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Vertical Restraints:
Federal and State Enforcement of Vertical Issues

Written Materials
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I. INTRODUCTION

This is the first time since I have been a member of the program faculty where there has been no state or federal enforcement of vertical restraints upon which to report. Events in the Supreme Court, however, do provide a topic for exploring the differing views of state and federal enforcers regarding vertical restraints. On December 7, 2006, the Supreme Court agreed to review the 96 year old rule in the *Dr. Miles Medical* case that minimum resale price maintenance is *per se* unlawful under the antitrust laws.[2] Discussion of the status or disposition of the *Leegin* case[3] will likely play a large role in this year's conference.

If history is a fair judge, state and federal enforcers will split over how the Court should resolve the matter. The states will likely argue that the *per se* rule should be retained. At least one, if not both, of the federal agencies will likely advocate for the rule of reason. Unfortunately, the Court will have to resolve the issue without firm guidance from empirical economics regarding the actual effects of vertical restraints.

I first became aware of the scope of the problem with the economics of vertical restraints when I participated in an American Antitrust Institute program dedicated to the works of Robert Steiner.[4] The Steiner symposium strengthened my view that there is still far too much we do *not* know about the real-world effects of vertical restraints. The program also heightened my understanding that the federal-level reluctance to engage in aggressive vertical enforcement may be attributed to an absence of actual knowledge

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[2] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[3] Leegin Creative Leather Products, Inc. v. PSKS, Inc., dba Kay's Kloset. . . Kay's Shoes, Dkt. No. 06-480 (Sup. Ct. Oct. 5, 2006), *cert. granted* Dec. 7, 2006.

[4] AAI Symposium, *Combining Horizontal and Vertical Analysis in Antitrust: Implications of the Work of Robert L. Steiner* (June 21, 2004), *described at* http://www.antitrustinstitute.org/recent2/305.cfm.

about the harms that might be caused by vertical restraints, rather than to any actual knowledge about putative benefits of vertical restraints.

II. <u>WHY VERTICAL ENFORCEMENT MATTERS</u>

Before I go any further, let me be as explicit as possible about the underlying premise of my comments: vertical enforcement is important, especially to consumers. Most consumer goods are purchased from someone other than the manufacturer. Each item purchased by a consumer may have passed through the hands of several middlemen in the chain of distribution. At each step in the distribution chain, the imposition of vertical restraints may constrain or condition the nature and effectiveness of the competition that occurs. Each time competitive opportunities are lost in the distribution system, consumers may be asked to pay more for the goods and services they purchase – without receiving any perceived, or desired, added benefit.[5]

The potential for lost competitive opportunities is one of the enduring features of vertical restraints that make them perennial topics of interest to antitrust lawyers in general, and to myself in particular. As a Commissioner of the Federal Trade Commission ("FTC or "Commission"), I have sought to promote the continuing relevance of vertical enforcement, at both the federal and state levels. I intend to champion vertical enforcement throughout the remainder of my term.

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[5] It is interesting to note that Congress repealed our "fair trade laws" based, in part, on findings that legally-sanctioned resale price maintenance resulted in an 18-20% increase in the prices of fair traded goods and that business failures in fair trade states were 55% higher than in non-fair trade states. SENATE COMM. ON THE JUDICIARY, ACT TO REPEAL ENABLING LEGISLATION FOR FAIR TRADE LAWS, S. REP. NO. 94-466, 94th Cong., 1st Sess. (1975) at 3 (repealing the Miller-Tydings Resale Price Maintenance Act, Act of Aug. 17, 1937, Pub. L. 314, ch. 690, Title III, 50 Stat. 693, 15 U.S.C. § 1, and the McGuire-Keogh Fair Trade Enabling Act, Act of July 14, 1952, Pub. L. 543, ch. 745, 66 Stat. 631, 15 U.S.C. § 45). It is difficult to believe that all of these adverse consequences can be attributed solely to the compulsory nature of that form of resale price maintenance in so-called "non-signor" states.

Vertical enforcement is necessary because distribution of goods is not always rational. It is not always peaceful. The rights and interests of manufacturers, wholesalers, brokers, retailers and consumers do not always coincide. Goods do not always pass through the channels of distribution subject only to terms and conditions that are universally advantageous to all channel participants. Rather, each successive channel participant seeks to maximize its individual self-interest, creating myriad opportunities for the imposition of vertical restraints that may be harmful to consumers. Courts, legislatures and law enforcement officials should invest time and public resources to assure the effective, pro-consumer operation of our distribution channels.

Vertical distribution issues matter because they fundamentally affect the day-to-day activities of consumers. Under the antitrust laws, consumers are entitled to the mix of goods, services, products, prices and purchasing options that would be delivered by a competitive market, unconstrained by any unlawful exercise of market power.[6] Consumers engaged in the procurement of their daily needs have every right to expect that the promise of competitive markets is being met. It is not surprising that consumers often are skeptical of purveyors of goods who claim to have consumers' best interests in mind.[7] Consumers understand that they benefit from competition among manufacturers. Consumers also understand that they benefit from competition among retailers.[8] Consumers want – and are entitled to

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[6] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 76 ("... Congress decided that consumers were entitled to the benefits of a competitive economic system.").

[7] Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 GEO. MASON L. REV. 37, 108 (2002) ("An overarching principle of the American System of government is distrust of power in both the public and private sector.").

[8] Kenneth G. Elzinga, *Controversy: Are Antitrust Laws Immoral? A Response to Jeffrey Tucker*, 1 J. MARKETS & MORALITY 83, 86 (1998) ("To John Q. Public and Mary Q. Public, free enterprise connotes not only freedom of contract among sellers but the freedom to shop among alternative sources of supply ... To tell John Q. Public and Mary Q. Public, whose

receive – the pricing alternatives that retail competition can deliver, rather than just the manufacturer's "suggested retail price."[9] Consumers deserve the results of competitive markets; they should not be left to the mercies of a manufacturer's prescience[10] or the misplaced incentives of retailers.[11] Simply stated, consumers want to buy the most desirable products at the lowest prices.[12]

The competitive health and well-being of our domestic channels of distribution is of singular importance to Americans as workers as well as consumers. The proportion of workers engaged in the wholesale and retail segments of this country's economy, in relation to manufacturing, has been steadily increasing for many years.[13] In November 2006 there were over 21

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freedom to shop among alternative sources of supply has been curtailed by mergers, . . . 'that no monopoly is permanent' may be true, but not fully responsive to their concerns."), *available at* http://www.acton.org/publicat/m_and_m/1998_mar/elzinga.html.

9 Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L. J. 713, 719 (1997). Of course, sometimes the manufacturer's preferred price is the competitive price.

10 *See, e.g.*, Sharon Oster, *The FTC vs. Levi Strauss: An Analysis of the Economic Issues, in* IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINT CASES 48 (Ronald N. Lafferty et al. eds., 1984) (finding that imperfect information on the part of a clothing manufacturer led it to continue using resale price maintenance longer than was optimal).

11 *See* Warren S. Grimes, *Spiff, Polish and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 834-36 (1992) (resale price maintenance can provide larger dealer margins, which in turn, create an incentive for a merchant to "push" consumers towards particular brands of product, even when those brands might be inferior to competing brands within the same price range).

12 *See* Toys "R" Us, Inc. v. Fed. Trade Com'n, 221 F.3d 928 (7th Cir. 2000) (dominant retailer used its purchasing power to coerce toy manufacturers into agreements limiting availability of particularly desirable toys to low-priced warehouse clubs).

13 *See* Walter Oi, *The Indirect Effect of Technology on Retail Trade*, *in* THE IMPACT OF TECHNOLOGICAL CHANGE ON EMPLOYMENT AND ECONOMIC GROWTH (R. M. Cyert & D. C. Mowery eds., 1988).

million people employed in domestic retail or wholesale trades[14] – and Wal-Mart, with over 1.8 million employees and 2006 annual sales in excess of $312 billion, is the world's largest corporation.[15]

For these reasons, I believe consumers will be better off when the antitrust laws are effectively enforced against vertical restraints of trade that might artificially foreclose legitimate consumer options.[16]

III. VARIABILITY OF FOCUS AND OUTCOME

Product distribution is a continually evolving area of antitrust policy and legal doctrine. Tensions frequently arise because channel participants, with their inherently different views of the market, have differing expectations of what types of competition best serve their economic self-interests. Federal and state enforcers, courts and legislatures must take these differing perspectives into account whenever they deal with distribution issues and participants. At various times, any of these policymakers may make decisions that favor certain channel participants and not others. For example, legislatures have been known to attempt to tip the scales in favor of

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14 Bureau of Labor Statistics, ESTABLISHMENT DATA for November 2006, *available at* ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb3.txt.

15 Wal-Mart Stores, Inc., 2006 Annual Report, *available at* http://media.corporate-ir.net/media_files/irol/11/112761/2006_annual_report.pdf

16 *E.g.*, Grimes, *supra* note 11, at 853 ("Vertical restraints are frequently harmful to competition."). *But see* Elzinga, *supra* note 8, at 86 ("Most of the history of antitrust against vertical arrangements . . . has had no connection to promoting competition. Thus, consumers have seen little benefit from this kind of antitrust effort and often have been harmed.").

one or another set of market players.[17] The courts, in turn, have been equally inconsistent in their approach to vertical issues.[18]

A. Manufacturers, Retailers, and Consumers

Manufacturers typically wish to focus the distribution network on the competing products of other manufacturers; in the process, they seek to eliminate, insofar as permitted, competition between their own distributors with respect to the sale of their own products. In other words, manufacturers frequently wish to enhance competition between brands (interbrand competition) and limit competition between distributors of their branded products (intrabrand competition). Often, this can best be accomplished through the establishment and enforcement of price and non-price restraints on product distribution.

Retailers and consumers, on the other hand, typically are concerned with both interbrand and intrabrand competition. Indeed, once a consumer has made the decision to buy a particular brand, intrabrand competition is the only kind that really matters. A retailer may decide to respond to manufacturers' interbrand focus in different ways, including actions that a retailer can take alone, actions it can take in conjunction with other retailers,

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[17] *See, e.g.*, Robinson-Patman Act, Act of June 19, 1936, Ch. 592, 49 Stat. 1526, 15 U.S.C. §§ 13, 13a, 13b, 21a (prohibits discrimination in price); Petroleum Marketing Practices Act, Act of June 19, 1978, Pub. L. 95-297, 92 Stat. 322, 15 U.S.C. § 2801, (governs the creation, renewal and termination of franchises to sell motor fuels); Miller-Tydings Act and McGuire Fair Trade Act, *see supra* note 5 (exempted from federal antitrust law prohibitions certain state fair trade laws allowing resale price maintenance); New Jersey Unfair Cigarette Sales Act, NJ Stat. Ann. 56:7-18, *et seq.* (prohibits sales below costs, rebates or concessions in price in the sale of cigarettes in New Jersey); NJ Stat. Ann. 56:10-27 (prohibits automobile manufacturers from making direct sales of automobiles to New Jersey consumers).

[18] *Compare* White Motor Co. v. United States, 372 U.S. 253 (1963) (non-price vertical restraints subject to rule of reason) *with* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (non-price vertical restraints *per se* illegal) *and with* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (non-price vertical restraints subject to rule of reason).

or actions that it may wish the manufacturer (or other distribution intermediary) to undertake for its benefit.

Consumers, for their part, generally want to maximize goods and services obtained, spend the fewest possible dollars, and buy from the most conveniently situated sources. Modern technology and high-speed communications and transportation systems have materially altered consumers' purchasing calculus. Fixed-location distribution outlets simply are no longer necessary for the distribution of many consumer products, as evidenced by the explosive growth of electronic commerce. In response, however, manufacturers and their bricks-and-mortar distributors may find certain vertical restraints even more attractive – for example, to counter the potential impact of widespread comparison shopping via the Internet.

B. Federal vs. State: A Vision of Complementary Roles

Federal enforcers appear to be comparatively less enthusiastic about challenging vertical restraints of trade than are state enforcers. Part of this difference lies in the different remedies available to each. Consumers are, in my view, better off when both state and federal enforcers act to eliminate unwarranted vertical restraints of trade.

The appended cases show that the states have tended in recent years to pursue cases involving the possibility of significant monetary recoveries for individual and governmental consumers. This is no accident. An important provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 gave state attorneys general authority to sue as *parens patriae* to recover treble damages suffered by natural persons injured in their property by a violation of the federal antitrust laws.[19]

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[19] Act of Sept. 30, 1976, Pub. L. 94-435, Title III, § 301, 90 Stat. 1394, 15 U.S.C. § 15c.

As early as the 1970s, state attorneys general had been asserting consumer claims in antitrust litigation.[20] Many state attorneys general had gained significant experience in federal treble damage litigation by pursuing proprietary damage claims in various multidistrict litigations.[21] It was not, however, until the *parens patriae* provision was enacted that this type of litigation became a truly viable option for most state enforcers. The provision supplemented the state attorneys' general existing authority to sue for treble damages suffered by states and their political subdivisions, sometimes without resort to class action litigation.[22] By enabling the states to recover significant monetary relief for consumers, the *parens patriae* provision encouraged states to pursue antitrust violations.[23]

The resulting increase in state enforcement activity has included a number of civil treble damage litigations involving vertical restraints, brought on behalf of both individual and governmental consumers. Building on their existing foundation of consumer and treble damage experiences, the states have developed and honed their skills in damages litigation. It is, therefore, not surprising to find that states are more aggressive in pursuing vertical restraint cases than are their federal counterparts. And while all differences between federal and state vertical enforcement cannot be explained by the availability of remedies, the states' ability to use *parens*

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20 *See* California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir. 1973).

21 *See, e.g.*, New Jersey v. Chas. Pfizer & Co., Inc., 1973-1 Trade Cas. (CCH) ¶ 74,343 (S.D.N.Y. 1973).

22 *See* Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976); In re Chicken Antitrust Lit., CA No. C74-2454A (N.D. Ga. 1974) (Massachusetts) and C75-362A (N.D. Ga. 1977) (New Jersey); Nash Co. Bd. Of Education v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981) (North Carolina).

23 The virtually simultaneous approval of $30 million ($10 million per year for three years) in Law Enforcement Assistance Administration grants for state antitrust enforcement provided an additional incentive for states to take a more active role in the enforcement of the antitrust laws. Pub. L. 94-503, § 116, 90 Stat. 2415 (1976); *see also* NAT'L ASS'N OF ATTORNEYS GENERAL, ANTITRUST REPORT (Oct. 1976), at 6.

patriae authority to extract monetary relief arguably makes it comparatively more efficient to allocate greater antitrust enforcement to the states.[24]

In contrast, federal authorities have tended to focus their vertical efforts on cases where injunctive relief was needed or where the law might be clarified, as opposed to cases seeking monetary remedies. Therefore, while they may have less experience than the states when it comes to damage litigation, federal enforcers have greater experience in the areas of economic analysis, injunctive remedies, and litigation of the fact of an antitrust violation, both civilly and criminally.

Any perceived gap in comparative resources and expertise between state and federal enforcement officials has been narrowed substantially over the last two decades. Even so, many complainants take their claims to state attorneys general first, in large part because the states continue to maintain a high profile in the area of vertical restraints, and also because large monetary recoveries may be more understandable and impressive to the public (and get better press coverage) when compared to injunctions.

Our economy depends in large part on smoothly operating channels of distribution. Disputes occur within the operation of those channels with considerable frequency. I am more than confident that there is, and will be, more than enough available work in the vertical restraints area to provide both federal and state enforcers with a steady supply of potential vertical restraint cases for the foreseeable future.

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[24] *See* Stephen Calkins, *Perspective on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 679-684 (2003) (finding that states possess three comparative advantages in antitrust enforcement: familiarity with local markets; familiarity with and representation of state and local institutions; and ability to compensate parties injured by antitrust violations).

IV. ASSUMPTIONS, PRESUMPTIONS, AND DOING NO HARM[25]

As an enforcement official, I find it interesting that economists traditionally have neglected retailing and the effects of the "competition" between retailers and manufacturers.[26] Steiner's fundamental insights – which argue that such neglect can result in mistaken applications of the antitrust laws in consumer goods markets[27] – resonate with my intuitions about markets, as well as with my past experience as a state enforcement official.

Steiner's insights also resonate affirmatively with practitioners looking to actual market realities, rather than mere formalistic differences.[28] The lack of any substantial body of economic literature and scholarship on distribution issues is both troubling and curious. At a time when economic input and insights are becoming increasingly important to the contours of the law and

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[25] "As to diseases, make a habit of two things – to help, or at least, to *do no harm*." Hippocrates, EPIDEMICS, Bk. I, Sect. XI (circa 400 BCE) (emphasis supplied), *see* http://www.quotationspage.com/quotes/Hippocrates/.

[26] For evidence of this neglect see Michael P. Lynch, Why Economists Are Wrong to Neglect Retailing and How Steiner's Theory Provides an Explanation of Important Regularities 2-11 (June 14, 2004) (unpublished manuscript on file with author). *See also* William S. Comanor, Steiner's Two-Stage Vision: Implications for Antitrust Analysis 4 (June 15, 2004) (unpublished manuscript on file with author) (describing how, despite some giving early attention to vertical relationships, "economists and policy-makers had come to ignore these insights . . . . [and] the competitive significance of vertical relationships was downplayed.").

[27] *See, e.g.*, Robert L. Steiner, *The Third Relevant Market, 45 ANTITRUST BULL.* 719 (2000) (arguing that the Horizontal Merger Guidelines frequently neglect the role of the downstream distribution and resale market in consumer goods industries) [hereinafter *Third Relevant Market*]; Robert L. Steiner, *Intrabrand Competition – Stepchild of Antitrust*, 36 ANTITRUST BULL. 155 (1991) (asserting that, contrary to the Chicago School's view, intrabrand competition is important and that its presence often benefits consumers) [hereinafter *Intrabrand Competition*]; Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143 (1985) (suggesting that vertical restraints voluntarily adopted by consumer good makers with market power have a significant anticompetitive potential, in contrast with the prevailing Chicago School view of vertical restraints) [hereinafter *Vertical Restraints*].

[28] *See* Eastman Kodak Co. v. Image Tech. Svcs., 504 U.S. 451, 466-67 (1992).

the decisional processes of antitrust enforcement officials, this inattention to detail seems somewhat counterintuitive.

My purpose is not to advocate a position on, or offer a prediction regarding, where the economic debate on these issues might lead us. My purpose is simply to emphasize the extent to which enforcement decisions may be made in fear of what enforcers *do not* know instead of based on what enforcers *do* know.

Steiner's work highlights potential shortcomings in the current state of economic learning, most notably the failure to address the implications of distribution channel interaction for vertical restraints analysis. Steiner's writings provide unique insight on the benefits and harms vertical restraints may deliver in certain industries. They pose challenging questions that need to be answered. My fear is that, if economists fail to rise to this challenge and leave these questions unanswered, the profession may find itself in the position of advocating an antitrust enforcement policy that, by default, provides no role for the procompetitive elimination of vertical restraints.

A central tenet of Steiner's work is his argument that economic modeling of consumer goods markets frequently neglects basic features of distribution. This omission, in turn, leads to erroneous conclusions.[29]

Most economic models of consumer goods markets eliminate retail activity, in accordance with the simplifying assumption that retail markets are perfectly competitive. Under that assumption, distribution can be characterized as an undifferentiated pass-through for manufacturing costs, competitive conditions, and similar characteristics. One might assume, for example, that a change in manufacturing cost would be fully reflected in the

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[29] *See, e.g.*, Robert L. Steiner, *Marketing Productivity in Consumer Good Industries – A Vertical Perspective*, 42 J. MARKET. 60, 61-62 (1978) (describing early formulation of Steiner's "single stage error").

retail price paid by end-users of a consumer good. This view reflects what Steiner would label as the "single-stage" model.[30]

But Steiner observes that, in reality, distributors and retailers face imperfect competition from their counterparts, and therefore often are able to exercise a degree of market power.[31] He also asserts that manufacturers and retailers engage in "vertical competition," by competing to perform functions such as product certification or the provision of product information.[32] Steiner posits that firms at successive stages of an industry should be defined as vertical competitors when they can take sales, margins or market shares from each other.[33] Steiner therefore seeks to replace the prevailing single-stage model with a "dual-stage" model that accounts for competitive vertical relationships between manufacturers and retailers in consumer goods markets.[34]

Unlike advocates for the Chicago School,[35] Steiner believes that certain vertical restraints, particularly non-price distribution restraints, frequently

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[30] *E.g., id.* For a more recent formulation see Robert L. Steiner, *A Dual-Stage View of the Consumer Goods Economy*, 35 J. ECON. ISS. 27 (2001) [hereinafter *A Dual-Stage View*].

[31] *See, e.g.,* Steiner, *Vertical Restraints, supra* note 27, at 157-58.

[32] *See* Comanor, *supra* note 26, at 9 (noting, after examining Steiner's contributions to antitrust scholarship, that "[t]he essential point here is that providing product information is an important economic function that demands a substantial return . . . and [that therefore] higher margins accrue to those providing the information").

[33] Steiner, *Intrabrand Competition, supra* note 27, at 161.

[34] *E.g.,* Steiner, *A Dual-Stage View, supra* note 30.

[35] The Chicago School has long held the position that vertical restraints generally are efficient. For some representative statements of this view see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 288 (revised ed. 1993) ("Analysis shows that every vertical restraint should be completely lawful"); RICHARD A. POSNER, ANTITRUST LAW 171-89 (2d ed. 2001) (arguing that distribution restraints are generally efficient); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV.6 (1981).

result in anticompetitive effects. He claims that vertical restraints and the elimination of intrabrand competition can be economically harmful, especially when done by manufacturers with market power. He also suggests that manufacturers may voluntarily adopt harmful vertical restraints without reaching agreement with their distributors.[36] Additionally, he claims that the conjunction of price and non-price restraints – such as a combination of exclusive dealing and resale price maintenance – may be especially anticompetitive. Pervasive exclusive dealing may lead to a diminution of interbrand competition, such that attendant resale price maintenance would substantially raise consumer prices. Steiner posits an effect whereby retailer margins would increase and retail price-cutting would be eliminated via resale price maintenance, while the pervasive exclusive dealing would suppress competition from existing brands and also impede entry opportunities for new entrants.[37]

There are fundamental differences between the views of Steiner and the Chicago School. Steiner believes in the concept of intrabrand "vertical competition" between retailers and manufacturers,[38] in contrast to current economic thinking, which tends to view firms at successive stages of the distribution channel as fully complementary rather than competitive.[39]

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[36] *E.g.*, Steiner, *Intrabrand Competition, supra* note 27.

[37] Robert L. Steiner, Exclusive Dealing + Resale Price Maintenance: A Powerful Anticompetitive Combination (2004) (unpublished manuscript on file with author).

[38] *See* Steiner, *Intrabrand Competition, supra* note 27, at 161; Steiner, *Vertical Restraints, supra* note 27, at 158-60; Steiner, *Third Relevant Market, supra* note 27, at 721-25. *See also id.* at 724 (describing vertical competition as "the contest between a manufacturer and his retailers to obtain a larger share of a brand's retail price").

[39] *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 n. 4 (1988) (stating that "all anticompetitive effects are by definition horizontal effects"); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977) (citing various Chicago School proponents for the proposition that, as a general matter, the interests of manufacturers and retailers are aligned); William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CALIF. L. REV. 933, 937-38 (noting that, because of the complementary nature of vertical relationships, "scenarios that involve a firm or firms at one level of activity using vertical restraints deliberately

Steiner buttresses his claim of vertical competition by providing empirical evidence of an inverse association between the margins of consumer goods manufacturers and their retailers. This inverse association occurs, for instance, where an increase in the margins of manufacturers is accompanied by a decrease in retailer margins and that such an inversion could not occur if channel participants were truly complementary.[40]

The Chicago School responds to these observations on the potential harmful effects of vertical restraints by charging that such theories have only been identified theoretically, and without providing sufficient guidance on how to distinguish harmful restraints from beneficial restraints.[41] Chicagoans

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to confer market power on firms at an adjacent level are inherently suspect"). *See also* Steiner, *Third Relevant Market, supra* note 27, at 722 (recognizing his fundamental divergence from the accepted economic wisdom and noting that "[t]he complementary nature of firms at successive stages is a given in law and economics. The competitive dimension of the relationship is not generally recognized and is often flat out denied . . .").

40 *See* Robert L. Steiner, *The Inverse Association Between the Margins of Manufacturers and Retailers*, 8 REV. INDUS. ORG. 717 (1993) (citing empirical evidence from his own and others' studies in the food, toys, prescription drugs, and apparel industries. *See also* Michael P. Lynch, *The "Steiner Effect": A Prediction from a Monopolistically Competitive Model Inconsistent with any Combination of Pure Monopoly or Competition*, Working Paper 141, FTC Bureau of Economics (Aug. 1986) (an early empirical paper providing evidence of the inverse association between the margins of manufacturers and retailers). Steiner's work also implies a second inverse relationship between the margins of the leading national brand manufacturers and their fringe competitors. *See id.* at 731-33.

41 *See, e.g.*, Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 795 (2001) ("Post-Chicago Economics . . . can be characterized as stressing market outcomes that could *possibly* occur, rather than outcomes that are likely to occur") (emphasis added). Thus, in the words of a leading antitrust scholar:

> The biggest danger presented by post-Chicago antitrust economics is . . . that antitrust tribunals will be confronted with antitrust solutions that they are not capable of administering. Indeed, the major shortcoming of post-Chicago antitrust analysis is its failure to take seriously problems of judicial or agency administration.

Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV.

believe that the vast majority of vertical restraints are actually efficient;[42] they claim, therefore, that errors of over-enforcement and deterrence (so-called "Type I" errors) are more harmful than errors of under-enforcement ("Type II" errors).[43]

The "single-stage" versus "dual-stage" debate has potentially important implications for antitrust law and analysis of vertical restraints of trade, especially in retail markets. The Chicago School may be concerned about over-enforcement in the area of vertical restraints. I, like Steiner, may be concerned about under-enforcement. And while Steiner may be a leading advocate of more stringent treatment of vertical restraints, he certainly is not alone. There are other antitrust scholars who also believe that vertical restraints can, at times, harm consumers.[44] But the simple fact of the matter

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257, 269 (2001).

42 *See supra* note 35.

43 The Type I/Type II terminology has been borrowed by antitrust scholars from the behavioral sciences, where it is used to define possible errors in determining whether there is a relationship between variables in the population from which sample data are drawn. *See, e.g.,* ROBERT ROSENTHAL & RALPH L. ROSNOW, ESSENTIALS OF BEHAVIORAL RESEARCH: METHODS AND DATA ANALYSIS 38-40 (1991) (describing the basic logic of hypothesis testing and the associated errors of inference). For an early importation of these concepts into antitrust scholarship see Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582 (1983) (defining, in the context of merger enforcement policy, Type I error as preventing desirable mergers and Type II error as permitting undesirable acquisitions, and noting, *inter alia*, that the merger laws are far more concerned with avoiding Type II errors – that is, with allowing anticompetitive mergers – than with avoiding Type I errors by preventing desirable ones).

44 *See, e.g.*, William Comanor, *Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985); Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L. J. 83 (1995); Grimes, *supra* note 11, at 853 ("Vertical restraints are frequently harmful to competition."). *See also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L. J. 209 (1986) (describing, *inter alia*, vertical techniques that competitors successfully can employ to raise their rivals' costs and the circumstances under which success may confer on them the power to raise price); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A*

is this: the future of vertical enforcement will remain uncertain unless and until antitrust scholars make an affirmative effort to intensify and refine their empirical study of vertical effects.[45] This debate needs to be moved from the theoretic, the assumed and presumed into the world of the known. For that to happen, considerable scholarship and effort needs to be invested into this area. I, for one, believe that this task would be greatly aided by well-focused public law enforcement efforts.

If public antitrust enforcement is going to live up to the charge given by Hippocrates, we need to know a great deal more than we do today. Regardless of outcome, at the end of the day, I want to be able to say that the Federal Trade Commission had an effective program of vertical restraint enforcement during my tenure. I also want to be able to say, with a good deal of conviction, that we "did no harm" in the process.

V. <u>MUST HISTORY REPEAT ITSELF</u>

In *GTE Sylvania*,[46] the Supreme Court reaffirmed the *per se* illegality of price vertical restraints. That decision came only two years after the Congress had revoked antitrust immunity for state sanctioned RPM, so-called Fair Trade Laws, and expressly noted that "Congress recently [had] expressed its approval of the per se analysis of vertical price restrictions."[47] Twenty years later, the Court distinguished maximum RPM from minimum

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Post-Chicago Approach, 63 ANTITRUST L. J. 513, n. 15 (1995) (citing some of the extensive literature on the related topic of the possible harmful effects of vertical mergers).

[45] A related requirement is that antitrust economists develop formal, testable models that incorporate such findings in a tractable way. *See, e.g.,* Lynch, *supra* note 26, at 25-27 (discussing this problem in the specific context of Steiner's ideas, from the point of view of a sympathetic economist).

[46] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (non-price vertical restraints subject to the rule of reason).

[47] *Id*. at 51 n. 18.

RPM: holding the former subject to the rule of reason; and continuing the *Dr. Miles* rule of *per se* illegality for the latter.[48] It is now ten years later. The Petitioner and several of the *amici* in *Leegin* ask the Court to abandon *per se* illegality for minimum RPM as well. Several reasons argue in favor of retention of the *Dr. Miles* rule:

> Continuance of *per se* illegality has impacts outside of purely antitrust laws;
>
> The Court's analysis in *Khan* favors retention;
>
> The facts supporting repeal of the fair trade laws support retention;
>
> Retention the *per se* rule enhances consumer choice; and
>
> *Stare decisis*.

In *Khan*, the Supreme Court concluded that retention of the *per se* rule for maximum RPM had "little or no relevance to ongoing enforcement of the Sherman Act."[49] The same cannot be said for minimum RPM. The appendix includes a significant number of enforcement actions "directed solely against the conduct encompassed by [*Dr. Miles's per se*] rule."[50] More importantly, the rule of *per se* illegality of minimum RPM has been the fulcrum used by the Court to invalidate a host of state price regulatory matters.[51] State attorneys general and others counseling state regulators have used the *per se* illegality of minimum RPM to impede the adoption of myriad other

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48 State Oil Co. v. Khan, 522 U.S. 3, 17 (1997) (holding minimum RPM remains "illegal *per se*.").

49 522 U.S. at 18-19.

50 *Id*.

51 *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); and 324 Liquor Corp. v. Duffy, 479 U.S. 720 (1987).

regulatory measures that never had to be dealt with by the courts. The notion that the rule has no continuing utility to antitrust enforcement is misplaced.

"Low prices, we have explained, benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . Our interpretation of the Sherman Act also incorporates the notion that condemnation of practices resulting in lower prices to consumers is especially costly because cutting prices is the very essence of competition."[52] This quote from *Khan* is wholly consistent with retention of the *per se* rule: It is difficult to posit an effect of minimum RPM that does not include higher prices to consumers.[53] Petitioners in *Leegin* justify such higher prices on the ground that the enhanced profits will stimulate the provision of "demand-creating services," enhance interbrand competition, and benefit consumers. Petition for *Certiorari* at 15. Increasing profits via minimum RPM, standing alone, does not ensure these benefits will ever happen, much less always happen. "Economic theory alone cannot predict whether the imposition of vertical restraints – and dealers' provision of additional services – will benefit consumers and enhance efficiency. Whether consumers benefit depends on whether gains to marginal consumers outweigh losses to their infra-marginal counterparts."[54] Comanor criticized the position taken by DOJ in its *Monsanto* brief that "pure vertical restraints always lead to increased consumer welfare" on the grounds that DOJ's conclusion was "unfounded."[55]

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52 *Khan*, 522 U.S. at 15 (internal quotations and citations omitted).

53 White Motor Co. v. United States, 372 U.S. 253, 269 (1963) (Brennan, J., concurring) ("Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands.").

54 William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 999 (1985).

55 *Id*. at 1001.

The natural tendency of minimum RPM is to increase prices to consumers. Accordingly, the Court should be very reluctant to abandon long-established rules of law until or unless a rigorous showing of actual consumer benefit has been made by the defendant to excuse those enhanced prices to consumers.

Congress repealed the fair trade laws because it believed consumers were being harmed more than they were benefitted. In addition to finding that fair trade resulted in an 18-20% increase in the prices of fair traded goods and that business failures in fair trade states were 55% higher than in non-fair trade states, Congress was advised by witnesses from DoJ and the FTC regarding other economic harm done by fair trade. Deputy Attorney General Keith Clearwaters testified before the House Subcommittee on Monopolies and Commercial Law on April 10, 1975.[56] In particular, he noted that fair trade promoted inefficient distribution systems, propped up inefficient wholesalers and retailers, systematically depressed sales volume per retail outlet, blocked entry opportunities for new entrants, made prices more rigid and inflexible, rendered markets less responsive to changing economic circumstances, precluded local retailers from taking advantage of any superior knowledge regarding local markets, and prevented more efficient retailers from passing any savings on to consumers.[57] In effect, Congress decided that almost forty years was long enough for any failed experiment with a regime of administered prices. It is not clear why the Court should now decide to resuscitate this failed system.

Ultimately, this is a debate about whether consumers are better off, in any given case, by lower prices and less services or higher prices and higher services. That seems an inquiry better answered by consumers or legislators. In markets where interbrand competition occurs on the opposite sides of the same aisle in a number of different stores in a market, it is not obvious why

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[56] *Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee of the Judiciary House of Representatives Ninety-Fourth Congress First Session on H.R. 2384 Fair Trade Repeal*, 109-125 (1975).

[57] *Id.*

retailers' knowledge of consumers is inferior to that of a distant manufacturer, or why consumers cannot be trusted to vote their own preferences with their pocketbooks.

Even conceding that *stare decisis* is somewhat less persuasive in antitrust, given the common law nature of law,[58] Petitioner in *Khan* provides the Court with a mistaken characterization of Congress when it claims Congressional "inaction" with respect to the *per se* standard.[59] That characterization ignores the Court's express finding in *GTE Sylvania* that "Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States."[60] Petitioner's characterization is then buttressed by discounting to zero the fact that Congress cut off funds to Department of Justice on two occasions to prohibit the use of public monies for advocacy of abandonment of the *per se* rule for RPM.[61]

Finally, the *per se* rule against minimum RPM is hardly as unyielding and inflexible as claimed by its critics. The rule, as actually applied in light of *Colgate*[62] and its progeny, is one of considerable flexibility. Manufacturers can impose substantial controls over downstream pricing legitimately, albeit with a degree of indirection. Accordingly, it is not clear why express price fixing agreements are also necessary or desirable.

If, however, the Court decides to shift course with respect to minimum RPM, at a minimum the Court should:

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58 *Khan*, 522 U.S. at 20-21.

59 Petition for *Certiorari* at 25-27.

60 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 5l n. 18 (1977).

61 *Id*.

62 United States v. Colgate & Co., 250 U.S. 300 (1919).

retain a rule of presumptive illegality;

shift the burden of persuasion to defendants regarding any justification for the vertical price fixing; and

insist that defendants' justifications for express vertical price fixing agreements include substantial rigor in the demonstration that consumers will experience, or have experienced, a net benefit for the higher prices they are required to pay.

VI. CONCLUSION

On the federal side of next year's ledger, I hope to see cutting-edge initiatives that clarify the law and impose appropriate remedies. From antitrust scholars, I hope to see new empirical work emerging to inform the decisional processes of law enforcement in the vertical area. From my former state colleagues and friends, I will look eagerly for new cases with substantial recoveries, as well as, perhaps, revisions to the NAAG Vertical Restraints Guidelines, reflecting changes that have occurred since they last were revised.[63]

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[63] National Association of Attorneys General, Vertical Restraints Guidelines, *available at* http://www.naag.org/issues/pdf/at-vrest_guidelines.pdf.

Appendix of Selected Cases

I. FEDERAL CASES

Nintendo of America Inc., 114 F.T.C. 702 (1991) (consent order).

The Commission prohibited Nintendo, for five years, from terminating dealers on the basis of the resale price they charge. Although I was not at the Commission when it considered the *Nintendo* matter, I do not think it is merely a coincidence that the complaint also alleged that Nintendo accounted for more than 80% of all home video game equipment sales. The presence of market power makes vertical restraints far more suspect because of the potential for even nonprice restraints to have anticompetitive effects. *Nintendo*-like relief also may be appropriate in egregious situations where a manufacturer demonstrates a willful disregard of the law on *per se* vertical price restraints – for example, if a manufacturer continues to engage in unlawful RPM after repeated enforcement warnings.

Kreepy Krauly, 114 F.T.C. 777 (1991) (consent order).

The Commission alleged that a Florida manufacturer of swimming pool cleaning equipment entered into written agreements with dealers to maintain resale prices. Kreepy Krauly settled with Commission and agreed to rescind the paragraph of its dealer agreements that required dealers to agree to maintain resale prices, and to cease including that paragraph in dealer agreements. The consent order also prohibited Kreepy Krauly from entering into agreements with dealers to maintain resale prices.

United States v. Delta Dental Plan of Arizona, Inc., 1995-1 Trade Cas. (CCH) ¶ 71,048 (D. Ariz. 1995) (final judgment).

DOJ alleged that the defendant and co-conspirators agreed to restrain or eliminate the discounting of fees for dental services to other dental plans or consumers in the state of Arizona in violation of the Sherman

Act. Delta contracted with dentists to provide pre-paid dental services to employers. Delta's participating dentist agreements contained MFN clauses that required each dentist to charge Delta the lowest price the dentist charged any patient or competing dental care plan. If dentists wished to reduce their fees for dental services to any other plan or patient, the MFN required them to reduce their fees to Delta as well. Before the MFN was enforced, many Arizona dentists chose to reduce their fees to participate in various competing managed-care and other discount plans. For example, at one point a competing discount plan claimed to have contracts with over 1000 participating dentists. After Delta began enforcing the MFN clauses, participating dentists refused to discount their fees to non-Delta patients or competing discount dental plans because, if they did, the MFN would require them to also lower all of their fees to Delta. The consent judgment enjoined the defendant from maintaining, adopting, or enforcing a clause in dentists' contracts that would require a dentist to give the defendant the lowest fees offered to any person or dental plan.

United States v. California SunCare, Inc., 1994-2 Trade Cas. (CCH) ¶ 70,843 (C.D. Cal. 1994) (final judgment).

DOJ brought charges against California SunCare, an indoor tanning products manufacturer, alleging that, from November 1992 through April 1994, the defendant entered into agreements with certain dealers to fix and maintain the resale prices of its products. California SunCare settled with DOJ and agreed to refrain from price-fixing, announcing a pricing policy, or threatening to terminate or actually terminating for non-compliance with suggested retail prices for a period of five years.

Keds Corporation, 117 F.T.C. 389 (1994) (consent order).

The Commission settled charges that Keds Corporation allegedly had agreed with some dealers to maintain resale prices on certain types of athletic and casual shoes, solicited commitments from dealers regarding pricing, and encouraged dealers to report noncomplying dealers. The consent order required Keds to refrain from: fixing the prices at which any dealer may advertise or sell the product; coercing any dealer to adopt or adhere to any resale price; attempting to secure commitments from dealers about the prices at which they would advertise or sell the products; or requiring or even suggesting that dealers report other dealers who advertise or sell any Keds products below a suggested resale price. The order also required Keds to inform its dealers that they were free to advertise and sell Keds products at prices of their own choosing. For five years, the order required Keds to incorporate a similar statement in any materials sent to dealers suggesting resale prices.

Baby Furniture Plus Association, Inc., 119 F.T.C. 96 (1995) (consent order).
The Commission entered a consent order with a trade association, a buying cooperative and its members for allegedly threatening to boycott children's furniture manufacturers who sold their products to discount catalog merchants. The consent order prohibited coercion of baby furniture manufacturers by means of actual or threatened refusals to deal.

Reebok International, 120 F.T.C. 20 (1995) (consent order).
The FTC alleged that Reebok and Rockport fixed the resale prices of their products. The settlement prohibited both companies from fixing the prices at which dealers advertised or sold athletic or casual footwear products to consumers. The settlement also prohibited the companies from coercing or pressuring any dealer to maintain or adopt any resale price, or from attempting to secure their commitment to any resale price. The order required Reebok and Rockport to inform their dealers in writing that dealers were free to advertise and sell Reebok and Rockport products at any price they chose, despite any suggested retail price established by the companies.

United States v. Playmobil USA, Inc., 1995-1 Trade Cas. (CCH) ¶ 71,000 (D.D.C. 1995) (final judgment).
Playmobil USA had maintained a Retailer Discount Policy that provided for the termination of any Playmobil dealer that failed to adhere to certain Playmobil suggested price ranges. In January 1995,

DOJ filed a civil suit that alleged that Playmobil enforced this policy in a manner that violated the antitrust laws by reaching agreements with some of its retailers about what their retail prices would be. DOJ and Playmobil entered a settlement decree prohibiting Playmobil from reaching agreements with its dealers on retail price levels, and also from threatening dealers with termination for discounting off the retail price.

Onkyo U.S.A. Corporation, 1995-2 Trade Cas. (CCH) ¶ 71,111 (D.D.C. 1995) (final judgment).

Onkyo U.S.A. Corporation, a manufacturer of audio components, agreed to settle FTC charges that it violated a 1982 FTC order under which it agreed not to fix prices or engage in unlawful resale price maintenance. The complaint alleged that Onkyo sales representatives violated the terms of the order by: agreeing with a dealer to establish resale prices for the Onkyo products the dealer outlets sold to consumers; requesting that the dealer adhere to specified resale prices or price levels, informing the dealer that its prices were too low; directing the dealer to raise those prices, asking retailers to report other dealers who deviated from Onkyo's pricing policy; and responding to such deviations with threats and intimidation. Under the settlement, Onkyo paid $225,000 in civil penalties for violation of the original order.

RxCare of Tennessee, Inc., 121 F.T.C. 762 (1996) (consent order).

The Commission settled charges involving the use of an MFN clause by RxCare, the leading pharmacy network in Tennessee. The Commission concluded that a most-favored-customer clause in RxCare's contracts with participating pharmacies tended to keep reimbursement rates high by discouraging selective discounting and the development of rival networks. The primary theory of the case was that the most-favored-customer provisions facilitated horizontal coordination by the pharmacists. This "facilitating practices" theory is distinct from the equally interesting"raising rivals' costs" theory behind some recent DOJ cases involving most- favored-customer provisions.

New Balance Athletic Shoe, Inc., 122 F.T.C. 137 (1996) (consent order).
The Commission charged that New Balance entered into RPM agreements with some of its retailers, in which such dealers agreed to raise retail prices on New Balance's products, maintain certain prices or price levels set by New Balance, or refrain from discounting New Balance's products for a certain period of time. New Balance induced dealers to enter into these agreements by monitoring retailer prices, threatening to terminate or suspend shipments to discounting retailers, and demanding that retailers raise their prices. New Balance also assured retailers that New Balance would secure similar price agreements from other competing retailers or otherwise prevent unapproved discounting of New Balance athletic shoes. The settlement prohibited New Balance from fixing or controlling the prices at which retailers could sell the company's athletic footwear.

American Cyanamid Corp., 123 F.T.C. 1257 (1997) (consent order).
The Commission alleged that, between 1989 and 1995, American Cyanamid entered into written agreements with its retail dealers under its rebate programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. This conditioning of financial payments on dealers' charging a specified minimum price amounted to an agreement on resale prices. The consent decree enjoined the defendant from seeking agreements by retailers to fix prices.

Fair Allocation System, Inc., 126 F.T.C. 626 (1998) (consent order).
An association of auto dealers settled charges that it threatened to boycott Chrysler if the manufacturer did not agree to change its vehicle allocation system to restrict vehicle supply to discounters engaged in Internet sales.

United States v. City of Stillwell, OK, Docket No. CIV 96-196-B (E.D. OK 1998) (Consent Decree)

Consent Decree prohibits Stillwell, Oklahoma from refusing to provide water and sewer services unless electricity is also purchased from the municipality. The Decree prohibits the city from using its water and sewer monopoly to suppress competition from other electric companies.

Nine West Group, Inc., 65 Fed. Reg. 13386 (March 13, 2000) (proposed consent agreement).

The Commission ordered a manufacturer of women's shoes to cease seeking agreements by retailers to fix, raise or stabilize shoe prices to consumers.

In the Matter of Sony Music Entertainment, Inc.; In the Matter of Time Warner, Inc; In the Matter of BMG Music, d.b.a. "BMG Entertainment"; In the Matter of Universal Music & Video Distribution Corp. and UMG Recordings, Inc.; and In the Matter of Capitol Records, Inc., d.b.a. "EMI Music Distribution" et al., 65 Fed. Reg. 31319 (May 17, 2000) (proposed consent agreements).

The Commission settled charges that the five largest manufacturers of CDs and the three largest distributors of CDs entered into MAP agreements to fix CD prices at higher than competitive levels, thereby forcing retailers to charge higher CD prices to consumers.

Toys R Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

A major toy retailer unlawfully enforced multiple vertical agreements in which each manufacturer promised the retailer that it would restrict distribution of its products to low-priced warehouse club stores, on the condition the other manufacturers would do the same.

United States v. Dentsply International, Inc., 399 F.3d 181 (3rd Cir.), *cert. pending*, Docket No. 05-337 (2005).

Third Circuit held that the use of exclusive dealing arrangements by a monopolist provider of false teeth constituted maintaining a monopoly in violation of § 2 of the Sherman Act.

II. STATE CASES

New York, et al v. Nintendo of America, Inc., 775 F.Supp. 676 (S.D.N.Y. 1991).

RPM suit against the manufacturer of Nintendo game machines, filed by all states, was settled with $5 rebate coupons distributed to over five million consumers.

Curran v. Electrolux Corp., (Cir. Ct. for Baltimore City 1991) (Assurance of Discontinuance).

Settlement of allegations that a manufacturer of vacuum cleaners would only sell certain models to retailers in Maryland on the condition that retailers would agree only to resell at a specified mark-up or price.

In re Clozapine Antitrust Litigation, MDL 874 (N.D. Il. 1992).

Settlement of claims against a drug manufacturer that tied the sales of its prescription drug to the purchase of patient diagnostic services. The 35 litigating states and private class representatives settled the claims with injunctive relief, a 15% discount for future sales to patients on Social Security Disability Income until September 16, 1994 (almost two years), cash payments to each qualified purchaser in the amount of $38.92 per week purchased (up to a total of $10 million), $3 million credits to state mental health agencies, $3 million to a patient advocacy group earmarked for the treatment of new patients, and $2.08 million for attorneys fees and costs of litigation.

Maryland, et al v. Mitsubishi Electronics of America, Inc., 1992-1 Trade Cases (CCH) ¶ 69,743 (D. Md. 1992).

Fifty states and the District of Columbia obtained *parens patriae* damages and injunctive relief against an electronics manufacturer that engaged in resale price maintenance. Defendant was enjoined for five years from fixing resale prices, and also paid $7 million to settle damages and litigation cost claims.

Curran v. Schwinn Bicycle Co., Doc. No. 92183022/CE150758 (Cir. Ct. for Baltimore City 1992) (Assurance of Discontinuance).

Settlement of allegations that manufacturer of bicycles entered into minimum resale price agreements with dealers regarding prices to be offered by the dealers during a three day sales event – "Cycle Madness."

Curran v. Trek Bicycle Corp., Doc. No. 92183023/CE150759 (Cir. Ct. for Baltimore City 1992) (Assurance of Discontinuance).

Settlement of allegations that manufacturer of bicycles entered into minimum resale price agreements with dealers regarding prices to be offered by the dealers during a three day sales event – "Cycle Madness."

Texas v. Head Sport Wear Intern'l, Inc., et al, Doc. No. 93-062417 (165th Jud. D., Harris County, TX 1993).

Settlement of allegations that defendants coerced dealers into agreement to minimum resale prices of Head tennis sportswear in Houston. The settlement included $100,000 in sportswear distributed (*cy pres*) through the United Way, $45,000 in attorneys fees and costs, and an injunction.

New York, et al v. The Keds Corp., 1994-1 Trade Cases (CCH) ¶ 70,549 (S.D.N.Y. 1994).

Settlement of RPM claims by 50 states and the District of Columbia against manufacturer of women's athletic shoes. Defendant was enjoined from RPM for five years, and also paid $5.7 million for states to use *cy pres* to fund charitable programs benefitting women ages 15-44. Another $1.5 million went to costs of investigation and fees.

Pennsylvania, et al. v. Playmobil USA, Inc., 1995-2 Trade Cases (CCH) ¶ 71,215 (M.D. Pa. 1995).

Nine states obtained a consent decree banning future RPM activities by manufacturer of children's toys, as well as payment of $675,000 as costs, fees and *parens patriae* damages.

New York, et al v. Reebok International, 96 F. 3d 44 (2nd Cir. 1996).
Settlement of RPM claims by 50 states plus the District of Columbia for *parens patriae* damages, injunctive relief and costs and fees against manufacturer of Reebok and Rockport shoes. Defendants paid $9.5 million, of which $8 million was distributed by the states for charitable purposes to fund otherwise unfunded recreational programs. The remaining $1.5 million was distributed to cover costs of investigation and fees.

Missouri, et al v. American Cyanamid Co., 1997-1 Trade Cases (CCH) ¶ 71,712 (W.D. Mo. 1997).
Settlement of RPM claims by 49 states and the District of Columbia against manufacturer of crop protection chemicals. In addition to injunctive relief, the states received $7.3 million to be used either for agricultural purposes or to fund future antitrust enforcement activities.

Texas, et al v. Zeneca, Inc., 1997-2 Trade Cases (CCH) ¶ 71,888 (N.D. Tx. 1997).
Settlement by 49 states and the District of Columbia of *parens patriae* damage claims for RPM by a manufacturer of crop protection chemicals. In addition to injunctive relief, the states received $3.9 million dollars, of which $1.2 was reimbursement of costs and fees and the remainder was a contribution to the states.

Connecticut v. Ty, Inc., Doc. No. CV-97-0573484-S (CT Super. Ct., Hartford D. 1997).
Settlement of allegations that a toy manufacturer engaged in minimum resale price maintenance with its dealers. The settlement included the payment of a fine of $50,000 and the reinstatement of an improperly terminated dealer.

In re Toys "R" Us Antitrust Litigation, MDL 1211 (E.D.N.Y. 1999).
Settlement of *parens patriae* damage claims against toy retailer that used its purchasing power to limit competing discount outlets' ability to obtain certain highly desired toy products. Forty-four states, the

District of Columbia and Puerto Rico participated in the settlement. The settlement also included class actions, including some pending in various state courts. In addition to injunctive relief, defendant paid $13.5 million for costs of suit and fees, and also was required to make charitable distributions of toys having a total value of $27 million during the three-year period from 1999 to 2001.

Florida, et al v. Nine West Group, No. 00-Civ-1701 (S.D.N.Y. 2000).
Settlement of RPM claims by all states and territories of the United States against manufacturer of Nine West products. The settlement included injunctive relief, payment of *parens patriae* damage claims of $30.5 million, and an additional $3.5 million for costs of suit and fees. The consumer portion of the funds was distributed in proportionate shares by the states for charitable purposes related to women's health, women's educational/vocational training, and/or safety programs.

In re Disposable Contact Lens Antitrust Litigation, MDL 1030 (M.D. Fl. 2001).
Settlement of state *parens patriae* claims plus class action claims for all states other than Tennessee and Georgia against contact lens manufacturers who restricted the distribution of their products in distribution channels that competed with eye care professionals. In addition to injunctive relief the court approved a settlement of cash and benefits worth over $90.5 million, to be delivered to consumers.

New York et al v. Salton, Inc., 265 F. Supp. 2d 310 (S.D.N.Y. 2003).
Settlement between 45 states, the District of Columbia and Puerto Rico of resale price maintenance charges against the manufacturer of George Foreman grills. The court-approved settlement includes injunctive provisions requiring dealers to refrain from carrying competing products and from fixing resale prices (that latter includes a five-year ban on suggesting resale prices). Additionally, the defendant will pay $8 million in consumer damages to be distributed with court approval to otherwise unfunded state-specific health and nutritional programs.

In re Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me.). Settlement of state *parens patriae* claims by 43 states, as well as various private class actions, alleging resale price maintenance in the distribution of music recorded on compact discs. On June 12, 2003, the court approved a settlement of $64.3 million in cash, $75.7 million in music recordings, and an injunction substantially similar to that obtained by the FTC in its action, reported at 65 Fed. Reg. 31319 (May 17, 2000). The settlement became final and distribution occurred during 2004.

Utah v. Gemstone Properties, Inc., Case No. 2004-001-0364 (Utah AG 2004).

Settlement of allegations that a real estate subdivision developer placed limitations in the deeds to properties in the subdivision which provided that homes within the subdivision could only be resold through the services of a licensed real estate broker designated by the developer. The settlement included an agreement not to enforce the deed covenants, notice to home owners that they were not bound by the terms of the covenants, and a $10,000 suspended civil penalty that would be imposed in the event of any violation of the terms of the agreement.

Federated Department Stores, May Department Stores, Lenox, Inc., and Waterford Wedgewood U.S.A Assurances of Discontinuance, August 2004. The department stores and tableware manufacturers provided New York with Assurances of Discontinuance of agreements to deny Bed, Bath & Beyond access to the products of the tableware manufacturers. Additionally, the stores and manufacturers agreed to pay aggregate civil penalties of $2.9 million (Federated, $900,000; May, $800,000; Lenox, $700,000; and Waterford, $500,000).

Utah v. Cascade Yarns, Inc., Civ. No. 050905940 (3rd D. Ct., Salt Lake County, UT 2005).
Utah v. Black Sheep Wool Co., Case No. 2005-002-0365 (Utah AG 2005) (Assurance of Discontinuance).

Utah v. Wool Cabin, Case No. 2005-002-0365 (Utah AG 2005) (Assurance of Discontinuance).

Settlements of allegations that a yarn manufacturer (Cascade) entered into agreements with two of its dealers (Black Sheep and Wood Cabin) under which the manufacturer would compel a third local dealer in the same market to raise prices to the level of the other two dealers (100% mark-up over wholesale). The manufacturer consented to the entry of an injunction and a suspended fine of $25,000 to be imposed in the event of future violations. The dealers separately agreed to Assurances of Discontinuance regarding termination of the conduct and agreement of future compliance.