, at 29.

Other commentators take issue with the Chicago School view that all dealer-provided services are desired by all or most consumers. See, e.g., William S. Comanor, Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy, 98 Harvard L. Rev. 983, 990-92 (1985) (criticizing the efficiency argument for its failure to incorporate the different values that consumers apply to dealer-provided services); Edward O. Correia, Resale Price Maintenance—Searching for a Policy, 18 Notre Dame J. Legis. 213-17 (1992); Herbert Hovenkamp, Fact, Value and Theory in Antitrust Adjudication, 1987 Duke L.J. 897, 909-11 (criticizing Telser’s assumption of parallel demand curves); Levmore, supra note 1, at 986-90 (arguing that the free-rider problem can be solved by downstream solutions); Weiss, supra note 12, at 523-33 (contending that the dealer-services model will not lead to consumer welfare).

54. According to economic theory, the supplier, like the consumer, wants to maximize service and minimize the dealer’s profits. To the supplier, the dealer’s profits are in essence a cost of distribution that increases the overall cost of the supplier’s product in the interbrand market. Since a higher price to the consumer will result in a lower sales volume, the supplier will want to limit his dealer to earning only a competitive rate of return. See Posner, supra note 10, at 147; Easterbrook, supra note 1, at 146-47; Posner, supra note 5, at 283. In setting a resale price that exceeds costs, or in assigning exclusive territories, the supplier is simply ensuring that dealers will compete among themselves by providing services to consumers (who, when faced with a uniform price, will go to the dealer providing the greatest service). See Posner, supra note 10, at 148. The dealer will continue providing service 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, supra note 1, at 147-48. The supplier cannot simply lower his wholesale price to the dealers and hope they will provide the desired service because of the inevitable “free-riding” dealer. See infra note 55.

55. The discounter is able to offer a lower retail price only by riding 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 supplier (who loses distribution) and consumers (who lose service). Thus, the discounting dealer who evades the supplier’s vertical restraints is a villain to economic efficiency and ultimately to the consumer. See Kenneth
economic efficiency advocates contend that the market, not the judicial system, is the best method for correcting any poorly conceived vertical restraint.\textsuperscript{56}

What appears to be a pro-manufacturer bias in the approach is justified as being pro-consumer.\textsuperscript{57} According to economic theory, absent a cartel on the supplier or dealer level,\textsuperscript{58} any vertical restraint that exists over

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Economic theory teaches that in tying arrangements involving franchisees, the franchisee who evades a tie-in is an even greater villain and the consumer's welfare is even more closely associated with the supplier's interest. In patronizing a franchise, the consumer is looking for a standardized product or service which the franchisor seeks to ensure through tie-ins. A franchisee who does not depend on return business has an incentive to provide less-costly, lower-quality goods or services and ride on the reputation being upheld by other franchisees. Such free riding harms not only the franchisor and "good" franchisee (by lowering the reputation of the franchise) but also the consumer who pays full price for a product or service of lesser quality. See Baker, supra note 10, at 1277-78; Benjamin Klein & Lester F. Saft, \textit{The Law and Economics of Franchise Tying Contracts}, 28 J.L. & Econ. 343, 349-53 (1985); G. Frank Mathewson & Ralph A. Winter, \textit{The Economics of Franchise Contracts}, 28 J.L. & Econ. 503, 510 (1985).

A supplier could, of course, achieve the desired dealer services or product quality without a vertical restraint or tie-in by simply requiring that all dealers provide specified services or adhere to specified quality standards. Economists argue, however, that vertical restrictions and tie-ins are often the cheapest, most efficient way of achieving the supplier's goal. See Baker, supra note 10, at 1250-51; Klein & Saft, supra, at 352-54; Posner, supra note 5, at 294.

56. Economic efficiency theory teaches that the market will correct for any poorly conceived vertical restraint by penalizing the manufacturer with lower sales. See Posner, supra note 10, at 150; Baxter, supra note 1, at 945-46; Easterbrook, supra note 1, at 148-49. Courts, on the other hand, do a poor job of policing vertical restraints. See Michael K. Block & Joseph G. Sidak, \textit{The Cost of Antitrust Deterrence: Why Not Hang a Price FIXER Now & Then?}, 68 Geo. L.J. 1131 (1980) (arguing that "antitrust enforcement is costly because prosecutors and judges mischaracterize some competitive or efficiency-enhancing behavior as horizontal collusion"); Frank H. Easterbrook, \textit{Allocating Antitrust Decisionmaking Tasks}, 76 Geo. L.J. 305 (1987) (courts are ill-equipped to decide antitrust cases and erroneous findings of illegality will have long-term market harm; courts cannot successfully tamper with vertical restraints because a manufacturer can always change the product that it sells to its dealers or do its own retailing); Douglas H. Ginsburg, \textit{Vertical Restraints: De Facto Legality Under the Rule of Reason}, 60 Antitrust L.J. 67, 69 (1992) (court cannot possibly know if decreased intrabrand competition is "worth" increased interbrand competition); Page, supra note 5, at 1243 ("[C]ourts have limited fact-finding and remedial capabilities, and therefore the costs of enforcing" antitrust rules will be high.).

57. The consumer is aided, the argument goes, by having more product-service packages from which to choose and the minimizing of dealer profits. See Bork, supra note 10, at 250; Baxter, supra note 1, at 946; Easterbrook, supra note 52, at 25-26; Easterbrook, supra note 1, at 147; Klein & Murphy, supra note 1, at 282-85. \textit{But see} Grimes, supra note 1, at 824 (vertical restraints may harm consumers by encouraging dealers to promote goods of lesser quality or higher profit margin); White, supra note 1, at 53-59 (there are less restrictive means other than resale price maintenance that supplier can use to avoid free riding).

58. Economic efficiency advocates admit that a vertical restraint can be used to police either a dealer or a supplier cartel and, if so, it will be economically inefficient. However, they contend that such cartels are rare. See, \textit{e.g.}, Baxter, supra note 1, at 941-45 (outlining the requirements necessary for a supplier cartel to use vertical restraints to facilitate
time in a competitive interbrand market must be desirable to consumers and consequently competition-enhancing.  

Beginning with its 1977 decision in Continental T.V., Inc. v. GTE Sylvania Inc., the Supreme Court began gravitating toward this theory. In Sylvania the Court resolved the interbrand-intrabrand quandary by announcing that “[i]nterbrand competition . . . is the primary concern of antitrust law.” By 1988, with its decision in Business Electronics Corp. v. Sharp Electronics Corp., the Court effectively eliminated concern for

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59. See Baxter, supra note 6, at 697-98; Calvani & Berg, supra note 1, at 1182. Indeed, for this reason, some economic efficiency advocates have contended that vertical restraints should be presumptively or per se legal. See Bork, supra note 10, at 288; see, e.g., Baxter, supra note 1, at 947 (“[A]ll vertical arrangements should generally be presumed benign.”); Easterbrook, supra note 52, at 5 (criticizing illegality of most vertical restraints); Easterbrook, supra note 1, at 135; Posner, supra note 1, at 23 (proposing that a rule of per se legality be used in vertical restraint cases). One critic of the economic efficiency approach has summed up the theory as: “Over time’s rainbow, in the radiance of revelation, what is efficient is what is.” Frederick M. Rowe, The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics, 72 Geo. L.J. 1511, 1549 (1984). See also John J. Flynn & James F. 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, 1130-31 (1987) (economic theory substitutes predetermined rules, assumptions and rigid deductive reasoning for the traditional complex fact determination and inductive reasoning that is proper legal analysis); Grimes, supra note 1, at 826-27 (disputing theory that disgruntled consumer will necessarily switch quickly to another product).


61. Id. at 52 n.19. 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,” including “inducing competent and aggressive retailers to make . . . investment of capital and labor, . . . to engage in promotional activities or to provide service and repair facilities.” Id. at 54-55.

intrabrand competition altogether from the analysis of vertical pricing restraints. With tie-ins, the story was the same: the Court announced in Jefferson Parish Hospital District No. 2 v. Hyde that the anticompetitive aspect (and hence the illegality) of a tie-in lies in its lessening of competition in the interbrand market for the tied product.

On the question of whose marketing freedom should triumph, the Court—again consistent with the economic efficiency approach—came down squarely on the side of the supplier. The Court regarded the supplier as having a "legitimate" concern with resale policies, as a means of "further[ing] a particular marketing strategy" or offering the con-

63. The Court reiterated the statement from Sylvania that interbrand competition is the "primary concern" of the antitrust laws and added that "a rule of per se illegality ... is not needed or effective to protect intrabrand competition." 485 U.S. at 725. Vertical price restraints had been treated as per se illegal, according to the Court, only because "there was support for the proposition that [such] restraints reduce interbrand price competition [by] 'facilitat[ing] cartelizing.'" Id. at 725 (citation omitted). Absent such a likelihood of facilitating a horizontal interbrand cartel, a court ought not condemn a vertical restraint because it might well have "real potential to stimulate interbrand competition." Id. at 724. The dissenting justices, on the other hand, emphasized the need to consider loss in intrabrand competition:

[F]ostering 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.

Id. at 749 n.14 (Stevens, J., dissenting).


65. As with other vertical restraints, the Court acknowledged that tying arrangements could be procompetitive in the interbrand market by offering buyers an "attractive" package sale. See id. at 12. "[T]he essential characteristic of an invalid tying arrangement lies ... [in its restraint on] competition on the merits in the market for the tied item ... ." Id. "This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product." Id. at 14. The Court also stated that a tie-in might be illegal if used for price discrimination or to evade price controls on the tying product. See id. at 15, 28 n.47. Notably absent, however, was any notion that a tie-in's illegality might flow from its coercive effect on the buyer. See infra note 71.

66. See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984). In contrast, in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), the Court had regarded resale terms as a matter of concern primarily for dealers, not the manufacturer. "[T]he advantage of established retail prices primarily concerns the dealers. The enlarged profits ... would go to them and not to the [manufacturer]." Id. at 407. To the extent the manufacturer was concerned about resale terms, the Court considered that concern to be outweighed by society's interest in preserving the dealer's marketing freedom. See id. at 407-08.


[It is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product ... .

In order to assure an efficient distribution system, manufacturers and distrib-
sumer an attractive package. The Court noted that, when so used, vertical restraints increase interbrand competition and properly permit the manufacturer to guard against the destructive free-riding dealer who undermines "good" dealers and ultimately competition in the interbrand market. That a dealer might lose her "autonomy" or feel forced to abide by resale policies or buy a tied product is, by itself, irrelevant.

...
Absent a horizontal cartel or demonstrable effect in the interbrand market, the vertical restraint is procompetitive. While vertical restraints might well restrict the dealer's freedom, "an antitrust policy divorced from market considerations," the Court announced, "would lack any objective benchmarks."

By adopting this approach, the Supreme Court obtained neat, clean answers to the complexities of vertical restraints. As an economic matter, interbrand competition prevails over intrabrand. Moreover, the supplier's marketing decisions triumph over the dealer's. Finally, to the extent there is a conflict between economic and noneconomic concerns, the latter are dismissed as irrelevant.

Procedurally, the adoption of the economic efficiency approach had a similarly streamlining effect. Consistent with the views of the economic

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Jefferson Parish, 466 U.S. at 16. While the majority's opinion in Jefferson Parish is replete with talk of "forcing" of buyers, the context indicates that the court was using the "forcing" language as a short-hand way of referring to the need to show the seller had power in the tying market. See Burns, supra note 18, at 422 n.189; infra note 81.

72. In Business Elecs. Corp. v. Sharp Elecs. Corp., the Court noted that vertical price restraints are per se illegal because "there [is] support for the proposition that [they] reduce interbrand price competition because they 'facilitate cartelizing.' [D]eparture from [the rule of reason] standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing . . . ." 485 U.S. 717, 725-26 (1988). Using this reasoning, the Court concluded that a vertical pricing agreement was per se illegal only if it set a specific resale price, because only then would it likely facilitate a horizontal interbrand cartel among manufacturers or dealers. See id. at 735-36.

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

74. Sylvania left open the possibility that in a rule of reason analysis of a vertical nonprice restraint, the trier of fact might need to balance "intragbrand harm [and] interbrand benefit." Id. at 52. Some economic efficiency advocates argue that such a balancing of essentially apples and oranges is impossible and ought not be attempted. See Easterbrook, supra note 1, at 155 (rule of reason analysis is "snipe hunt"); Peter M. Gerhart, The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis, 1981 Duke L.J. 417, 438-39; Posner, supra note 2, at 14-18. Even one critic of the Chicago approach has concluded, after a detailed review of the post-Sylvania rule of reason cases, that the interbrand-intrabrand balance suggested by Sylvania is impossible to do (and leads to defendants almost always winning). See Mark E. 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). See also, Baxter, supra note 1, at 936 ("[T]hose practices subject only to the rule of reason will rarely, if ever, be found illegal if a plaintiff . . . must carry the burden of showing that human welfare is reduced by this particular use of the particular restriction in this particular set of markets at this particular time.").

As a way of bringing some order to the rule of reason analysis, some lower courts require that, as a threshold matter, the plaintiff prove (1) the relevant market and (2) the defendant's power in that market. See infra note 82.

75. Technically, Sylvania only ruled out the use of dealer freedom as a factor in a per se case. See Sylvania, 433 U.S. at 53 n.21. The Court did not say that dealer freedom could not be considered in a rule of reason analysis of a vertical nonprice restraint. However this possibility seems remote and, in practice, in the cases following Sylvania, the lower courts have looked primarily (as the rest of the Sylvania opinion suggested) to market effects. See infra note 82.
efficiency advocates, the Supreme Court constructed a number of standing rules to avoid over-deterrence, duplicative damage awards, and remote claims. As a result, courts today are able to dismiss many vertical restraint lawsuits at pleading stages. Furthermore, even when


77. In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), the Supreme Court constructed an "antitrust injury" doctrine that limited standing to those plaintiffs who could show injury flowing from "that which makes defendants' acts unlawful" under the antitrust laws. In Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990), the Court applied the doctrine to vertical restraints and denied standing to a firm complaining of a rival's maximum vertical price fixing. The economic efficiency advocates applaud the antitrust injury standing requirement. See Page, supra note 5, at 1270-75; Page, supra note 76, at 1460-64. For criticism of the antitrust injury doctrine, see John J. Flynn, Which Past Is Prolog? The Future of Private Antitrust Enforcement, 35 Antitrust Bull. 879, 914-16 (1990); Hawker, supra note 76, at 103-10.

78. To avoid duplicative damage awards, the Court held that indirect purchasers may not sue for antitrust damages. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977). The Illinois Brick rule has been applauded by economic efficiency advocates, see, e.g., William M. Landes & Richard A. Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick, 46 U. Chi. L. Rev. 602, 604 (1979) ("[A]llowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement."); William H. Page, Optimal Antitrust Penalties and Competitors' Injury, 88 Mich. L. Rev. 2151, 2162 (1990), but has been criticized by other commentators. See, e.g., Flynn, supra note 77, at 907-10 ("[e]ver since the decision, confusion has reigned over issues like who are indirect purchasers and whether the concerns underlying Illinois Brick are present where overcharges caused by an antitrust violation are passed through to an indirect plaintiff down the line of distribution."); Robert G. Harris & Lawrence A. Sullivan, Passing On the Monopoly Overcharge: A Response to Landes and Posner, 128 U. Pa. L. Rev. 1280, 1284 (1980) (proposing a reversal of Illinois Brick).

79. In Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540-45 (1983), the Court reiterated the Brunswick and Illinois Brick requirements and, additionally, emphasized the need for the plaintiff to have suffered directly from the antitrust violation. For a discussion of the effect of this decision, see Nat Stern & Kevin B. Getzendanner, Gauging the Impact of Associated General Contractors on Antitrust Standing Under Section 4 of the Clayton Act, 20 U.C. Davis L. Rev. 159 (1986).

80. See, e.g., Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788-89 (2d Cir. 1992) (supplier entitled to summary judgment on distributor's tying claim where distributor failed to show it was forced to take tied product or that supplier had power in tying
a lawsuit survives to a review of the merits, courts apply increasingly strict substantive requirements for *per se* liability or a rule-of-reason analysis that uses a market-power screen or absolves a defendant of liability whenever there is any showing of gain in the interbrand market; Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Ass'n, 908 F.2d 200 (7th Cir. 1990) (summary judgment on resale price fixing claim proper where dealer failed to show agreement on specific price); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989) (summary judgment for supplier proper where dealer failed to show agreement under *Monsanto*); Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1154-60 (9th Cir. 1988) (supplier entitled to judgment not standing verdict where dealer failed to show conspiracy and setting of specific resale price); Flynn, *supra* note 77, at 920 (summary judgment has been granted in whole or in part in 50% of private cases in recent years); Roszkowski, *supra* note 74, at 183-86 (after *Monsanto*, most dealers have lost vertical cases on summary judgment or directed verdicts); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1003 (1986) (empirical study showing decline in antitrust cases filed in the 1980s).

81. After *Monsanto* and *Sharp*, resale price maintenance is still technically *per se* illegal. See Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725 (1977); *Monsanto* Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761-62 n.7 (1984). However, in order to prove a violation a plaintiff will have to show (1) the meeting-of-the-minds type agreement required by *Monsanto*; (2) the setting of a specific resale price as required by *Sharp*; and (3) antitrust injury as required by *USA Petroleum*. See Burns, *supra* note 11, at 29-31 (discussing the difficulty of satisfying both *Monsanto* and *Sharp*); Peritz, *supra* note 1, at 550-51 (Supreme Court has shrunk *per se* category to point of collapse); Piraino, *supra* note 12, at 315 ("*Sharp* actually effected a *de facto* overruling of the *per se* approach"); White, *supra* note 1, at 34-35 (*Sharp* creates a *per se* legal category when there is no agreement regarding specific prices and no agreement on a nonprice restraint). As one antitrust practitioner has stated, "only the most poorly advised manufacturer will be found liable for resale price fixing." Maxwell M. Blecher, *The Impact of GTE Sylvania on Antitrust Jurisprudence*, 60 Antitrust L.J. 17, 20 (1991).

The *per se* rule for tying arrangements is equally formidable and requires a showing of two distinct products, power in the tying market and effect in the tied market. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-16 (1984); Flynn, *supra* note 77, at 927 (for tying cases, *per se* no longer means "in itself" but "in itself along with a few other mushy things").

82. Some economic efficiency advocates argue that if a rule of reason analysis is retained for vertical restraints (and there has been some suggestion that a *per se* or presumptive legality rule would be better, *see supra* note 59), the analysis should focus on the defendant's market share and market power. Without market share and power, the argument goes, the supplier cannot possibly restrain interbrand competition through the use of a vertical restraint or tying arrangement. Therefore when a supplier lacking market power uses a vertical restraint, the restraint must be producing a package that consumers find desirable; if not, consumers will switch to another brand and the supplier, penalized through lost sales, will abandon or modify the restraint or tie-in. See Easterbrook, *supra* note 1, at 157-68; Hay, *supra* note 1, at 441-42; Klein & Murphy, *supra* note 1, at 295. Some lower courts have adopted this suggestion and require in any vertical rule of reason case that the plaintiff prove, as preliminary matters, what the relevant market is and that the defendant has power in that market. *See* e.g., Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334-37 (7th Cir. 1986) (stating that market power is a necessary element under the rule of reason analysis); Graphic Prods. Distrib., Inc. v. Itel Corp., 717 F.2d 1560, 1568-69 (11th Cir. 1983) (requiring proof of a "well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact"). For criticism of this approach, see Flynn & Ponsoldt, *supra* note 59, at 1150; David L. White, *Antitrust Enforcement: Enhancement Through a Sharpened Rule of Reason*, 20 Ariz. St. L.J. 749, 759-69 (1988).
The upshot is that courts are doing fewer case-by-case evaluations of vertical restraints. Antitrust jurisprudence now rests on an economic theory that provides a procompetitive justification for most vertical restraints. Moreover, under this theory, courts largely exclude considerations of intrabrand competition and dealer fairness from their analyses. Not surprisingly, vertical restraint and tying cases have become virtually impossible for a plaintiff dealer to win.

83. See Ginsburg, supra note 56, at 74-75 (analysis of vertical nonprice cases in which rule of reason was applied shows that defendants typically win if there is any indication of gain in the interbrand market).

84. Indeed, some critics of the Chicago approach complain that, in assessing the legality of restraints, courts often seem to look more to economic models than the facts of the particular dispute. See Flynn, supra note 1, at 1126-30; Flynn & Ponsoldt, supra note 59, at 1130-31.

85. Coercion does continue to be a limited factor in vertical cases. Some courts continue to look at coercion as a means of finding a conspiracy. See, e.g., World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1476 (10th Cir.) (dismissing argument that coercion to maintain price levels is not illegal when conspiracy is vertical), cert. denied, 474 U.S. 823 (1985). The lower court cases grappling with the vertical conspiracy issue after Monsanto are collected in Flynn, supra note 1, at 1104-12. See also John R. Allison, Complying Dealers, the Terminated Price Cutter, and Sherman Act Conspiracy Doctrine, 22 Am. Bus. L.J. 467, 486-501 (1985). For an argument that, assuming the economic efficiency theory is used, coercion ought to play a role in finding a vertical conspiracy, see Burns, supra note 18, at 405-14.

Coercion also continues to play a role in tying cases, but not because coercion of a dealer by itself is actionable. See supra note 71. Rather, evidence of coercion in tying cases is used to show linkage of two products, see Austin, supra note 45, at 1156-68; John H. Matheson, Class Action Tying Cases: A Framework for Certification Decisions, 76 Nw. U. L. Rev. 855, 866-73 (1982); power in the tying market, see Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); Hovenkamp, supra note 29, § 8.10 at 238-39; or injury to the buyer, see Hovenkamp, supra note 45, at 226. For an argument that coercion can still play some role in tying cases, even assuming an economic efficiency approach, see Burns, supra note 18, at 426-31.

86. See Ginsburg, supra note 56, at 71 (defendants have won over 90% of rule of reason decisions in vertical nonprice cases after Sylvania); John B. McArthur & Thomas W. Paterson, The Effects of Monsanto, Matsushita, and Sharp on the Plaintiff's Incentive to Sue, 23 Conn. L. Rev. 333, 343-47 (1991) (fewer vertical cases are likely to be brought after Monsanto and Sharp); Roszkowski, supra note 74, at 183-86 (after Monsanto most plaintiff dealers lose on summary judgment or directed verdict). Maxwell Blecher summed up the attitude of the plaintiffs’ bar when he said that when dealers 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.” ABA Antitrust Spring Meeting Focuses on Federal, State, Foreign Enforcement, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1512, at 533 (Apr. 18, 1991). The lower court cases following Monsanto and Sharp are described in Correia, supra note 53, at 204-07. During the 1980s, Department of Justice cases involving vertical restraints were similarly rare. See Baxter, supra note 6, at 697-98 (arguing that the DOJ should prosecute vertical cases only when there is likely collusion and effect in the horizontal interbrand market). Recently, however, the Department of Justice and the FTC have brought some vertical resale price maintenance cases. See, e.g., United States v. Canstar Sports USA, Inc., [1993 CCH 7 Trade Reg. Rep.] ¶ 50,746, ¶ 70,372 (D. Vt. Sept. 17, 1993) (sports product manufacturer ordered to refrain from resale price fixing of hockey skates); The Keds Corp., [1993 CCH Trade Reg. Rep.]
II. THE INCOMPLETENESS OF THE ECONOMIC EFFICIENCY APPROACH

While the economic efficiency approach has eliminated from the antitrust calculus all consideration of the various concerns centering on the dealer's, apart from the consumer's, well being, the identical dealer-fairness issues continue to surface in a variety of contexts and legal theories outside of antitrust. This is not to say that there has been a wholesale rejection of the economic efficiency theory or a blanket adoption of rules outlawing coercive or unethical business dealing. Rather, what is emerging, in a number of areas outside of antitrust, are detailed, case-by-case inquiries into vertical restraints. Typically, among the factors considered are business ethics and the general fairness of the transaction for the dealer. In other words, courts are considering (and, in some cases, offering legal protection for) the very concerns that economic efficiency eliminated from the antitrust analysis of vertical restraints.

A detailed analysis of each of the statutory and common law remedies that currently address issues of fairness in vertical transactions is beyond the scope of this Article. A brief overview of the general areas will suffice to show the pattern that is developing.

As a statutory matter, probably nowhere are fairness concerns more directly considered than in the state franchise and dealer laws, some of

A consumer lawsuit challenging a vertical restraint faces an additional hurdle: the Illinois Brick bar on indirect-purchaser suits. See supra note 78. Some courts have held that a consumer can avoid this standing hurdle by naming the dealer as a co-conspirator. See, e.g., California v. Standard Oil Co. of Cal., 691 F.2d 1335, 1342 (9th Cir. 1982) ("[I]f plaintiffs seek to by-pass the rule in Illinois Brick, any theory on which they might rely would raise . . . questions relating to the relationships between the defendants and each of their . . . retail dealers."); cert. denied, 464 U.S. 1068 (1984); New York v. Dairylea Coop., 570 F. Supp. 1213, 1215-16 (S.D.N.Y. 1983) (dismissing state's claim on behalf of consumers against milk wholesalers, but allowing for repleading pursuant to the rule of Illinois Brick). As a practical matter, however, most private vertical restraint cases are brought by dealers. See Salop & White, supra note 80, at 1005 (empirical study showed that dealers are principal plaintiffs in private vertical cases).

which apply to specific industries (such as automobile or liquor distributors) and some of which apply to all franchises. There is, for the most part, no cause-and-effect relationship between the enactment of these state laws and the elimination of fairness concerns from antitrust. The bulk of the state franchise statutes were passed during the 1970s, when most courts were willing to consider at least some fairness factors in analyzing vertical restraints under the antitrust laws. The continued interest in such laws is seen in Iowa’s 1992 enactment of a franchise law.


89. State franchise laws are currently in place in at least 17 states, Puerto Rico and the Virgin Islands. See Monograph No. 17, supra note 87, at 17 n.73; Pitegoff, supra note 87, at 321, and in Legal Aspects of Buying and Selling, supra note 87, at 651. See also 1992 Iowa Legis. Serv. H.F. 2362 (West) (most recent franchise statute discussed further, see infra note 92).

Even among the laws geared to all franchises, the definition of a “franchise” varies from state to state. For reviews of the various approaches to defining “franchise,” see Allen S. Joslyn, Legislative Definitions of the Franchise Relationship, 32 N.Y.L. Sch. L. Rev. 779 (1987); Lockerby, supra note 87, at 803-04, 840-43; Pitegoff, supra note 87, at 292-96; Zeidman & Ausbrook, supra note 87, §§ 9.28-9.34. A key aspect of most franchises is an identifiable brand or trade name for the product or service. See James A. Brickley & Frederick H. Dark, The Choice of Organizational Form, The Case of Franchising, 18 J. Fin. Econ. 401, 403 (1987); Goldberg, supra note 53, at 746; Mathewson & Winter, supra note 55, at 504.


91. See supra notes 40 and 42 and accompanying text.

and Congress' recent consideration of similar legislation on a federal level.93

Substantively, the protection offered by the state franchise and dealer laws is often broader than that offered by the early antitrust vertical restraint case law. While the specifics of the legislation vary from state to state, typically these laws protect the franchisee at two distinct times: (1) when the franchisee purchases the franchise, and (2) during the ongoing course of the franchise relationship.94 The first type of protection, about which there is little controversy,95 is handled by requiring the franchisor to make certain disclosures to prospective franchisees.96 The second, and more controversial and far-reaching protection, is handled in various

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93. In July 1993, three bills were introduced into Congress to regulate franchises. One, H.R. 2593, would establish minimum standards of fair conduct in ongoing franchise relationships. The other two bills, H.R. 2595 and H.R. 2596, would regulate disclosures required in connection with the sale of franchises and provide consumers with statistical information about franchises. See Bills Introduced, [July-Dec.] 65 Antitrust & Trade Reg. Rep. (BNA) No. 1622, at 88 (July 8, 1993). The bills are reported to have broad-based, bipartisan support. See Jeffrey A. Tannenbaum, Support Grows in Congress for New Franchise Laws, Wall St. J., July 9, 1993, at B2. Similar bills were introduced in 1992. H.R. 5232 and H.R. 5233, 102d Cong., 2d Sess. (1992). For a discussion of earlier proposed federal legislation, see Braun, supra note 87, at 213-14; Lockerby, supra note 87, at 802. Rep. John J. LaFalce, Chairman of the House Small Business Committee and a principal proponent of this legislation, likens the franchise bills "to what was done to bring about fair dealing between labor and management in the '30s." Victor, supra note 92, at 2185.


95. Even those commentators critical of the state statutes regulating ongoing franchise relationships typically support the disclosure requirements. See, e.g., Braun, supra note 87, at 211 (full disclosure legislation received practically unanimous support from all concerned, including franchisors); Brickley et al., supra note 90, at 111; Pitegoff, supra note 87, at 314-15. The new IFA code of ethics also contains a disclosure requirement. See supra note 92, at 664.

96. See Kobak, supra note 87, at 812-13 (reviewing state statutes). The Federal Trade Commission has also promulgated a rule requiring that franchisors make certain disclosures to prospective franchisees. See 16 C.F.R. § 436.1 (1992) (listing information that franchisor or franchise broker must provide to prospective franchisees). For a discussion of the FTC rule, see Braun, supra note 87, at 206-08; Kobak, supra note 87, at 813-14; Pitegoff, supra note 87, at 291. Some franchisees complain that franchisor deception is rising and that the FTC has been lax in its enforcement of its disclosure rule. See Jeffrey A. Tannenbaum, Angry Franchisees Turn Spotlight to FTC Enforcement, Wall St. J., Oct. 13, 1992, at B2. A recent report of the General Accounting Office supports this view; the GAO found the FTC to be a slow and infrequent enforcer of its franchise rules. See General Accounting Office Report: FTC Franchise Rule Enforcement, 163 Bus. Franchise Guide (CCH) July 23, 1993 (Supp.).

Some states guarantee pre-sale disclosures by including sales of franchises in their deceptive trade practices statutes which typically provide a buyer with a cause of action in case of a misstatement of facts in connection with the sale of goods or services. See, e.g.,
ways. Typically, the state laws require that the franchisor have good cause to terminate a franchisee or to fail to renew the franchise. Some limit a franchisor’s ability to change substantially the terms of the franchise. Some limit the franchisor’s ability to encroach on a franchisee’s exclusive territory, impose arbitrary standards, or tie the purchase of supplies to the franchise trademark. Many statutes set out procedural requirements (such as notice and time to cure) for termination or nonrenewal.

Running throughout all of these statutes is a concern for the franchisee or dealer as opposed to the more general consuming public. The laws project a view of the franchisee as being in an unequal bargaining position vis-a-vis the franchisor. Specifically, these laws seek to protect the franchisee or dealership in circumstances involving franchisor abuse.


100. See, e.g. Neb. Rev. Stat. § 87-406(5) (1987); Wash. Rev. Code Ann. § 19.100.180(2)(h) (West Supp. 1993). See Kobak, supra note 87, at 806 (collecting state statutes prohibiting arbitrary standards of conduct); Pitegoff, supra note 87, at 307, 329-31 (collecting examples of unlawful practices). See also Aubin, supra note 87, at 4 (discussing how unscrupulous franchisor can increase its profits through unreasonable tie-in); Brickley & Dark, supra note 89, at 406-07 (franchisor can exact unfair quasi-rents from franchisee by demanding higher franchise fees after franchisee has invested in expensive items that do not have other uses).

101. The required notice for termination typically ranges from 30 days to 90 days. See, e.g., Cal. Bus. & Prof. Code § 20020 (West 1987) (30 days notice necessary for termination); Mo. Rev. Stat. § 407.405 (1990) (90 days notice necessary for termination). The rationale is to provide the franchisee a reasonable amount of time to recoup her investment. For listings of specific state statutes, see Kobak, supra note 87, at 804-05; Pitegoff, supra note 87, at 325-28. The new IFA code of ethics requires 30 days notice for termination and 180 days notice for nonrenewal. See supra note 92, at 664.

102. See Andrew A. Caffey, Franchise Termination and Nonrenewal Legislation: Recent Developments and Trends in State Legislation, 49 Antitrust L.J. 1343 (1980); Lockery, supra note 87, at 831-34; Pitegoff, supra note 87, at 289. See also Va. Code Ann. § 13.1-558 (Michie 1993) (policy of state law “to correct. . . . such inequities as may exist in the franchise system so as to establish a more even balance of power between franchisors and franchisees; . . . to deal fairly with their franchisees with reference to all aspects of the franchise relationship”); Wis. Stat. Ann. § 135.025(2)(b) (West 1989) (purposes of state law include “protect[ing] dealers against unfair treatment by [suppliers], who inherently have superior economic power and superior bargaining power in the negotiation of dealership contract terms”).
franchisee, who has invested time, money, and energy into developing a business,\textsuperscript{103} from unfair termination (or the threat of termination),\textsuperscript{104} overreaching, and arbitrary or unethical business practices by an unscrupulous franchisor.\textsuperscript{105} Notably absent from the typical franchise law is any reference to the market share of the franchisor, interbrand competition, or economic efficiency. Rather these laws focus simply on the two-party franchisor-franchisee relationship\textsuperscript{106} with the implicit assumption that society as a whole will be better off if the franchisee is protected.\textsuperscript{107}

In applying these statutes, however, courts have not simply granted

\textsuperscript{103} In building up her business, the franchisee promotes the franchisor's interests (both by promoting the franchisor's name and through royalties) as well as her own. See Braun, supra note 87, at 212-13; Rubin, supra note 94, at 226-27.

\textsuperscript{104} See Lockerby, supra note 87, at 834-36 ("A concern . . . is that franchisors will terminate arbitrarily, unfairly capitalizing on goodwill built up by their franchisees."). Even absent actual termination, franchisee may fear threat of termination.

\textsuperscript{105} See Braun, supra note 87, at 213; Pitegoff, supra note 87, at 307. The New Jersey statute, for instance, seeks to "rule out arbitrary and capricious cancellation of franchises while preserving the right of franchisors to safeguard their interests through the application of clear and nondiscriminatory standards." Carlos v. Philips Business Sys., Inc., 556 F. Supp. 769, 775 (E.D.N.Y.); aff'd, 742 F.2d 1432 (2d Cir. 1983) (quoting Assembly Bill 2063 (1971)). See also Tenn. Code Ann. § 47-25-1501 (Supp. 1993) (legislative intent to provide "uniform rights and procedures to prevent arbitrary and capricious business practices by franchisors").

\textsuperscript{106} Similarly, the aim of the federal dealer acts, supra note 88, is protection of the dealer from coercive and unfair acts of the supplier. The Automobile Dealer's Day in Court Act imposes on a supplier a duty of good faith "in performing or complying with any of the terms . . . of [a dealer's] franchise, or in terminating, canceling, or not renewing the franchise." 15 U.S.C. § 1222 (1988). "Good faith" is defined as acting "in a fair and equitable manner . . . so as to guarantee . . . freedom from coercion, intimidation, or threats of coercion or intimidation . . . ." Id. § 1221(e). The primary motivation behind the act "was to address . . . perceived . . . inequality in bargaining power between the automobile manufacturers and their . . . dealers, and to address the concern . . . with the increase in the concentration of economic power such that traditional contractual concepts no longer afforded adequate protections for the dealer." Monograph No. 9, supra note 88, App. B at 58. See Schwartz, supra note 7, at 1078-79 (the federal Automobile Dealer Franchise Act is an example of society's concern with the noneconomic components of antitrust policy). The PMPA lists the grounds on which a franchise may be terminated or not renewed. 15 U.S.C. § 2802(b) (1988). For a discussion of the PMPA standards, see William R. O'Brien, Federal Laws Affecting the Right of a Franchisor to Terminate or Not Renew a Franchise: Petroleum Marketing Practices Act, 49 Antitrust L.J. 1371, 1371 (1980) ("The stated purpose of the [PMPA] is to protect the interests of franchisees and to balance the perceived unequal bargaining power between dealers and their suppliers," while at the same time "recognizing the franchisor's right to terminate or not renew where the circumstances justify . . . ."). Bills were introduced in the 102d Congress to provide even greater protection for the gasoline retailers. Reports on Petroleum Marketing Bills Maintain Inadequacies in Current Law, Antitrust & Trade Reg. Rep. (BNA) No. 1585, at 457-58 (Oct. 8, 1992); Compromise Bill Is Developed to Amend Petroleum Marketing Practices Act, Antitrust & Trade Reg. Rep. (BNA) No. 1585, at 458-59 (Oct. 8, 1992), and reintroduced in the 103d Congress. See House Bill is Reintroduced on Gasoline Franchise Relationship, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1609, at 403 (Apr. 8, 1993).

relief to any and all disgruntled franchisees and dealers. What is notable about the judicial decisions is the willingness of the courts to engage in detailed, factual inquiries and to balance the franchisee's need for fairness with the franchisor's need to make marketing decisions for a uniform product or service. In doing so, the courts tend to consider some of the very factors that had often been considered in antitrust before the ascendancy of the economic efficiency approach.

Thus courts consider such matters as: the type of franchise and regulation involved; the reason for, scope, and effect of any substantial change in the terms of the franchise; the success or failure of the franchise to promote the compelling interest of the public in fair business relations between dealers and grantors, and in the continuation of dealerships on a fair basis.

108. For a discussion of the case law under the state franchise acts, see Pitegoff, supra note 87, at 297-307; Zeidman & Ausbrook, supra note 87, §§ 9.62-9.64. One commentator who reviewed judicial decisions under the state franchise statutes concluded that "[a] trend appears to be emerging to construe the coverage of the franchise relationship laws narrowly." Pitegoff, supra note 87, at 318.

109. Similarly, while certainly not granting redress to any and all dealers, courts have engaged in the same sort of detailed factual reviews in applying the federal dealer laws. See, e.g., Empire Volkswagen Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90 (2d Cir. 1987) (court reviews in detail the agreements between manufacturer and automobile dealer concerning dealer's facility); Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901 (9th Cir.) (court reviews in detail automobile dealer's allegation of improper warranty reimbursements), cert. denied, 436 U.S. 946 (1978). At the same time, courts have interpreted the Automobile Dealers' Day in Court Act as requiring proof of coercion. See Minson Plymouth, Inc. v. Chrysler Motors Corp., 554 F.2d 1266, 1267 (4th Cir. 1977); Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 514 (10th Cir. 1976). Dealer relief under the PMPA has similarly been restricted by judicial interpretations permitting supplier imposition of any restrictions motivated by the supplier's business judgment. See, e.g., Hinkleman v. Shell Oil Co., 962 F.2d 372, 376 (4th Cir.) (no violation where termination due to dealer's failure to make timely payments), cert. denied, 113 S. Ct. 831 (1992); Riddle v. Mobile Oil Corp., No. 86-1636-CIV-T-17a, 1992 WL 81321 (M.D. Fla. Apr. 8, 1992) (upholding hours of operation); Malone v. Crown Cent. Petroleum Corp., 474 F. Supp. 306 (D. Md. 1979) (upholding sales quota). For a discussion of the case law under the automobile act, see Monograph No. 9, supra note 88, at app. B at 52-58; John A. Donovan, Federal Laws Affecting the Right of a Franchisor to Terminate or Not Renew a Franchise: Automobile Dealers Day in Court Act, 49 Antitrust L.J. 1353 (1980); Lockerby, supra note 87, at 793-98. The case law under the PMPA is summarized in Monograph No. 9, supra note 88, App. C at 60-64.

110. See supra notes 39-42 and accompanying text. Prior to the ascendancy of the economic efficiency approach, the rule of reason in antitrust law was a far-reaching inquiry into "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, ... the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained ...." Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918). For a historical review of the rule of reason in antitrust, see Rudolph J. Peritz, The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition, 40 Hastings L.J. 285 (1989).

111. See, e.g., Deutschland Enters., Ltd. v. Burger King Corp., 957 F.2d 449, 453 (7th Cir. 1992) (court considers whether contract provision barring franchisee from having an interest in a "same or similar" business is essential and reasonable under the circumstances).

chisee in meeting reasonable expectations;\textsuperscript{113} the notice, if any, that the franchisee had of any unwritten policies of the franchisor;\textsuperscript{114} the motive behind and evenhandedness of the franchisor's actions;\textsuperscript{115} the franchisee's violation of the franchise agreement or the reasonable expectations of the franchisor;\textsuperscript{116} the franchisor's withdrawal from the market or substitution of its own stores.\textsuperscript{117} The upshot is that some franchisees are

had formerly been exclusive dealership), \textit{aff'd}, 983 F.2d 1046 (1st Cir. 1993); Carlos v. Philips Business Sys., 556 F. Supp. 769, 776 (E.D.N.Y.) (change in dealership terms, from exclusive distributor to nonexclusive dealer, can be “termination” for purposes of state franchise act), \textit{aff'd}, 742 F.2d 1432 (2d Cir. 1983); Ziegler Co., Inc. v. Rexnord, Inc., 433 N.W.2d 8, 13 (Wis. 1988) (jury trial necessary to determine whether change in dealership terms was essential, reasonable and nondiscriminatory).

113. \textit{See, e.g.}, Reinders Bros., Inc. v. Rain Bird E. Sales Corp., 627 F.2d 44, 50-51 (7th Cir. 1980) (trial necessary to determine whether termination was proper because dealer failed to use “best efforts” to sell manufacturer's product or whether this was simply a pretextual reason given by manufacturer).


115. \textit{See, e.g.} East Bay Running Store, Inc. v. Nike, Inc., 890 F.2d 996, 1000 (7th Cir. 1989) (no violation of state franchise act where supplier's new policy regarding telephone and mail orders was a system-wide, nondiscriminatory change applicable to all dealers, was supported by a business reason, and did not affect the dealer's marketing of other Nike products); \textit{Reinders Bros.}, 627 F.2d at 50-51 (trial necessary to determine whether termination was proper because dealer failed to use “best efforts” to sell manufacturer's product or whether this was simply a pretextual reason given by manufacturer); J.I. Case Co. v. Early's, Inc., 721 F. Supp. 1082, 1085 (E.D. Mo. 1989) (manufacturer entitled to summary judgment on state franchise act claim where dealer failed to install computer required by manufacturer and manufacturer showed that requirement was applicable to all dealers and was supported by a good business reason).

116. \textit{See, e.g.}, Deutschland Enters., Ltd. v. Burger King Corp., 957 F.2d 449, 453 (7th Cir. 1992) (manufacturer entitled to summary judgment on state franchise act claim where franchisee violated franchise contract provision which the manufacturer showed was essential and reasonable); Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., 633 F.2d 649, 651-52 (2d Cir. 1980) (manufacturer did not violate state automobile dealer act in terminating dealer, where manufacturer showed it reasonably concluded that dealer's addition of three more car lines would result in poor sales and service of the manufacturer's product); An-Port, Inc. v. MBR Indus., Inc., 772 F. Supp. 1301, 1314 (D.P.R. 1991) (manufacturer entitled to summary judgment on dealer act claim where dealer had violated oral contract with the manufacturer by selling goods that were in direct competition with those of the manufacturer and mislabeling some of those goods).

117. \textit{See, e.g.}, Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 136-39 (7th Cir. 1990) (supplier violated state franchise law where it replaced national distributors with regional distributors; supplier's internal economic reasons were not, by themselves, "good cause" for termination or nonrenewal); Kealey Pharmacy & Home Care Servs., Inc. v. Walgreen Co., 761 F.2d 345, 349-50 (7th Cir. 1985) (dealers entitled to damages under state franchise law where supplier terminated all dealers to replace them with company-owned stores); Slowiak v. Hudson Foods, Inc., 1992-1 Trade Cas. (CCH) ¶ 69821 (W.D. Wis. 1992) (trial necessary to determine whether change in distribution systems was made for good cause where supplier is not withdrawing from marketplace), \textit{aff'd without opinion}, 987 F.2d 1293 (7th Cir. 1993); Lee Beverage Co., Inc. v. I.S.C. Wines of Cal., Inc., 623 F. Supp. 867, 871 (E.D. Wis. 1985) (supplier has no liability under state franchise act where it ceased selling product line altogether); St. Joseph Equip. v. Massey-Ferguson, Inc., 546 F. Supp. 1245, 1246-47 (W.D. Wis. 1982) (no violation of state
able to obtain relief, or at least a review of the facts, in circumstances that would likely not result in relief under current antitrust jurisprudence.\textsuperscript{118}

Even apart from legislation specifically directed to dealers, courts are finding a variety of ways to review the fairness of a supplier's restraints on, and actions toward, his dealer. For instance, some courts utilize state unfair trade practices statutes to resolve supplier-dealer disputes even though, typically, these laws do not directly apply to such relationships.\textsuperscript{119} Dealers have also been successful under a number of common franchise law where supplier completely withdraws from geographic market); United States Surgical Corp. v. Oregon Medical & Surgical Specialties, Inc., 497 F. Supp. 68, 72 (S.D.N.Y. 1980) (summary judgment for manufacturer on state franchise act claim where manufacturer was not renewing any dealerships). See Kobak, \textit{supra} note 87, at 799-801 (collecting cases on dealer termination where supplier leaves market or changes mode of distribution).

\textsuperscript{118} For example, courts have stated that franchisees are entitled to relief (or at least a trial) under franchise laws where the franchisee is terminated for a reason not specified in the franchise contract, see Kawasaki Shop of Aurora, Inc. v. Kawasaki Motors Corp., 544 N.E.2d 457 (Ill. 1989), \textit{appeal denied}, 550 N.E.2d 556 (1990); the franchisor terminates the franchisee in order to establish company-owned stores, see Kealey Pharmacy & Home Care Servs., Inc. v. Walgreen Co., 761 F.2d 345 (7th Cir. 1985); the franchisor uses an unfair tying arrangement for supplies, see Nelson v. National Fund Raising Consultants, Inc., 842 P.2d 473 (Wash. 1992); the franchisor is unable to show the franchisee violated a written or unwritten policy, see Power Draulics-Nielsen, Inc. v. Libbey Owens-Ford Co., [1987-89 Transfer Binder] Bus. Fran. Guide (CCH) \textsuperscript{\textsection} 9075 (S.D.N.Y. 1988); the franchisor's own actions allegedly made it impossible for the franchisee to expand to meet marketing needs, see Draft-Line Corp. v. Hon Co., 781 F. Supp. 841 (D.P.R. 1991), \textit{aff'd,} 983 F.2d 1046 (1st Cir. 1993); the franchisee breached a promise to give the franchisee an exclusive sales territory, see Freiburg Farm Equip., Inc. v. Van Dale, Inc., 978 F.2d 395 (7th Cir. 1992). In some instances, relief is specifically denied under the antitrust laws but the dealer is permitted to proceed with a state franchise act claim. See, e.g., Slowiak v. Hudson Foods, Inc., 1992-1 Trade Cas.(CCH) \textsuperscript{\textsection} 69821 (W.D. Wis. 1992), \textit{aff'd without opinion,} 987 F.2d 1293 (7th Cir. 1993); Power Draulics-Nielsen v. Libbey Owens-Ford Co., [1987-89 Transfer Binder] Bus. Fran. Guide (CCH) \textsuperscript{\textsection} 9075 (S.D.N.Y. 1988); Carlo C. Gelardi Corp. v. Miller Brewing Co., 502 F. Supp. 637 (D.N.J. 1980) (no violation of federal antitrust laws, but possible violation of the New Jersey Franchise Practices Act).


124. See, e.g., Lano Equip., Inc. v. Clark Equip. Co., 399 N.W.2d 694 (Minn. Ct. App. 1987); A.S. Rampell, Inc. v. Hyster Co., 144 N.E.2d 371 (N.Y. 1957). The franchisor's breach of a written contractual provision is also a common basis for suit by franchisees. See, e.g., Sir Speedy, Inc. v. L & P Graphics, Inc., 957 F.2d 1033, 1038 (2d Cir. 1992) (franchisor breached contractual obligations to provide services and assistance). Such lawsuits, however, are simply applications of standard contract law and do not typically involve inquiries into fairness or good faith.

125. Of the various common law theories, this one has probably been the least successful for dealers as most courts reject the notion that a supplier has a fiduciary duty toward its dealer. See, e.g., Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 485 (5th Cir. 1984); Murphy v. White Hen Pantry Co., 691 F.2d 350, 354-56 (7th Cir. 1982). Cases are collected at Lockerby, supra note 87, at 812-17; Pitegoff, supra note 87, at 308 n.83; Zeidman & Ausbrook, supra note 87, § 9.73. The use of a fiduciary theory is criti-
As with the state franchise acts, use of one or more of these theories does not automatically mean that the dealer wins. It does, however, often lead to a factual inquiry into the particular vertical arrangement with an eye toward protecting the dealer from the supplier’s overreaching or unethical practices.\textsuperscript{126} Courts have, for instance, granted relief or at least ordered trials where there are allegations that: the supplier tried to solicit the dealer’s customers or move customers to another dealer;\textsuperscript{127} the supplier attempted to dictate resale prices, restrict price advertising, or impose territorial restrictions;\textsuperscript{128} the supplier attempted to change substantially the terms of the dealer’s contract;\textsuperscript{129} the supplier failed to

\textsuperscript{126} Some commentators have criticized the use of these common law theories on both doctrinal and practical grounds. See \textit{Braun}, \textit{supra} note 87, at 228-30; \textit{Zimmer-Masiello, Inc. v. Zimmer, Inc.}, 552 N.Y.S.2d 935, 936-37 (App. Div.) (dealer stated cause of action for breach of fiduciary duty where manufacturer maintained position of dominance and imposed various vertical restraints on dealer), \textit{appeal dismissed}, 559 N.E.2d 680 (N.Y. 1990).

\textsuperscript{127} \textit{See Western Fireproofing Co. v. W.R. Grace & Co.}, 896 F.2d 286, 291 (8th Cir. 1990) (affirming jury award for licensee on theory of tortious interference with contract where supplier provided preferential pricing to other licensees and attempted to move customer from plaintiff to other licensees); \textit{Chem-Tek, Inc. v. General Motors Corp.}, 816 F. Supp. 123, 130 (D. Conn. 1993) (finding dealer entitled to trial on claim that supplier made intentional misrepresentations to dealer’s customers); \textit{Machine Maintenance & Equip. Co. v. Cooper Indus., Inc.}, 661 F. Supp. 1112, 1116-17 (E.D. Mo. 1987) (supplier tortiously interfered with dealer’s contracts with its customers by trying to move customers to another dealer); \textit{Integrated Micro Sys., Inc. v. NEC Home Elecs. (U.S.A.)}, 329 S.E.2d 554, 558-59 (Ga. Ct. App. 1985) (dealer entitled to trial on claim that supplier interfered with dealer’s business relations with customer by giving customer false information about dealer in attempt to obtain customer’s business for itself); \textit{Zimmer-Masiello, Inc. v. Zimmer, Inc.}, 552 N.Y.S.2d 935, 937-38 (N.Y. App. Div.) (dealer stated cause of action for breach of fiduciary duty and tortious interference with contract where supplier began selling directly to dealer’s customers), \textit{appeal dismissed}, 559 N.E.2d 680 (N.Y. 1990). But see \textit{Turner v. Purina Mills, Inc.}, 989 F.2d 1419, 1423 (5th Cir. 1993) (no violation of state unfair trade practices act where supplier called on nonexclusive dealer’s customers in attempt to increase sagging sales and invited the dealer to participate in calls); \textit{McKeown Distribs., Inc. v. Gyp-Crete Corp.}, 618 F. Supp. 632, 644 (D. Conn. 1985) (no tortious interference with contract where supplier contacted dealer’s customers after lawful termination).

\textsuperscript{128} \textit{See Entre Computer Ctrs., Inc. v. FMG of Kansas City, Inc.}, 819 F.2d 1279, 1284 (4th Cir. 1987) (affirming jury award for franchisee on theory of implied duty of good faith where supplier had, inter alia, restricted price advertisements and returns of merchandise), \textit{overruled by}, \textit{Busby v. Crown Supply, Inc.}, 896 F.2d 833 (4th Cir. 1990); \textit{Lano Equipped, Inc. v. Clark Equip. Co.}, 399 N.W.2d 694, 695-99 (Minn. Ct. App. 1987) (affirming trial court’s grant of temporary restraining order prohibiting termination of dealer where supplier breached oral agreement by imposing restrictive sales territories); \textit{Dunfee v. Baskin-Robbins, Inc.}, 720 P.2d 1148, 1154 (Mont. 1986) (affirming jury award for franchisee on theory of implied duty of good faith where franchisor unreasonably refused franchisee’s relocation request); \textit{Owens v. Pepsi Cola Bottling Co.}, 381 S.E.2d 819, 823-24 (N.C. Ct. App. 1989) (store owner stated cause of action under state unfair trade practices act where supplier attempted (unsuccessfully) to impose resale prices on store and to limit customers), \textit{modified}, 412 S.E.2d 636 (N.C. 1992). In \textit{Zimmer-Masiello, Inc.}, 552 N.Y.S.2d at 936-37, the existence of various vertical price and nonprice restraints were, in part, the basis for implying a fiduciary relationship between the supplier and the dealer.

\textsuperscript{129} \textit{See Entre Computer Ctrs., Inc. v. FMG of Kansas City, Inc.}, 819 F.2d at 1284 (affirming jury award for franchisees
give the dealer necessary support during the notice-of-termination period;\textsuperscript{130} the supplier saturated the market with company-owned stores in order to purchase the dealer's outlets at a reduced price;\textsuperscript{131} the supplier, due to complaints from other dealers, made conditions intolerable for the dealer.\textsuperscript{132}

In short, in a variety of areas outside of antitrust, courts are considering a wide panoply of factors, and not solely economic ones, to insure fairness and good faith in vertical relationships.\textsuperscript{133} A supplier can certainly prevail but usually not by showing (as in current antitrust analysis) that he lacks market power or that his action will ultimately increase interbrand competition.\textsuperscript{134} Rather the supplier's victory is typically due

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\textsuperscript{130} See American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135, 1144-46 (8th Cir. 1986) (failure to give pricing information supports dealer's claim of tortious interference with contract); Machine Maintenance & Equip. Co. v. Cooper Indus., Inc., 661 F. Supp. 1112, 1116 (E.D. Mo. 1987) (supplier tortiously interfered with dealer's contracts with customers by giving inadequate notice of termination, thereby making it difficult for dealer to obtain alternate supplier, and by actively soliciting dealer's customers during notice-of-termination period).

\textsuperscript{131} See Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 727-28 (7th Cir. 1979) (affirming damage award for franchisee on theory of implied covenant of good faith where franchisor saturated market with its own stores in an attempt to reduce value of franchisee's stores which franchisor then sought to purchase), cert. denied, 445 U.S. 917 (1980); see also In re Globe Distribs., Inc., 129 B.R. 304, 317 (Bankr. D.N.H. 1991) (brewer violated duty of good faith and fair dealing and state consumer protection act when it tried to coerce distributor into selling out to brewer).

\textsuperscript{132} See Carlo C. Gelardi Corp. v. Miller Brewing Co., 502 F. Supp. 637, 651 (D.N.J. 1980) (dealer entitled to trial under theory of implied covenant of good faith where supplier allegedly responded to complaints from other dealers by making plaintiff's business life so miserable that plaintiff was forced to quit); see also Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 742 (Pa. 1978) (supplier breaches implied covenant of good faith by terminating dealer arbitrarily).

\textsuperscript{133} Some commentators argue that the law ought to impose certain minimal rules of fairness on the franchise relationship. See Braun, supra note 87, at 233-35 (proposing two rules: (1) neither party may appropriate or capriciously damage the interest of the other; (2) each party owes other a duty of loyalty including a duty to refrain from violating other's reasonable expectations); Gellhorn, supra note 120, at 505-21 (doctrine of unconscionability should be expanded to insure fairness in franchise terminations).

\textsuperscript{134} See, e.g., Machine Maintenance & Equip. Co. v. Cooper Indus., Inc., 661 F. Supp. 1112, 1119 (E.D. Mo. 1987) (denying relief to dealer under antitrust laws because no showing that supplier had market power or that competition had been reduced, but granting relief under tortious interference with contract theory). Furthermore, in these cases, the supplier's marketing decision does not carry a presumption of correctness simply because it emanates from the supplier. See Kobak, supra note 87, at 798-99 (statutory and judicially created remedies for franchisees and dealers "tend[] . . . to focus on
to a specific contract provision permitting the supplier to take the action in question, a showing that the dealer violated the contract, or a

whether the franchisee is performing its obligations under the agreement, not on the overall long-term interests of the franchisor”). On the other hand, in interpreting statutory and common law doctrines, some courts do take into consideration economic efficiency factors. See, e.g., Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1293-95 (4th Cir.) (en banc) (interpreting state unfair trade practices act as requiring a showing that interbrand competition is adversely affected), cert. denied, 484 U.S. 827 (1987); Glaesner v. Beck/Arnley Corp., 790 F.2d 384, 387-88 (4th Cir. 1986) (state common law tort of wrongful termination applies only where supplier acts arbitrarily or in bad faith; supplier cannot be forced to keep unprofitable dealer because doing so harms other dealers and consumers); Monmouth Chrysler-Plymouth, Inc. v. Chrysler Corp., 509 A.2d 161, 170 (N.J. 1986) (to show a violation of state motor vehicle franchise act due to establishment of a new automobile dealership, dealer must prove new dealership will cause substantial deterioration in service to customers or that manufacturer is motivated by primarily noneconomic factors). Interestingly, contrary to standard economic efficiency doctrine, one court used the need for robust intrabrand competition as a factor in interpreting a state unfair trade practices act. See McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 1185, 1191 & n.14 (Conn. 1984).

135. See, e.g., Glaesner, 790 F.2d at 389-90 (holding that a dealer cannot recover for tort of wrongful termination where dealership contract allowed for termination by either party at any time without cause, there was no showing of bad faith, and there was evidence of the dealer's failure to perform); Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 679 (2d Cir. 1985) (finding no breach of implied duty of good faith where express contract provision allowed for termination by either party with notice); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 485 (5th Cir. 1984) (finding no breach of implied covenant of good faith where franchise contract allowed franchisor to add hotels in area). Because of the protection offered by specific contract terms, franchise contracts are getting more specific and longer, sometimes running 75 pages. See Claudia H. Deutsch, Franchisees Fight Back, N.Y. Times, Dec. 4, 1988, § 3, at 1.

136. See, e.g., Deutchland Enters., Ltd. v. Burger King Corp., 957 F.2d 449, 453 (7th Cir. 1992) (manufacturer entitled to summary judgment where franchisee violated essential and reasonable contract provision); Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., 633 F.2d 649, 652 (2d Cir. 1980) (finding no violation of state automobile dealer act, where manufacturer terminated dealer who added three new car lines and could not thereafter properly sell or service manufacturer's brand); Reinders Bros., Inc. v. Rain Bird E. Sales Corp., 627 F.2d 44, 50-51 (7th Cir. 1980) (finding that a trial is necessary to determine whether termination was based on dealer's failure to use "best efforts" to sell manufacturer's product or whether this was simply a pretextual reason given by manufacturer); An-Port, Inc. v. MBR Indus., Inc., 772 F. Supp. 1301, 1314 (D.P.R. 1991) (manufacturer entitled to summary judgment where dealer violated oral contract by selling goods in direct competition with those of the manufacturer and mislabeling some goods); Great Licks, Inc. v. Baskin-Robbins, U.S.A. Co., [1987-89 Transfer Binder] Bus. Fran. Guide (CCH) ¶ 9252 (D. Minn. 1988) (good cause for termination existed where franchisee palmed off other products as those of franchisor, had overdue accounts, and refused to remodel store); Martin v. U-Haul Co., 251 Cal. Rptr. 17, 24-26 (Ct. App. 1988) (allowing dealer recovery for supplier's failure to give required notice of termination but denying damages for tort of good faith and fair dealing where dealer acted dishonestly and there was no showing of unequal bargaining positions); Dayan v. McDonald's Corp., 466 N.E.2d 958, 975 (Ill. App. Ct. 1984) (franchisor did not violate implied duty of good faith when it terminated dealer for failure to maintain quality standards). A supplier typically has no difficulty terminating a dealer where the latter has failed to pay royalty fees, advertising costs or otherwise breached the contractual relationship. See PPM Chem. Corp. v. Saskatoon Chem. Ltd., 931 F.2d 138, 139 (1st Cir. 1991); Hacienda Mexican Restaurant of Kalamazoo Corp. v. Hacienda Franchise Group, Inc., 569 N.E.2d 661, 667 (Ind. Ct. App. 1991); Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166, 178 (1985).
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demonstration of the fairness and reasonableness of the supplier's action toward the dealer. Whatever legal theory is invoked, the common denominator in these cases is an interest in supplanting the "law of the jungle" with a detailed case-by-case, industry-by-industry inquiry into the fairness of the transaction and the good faith and bargaining power of the parties. In doing so, moreover, courts engage in the balancing of competing supplier and dealer concerns that antitrust courts shun. Furthermore, while some of these cases are dealt with summarily, courts in these areas have constructed few standing hurdles for dealers and express less concern with the number of potential lawsuits and potential damages awards than courts handling vertical antitrust cases.

137. See, e.g., East Bay Running Store, Inc. v. Nike, Inc., 890 F.2d 996, 1000 (7th Cir. 1989) (finding no violation of state franchise act where supplier showed that its new policy regarding telephone and mail orders was a system-wide, nondiscriminatory change applicable to all dealers, was supported by a business reason, did not affect the dealer's marketing of other Nike products, and did not appropriate dealer's goodwill); Moodie v. School Books Fairs, Inc., 889 F.2d 739, 745-46 (7th Cir. 1989) (finding that supplier acted reasonably in requiring that all dealers install computer systems leased by supplier); J.I. Case Co. v. Early's, Inc. 721 F. Supp. 1082, 1085 (E.D. Mo. 1989) (supplier entitled to summary judgment on state franchise act claim where dealer failed to install required computer and supplier showed that requirement was applicable to all dealers and was supported by a good business reason).

138. See In re Burger Chef Franchise Litig., [1987-89 Transfer Binder] Bus. Fran. Guide (CCH) ¶ 9072, at 18,696 (N.D. Ohio 1987) (Although court declines to find fiduciary relationship in franchise situation, "neither is the court willing to characterize it as one appropriately governed by the law of the jungle, which is how the [franchisors] appear to see it." Court opts for standard of good faith and reasonableness.).

139. See Weight Watchers of Quebec Ltd. v. Weight Watchers Int'l, Inc., 398 F. Supp. 1047, 1052-53 (E.D.N.Y. 1975) ("[I]nterpretation of bargained for contract terms in a franchise agreement must take account of the extent to which the franchisor has . . . sought to exercise contractual control over the operation of the franchises."); A.S. Rampell, Inc. v. Hyster Co., 144 N.E.2d 371, 376 (N.Y. 1957) ("In the present case we are not dealing with competition between economic equals, but rather with the destruction of a relationship between the manufacturer and the distributor, which is recognized to be that of dependency of the latter upon the former . . . ."); Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 742 (Pa. 1978) (dealer builds goodwill for both his own business and supplier's business and, in exchange, dealer "can justifiably expect that his time, effort, and other investments" promoting the goodwill of the supplier will not be destroyed by an arbitrary termination).

140. Courts are often able to handle cases summarily when the dealership contract has a specific provision on point. See, e.g., An-Port, Inc. v. MBR Indus., Inc., 772 F. Supp. 1301, 1314 (D.P.R. 1991) (granting summary judgment for supplier where dealer violated oral contract forbidding sales of directly competing goods); United States Surgical Corp. v. Oregon Medical & Surgical Specialties, Inc., 497 F. Supp. 68, 72 (S.D.N.Y. 1980) (granting summary judgment for franchisor where contract expressly permitted nonrenewal without cause).

141. Some standing hurdles do exist in the remedies outside of antitrust. To use a state franchise statute, for instance, a dealer must show she is a "franchisee" with in the meaning of the act. See supra note 89.

142. In the areas outside of antitrust, courts have shown a good deal more flexibility on the question of damages and have often tailored the remedy or damage award to fit the facts of the specific case. See, e.g., Sir Speedy, Inc. v. L & P Graphics, Inc., 957 F.2d 1033, 1040 (2d Cir. 1992) (finding that trial court did not abuse its discretion in denying punitive damages under state unfair trade practices act); Draft-Line Corp. v. Hon Co.,
Jurisprudentially, then, the balance of fairness versus economic concerns that previously took place within antitrust analysis is now taking place across the bounds of different legal theories. Put another way, these new dealer remedies are filling the very gap left in antitrust by the economic efficiency approach.

III. THE FAILURE TO COMPORT WITH REALITY

At the same time state statutory and common law has been expanding to incorporate the fairness concerns eliminated from antitrust, a second major development has occurred. Consumers are increasingly indicating that they do not regard vertical restraints, and particularly vertical pricing restraints, as beneficial to them. In the past, criticism of the economic efficiency approach has come from antitrust scholars. What is


144. See Flynn, supra note 77, at 895 (the state franchise regulations can be seen as a response to the lack of sensible federal regulation in antitrust or elsewhere).

145. See, e.g., Comanor, supra note 53, at 990-92 (arguing that the added services achieved through vertical restraints may not appeal to the majority of consumers); Crespi, supra note 12, at 239-42 (noting that the assumption that people make rational economic choices cannot be verified); Flynn, supra note 1, at 1124-36 (arguing that the economic efficiency advocates rely on economic models and assumptions instead of analyzing facts of actual case); Hawker, supra note 76, at 118-19 (arguing that the real goal of Sherman Act is free interaction of consumers and retailers, not necessarily low prices for consumers); Kaplow, supra note 12, at 520-25 (arguing that the Chicago School's analysis of tie-ins is flawed because it fails to recognize welfare costs of exploitation of existing monopoly power); Pitofsky, supra note 76, at 323 ("[T]hey assume a kind of
new is the emerging and widespread disbelief now being voiced by consumers themselves.

The pervasiveness of the public's disbelief is perhaps best seen in the response of large, well-respected consumer groups to proposed federal legislation to reverse partially the Supreme Court's *Monsanto* decision and to reverse fully its *Sharp* decision. The most recent bill, known as the "Price Fixing Prevention Act," was introduced into Congress in 1991. The act would codify the *per se* rule against minimum vertical price fixing. In addition, in a partial reversal of *Monsanto*, the act would allow a jury to infer a conspiracy from evidence that a manufacturer terminated a dealer in response to demands or complaints from other dealers. Furthermore, the act would make illegal the setting, changing, or maintaining of a minimum resale price, even if no specific

perfect competition encountered only in theory, never in practice."; Shores, *supra* note 12, at 404-06 (stating that vertical restraints can be inefficient where there is brand differentiation); Slawson, *supra* note 12, at 263-73 (assumptions underlying Chicago School's analysis of tie-ins are faulty in assuming that tie-in is anticompetitive only if seller has power in tying market); Weiss, *supra* note 12, at 525-31 (arguing that vertical restraints do not necessarily generate an optimal level of services from the consumer's point of view). See also authorities cited *supra* at notes 7 and 12.

146. See *supra* notes 62-75 and accompanying text.


The 1991 bill was previously introduced in the 101st Congress as H.R. 1236 and S. 865. Similar bills were introduced in the 100th Congress (H.R. 585 and S. 430) and in the 99th Congress (H.R. 5293). The 1987 bill is discussed in Day, *supra* note 37, at 369-73.

148. See H.R. 1470, *supra* note 147; S. 429, *supra* note 147. The bill specifically leaves in place the rule-of-reason standard for nonprice vertical restraints, thereby codifying *Sylvania*. See id. Additionally, the bill only applies to minimum, not maximum, vertical price fixing. See id. Most commentators agree that maximum vertical price fixing is proconsumer because it allows the supplier to keep retail prices down. See Blair & Lang, *supra* note 1; White, *supra* note 1, at 48-53. But see Hawker, *supra* note 76, at 116-17 (maximum vertical price fixing should be barred because it interferes with free interaction of consumers and retailers).

149. See H.R. 1470, *supra* note 147; S. 429, *supra* note 147. The *Monsanto* decision held that, while complaints from dealers were some evidence of a conspiracy, evidence of such complaints and the manufacturer's actions responding to those complaints was not, by itself, sufficient to get to the jury on the conspiracy issue. See *Monsanto*, 465 U.S. at 764. Specifically the bill permits a jury to infer a conspiracy in a vertical case from evidence: (i) that a dealer made a request, demand or threat to a supplier that the supplier take steps to curtail or eliminate price competition, and (ii) because of such request, demand or threat, the supplier terminated or refused to continue to supply goods to a competitor of the dealer, and (iii) the request, demand or threat is the major cause of termination or refusal to continue to supply. See H.R. 1470, *supra* note 147; S. 429, *supra* note 147.
price or price level is agreed upon, thus overruling Sharp.\footnote{150}

Well-established and sophisticated consumer groups such as Consumers Union,\footnote{151} the American Association of Retired Persons,\footnote{152} Consumer Federation of America,\footnote{153} the National Council of Senior Citizens,\footnote{154} and Public Citizen's Congress Watch\footnote{155} have all publicly voiced support for the bill.\footnote{156} In doing so, these consumer groups take issue with the fundamental precepts of the economic efficiency approach. Rather than regarding vertical restraints as benefitting the consumer, they characterize such restraints, particularly vertical pricing restraints, as "anticompetitive"\footnote{157} and simply a way for a supplier and a high-priced retailer "to

\begin{itemize}
\item See id.

\item Consumers Union is a non-profit membership organization that provides information, education and counsel to consumers and publishes Consumer Reports magazine, which has a circulation of 3.5 million. See Retail Competition Enforcement Act: Hearing Before Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 31 n.1 (1987).

\item The American Association of Retired Persons (AARP) is a 32 million member organization. Members consist of persons 50 years or older, working or retired. See Encyclopedia of Associations 1349-50 (28th ed. 1993).

\item Consumer Federation of America consists of 240 member groups, including national, regional, state, and local consumer groups, consumer cooperatives, public utilities, and labor organizations. See id. at 1755.

\item The National Council of Senior Citizens has five million members with over 5,000 local clubs, councils and state affiliates. See id. at 1211; Consumer Protection Against Price Fixing: Hearings on S. 429 Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 62, 65 (1991).


\item See, e.g., 137 Cong. Rec. S5341 (letter from AARP, May 3, 1991) (criticizing the "anticompetitive" behavior involved in vertical price-fixing and the Supreme Court's "anti-consumer" decisions in Monsanto and Sharp); Consumers Union, Why Consumers Need H.R. 1470, The Price Fixing Prevention Act of 1991, 1 (unpublished press release) [hereinafter Consumers Union] (criticizing the Chicago School as an "anti-consumer theory of economics"); Retail Competition Enforcement Act: Hearing Before Senate Comm. on Judiciary, 100th Cong., 1st Sess. 28 (1987) (statement of Mark Silbergeld, Director of Consumers Union) ("It stands to reason that when manufacturer and retailer are agree-
Intrabrand competition, according to these consumer groups, is not economically irrelevant, but rather is essential to free-market competition and low prices for the public. The consumer advocacy groups cite studies showing that vertical pricing restraints cost consumers over $1 billion each year and ing not to sell the consumer a product below a certain price, they are not conspiring in the consumer's best interest. The assertions to the contrary by certain devotees of the . . . Chicago School of Economics are clearly counter-intuitive and . . . not supported by empirical evidence.

158. See, e.g., 137 Cong. Rec. S5341 (daily ed. May 6, 1991) (letter from AARP, May 3, 1991) ("Vertical price-fixing occurs when a high-priced retailer conspires with a supplier to discontinue the supply of goods to a discounter in an effort to drive price competition from the marketplace. . . . The result for consumers is higher prices and less choice."); id. (letter from National Council of Senior Citizens, May 3, 1991) ("Over the past few years, we have seen a growing number of discount stores closing their doors or offering fewer goods because of price-fixing agreements between manufacturing and higher priced, competing retail outlets. . . . The next thing you know, all of us are paying higher prices because the check of competitive forces is gone."); Eleanor Chute, Discount Stores Fighting Pricing Pressures, Pittsburgh Press, Mar. 17, 1991, at B6 (As a result of Supreme Court decisions, "[m]anufacturers and . . . high-priced retailers literally feel free to coerce and threaten discounters and drive them out of the marketplace. The ultimate victim is consumers who are forced to pay a price-fixing premium on a variety of goods.") (quoting Kristen Rand, counsel for Consumers Union)). Daniel J. Schuler, Legislative Director of the National Council of Senior Citizens, echoed the same view in his testimony before Congress:

[A] serious cancer is growing in the marketplace that will affect the pocketbook of every consumer. Full-price retailers, rather than compete with discounters, are now using their economic muscle to pressure many manufacturers to force discounters to raise prices or just out-and-out terminate their business with them. Unfortunately, the U.S. Justice Department, Federal Trade Commission and two recent U.S. Supreme Court cases have encouraged manufacturers and full-price retailers to increase price-fixing activities and force the consumer to pay higher prices.


159. Without intrabrand competition from discounting dealers, "the result is higher prices and fewer choices." Consumers Union, supra note 157, at 5. Other consumer advocates have voiced similar concerns. "American consumers may one day face a situation where the only price on a product is the one set by the manufacturer. This is a development that threatens senior citizens' pocketbooks that are already stretched too thin." 137 Cong. Rec. S5341 (daily ed. May 6, 1991) (letter from National Council of Senior Citizens, May 3, 1991). Vertical price fixing results in "higher prices and less choice" for consumers; the proposed bill "will help to insure vigorous price competition in the marketplace." Id. (letter from AARP, May 3, 1991); "[D]uring [a] recessionary period, [discounters] are not just an option but are a salvation, offering a way to buy goods that many consumers could afford at [the] suggested retail price." Vertical Price Fixing: Hearings Before the Subcomm. on Antitrust and Restraint of Trade Activities Affecting Small Business of House Comm. on Small Business, 98th Cong., 1st Sess. 48 (1983) (statement of Barbara F. Warden, Executive Director, National Consumers' League). Kristen Rand, counsel for Consumers Union, concludes the bill is one of the "most important economic issues of consumers that being considered by Congress." Chute, supra note 158.

160. Consumers Union cites a 1969 Economic Report of the President showing that resale price maintenance costs consumers $1.2 billion per year. Consumers Union, supra note 157, at 4. House Judiciary Committee Chairman Jack Brooks has been quoted as
raise prices by as much as fifty percent.\textsuperscript{161} To these consumer organizations, the true ally of the consumer is not the manufacturer, as the economic efficiency advocates argue, but the discounting dealer.\textsuperscript{162}

Various popular press newspapers and magazines echo the same views. These papers and magazines, which are far more likely to reflect the views of the common consumer than is the Journal of Law and Economics, characterize vertical restraints as a way in which manufacturers and retailers, "hungry for fatter profits," "rig" the marketplace.\textsuperscript{163} Shoppers saying that resale price maintenance costs consumers $20 billion a year. \textit{See} Paul M. Barrett, \textit{Anti-Discount Policies of Manufacturers Are Penalizing Certain Cut-Price Stores}, Wall St. J., Feb. 27, 1991, at B1. AARP says the proposed bill "will save consumers billions of dollars each year by increasing the variety and amount of goods available at discount prices." 137 Cong. Rec. S5341 (daily ed. May 6, 1991) (letter from AARP, May 3, 1991).

161. Consumers Union cites a 1975 Department of Justice study showing prices were 18 to 27\textsuperscript{\%} higher where resale price maintenance was permitted. Consumers Union, \textit{supra} note 157, at 4. Public Citizen's Congress Watch conducted a study that showed a difference of 10 to 45\textsuperscript{\%}. Michael Waldman & Jonathan W. Cuneo, \textit{Business Forum: Doom For Discounters?}, N.Y. Times, May 15, 1988, at 3-2. Another survey, conducted by eleven consumer groups, showed consumers could save as much as 50\textsuperscript{\%} by buying through discounters. Kerry E. Knobelsdorff, \textit{Discounters Say Supplies Have Been Cut Since Supreme Court Ruling}, Christian Sci. Monitor, July 8, 1988, at 11, 16. Before 1975, when states were allowed to permit resale price maintenance under the so-called fair trade laws, resale price maintenance was said to "increase\textsuperscript{\%} prices by as much as 37 percent." 121 Cong. Rec. 38,050 (Dec. 2, 1975) (statement of Sen. Brooke).

162. A spokesperson for Consumers Union, for instance, has written: "Consumers who benefit from the $125 billion discount industry . . . should take note [of resale price maintenance]. . . . Legislation is pending in Congress that would restore some protection afforded to discounters and help turn back the judicial attack on price competition. . . . [I]f President Bush is at all concerned with the welfare of low and middle income consumers, he should sign the legislation." M. Kristen Rand, \textit{Fixing Prices With a Nod and a Wink}, Christian Sci. Monitor, Apr. 24, 1990, at 19.

163. \textit{See} Michael Arndt, \textit{Consumers Pay More as Price-fixing Spreads}, Chi. Trib., Aug. 18, 1991, at C1; \textit{see also A Ruling That Doesn't Do Discounters Justice}, Bus. Wk., May 16, 1988, at 146 ("The probable result [of \textit{Sharp}] is that prices will be higher. . . . If the [proposed] legislation survives a threatened Presidential veto, consumers will have the freedom of choice and price competition that antitrust laws are supposed to ensure."); \textit{Consumer Protection}, J. Commerce, Apr. 12, 1991, at 4A ("When a supplier and one of its high-price retailers conspire to shut out another retailer that sells the supplier's product for less, consumers lose out."); \textit{Curbing Price Fixers}, Boston Globe, Mar. 21, 1991, at 54 (supporting the proposed legislation; "Price competition, after all, is the most prominent feature of modern retailing and every sensible action to preserve it should be taken."); \textit{Keeping the Marketplace Free}, Patriot-News (Harrisburg, PA), Mar. 7, 1991, at A12 (Vertical price-fixing and the \textit{Sharp} decision "could result in a decrease in consumer choice and competitiveness as discounters are driven from the marketplace. . . . The country needs a Justice Department that seeks to maintain the competitive marketplace we have, not one which chooses to ignore price fixing to the detriment of consumers and other retailers."); \textit{Prohibit Retail Price-Fixing}, St. Louis Post Dispatch, Mar. 23, 1990, at 2C ("There seems to be no end to the task of repairing the damage done in the 1980's to the rights of American consumers. . . . Both Missouri senators . . . should side with consumers against price fixing [and support proposed legislation]."); \textit{Retail Class Wars}, Philadelphia Inquirer, Mar. 5, 1991, at 10A ("[Vertical] price-fixing hurts consumers and corrupts the free-enterprise system. . . . Despite high-toned arguments from pricey stores and manufacturers, the fundamental problem is that some businesses don't really like competition.").
lose out through "inflat[ed] prices of everything from candy to computers" and "reduce[d] . . . selection at off-price stores." Vertical pricing restraints, far from benefitting the consumers through increased services, "are imposed to benefit manufacturers and full-priced retailers," particularly, the "tonier stores that have higher mark-ups." The economic efficiency argument in favor of vertical restraints is not a value neutral theory, but rather is part of a politically pro-business bias. In short, it is a theory that is "incredible," "nonsense," "strange," "esoteric," and "tortured." As one publication stated: "[A]nyone who believes that [vertical pricing restraints result in added dealer services] hasn't been shopping lately."

Similarly, state attorneys general—who are typically elected state officials, accountable to consumer voters—are virtually unanimous in

164. Arndt, supra note 163.
165. Id.
166. Michael Arndt, Co-op Ad Deals Avoid Price-fixing Strictures, Chi. Trib., Sept. 1, 1991, at Cl. The cause in the "upsurge" in vertical price-fixing is attributed to "inroads by Japanese and other foreign businesses accustomed to dictating prices at home; desperation among full-priced stores that are steadily losing sales to off-price outlets, yet need higher markups to afford space in fancier shopping malls; marketers' success in turning brand names into status symbols; and just plain greed." Arndt, supra note 163.
167. See Retail Class Wars, Philadelphia Inquirer, Mar. 5, 1991, at 10A.
168. See The Price Is Right, Arizona Daily Star, Mar. 13, 1991, at 10A ("Congress is still trying [through the proposed legislation] to undo the damage done to the rights of the little guy during the big-business Reagan years.")
169. See A Ruling That Doesn't Do Discounters Justice, Bus. Wk., May 16, 1988, at 146 ("Sometimes the U.S. Supreme Court has a blind faith in esoteric legal theories . . . . [In Sharp] the high court acted on one of those notions, and consumers may be big losers."); Prohibit Retail Price-Fixing, St. Louis Post Dispatch, Mar. 23, 1990, at 2C (Sharp is based on "tortured reasoning"); Some Comfort in Setback, L.A. Times, May 4, 1988, at 2-6 ("The majority in [Sharp] arrived at its strange conclusions by adopting the economic analysis promoted by the University of Chicago's antitrust experts and the legal views of the Reagan administration . . . . For discounters now worried about their survival and consumers fearful that the court's decision will boost prices, there is one comfort: Whatever the court has done can be undone by Congress."); The Price Is Right, Arizona Daily Star, Mar. 13, 1991, at 10A ("Incredibly some have even tried to portray the court's ruling [in Sharp] as beneficial to consumers. Higher prices, the argument goes, will guarantee better service. Nonsense. All that consumers face for sure are steeper prices and less choice in shopping.").
170. A Ruling That Doesn't Do Discounters Justice, Bus. Wk., May 16, 1988, at 146. This is not to say that all popular press newspapers support the proposed legislation. A New York Times editorial characterized the proposed legislation as "overkill" and echoed the economic efficiency view that: "If manufacturers were trying to jack up prices, they wouldn't ordinarily use vertical price restraints. All they would need to do is charge all their dealers more. The purpose of vertical price restraints is to encourage better service to consumers." Price Fixing Isn't Always Gouging, N.Y. Times, Apr. 1, 1991, at A16.
171. The vast majority of state attorneys general are elected, and as one stated: "We hear from consumers every day by the droves." Paul Van Dam, Developments in Consumer Protection: The States' View, 60 Antitrust L.J. 133, 134-35 (1991). The actions of the state attorneys general have been praised by consumer groups but criticized by economic efficiency advocates. See Landes & Posner, supra note 78, at 613. Whether the state attorneys general are praised or criticized, however, the point is the same: the lawsuits brought by and stances taken by these state officials typically reflect the opinion of
condemning vertical price restraints and in supporting the proposed federal legislation. They have brought resale price maintenance cases against a number of manufacturers, and, in doing so, have won the average consumer. Those consumer views may, as the economic efficiency advocates contend, be uninformed and wrong, but they are nonetheless the views of the populace.


[The] debate over effective standards for combating vertical price fixing comes down to two simple issues. First, should consumers pay more for goods and services than the stores where they shop wish to charge them? Second, in a free market economy, should retailers be free to charge prices which they believe will best serve their own business interests, without coercion from large manufacturers and large competing retailers who wish to end price competition?

Id. at 15.


A similar suit against Nintendo resulted in a settlement requiring Nintendo pay up to $25 million for consumer rebates, $3 million to the states for antitrust enforcement and $1.75 million to cover the legal costs of the lead states. 61 Antitrust & Trade Reg. Rep. (BNA) No. 1538, at 513-14 (Oct. 24, 1991). The role of the states in the lawsuit was crucial. According to one reporter: "Nintendo . . . showed only scorn when the FTC first suggested a negotiated deal. . . . The electronics firm agreed to pay back consumers only after the state prosecutors, who were conducting a parallel investigation, agreed to join in a settlement." Michael Arndt, States Move to Curt Price-Fixing as U.S. Takes Hands-Off Approach, Chi. Trib., Aug. 19, 1991, at Cl. Forty-nine state attorneys general obtained a $16 million settlement with Panasonic in a 1989 resale price-fixing case. In re Panasonic Consumer Elecs. Prods. Antitrust Litig., No. 89 Civ. 0368 (S.D.N.Y. June 5, 1989).

praise of consumer groups\textsuperscript{175} and the criticism of economic efficiency advocates who accuse them of trying to appease consumer voters.\textsuperscript{176}

Most recently, in something of an about-face, the Supreme Court added its voice to those expressing doubts about whether the economic efficiency theory actually jibes with reality. In \textit{Eastman Kodak Co. v. Image Technical Services, Inc.},\textsuperscript{177} independent service providers charged Kodak with illegally tying service and replacement parts.\textsuperscript{178} In support of its

\textsuperscript{175} See Arndt, supra note 174 ("'Shoppers should be thankful [to the state attorneys general], says Kristen Rand, a Consumers Union attorney. 'The situation would be a lot worse if the state AGs were not out there,' she says. 'Without them, the conduct would be more blatant and more pervasive.'"); Constance L. Hays, \textit{Panasonic to Return S16 Million to Consumers}, N.Y. Times, Jan. 19, 1989, at A1, A27. ('


\textsuperscript{177} See id. at 2076-79. The plaintiffs, who competed with Kodak in the market for servicing Kodak equipment, alleged that Kodak replacement parts were the tying prod-
summary judgment motion, Kodak made the basic economic efficiency arguments: the key to competition was the interbrand market; so long as Kodak lacked market power in the interbrand original equipment market, the vertical tying restraints it placed on the intrabrand markets for Kodak replacement parts and services were irrelevant; and interbrand competition would act as a check on any effort by Kodak to charge monopoly prices in the intrabrand parts and services markets because if Kodak raised its parts and service prices above competitive levels, potential customers would simply stop buying Kodak equipment. 179

The Supreme Court rejected the defendant’s economic efficiency argument 180 and held that the plaintiffs had presented sufficient evidence to survive the summary judgment motion. 181 The Court refused to accept the economically based “legal presumptions” offered by Kodak and noted that economic theory is not an “immutable physical law.” 182 The majority repeatedly responded to Kodak’s economic theory by references to factual evidence in the record, such as the rise in both intrabrand service prices and Kodak’s interbrand equipment prices (suggesting that interbrand competition was not acting as a check on intrabrand price rises or vice versa). 183 Similarly, the Court refused to assume, as the economic efficiency theory does, that consumers are knowledgeable. 184 In sum, the majority characterized Kodak’s argument as “mere conjecture” and questioned “why the Court should accept . . . theory on faith rather than requiring the usual evidence needed to win a summary judgment motion.” 185 In language reminiscent of its early vertical restraint cases, 186 the Court concluded that legality must be decided case by case on the

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179. See id. at 2081-82.

180. The Department of Justice took the same position. See id. at 2084 n.16.


182. 112 S. Ct. at 2084. As Professor Hay notes the Kodak decision cannot be regarded as a total rejection of economic analysis in antitrust; the Court merely declined to rule, after limited discovery, that Kodak was incapable of having market power in the service market. George A. Hay, Is the Glass Half-Empty or Half-Full?: Reflections on the Kodak Case, 62 Antitrust L.J. 177, 183-84 (1993).

183. See Kodak, 112 S. Ct. at 2084.

184. See id. at 2087. The Court noted that “it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of total cost of equipment, service, and parts.” Id.

185. Id. at 2089 n.29. The three dissenting justices, in contrast, wrote a basic Chicago School economic efficiency dissertation on the impossibility of a nonmonopolist affecting the interbrand market through an intrabrand restraint. Like the opinion in Sharp the dissenting opinion was long on economic theory and short on citations to the record. The dissent found “no [economic] sense” in considering further a tying claim when the defendant lacked power in the interbrand market. Id. at 2095-96 (Scalia, J., dissenting). In contrast to the majority decision which looked to record evidence regarding specific cus-
basis of "actual market realities." Specifically, a jury must consider evidence that this market for this product might not function in accordance with the economic efficiency theory.

Thus, in a variety of contexts a second major flaw in the economic efficiency approach to vertical restraints is emerging. In the eyes of many consumers, the approach seems unrelated to the real world. Whether speaking through consumer groups, the popular press, or their state attorneys general, the message is the same. The consuming public sees intrabrand competition and dealer autonomy as vital for consumer protection.

IV. THE RAMIFICATIONS OF THESE DEVELOPMENTS

The developments outlined in Parts II and III of this Article affect not only the current law of vertical restraints but also raise significant questions about the future of the new dealer remedies and antitrust jurisprudence.

With respect to current law, the effect of the new dealer remedies is manifest: the simplification of antitrust vertical restraint law brought about by economic theory is illusory. The difficult tasks of balancing intrabrand and interbrand effects and accommodating fairness issues may be gone from antitrust, but they have resurfaced elsewhere.

A. The Future of Dealer Remedies

Saying dealer remedies currently exist outside of antitrust, however, does not mean they should continue to be tolerated. A number of economic efficiency advocates argue that, provided there is active competition among suppliers in the marketing of dealerships and franchises and
there is truthful disclosure at the time of contracting, the prospective franchisee-dealer is adequately protected. If she does not like the terms being offered by one supplier, she can contract with another. That during the dealer relationship the dealer is subordinate to the supplier has nothing to do with the supplier's power in the interbrand market but is simply the result of a freely negotiated contract that gave the supplier certain rights. Indeed, a supplier's ability to impose vertical restraints or terminate a dealer at will, the argument goes, is beneficial

192. Franchisees, they argue, receive a number of benefits from participating in a franchise program as opposed to opening a stand-alone business. The franchisee gets use of a valuable trademark, often receives managerial advice and financial support from the franchisor while still having her own business, and frequently has a reduced risk of business failure. See Lockerby, supra note 87, at 858; Rubin, supra note 94, at 230. As long as there is a competitive market for franchises, the franchisee will be adequately protected and further legal protection is unnecessary. See Pitegoff, supra note 87, at 311-15; Rubin, supra note 94, at 232. These commentators do not, however, object to statutory requirements for disclosures in connection with the sale of franchises. See supra note 95.

193. See Brickley et al., supra note 90, at 111 (the argument that the individual does not know what is best for him is fallacious where there is full disclosure prior to sale of the franchise). The various common law remedies for dealers are criticized by Lockerby, supra note 87, at 851-57 (uses of unconscionability, fiduciary duty and good faith are objectionable on both doctrinal and practical grounds). See also Gary Myers, The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law, 77 Minn. L. Rev. 1097, 1147 (1993) (tortious interference law is poor vehicle for governing supplier-dealer relationship).

194. Given the multitude of different franchises being offered, no single franchisor has a monopoly on the interbrand franchise market. See Braun, supra note 87, at 224-25 (even assuming franchisor has market power, that is not what induces prospective franchisee to enter into franchise contract; use of standardized contracts is irrelevant to validity and enforcement of contracts); Pitegoff, supra note 87, at 314-15. Pitegoff also argues that the assumption of unequal bargaining power between the franchisor and franchisee is faulty. See id. at 315.

195. The economic efficiency advocates argue that the time to look at the franchisor-franchisee relationship is at the outset when the franchisee chooses a particular franchise from the interbrand market for sale of franchises. See Klein & Saft, supra note 55, at 356.

196. See id. Some commentators contend that after the franchise is purchased, the franchisee is similar in many respects to an employee or agent and ought not be viewed as an independent firm. See Braun, supra note 87, at 158-73, 196 (franchise relationship is sui generis but akin to agency or employment relationship in that individuality of franchisee is submerged); Brickley & Dark, supra note 89, at 402-04 (franchising is a form of incentive-based compensation falling between salaried employee and independent firm); Rubin, supra note 94, at 225 (franchisee is essentially an employee and to treat her as a separate firm is economically improper).

not just to the supplier but also to other dealers, prospective dealers, and consumers. 197 A "good" dealer need not fear such restraints because the rational supplier will not make his dealers unprofitable or terminate a money-making outlet. 198 The economic efficiency proponents conclude that the new dealer remedies should be curtailed to the extent they impose vague standards of fairness or business ethics on suppliers. Such standards merely increase the costs of doing business, costs that will inevitably be passed on to consumers. 199

They toss a 75-page contract at you and say: 'If you want to deal with us, you sign here. We don't negotiate any provisions.'" Victor, supra note 92, at 2185.

197. The promise of a uniform product or service is what attracts many consumers to a franchise establishment, and therefore the franchisor has a strong interest in quality control to maintain the value of his brand or trade name. Brickley & Dark, supra note 89, at 402; Rubin, supra note 94, at 227-28. Moreover, because the value of a franchise depends largely on the consumer's perception that a standardized product or service is being offered, any one franchisee has a financial incentive to "ride" on the reputation being upheld by her fellow franchisees and to cut her own costs (and hence increase her profits) by offering a lower quality product or service to the consumer. Goldberg, supra note 53, at 746; Klein & Saft, supra note 55, at 349-50. The franchisee's incentive to free ride and sell a below-standard product or service is strongest where the level of repeat customers is low. Brickley et al., supra note 90, at 104; see also Brickley & Dark, supra note 89, at 406 (discussing franchisee free-rider problem but noting that franchisor may also free ride in defaulting on obligations to provide training and managerial assistance).

Such free riding hurts the franchisor by diminishing the value of his franchise; it hurts "good" franchisees by lowering future demand for the product; it harms the consumer who receives a lower quality good although paying full price; and if the franchisor cannot terminate the free-riding franchisee easily and speedily, prospective franchisees lose. See Epstein, supra note 196, at 314-15; Klein & Saft, supra note 55, at 349-51; Lockerby, supra note 87, at 866-68; Pitegoff, supra note 87, at 309-10; Rubin, supra note 94, at 227-28. In fact undue restrictions on the franchisor could lead to a lessening in the amount of franchises available as suppliers begin doing their own distribution. See Brickley et al., supra note 90, at 106-08. In addition, payments to terminated franchisees under the state laws result in wealth transfers from the franchisor to a few franchisees. See Brickley et al., supra note 90, at 126-30.

198. Indeed, the franchisor will only hurt his future attempts to sell and renew franchises by arbitrary terminations. See Epstein, supra note 196, at 315; Klein & Saft, supra note 55, at 356; Lockerby, supra note 87, at 846, 859-60 (statutory requirements for good cause and notice of termination are superfluous because any franchisor will take such actions out of self-interest to avoid costs of replacing an experienced franchisee); Pitegoff, supra note 87, at 310 (as practical matter few franchisees are terminated, and franchisor has no incentive to terminate without cause); Smith, supra note 88, at 130 (supplier has no incentive to terminate or fail to renew dealer without cause). Rep. Andy Ireland, an opponent of federal bills to regulate franchisees, dismisses the complaining franchisee as a "whiny butt" who "couldn't hack it because he didn't have the skills." Victor, supra note 92, at 2184.

199. See Epstein, supra note 196, at 314; Jordan, supra note 121, at 840; Pitegoff, supra note 87, at 310. Suppliers will be forced to incur additional costs in documenting the reasons for each action they take. The public will also have to bear the cost of inefficiency due to over-deterrence and the cost of having the courts determine on a case-by-case basis the fairness of each particular action. All of this is unnecessary, they argue, because each supplier, acting in his own self interest, will inevitably act in accord with basic rules of business ethics. Lockerby, supra note 87, at 845-48 (state and federal dealer statutes provide little guidance as to when termination is lawful and therefore require costly case-by-case adjudications which, in turn, cause greater monitoring and documentation costs). One empirical study found that in industries characterized by nonrepeat customers, there
However, the developments outlined in Parts II and III of this paper indicate that any such attempt to limit dealer remedies is doomed to failure.\textsuperscript{200} Regardless of the logic of the economic theory regarding dealer remedies (and some dispute its claims),\textsuperscript{201} the public has shown that it wants the law to protect intrabrand competition and to guarantee dealers a certain degree of fairness and independence. Indeed, there are three ways to account for new dealer remedies. First, society may be indicating a willingness to sacrifice some economic efficiency in order to protect dealers. This is not to say that society does not want the market efficiency and supplier protection offered by current antitrust jurisprudence.\textsuperscript{202} Rather, society may simply value both economic and noneconomic concerns and be willing to protect the latter, even at the cost of higher consumer prices.\textsuperscript{203} Second, the new dealer remedies may reflect the public’s skepticism about basic, but ultimately unverifiable,
tenets of the economic efficiency theory, and in particular, the claim that being pro-manufacturer is also pro-consumer. Society may, in effect, be voicing its belief that dealer fairness and intrabrand competition are as vital to low prices and optimal product selection as the supplier protection now guaranteed by antitrust. Third, and most probable, the new dealer remedies may reflect some combination of these two factors. In any of these cases, the remedies emerging outside of antitrust are responding to concerns that the public wants considered but that current antitrust analysis ignores. To say, as some economic efficiency advocates do, that the public is wrong is no answer. The concerns expressed by the public are valid and legitimate, not because they conform to some economic theory, but because they reflect how society believes its well-being will be maximized.

Some economic efficiency proponents offer a different explanation for the emergence of the various dealer remedies, particularly, the state

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204. A number of commentators have noted that one weakness of the economic efficiency approach is that it is based on unprovable premises. Crespi, supra note 12, at 239-42; Fox, supra note 6, at 1170; Hovenkamp, supra note 7, at 234-37; Rowe, supra note 59, at 1550. For a discussion of whether the law should even assume that a firm seeks to maximize its profits, see Kaplow, supra note 12, at 547-51 (a firm's managers may want to maximize sales and growth rather than profits).

205. While Chicagoans claim that their theory is nonpolitical, some commentators contend that, in fact, it is based on normative judgments and has a very strong pro-business political bias that works to the benefit of the rich. Crespi, supra note 12, at 243-44; Fox, supra note 6, at 1155-56; Hovenkamp, supra note 7, at 232; Peritz, supra note 196, at 305, 311. The recent statements of the consumer groups show that consumers agree with the critics of the Chicago approach. See supra notes 157-162 and accompanying text.

206. See supra note 8. In other words, consumers might agree with the position that dealer protection and intrabrand competition are relevant economic concerns. In doing so consumers are not necessarily rejecting the entire Chicago theory; they may simply be saying that both interbrand and intrabrand competition and both supplier and dealer protection are necessary for true economic efficiency. See Piraino, supra note 8, at 298-99 (intrabrand competition benefits the consumer by lowering prices, encouraging efficient and innovative retailing and, in some cases, spurring interbrand competition). See also supra note 202.

207. See infra note 211 and accompanying text.

208. Ironically, the economic efficiency advocates, on the one hand, argue that the common law developments in antitrust reflect new learning about consumer welfare but, on the other hand, contend that statutory and common law developments outside of antitrust are wrongheaded. See supra notes 21, & 192-193 and accompanying text.

209. Indeed, a principal economic efficiency proponent, Richard Posner, adopts the premise that "the common law seeks to promote efficiency in the sense of wealth maximization." Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 Case W. Res. L. Rev. 179, 185 (1986) [hereinafter Posner, Legal Formalism]. If this is true, then the common law developments outside of antitrust law reflect a view that dealer protection and preservation of intrabrand competition are necessary for society's wealth maximization. Posner also admits that the economic efficiency theory works well only where there is "at least moderate agreement" that economic efficiency is the end to be sought. Richard A. Posner, What Has Pragmatism To Offer?, 63 S. Cal. L. Rev. 1653, 1668 (1990) [hereinafter Posner, What Has Pragmatism]. The emerging dealer remedies, however, indicate that economic efficiency, as defined by the Chicago School, is not the only "end" that society is seeking.
franchise laws.210 They contend that these laws reflect nothing more than strong lobbying by dealer associations coupled with consumer ignorance and irrational sentimentality about small businesses.211 One flaw in this theory, however, is that it does not account for the increasing protections for dealers in the common law, which even economic efficiency proponents concede tends to reflect basic societal values.212 Moreover, to the extent the argument addresses state statutes, it faces the problem there are substantially more consumers, equipped with their own lobbies, than dealers in the electorate.213 Lobbies for dealers might

210. The problem these commentators face is explaining why state legislatures have passed franchisee-protection laws that, according to the economic efficiency theory, harm consumers.

211. See, e.g., Brickley et al., supra note 90, at 115 (the laws were the result of political pressure from former and some existing franchisees and some dealer and franchisee associations); Caffey, supra note 102, at 1343 (the bills "tend to be presented to legislators and perceived in very emotional terms—vulnerable small business versus overpowering big business"); Smith, supra note 88, at 154 (attributing the laws to consumer ignorance, dealer power, and the ability of suppliers to pass the added costs on to consumers). These explanations are consistent with the general theory of legislation espoused by some economic efficiency advocates: that legislation often reflects interest-group lobbying rather than the general public interest. Frank H. Easterbrook, Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 15-16 (1984); William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 877 (1975). For a summary of this theory of legislation, see Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 875-83 (1987).

212. Many jurisprudence scholars have noted that the common law and judicial interpretations of statutes reflect the overall interests of society. See, e.g., Steven J. Burton, An Introduction to Law and Legal Reasoning 220, 223-24 (1985); Edward H. Levi, An Introduction to Legal Reasoning 4 (1949); Roscoe Pound, 3 Jurisprudence 21 (1959); Max Rümelin, Developments in Legal Theory And Teaching During My Lifetime, in The Jurisprudence of Interests 1, 22-24 (1948); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1535-37 (1987). In accounting for the fact that in molding the common law (and in interpreting statutes), judges reflect the general ethical principles and goals of society, Guido Calabresi states:

Judges are, after all, either elected or appointed and ratified by elected officials. Their manner of selection suggests that they can both discern and respond to the popular will. . . . In seeking to apply [a common law] framework to new circumstances, each judge inevitably brings to the task some sense of the majority that selected him or her and some sense of what is right for the country. Guido Calabresi, A Common Law for the Age of Statutes 93, 97 (1982). Even Richard Posner, a key proponent of the economic efficiency approach, recognizes that the common law reflects the current outlook of the populace. See Posner, What Has Pragmatism, supra note 209, at 1667 ("As society changes, judges, within the broad limits set by the legislators and by the makers of the Constitution, must adapt the law to its altered environment."); Posner, Legal Formalism, supra note 209, at 186 (Common law premises "could be, and no doubt would be . . . , altered by the judges in response to changing perceptions of public policy."). See also William M. Landes & Richard A. Posner, Adjudication As A Private Good, 8 J. Legal Stud. 235, 261 (1979) (common law is economically efficient); see also supra note 209.

213. One theory of the economic efficiency school is that consumers are "too numerous to organize an effective 'cartel' in support of or in opposition to existing or proposed legislation." Richard A. Posner, Economic Analysis of Law 497 (3d ed. 1986). The same point is made in Easterbrook, supra note 211, at 15-16. Left unexplained are: (1) the organized and forceful consumer lobbies speaking out against vertical restraints, and (2)
be able to hoodwink consumers in one, two, or even five states. But to say such lobbies duped consumers in seventeen states over a twenty-year period strains credulity. The recent work of sophisticated groups like Consumers Union, AARP, and Public Citizen's Congress Watch in favor of federal bills which strengthen the positions of dealers shows that consumer lobbies have not ignored this issue. To the contrary, these groups have considered and rejected the arguments of the economic efficiency proponents. Furthermore, the suggestion that the public in seventeen states cannot protect itself flies in the face of a fundamental premise of the economic approach: that the free market maximizes social welfare. As Herbert Hovenkamp points out, if the Chicago School truly wants the free market to govern, then the market must also be permitted to rule in the legislative arena.

That society may have inconsistent desires—wanting both interbrand and intrabrand competition and both supplier and dealer protection—is also no reason to curtail the new dealer remedies. Many areas of law involve an accommodation of conflicting societal goals. In antitrust why, when consumer lobbies do speak out, they should be ignored if they disagree with economic efficiency theory. See supra notes 157-162 and accompanying text.

214. Reports of the Iowa franchise legislation fight suggest that franchisors are well equipped to battle any franchisee lobby. In Iowa the franchisors' association and its members spent "well in the six figures . . . and are prepared to do that in every state." Victor, supra note 92, at 2188.

215. See supra notes 89 and 92. Not surprisingly, some scholars argue that the economic theorists have greatly exaggerated the importance of interest groups in the enactment of legislation. See Farber & Frickey, supra note 211, at 886-90 (summarizing recent political science literature and research); Eskridge, supra note 212, at 1515-16 (both history and political science scholarship indicate interest group theory is overstated).

216. See supra notes 151-156 and accompanying text. Furthermore, while Consumers Union might be said to represent a special subset of consumers—those who are self-educated about products and less likely to need dealer-provided services—the same charge cannot be leveled at AARP, Citizen's Congress Watch, the National Council of Senior Citizens or the many other consumer groups who have voiced concern about this issue.

217. See supra notes 157-162 and accompanying text.

218. Hovenkamp, supra note 7, at 249, 255 (voters are entitled to have what they want even if it is irrational and inconsistent; ironically, Chicagoans want a free market everywhere but in the legislature); Hovenkamp, supra note 203, at 17-22 (we cannot assume that the free economic market is rational but the legislative market is irrational).

219. See Hovenkamp, supra note 7, at 249, 255; Peritz, supra note 196, at 311-12 (discussing conflicting consumer goals in antitrust).

220. Indeed, a key purpose of a legal system is to resolve conflicts between competing societal interests. See Philipp Heck, The Jurisprudence of Interests: An Outline, in The Jurisprudence of Interests 29, 35 (M. Magdalena Schoch trans. & ed. 1948); Pound, supra note 212, at 327-28. In many areas of law, the accommodation of competing interests is handled within the same body of law. In civil procedure, for instance, the discovery rules provide a balance between the desire for full disclosure to aid efficiency at trial and the need to protect attorney work product. See Fed. R. Civ. P. 26(b)(3). In abortion, the law attempts to achieve a balance between the rights of the pregnant woman and the state's interest in a viable fetus. See Webster v. Reproductive Health Servs., 492 U.S. 490, 521 (1989); Roe v. Wade, 410 U.S. 113, 162-65 (1973). In criminal procedure, Fourth Amendment law attempts to reconcile society's interest in detection, apprehension, and conviction of guilty persons with the sometimes conflicting goals of fair procedures and
law, the rise of the economic efficiency approach, while satisfying society's desire to protect the supplier and interbrand competition, effectively eliminated competing concerns by adjudging them to be without value. Now the law is accommodating society's continued interest in those concerns by expanding various areas outside of antitrust.

Moreover, the case law in these areas demonstrates the fears of over-deterrence, large damage awards, and lack of manageability are not necessarily applicable to the new dealer remedies. In handling cases under these theories, courts have shown that accommodation of competing dealer and supplier interests is feasible and that remedies can be tailored to fit the case. Standards of "fairness" and "ethical" behavior admittedly lack the mathematical precision cherished by some economic efficiency advocates. However, anyone reading the case law quickly discerns what factors are influential. Indeed, if, as the Chicagoans argue, the typical supplier will treat his dealers fairly out of self-interest, then the lawsuits in these areas should not be a matter of concern to the rational, profit-seeking supplier.
Concerns for fairness and business ethics also become less frightening when one remembers that these concerns are not unique to the various dealer remedies outlined in this Article. Rather, these very same concerns arise, inter alia, in the law of trade secrets,229 restrictive covenants,230 tortious interference with contract,231 and in the Federal Trade Commission Act232 and the "little FTC acts" of various states.233 In none of these areas have courts ignored societal demands for commercial predictions risky. See id. If business deals take place within a system of ethical norms, rules based on such norms should come as no surprise and may be better suited to resolving disputes than economically based rules. See id. Moreover, flexible standards such as "unfairness" discourage a supplier from trying to maneuver around the law; the supplier's economic self-interest may not be sufficient to insure fairness toward dealers. See id.

229. See, e.g., E.I. duPont deNemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917); Metallurgical Indus., Inc. v. Fourtek, Inc., 790 F.2d 1195, 1201 (5th Cir. 1986); Chicago Lock Co. v. Fanberg, 676 F.2d 400, 404 (9th Cir. 1982); E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1015 (5th Cir. 1970), cert. denied, 400 U.S. 1024 (1971).


231. See, e.g., Restatement (Second) of Torts §§ 767-68, 771 (1979); Nathanson v. Medical College of Pa., 926 F.2d 1368, 1388-89 (3d Cir. 1991); Adler, Barish, Daniels, Levin & Creshkov v. Epstein, 393 A.2d 1175, 1183-84 (Pa. 1978), cert. denied, 442 U.S. 907 (1979); Pleas v. City of Seattle, 774 P.2d 1158, 1163 (Wash. 1989) (en banc). For a history and detailed analysis of this tort, see Harvey S. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61 (1982). The standards for tortious interference law and antitrust are compared in Myers, supra note 193, at 1137-40.

232. See, e.g., FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245 (1972) (FTC is authorized to protect consumers as well as competitors); Orkin Exterminating Co., Inc. v. FTC, 849 F.2d 1354, 1363-64 (11th Cir. 1988) (setting forth "unfairness" standard promulgated by FTC) cert. denied, 488 U.S. 1041 (1989); Spiegel, Inc. v. FTC, 540 F.2d 287, 293 (7th Cir. 1978) (holding that the FTC is authorized to prohibit conduct that, although legally proper, is unfair to consumers).

ethics simply because fairness is an imprecise concept.\textsuperscript{234}

Furthermore, even if state legislatures and courts could curtail the new dealer remedies, there is a fundamental reason why they ought not embark on such a course. These remedies provide a safety valve for society's skepticism regarding the economic efficiency approach. Until someone can prove that the economic efficiency theory in fact comports with reality,\textsuperscript{235} there is the chance that in some (perhaps many) markets, public perception is correct and suppliers are not protecting consumer interests in imposing vertical restraints on dealers. Obviously, as long as there is a possibility that real markets do not function in the way economists theorize, prudence dictates retaining an avenue of dealer and intrabranded protection as a way of protecting consumers.

B. The Future of Antitrust

Assuming that the statutory and judicial dealer remedies cannot and should not be curtailed, the next inquiry is: What do these developments imply for future antitrust jurisprudence? While a detailed plan for the future of vertical restraints in antitrust law is beyond the scope of this Article, some broad outlines are possible.

The growing public disbelief of the economic efficiency theory is a clear sign that courts need to rethink their almost-total reliance on this theory and its models in antitrust jurisprudence. To the extent society views antitrust law as out of touch with the real world, the public's confidence in and respect for the law will be lost.\textsuperscript{236} In particular, given the outcry over vertical pricing restraints, the courts ought not remove the \textit{per se} bar to resale price maintenance. Instead, the judiciary should relax the substantive and standing rules with respect to vertical price fixing.\textsuperscript{237} With regard to tie-ins and vertical nonprice restraints, courts should continue with the approach taken in \textit{Eastman Kodak} and demand, on a case-by-case basis, a showing that theory matches reality.\textsuperscript{238}

Congress, for its part, should go forward with legislation to remove the limits placed on the \textit{per se} rule for vertical pricing restraints by \textit{Monsanto} and \textit{Sharp}.\textsuperscript{239} Consumers have indicated, in no uncertain terms, that they want such legislation.

\textsuperscript{234} Louis Schwartz points out that concerns with "justice" and other noneconomic values are also found in the antitrust laws that the United States insisted be adopted by Germany and Japan following World War II and in the Robinson-Patman Act. See Schwartz, \textit{supra} note 7, at 1077-78.

\textsuperscript{235} See \textit{supra} note 204.

\textsuperscript{236} As Robert Pitofsky points out, the law needs the consensus of society more than the consensus of economists. See Pitofsky, \textit{supra} note 6, at 1052 n.3.

\textsuperscript{237} At least one lower court has used the doctrine in the vertical area to deny damages to a discounting dealer whose damage claim assumed continued adherence to resale price maintenance by other dealers. See Local Beauty Supply, Inc. v. Lamaur Inc., 787 F.2d 1197, 1202-03 (7th Cir. 1986).

\textsuperscript{238} See \textit{supra} notes 177-88 and accompanying text.

\textsuperscript{239} See \textit{supra} notes 147-50 and accompanying text.
This approach, however, only answers the public's concerns about the unreality of economic theory; there remains the complete disregard for intrabrand competition and dealer protection in current antitrust analysis. In the past, some scholars argued for the inclusion of such concerns on the basis of the legislative history of the antitrust laws. Until now, economic efficiency advocates discounted these historical arguments on the theory that economic learning evolves and courts ought not be shackled with outmoded, erroneous views. The developments outlined in this Article, however, demonstrate that society continues to value fairness and intrabrand competition and that these concerns cannot be dismissed as dusty artifacts of history. To retain the public's support, the law cannot totally exclude these issues as antitrust analysis currently does.

The emerging dealer remedies indicate that the real question is not whether to take these concerns into account but where. At present these concerns are being handled by a patchwork of state (and a few federal) remedies. Bringing these issues back into the antitrust fold would certainly make messy what is an increasingly tidy area of law. On the other hand, it would have the advantage of providing more uniform, predictable treatment for dealers and suppliers. Furthermore, the tidiness in current antitrust jurisprudence is largely offset by the detailed, case-by-case adjudications occurring in areas outside of antitrust.

240. For example, in Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2092 (1992), the Supreme Court affirmed the Ninth Circuit's denial of defendant's summary judgment motion. The Court stated that a question of fact existed as to whether defendant's conduct lessened competition in the tied service market. See id. at 2084-89. There was no suggestion that the trier of fact should consider trader freedom issues in resolving the case.

241. See Fox, supra note 6, at 1147-50; Hovenkamp, The Sherman Act, supra note 8, at 1021-30; Lande, supra note 7, at 86-106; James May, The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History, 59 Antitrust L.J. 93, 95-105 (1990); Pitofsky, supra note 6, at 1060-65; Rowe, supra note 59, at 1513-24.


243. See supra notes 60-75 and accompanying text.

244. See supra part II.

245. See supra notes 88 and 106.

246. One commentator argues that because of the special nature of the franchise relationship, the antitrust laws are ill-suited to resolving franchise disputes. See Braun, supra note 87, at 202-16. Similarly, Phillip Areeda suggests that absent a showing of anticompetitive effect (by which he seems to mean effect in the horizontal interbrand market), coercion and dealer fairness issues are better handled through the state franchise statutes and common law remedies rather than the antitrust laws. See 8 Areeda, supra note 45, at 1609, at 139-42.

247. See Flynn, supra note 77, at 895 (suggesting the need for a federal, uniform approach to franchise issues rather than patchwork of state remedies); Gellhorn, supra note 120, at 472 (the law needs a rational, uniform approach to dealer terminations rather than an ad hoc approach).
Given this, antitrust jurisprudence should opt for completeness over tidiness. This does not mean a return to the cases in which coercion of a dealer was almost equated with violation of the antitrust laws. Instead, it means, for any vertical restraints that are not \textit{per se} illegal, a return to a fuller rule-of-reason analysis that includes consideration of intrabrand competition and fairness issues—fairness to both the dealer and the supplier. These issues can be considered as part of the overall reasonableness of the restraint, as a tie-breaker where the interbrand effects of the restraint are unclear, or as a means of shifting the burden to the supplier to justify the restraint by showing it will actually lead to lower prices or a better product mix. Exactly how these factors are considered is not as important as that they be considered. Until they are, antitrust jurisprudence will continue to be incomplete and unconnected with the real world in the eyes of the public.

CONCLUSION

The economic efficiency theory of vertical restraints has many advantages: it is logical, consistent, and simple. By using this theory, courts have a ready justification for not getting involved in complicated distribution arrangements: if a vertical arrangement were inefficient, the market would produce a change. Furthermore, a judge is assured that in

\begin{itemize}
\item 248. Phillip Areeda notes that in the years following Colgate, many lower courts came to view coercion "as 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." Areeda, \textit{supra} note 45, \textsuperscript{n} 1451a, at 120. Having found an agreement based on coercion, the court had only to find some specification of a resale price to conclude there was \textit{per se} illegal price fixing. \textit{See}, e.g., Yentsch v. Texaco, Inc., 630 F.2d 46, 51-55 (2d Cir. 1980) (holding that jury could reasonably find an illegal combination to fix prices where an oil company threatened to terminate service station dealers to enforce pricing policy); Green v. General Foods Corp., 517 F.2d 635, 648-56 (5th Cir. 1975) (prohibiting RPM where independent firms, otherwise in competition, sell a product with wide spread consumer demand), \textit{cert. denied}, 424 U.S. 942 (1976).
\item 249. As indicated earlier, I advocate keeping the \textit{per se} illegal bar to vertical price fixing and removing the limits placed on that bar by \textit{Monsanto} and \textit{Sharp}.
\item 250. Some Chicagoleans question whether a judge or jury is capable of performing a rule of reason analysis, Easterbrook, \textit{supra} note 52, at 11 ("it is fantastic to suppose that judges and juries could make such an evaluation"); a formula that makes everything relative makes nothing dispositive, so it is impossible to know what factor might outweigh another); Gerhart, \textit{supra} note 74, at 438-39 ("the rule-of-reason standard generally applied gives the jury wide discretion to arrive at its own assessment of competitive effects"); Posner, \textit{supra} note 1, at 15 ("vagueness" of rule of reason standard is problem with juries consisting of laymen). However the case law under the various dealer remedies shows that judges and juries are indeed capable of balancing competing concerns.
\item 251. This is the position advocated by Eleanor Fox, \textit{supra} note 6, at 1182-83 and John Flynn, \textit{supra} note 1, at 1146-47.
\item 252. Pitofsky, \textit{supra} note 6, at 1074-75, suggests the tie-breaker approach.
\item 253. Schwartz, \textit{supra} note 7, at 1076, recommends using noneconomic concerns to shift the burden to the supplier to justify the restraint. \textit{See} Flynn, \textit{supra} note 1, at 1144-46, suggests treating some vertical restraints as presumptively illegal and placing the burden on the supplier to rebut the presumption.
\end{itemize}
protecting suppliers, she is not being pro-business; she is being pro-consumer.

In the past there has been a lively theoretical debate among antitrust scholars about the validity of the economic approach. The time has now come to move away from theory and consider the real world and societal needs. The recent developments outlined in this Article indicate that, regardless of whether it is theoretically correct, the economic efficiency approach suffers from two serious, and ultimately fatal, flaws: it is incomplete in the sense of failing to respond to key societal concerns, and consumers view it as out of sync with reality.

The state franchise acts and evolving common law doctrines show that society continues to value dealer fairness and wants it protected by law. Like much in life, law is at heart a sponge. Although the economic efficiency theory banished fairness issues from antitrust, because these same issues do have public support, they have popped out and received attention elsewhere. Moreover, the new statutory and common law developments are as valid and reflective of societal goals as antitrust jurisprudence. Here, as in so many places, society simply has conflicting and competing needs.

Furthermore, the recent public outcry over vertical restraints provides vivid evidence of a deep-seated and widespread disbelief about fundamental precepts of the economic model. The people who are questioning the reality of the economic efficiency approach are not just a few crackpots. They are sophisticated consumer-protection organizations and writers for well-established popular press newspapers. They may, of course, be wrong. But so too the economic theorists may be wrong—not necessarily about the theory but about its application to the real world.

In light of these dual developments, reliance on economic models in antitrust vertical restraint law needs to be tempered. Specifically, the per se rule for vertical pricing restraints should be retained. Additionally, Congress should go forward with legislation to remove the limits placed on the per se rule by Monsanto and Sharp. Tie-ins and nonprice vertical restraints should be subjected to a fuller rule-of-reason analysis that includes consideration of intrabrand competition and dealer fairness. In short, the time has come to move away from theory and into the real world and consider what goals society wants protected and how consumers regard their self interest as best served. No matter how logical or simplifying the economic theory is, the law cannot retain public confidence if it ignores society's concerns and perception of marketplace realities.