12-2-2010

Vertical Restraints, Dealers with Power, and Antitrust Policy

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Introduction

Although a vertical distribution restraint resembles a dealer cartel in that both limit intraband competition, a manufacturer restraining the distribution of its product shuns the excess dealer profits a dealer cartel would seek.[1] Accordingly, a knowledgeable and uncoerced manufacturer who restricts rivalry among dealers must do so for some other reason, such as to facilitate dealer services. In fact, however, manufacturers have often restrained intrabrand competition—especially through resale price maintenance —not to achieve more effective distribution but rather to appease dealer interests in excess profits.

The shorthand term "dealer power" embraces all the circumstances that induce a manufacturer to accommodate those dealer interests.[3] The most obvious circumstances are dealer cartels or individually powerful dealers with something approaching monopsony power, but dealers may get their way in other market situations as well. We shall also see that a manufacturer may willingly exchange such excess profits on its brand for something it wants in return, such as dealer refusals to handle rival brands. Nevertheless, it is convenient to use the shorthand expressions "coercion" of an "unwilling" manufacturer to describe its adoption of a distribution restraint that brings dealers more profit than necessary for efficient distribution of a brand. Accordingly, a coerced restraint may result from ordinary bargaining between dealers and manufacturers. The antitrust objection to such restraints is not that the manufacturer is coerced but that competition is limited for an illegitimate end.

Whatever the social benefits of a distribution restraint that serves a manufacturer's self-interest, a competition-limiting restraint extracted by dealer power can be anticompetitive. Of course, even a dealer cartel need not be seeking excess profits or the quiet life, for the resulting vertical restraint might be identical to that which a wiser manufacturer would have adopted on its own. But such a beneficial effect must be doubted in situations where a manufacturer does not itself desire it.

In all events, vertical restraints reflecting dealer power could well be ignored by antitrust law if they were rare in occurrence, insignificant in magnitude, or readily detected and remedied under other branches of antitrust law. But we doubt that dealer

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[1]See 8 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1603 (3d ed. 2011), for the proposition that a manufacturer ordinarily maximizes its profits by selling at a price satisfactory to itself and by encouraging maximum competition among dealers so that their profit margins will be as low as possible, consistent with the continued performance of their distribution functions.

[3]The term "dealer cartel" could do as well when defined with similar breadth, but its customary meaning of an express concert among dealers tends to push out of mind the broader concept of dealer power that is critical for the present purpose.

power is that rare and are troubled by an apparent history of price-enhancing resale price maintenance for the benefit of dealers. At least some of the claimed justifications for it actually reflect dealer power, and antitrust rules controlling horizontal combinations cannot themselves prevent those distribution restraints that result from dealer power.

The most anticompetitive situation is an express dealer cartel that covers all rival brands, fixes prices or allocates markets, and enlists the several manufacturers both to restrict their dealers' prices or markets in accordance with decisions of the cartel and to enforce those restrictions against wavering cartel members and nonmembers alike. But such explicit and detailed concert among so many actors is likely to be detected and then condemned as a horizontal conspiracy among the dealers. Such condemnation will terminate the cartel and punish its members. The law would then have no need to address the vertical restraints, for the manufacturers would cheerfully abandon them once freed of the coercive cartel.

Much less certain to be detected, however, is the informal or loosely organized dealer group that pressures a manufacturer to eliminate interbrand competition. For example, dealers acting individually but with awareness of each other's actions may press the manufacturer to adopt resale price maintenance or other distribution restraints. Furthermore, individual dealers, each acting in its own interest and without regard to other dealers' behavior, may be able to compel a manufacturer to impose a vertical restraint on intrabrand competition.

Of course, as the source of such pressure becomes less widespread, dealer power over a manufacturer also declines. And as the restriction of competition becomes less complete, the dealers' ability to profit from it, and therefore their incentive to secure it, declines. In addition, interbrand competition might prevent the restraint from having any substantial effect, and unrestricted dealer rivalry in the provision of services might erode any excess profit. Accordingly, industrywide restraints that also limit service competition are most dangerous. Nevertheless, incomplete restrictions on competition may remain attractive to dealers who have the power to obtain them —perhaps even more attractive than lower wholesale prices.[5]

Distribution restraints, especially resale price maintenance, have sometimes resulted from dealer power rather than from the manufacturer's independent and unilateral interest in effective distribution. Moreover, the driving political forces behind “fair trade” legislation permitting resale price maintenance[6] were not manufacturers but associations of retailers or wholesalers; the most active of these was the National

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[5]A powerful dealer pressing for lower wholesale prices can expect that other strong dealers will do the same and that subsequent intrabrand competition among them will push the larger wholesale-retail margin back to competitive levels. Protecting dealer margins through resale price maintenance may thus be more attractive to them. Moreover, the manufacturer might conclude that lowering its wholesale prices—especially if rival manufacturers do the same—would impair its profits more than fixing resale prices.

[6]See 8 Antitrust Law ¶1629.

Association of Retail Druggists.[7]

Indeed, Congress enacted such legislation—and also, at approximately the same time, the Robinson Patman Act[8]—not to help manufacturers assure effective distribution but to protect dealers, especially smaller ones, from more intensive competition for consumer patronage. In addition, dealer associations actively sought to induce manufacturers to fix resale prices. Although strong efforts by associations in the grocery, hardware, and tobacco businesses were largely unsuccessful, dealer associations had considerable success in the liquor trade, and the druggists' association obtained significant price restraints on proprietary drugs, surgical and related supplies, and those toiletries that were not sold extensively by other types of stores.[9]

Around 1930, the Federal Trade Commission studied attitudes toward resale price maintenance[10] and found that wholesalers almost unanimously favored the restraint as a means to thwart the competition that they and their retailer customers faced from department stores, supermarkets, chain stores, and mail order houses. Among retailers, resale price maintenance was generally opposed by chains, department stores, and dry goods stores, while it was generally favored by druggists, grocers, jewelers, stationers, and hardware stores. Even commentators sympathetic to the potential efficiency of distribution restraints acknowledge that such restraints were often sought by retailers and wholesalers in order to insulate themselves from competition[11] rather than to serve the manufacturers' interests in effective distribution.[12]

This pattern has also been observed in other countries. Although many manufacturers eventually became members, independent retailers were the driving

[7]On the role of this association in early resale price maintenance decisions, see Herbert Hovenkamp, Enterprise and American Law, 1836-1937 at 331-348 (1991). For the possibility that such dealers were motivated by concern about free riders and similar possible efficiencies, see discussion infra. In any event, one would not infer that the dealers turned to the political process because they lacked the power to coerce manufacturers, for even those able to extract resale price maintenance from reluctant manufacturers first needed legislation to legalize the restraint.

[8]On the anticompetitive consequences of that statute, which was often hostile toward efficient distribution, see 14 Herbert Hovenkamp Antitrust Law ¶¶2302, 2340, 2342 (2d ed. 2004).

[9]Thomas R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence 140-144 (FTC Bureau of Economics 1983). See also Edward O. Correia, Resale Price Maintenance—Searching for a Policy, 18 J. Legis. 187 (1992).

[10]Federal Trade Commission, Report on Resale Price Maintenance (Part I 1929; Part II 1931); see Overstreet, supra, at 129-134.

[11]Overstreet, supra, at 134.

[12]It is not inconsistent that some manufacturers favored such restraints. Interestingly enough, their most common justification was that resale price maintenance protected the goodwill they had built up through heavy advertising expenditures. Yet, if manufacturers and not dealers provided the advertising, dealer discounting could interfere with brand goodwill only through doubtful loss-leader or snob image effects.

force behind the United Kingdom's Proprietary Articles Trade Association (PATA), which was formed in 1895 to protect dealer margins from the growing competition of department stores and chains. Competition from the latter became troublesome to the independent retailers when consumers began to judge the quality of branded goods on the basis of manufacturer advertising rather than, as previously, upon a retailer's recommendations. Once some manufacturers signed resale price maintenance agreements with PATA, their rivals felt compelled to do likewise, lest dealers discourage consumers from buying their products or refuse to handle them altogether.[13]

In Sweden as well, resale price maintenance seemed to serve the interests of dealers rather than those of manufacturers. Following legal abolition in 1954, the number of wholesalers and retailers declined, and their average size and efficiency rose.[14]

Although the monograph from which these examples are drawn acknowledges that dealer power explains resale price maintenance on many items in the United States and abroad, the author correctly cautions that dealer power "should not automatically be assumed to fit other resale price maintenance applications without careful study of the relevant circumstances."[15] Yet the study also acknowledges that distribution has at times been restrained on goods "for which any straightforward application" of the usual efficiency justifications for such restraints "seems strained."[16]

Other commentators have also observed that minimum resale price maintenance often occurred in the distribution of products for which dealer service or other dealer contributions to product goodwill were unimportant: gasoline, auto parts, toiletries, paper, beer, men's shoes, rainwear, women's and children's clothing, underwear,[17] cosmetics, perfumes, over-the-counter drugs, tobacco products and accessories, simple photographic supplies, drugstore watches and clocks, eyeglass lenses, and small

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[13]Overstreet, supra, at 149-155. By 1956, about 44 percent of consumer goods and services purchased by households in the United Kingdom were sold at fixed or suggested resale prices. In that year, the Restrictive Trade Practices Act outlawed collective enforcement of resale price fixing by manufacturers. Later, the Resale Prices Act of 1964 outlawed resale price maintenance altogether and even forbade manufacturers to refuse to supply a dealer based on its actual or prospective price cutting. Id. at 152-154.

[14] Thomas R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence 156-157 (FTC Bureau of Economics 1983).

[15]Id. at 160.

[16]Id. at 162. Although one of the most common efficiency claims today is the control of free riders on substantial services provided by dealers, free riding is not the only impediment to important dealer services. In any event, the present suggestion is that distribution has been restrained in circumstances that are difficult to explain by any of the potentially "legitimate" objectives analyzed in 8 Antitrust Law ¶¶1611-1619 (3d ed. 2011).

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[17]Stanley I. Ornstein, Resale Price Maintenance and Cartels, 30 Antitrust Bull. 401, 428 (1985): "[E]conomists appear to have been forcing the special service theory into areas where it does not apply." That article does suggest, however, that other explanations may sometimes apply. Id. at 428-431.

appliances.[18] The high level of concentration in local markets for eyeglass lenses was noteworthy, as was the higher incidence of such restraints for small appliances, which did not require dealer demonstration or service, than for major appliances, which did. In these instances, collusive pressure by dealers may best explain the restraints.[19] Moreover, in major appliances intrabrand competition was typically restricted only by manufacturers with "small market shares or weak positions"[20]—suggesting either dealer power relative to those particular manufacturers, the latter's greater need for point-of-sale services, or for dealer recommendations to consumers.

Resale price maintenance tends to produce higher consumer prices than would otherwise be the case.[24] The evidence is persuasive on this point.[25] Indeed, the restraint that did not hold a product's price above the level that would otherwise prevail would be unnecessary; its very purpose is to prevent price cutting. So we should, of course, expect prices to be higher with resale price maintenance than without it.

Although this history suggests that anticompetitive dealer power accounts for some vertical restraints, a further aspect of this experience deserves emphasis. Dealer associations usually represented multibrand dealers and sought restricted distribution not simply on one brand of a product but on most brands, for eliminating competition in one brand would not fully insulate dealers from competition so long as rival brands were available in free competition. Stated another way, the multibrand dealers wished to minimize competition in the retailing function and therefore sought distribution restraints on all significant brands. We consider later whether broad market coverage of a distribution restraint is necessary before we need to worry about dealer power.

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[18]E. Raymond Corey, Fair Trade Pricing: A Reappraisal, 30 Harv. Bus. Rev. 42 (Sept.-Oct. 1952) at 47; Marina Lao, Free-Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance (July 14, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024221&rec=1&srcabs=951609; Robert Pitofsky, In Defense of Discounters: the No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 geo.L.J. 1487 (1983). See also Frederic M. Scherer and David Ross, Industrial Market Structure and Economic Performance 552 (3d ed. 1990) (observing that "relatively few products" appears to require the kinds of dealer service that the free rider explanation cites).

[19]See id. at 51-52; and Richard E. Caves, Economic Models of Vertical Restraints: Market Failure and Market Power 21 (Harvard Institute for Economic Research Discussion Paper No. 754, 1980).

[20]See Caves, supra, at 21.

[24]To the extent that fixed resale prices induce incremental dealer services that consumers value more than the incremental price, they receive a better product (goods plus services) for the higher price.

[25]See Thomas R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence 106-117 (FTC Bureau of Economics 1983). Although numerous flaws in those studies were pointed out, those flaws related to whether price decreases, after the end of resale price maintenance, improved consumer welfare—that is, whether product quality, services, information, or image also declined.

Express Dealer Cartel on Single Brand.

A group of dealers may combine to fix their prices, territories, or customers and then enlist the aid of a manufacturer in enforcing their anticompetitive restraint. Their object, of course, is excess profit for themselves. Instead, or in addition, a dealer cartel might seek to protect its members from more efficient dealers.[26] In this scenario, "traditional" dealers pressure the manufacturer to deny its product to more efficient "new" dealers or to fix resale prices, which would prevent the latter from attracting patronage with the lower prices their lower operating costs allow them to charge.[27] So long as a cartel of traditional dealers accounts for a majority of a manufacturer's sales and has the credible capacity to abandon the manufacturer, the latter cannot resist the cartel's demands. The lost business of the cartelized dealers would not be offset by that of the new lower-priced dealers. Furthermore, where dealers handle multiple brands, a manufacturer who does not succumb to their demands may find that its product will be removed from their shelves if rival manufacturers adopt the restraint desired by the dealers.

But we must not exaggerate the danger that traditional dealers could permanently prevent the entry and growth of more efficient distributors. First, an ultimate sales gain through the lower prices of new dealers may be attractive to the manufacturer, notwithstanding the severe intermediate losses the cartel might inflict. Second, if most manufacturers supply the new dealers without fixing their prices, the cartel cannot abandon them all, and the new dealers will become more quickly established. Even so, the several manufacturers may differ in their assessment of the new dealers and in their aversion to risk, such that none of them dares to take the lead in defying the cartel.[28] And a cartel of multibrand dealers might, after all, threaten manufacturers one at a time.[29] Third, some manufacturers are likely to supply the new dealers with secondary or private brands, thus allowing the dealers to become established. In the long run, therefore, more efficient dealers will probably arise, and manufacturers will come to prefer them, even if that means losing the traditional dealers. In the meantime, however, the traditional dealers may be able to impede the growth of the new dealers by pressing manufacturers to deny them popular brands or to sell to them only in conjunction with price restraints.

Even when only one brand is involved, a horizontal dealer cartel that fixes prices or

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[26]This might also be the objective of less organized dealers.

[27]If the new dealer's efficiency lies in forgoing services that consumers value less than their cost—such as luxury surroundings, charge accounts, or free delivery—consumers are unlikely to dispense with such services so long as the new dealers are forced to charge the same prices as the traditional outlets.

[28]See 6 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1425d (3d ed. 2011)
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[29]If most manufacturers succumbed, the resulting industrywide use of distribution restraints should be a danger signal to the antitrust authorities.

allocates customers or territories is usually viewed as per se illegal.[30] By contrast, *vertical* restrictions on prices, customers or territories are lawful when reasonable.[31] For this reason the courts typically approve *manufacturer*-initiated restraints where dealers merely cooperated with the manufacturer, even if there were some communications among the dealers that could be characterized as an "agreement."[32]

There are two respects in which the market effects of a horizontal cartel among dealers might not differ from those of a vertical restraint. First, a dealer cartel might choose the same retail price that the manufacturer imposing a vertical restraint would choose—for that price would maximize the aggregate dealer-manufacturer profit available for that brand—and use its collective power solely for the purpose of bargaining the wholesale price down, thus increasing dealer profits at the expense of the manufacturer. In that event, the dealers would transfer some excess profit from the manufacturer to themselves without disturbing output or resource allocation. Offsetting the bargaining power of another party, however, is not an acceptable justification for a horizontal cartel.[34] Second, a dealer cartel might have the same procompetitive purpose as a lawful vertical restriction. For example, suppose that dealers had abandoned desirable pre-sale demonstrations because those dealers who did not bear the cost of such demonstrations undersold those who did. Although each dealer individually has an incentive to behave opportunistically, all might realize that the long-run position of the brand will be impaired unless they are protected from each other by, say, territorial allocations. Just as a manufacturer might vertically impose a territorial restriction for this reason, its dealers might do so horizontally. Given that vertical restrictions are judged by

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[30]E.g., *United States v. General Motors Corp.*, 384 U.S. 127, 145-147 (1966) (restraint upon price competition); *Big Apple BMW, Inc. v. BMW of North America*, 974 F.2d 1358 (3d Cir. 1992) (plaintiff dealer claimed boycott orchestrated against it, a price cutter, by other dealers; reversing summary judgment). Accord Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II, 75 Yale L.J. 373, 380-384 (1966).

[31]*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[32]See, e.g., *K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co.*, 61 F.3d 123 (2d Cir. 1995) (auto parts manufacturer's termination of distributor in response to complaints from rivals about plaintiff's superior service did not injure competition; such injury not shown merely by statements from customers that they had preferred the plaintiff distributor; further, more than 20 dealers of the manufacturer's product remained in the area, and market as a whole continued robustly competitive); *International Logistics Group., Ltd. v. Chrysler Corp*., 884 F.2d 904, 907 (6th Cir. 1989) (similar); cf. *Eastern Scientific Co. v. Wilde Heerbrugg Instruments, Inc.*, 572 F.2d 883, 885 (1st Cir.1978), cert. denied, 439 U.S. 833 (1978) (applying rule of reason to an agreement among dealers and supplier that the supplier would impose resale price maintenance on dealers outside the agreeing dealers' territories); *Purity Products, Inc. v. Tropicana Products, Inc.*, 702 F. Supp. 564 (D. Md. 1988), aff'd mem., 887 F.2d 1081 (4th Cir. 1989) (similar); *Culberson, Inc. v. Interstate Electric Co*., 821 F.2d 1092 (5th Cir. 1987) (similar; manufacturer's restraint in place before dealers began corresponding); *Beach v. Viking Sewing Machine* Co., 784 F.2d 746 (6th Cir. 1986) (dealers assisted manufacturer in enforcing its unilaterally imposed restraints and reported violations; no conspiracy); *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc*., 763 F.2d 604, 614-15 (4th Cir. 1985) (similar); *Parsons v. Ford Motor Co*., 669 F.2d 308, 313 (5th Cir. 1982) (similar).

[34]E.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951).

the rule of reason, and given that the horizontal and vertical restrictions may have the same object and price-output effect, should not the dealers' agreement also be judged by the rule of reason?

A restraint *imposed* by a horizontal dealer cartel should not be treated as hospitably as a similar vertical restraint.[35] *First*, although a dealer cartel might be sincere in claiming that its horizontal restraint served an objective that would justify a purely vertical restraint, the dealers have an incentive to create excess profit for themselves. By contrast, a manufacturer cannot ordinarily increase its own power through a vertical restraint, and has every incentive to prevent excess dealer profit beyond that necessary for effective distribution.

Second, we may reasonably doubt a dealer cartel's claim that intrabrand competition must be restrained in order to achieve effective distribution. If that were so, the manufacturer would presumably impose the restraint itself. But if it does not, the cartel is likely to be either mistaken or insincere in claiming that competition must be restricted for distribution to be effective. To be sure, a manufacturer might be mistaken, or it might desire the restraint and yet be so slow to impose it that dealers feel compelled to take matters into their own hands. But lethargy can be overcome by argumentation, and the possibility of error seems too insubstantial to allow a cartel—with its incentive to seek excess profit—to override a manufacturer's preference for intrabrand competition.

Of course, those who oppose per se illegality for a dealer cartel would have us take these matters into account in applying the rule of reason. The court itself could judge the validity of the cartel's efficiency justification while taking the manufacturer's position into account. But even then, finding that the dealer cartel did not restrain competition more than is necessary would require the court to examine whether output had fallen or whether prices had risen by more than they would have under a hypothetical vertical restraint—inquiries that are always difficult and often impossible. Even without making those inquiries, we might suppose that any harm to competition would be minimal when trade is restrained in only one of many brands. Nevertheless, dealers are often left some pricing discretion among differentiated products, and the Supreme Court has not hesitated to condemn a horizontal customer restraint on a single brand.[36] Automatic condemnation of the cartel sacrifices only those efficiencies, if any, that a manufacturer fails to recognize.

Once a dealer cartel is identified as such, it is properly condemned. We need to reach the accompanying vertical restraint only if it can "camouflage" the horizontal restraint, making detection more difficult. In examining this question, it seems helpful to distinguish between (1) the dealer cartel that gets the manufacturer to enforce the dealers' own horizontal agreement on their prices or markets and (2) the cartel that, without specifying details, coerces a manufacturer to restrain intrabrand competition among dealers. If both types can be readily detected, the horizontal *cartel* can be largely ignored in framing rules to deal with vertical restraints, although other

[35] For a contrary position, see Wesley J. Liebeler, Intrabrand "Cartels" under *GTE Sylvania*, 30 UCLA L. Rev. 1 (1982).

[36] *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

manifestations of dealer power remain to be considered.

In *Toledo Mack* the Third Circuit condemned a horizontal agreement of Mack Truck dealers to limit price competition and also collectively to induce their manufacturer/supplier to impose resale price maintenance on a price cutting dealer.[S1] The court found that the per se rule applied to the horizontal portion of the conspiracy but the rule of reason to the vertical portion:

> Because Toledo's evidence was sufficient to allow a jury to conclude that Mack entered into a competition-restricting agreement with its dealers, the only remaining question before us as to that agreement is whether, if proven, it violates §1 of the Sherman Act. In contrast to horizontal price-fixing agreements between entities at the same level of a product's distribution chain, the legality of a vertical agreement that imposes a restriction on the dealer's ability to sell the manufacturer's product is governed by the rule of reason. The rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers.[S2]

The court quoted this language from the Supreme Court's *Leegin* decision:

> "A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason."[S3]

On the rule of reason issue the court concluded that:

> Toledo also presented sufficient evidence to allow a jury to conclude that the agreement between Mack and its dealers produced anti-competitive effects in the relevant product and geographic markets. Toledo bears the burden of identifying those markets and showing the anti-competitive effect of the agreement between Mack and its dealers.…We have explained that proof of anti-competitive effects "can be achieved by demonstrating that the restraint is facially anticompetitive or that its enforcement reduced output, raised prices or reduced quality. Alternatively, because proof that the concerted action actually caused anticompetitive effects is often impossible to sustain, proof of the defendant's

[S1] *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc*., 530 F.3d 204 (3d Cir. 2008).
[S2] Id. at 224-225.
[S3] Id. at 225, quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc*. 551 U.S. 877, 893 (2007).

market power will suffice."

The court said nothing about Mack's market share in any market, concluding merely that the jury's finding of power was supported.

Notwithstanding the dicta in *Leegin*,[S4] we doubt that the market power finding was necessary, *assuming* that the court was correct in its conclusion that the dealer cartel was a per se unlawful price fixing conspiracy and not simply reporting to the manufacturer of a free-riding dealer. In that case the manufacturer was fully implicated in a per se unlawful naked restraint, even though it may have been coerced into doing so.

Dealers' Agreements on Prices or Markets

In one scenario, the dealers agree among themselves about their prices, customers, or territories and then force the manufacturer to adopt vertical restraints reflecting the cartel's terms, to monitor each dealer's compliance (often with the aid of complaints from other dealers), and to cease supplying those dealers who depart from the horizontally established terms. Those commentators who deemphasize the dealer power issue in judging vertical restraints focus mainly on this case, believing that "detection of reseller cartels is relatively simple."[37] Their arguments are several.

First, dealers who have fixed prices or have allocated markets among themselves are unlikely to seek vertical enforcement, for in so doing they would reveal themselves to a manufacturer who is being harmed and who therefore might not only refuse to cooperate but might even turn them in to the enforcement authorities.[38] Yet this risk is far from certain. The manufacturer may abstain from reporting the cartel because the manufacturer gets something in return for its cooperation, such as preferential treatment vis-à-vis other manufacturers[39] or because it fears a retaliatory withdrawal of patronage. And if the manufacturer does comply, it will hesitate to reveal the dealer cartel later, thereby tainting its vertical restraint and exposing itself to possible treble damage liability. Still, any incremental monitoring and enforcement that could be obtained from an unsympathetic manufacturer may not profit the cartel enough to expose itself.

Second, a dealer cartel may be difficult to organize and administer, and it could be quite visible to the enforcement authorities.[41] Unless dealers are in separate markets, they might want to agree not only on prices or territories but also on services as well, lest service competition simply replace price competition. Yet, as the restraint becomes more nearly complete, the cartel becomes more visible. Still, much the same could be said of all horizontal price fixing, which occurs nevertheless. Indeed, a dealer cartel

[S4]The statement in *Leegin* was dicta because no horizontal dealer cartel was at issue there.

[37]See Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II, 75 Yale L.J. 373, 409 (1966).

[38]Id.

[39]See 8 Antitrust Law ¶1610. The manufacturer might also obtain higher profits in the form of a somewhat higher wholesale price. If a multibrand dealer cartel had the power to raise retail prices, they might pass some of the profit back to manufacturers in return for their cooperation in enforcing the cartel.

[41]See Bork, supra, at 408-410.

designed to coerce the manufacturer seems easier to implement than the usual horizontal price-fixing cartel, for fewer details need to be agreed upon. The dealers need not act unanimously in pressuring the manufacturer,[42] and the coerced manufacturer monitors and enforces the resale prices it then adopts against all dealers, including "cheating" members of the cartel and nonmembers as well.[43]

Third, the scarcity of tangible examples of dealer cartels suggests that the problem may not be widespread.[44] But such scarcity may reflect the difficulty of detection rather than rarity. More important, the alleged paucity is limited to the express horizontal agreement among numerous dealers. That is not our only concern here: Perhaps most significant, under the per se rule against resale price maintenance that has been in place for nearly a century, the presence or absence of a dealer cartel is irrelevant to illegality. As a result, litigation records have not sought to develop whether dealer collusion was occurring, and most of the studies of resale price maintenance (RPM) have focused on these records.[45]

Less ambitious dealer collaboration is more likely to occur and— even when express—to avoid detection. An explicit agreement among only a few powerful dealers that each will individually threaten to abandon the manufacturer's product may impress the manufacturer with the danger that many more dealers will abandon it if it does not restrict intrabrand competition. As compared with the first scenario, fewer dealers need agree, for the manufacturer chooses the resale price; no horizontal agreement will be brought to the attention of a manufacturer who might turn the dealers in; and organization and administration need not be so complex as to be obvious to the enforcement authorities. Such agreements among dealers will not always be detected.

[42]By contrast, horizontal price fixing breaks down when some conspirators "cheat" by undercutting the agreed price.

[43]See Herbert Hovenkamp, Enterprise and American Law, 1826-1937, ch. 25 (1991), detailing a pharmacists' cartel that induced manufacturers to enforce its prices. That cartel was implicated in the *Dr. Miles* decision. See *Dr. Miles Medical Co. v. Jaynes Drug Co*., 149 F. 838 (C.C.D. Mass. 1906) (upholding RPM agreement); *Dr. Miles Medical Co. v. Goldthwaite*, 133 F. 794 (C.C.D. Mass. 1904) (allowing an injunction to restrain interference with resale price maintenance contracts); *Park & Sons Co. v. National Druggists' Ass'n*, 175 N.Y. 1 (1903) (upholding RPM agreement that placed no restrictions on either quantity to be sold or on territory in which it could be sold). The existence of the cartel was established in *Loder v. Jayne*, 142 F. 1010 (C.C.E.D. Pa.), aff'd, 149 F. 21 (3d Cir. 1906). Other state court decisions condemned boycotts that resulted from the cartel. *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218 (1906); *Brown v. Jacobs Pharmacy Co*., 115 Ga. 429 (1902).

[44]Richard A. Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 23-24 (1981). Judge Posner's more recent position seems more sympathetic to the view that dealers' cartels are sufficiently troublesome to warrant scrutiny and condemnation. See Richard A. Posner, Antitrust Law 172 (2d ed. 2001).

[45]E.g., Thomas R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence (FTC Bureau of Economics 1983); Pauline M. Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J.L. & Econ. 263 (1991). See also David A. Butz, Vertical Price Controls with Uncertain Demand, 40 J.L. & Econ. 433 (1997) (finding dealer cartels a common explanation in certain markets characterized by low production costs, high retailer markups, but highly uncertain demand).

Still more difficult to detect or prohibit is dealer pressure that is not embodied in any horizontal agreement.

Interdependence and Informal Action

No express agreement among the dealers need be postulated at all. Perhaps at lawful trade association meetings for the industry or for a particular brand, dealers express to each other a common preference for restricted distribution or opposition to discounters or new types of dealers. Each may independently express that view to the manufacturer—perhaps simply in a public forum.[46] Well short of any understanding among the dealers, the manufacturer could feel the pressure. There is much less to detect or report here than in the cartel situation, and, if reported, there is no clear agreement among the dealers. Even if the dealers were acting interdependently, mere interdependent behavior does not establish a conspiracy. Indeed, many situations in which partial or informal coordination would not constitute a "conspiracy" within the meaning of Sherman Act §1. It would be a serious misjudgment to overlook the many forms of "quasi-collective" pressure that can be exerted by dealer organizations.

Powerful individual dealers

A manufacturer might be forced to restrain distribution in order to appease one or more individually powerful dealers. To be sure, dealer power might seem rare in view of the large numbers of wholesale and retail dealers and the relatively easy entry into distribution(unless government licenses are both required and scarce). Distribution seems generally competitive, at least in the absence of the express, fairly obvious, and illegal cartel.

Nevertheless, dealer power might exist for some products, at some times, and in some places.[49] In selected geographic markets, demand may be insufficient to support a large number of dealers. Even within large metropolitan areas, effective distribution may involve few outlets, either because unusual talents are needed or because efficient scale is large relative to demand. Furthermore, the success, situation, or special talent of some dealers will give them power over particular suppliers. Multibrand dealers, especially those who also handle other types of products, are relatively more powerful than less diversified dealers. Chain or other stores may have power due to their high concentration in some areas. Finally, present dealers may enjoy some degree of power simply because the manufacturer would bear significant transaction costs in shifting to

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[46]For example, in *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919 (2d Cir. 1985), an official of a large department store chain gave a public speech indicating that suppliers of discount retailers risked losing department store patronage. Id. at 921-922. The court declined to infer any conspiracy between the department store and a manufacturer who refused to fill the orders of the plaintiff discounter (but who did supply other discounters). The court understood *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), to prevent the inference of a conspiracy merely from reaction to a direct complaint to a manufacturer. 769 F.2d at 923.

[49]See generally Michael E. Porter, Interbrand Choice, Strategy, and Bilateral Market Power, ch. 2 (1976); Richard E. Caves, Economic Models of Vertical Restraints: Market Failure and Market Power (Harvard Institute for Economic Research Discussion Paper No. 754, 1980); Overstreet, supra, at 16 n.2.

new dealers.

Indeed, several claimed justifications for distribution restraints that will be discussed later seem to assume that dealers have power to extract extra profit. The dealer whose status allows it to "certify" that the products it handles are fashionable or of high quality may have such power. The dealer whose professed brand preferences are valued by consumers also has that capacity.

Moreover, any dealer who seeks a distribution restraint may be typical of a class of dealers whom the manufacturer values highly. Even without express or tacit coordination among such dealers, the manufacturer may well understand that the consequences of not bowing to one dealer's expressed desire may be far-reaching. This situation blends into the next, which requires neither a cartel nor individually powerful dealers.

A manufacturer's choice might be constrained by the realization that multibrand dealers, though numerous and individually without market power, might cease to stock any one brand that is subject to intense intrabrand competition.

Imagine that a new and more efficient dealer lowers its price on brand *A*. Because the reduction results from greater efficiency and not from free riding, the manufacturer of *A* should be pleased. However, other more "traditional" dealers will be displeased and may abandon brand *A*, display it poorly, or make it available only to customers who will buy no other brand. Whether they actually do so or only threaten to do so, the manufacturer can foresee the danger. Accordingly, it may either refuse to supply the price-cutting dealer or restrict its competitive freedom. Such restricted distribution results neither from the manufacturer's unconstrained preference nor from the obvious power of a dealer cartel or of a locally dominant dealer; it results rather from a more subtle form of coercion by numerous nondominant dealers acting individually. But we cannot predict how often such a manufacturer would be driven in this direction.

Given its preference for the lowest possible dealer profit margin consistent with efficient distribution and given the assumed absence of free riding or similar conditions, the disaffection of the traditional dealers would not trouble such a manufacturer when the "efficient" dealers are sufficiently established and numerous to maintain sales volume. But until their volume offsets that likely to be lost as traditional dealers downgrade or abandon the brand, the manufacturer needs the traditional dealers. Their hold over the manufacturer may be merely transitional, but the intervening losses may be very serious to a manufacturer whose profit margins are modest.

Dealer power can be particularly onerous to the manufacturer who does not enjoy pronounced consumer loyalty and who therefore depends upon dealers' willingness to stock its brand. Multibrand dealers' ability to substitute other brands gives the dealers considerable leverage. This might explain why so many of the products that have been subject to resale price maintenance, both here and abroad, have not exhibited the free-rider or difficult entry characteristics that might suggest a manufacturer's need for restricted distribution.

Even manufacturers with well-recognized brand names can be the victims of such dealer power, as the Pepsodent episode illustrates. In the 1930s, Pepsodent was a well-known brand of toothpaste, nationally promoted on one of the most popular radio comedies of the day. Nevertheless, when the manufacturer abandoned resale price maintenance, the National Association of Retail Druggists urged its members to remove Pepsodent from public display and to attempt to switch customers to other brands. The manufacturer felt the heat and surrendered, not only reinstituting vertical price fixing but making a contribution to the association's lobbying fund.[52] While the druggists were obviously powerful when acting as a cartelized unit, the results could have been identical without any organization or recommendation. An individual druggist unhappy with Pepsodent's efforts toward competition could put that toothpaste behind the counter and bring it out only for those few consumers who would refuse to accept other brands. This step would not only be personally satisfying for the druggist, it would also sacrifice no significant sales even if other druggists did not do the same. With many individual dealers acting similarly, Pepsodent would feel the pressure even though the dealers individually lacked dominant positions and had organized no cartel.

It may seem curious to speak of dealer power in a competitively structured retail market. No such power would be inferred when dealers generally shun a particular manufacturer with a “too high” wholesale price and thereby “force” the manufacturer to lower its price. That case illustrates a “competitive market,” not dealer “power.” By contrast, however, the dealers' ability to force an unwilling manufacturer to insulate them from competition among themselves is surely not an instance of competition at work. In the Pepsodent illustration, the druggists' ability to force a suppression of competition may fairly be described as “dealer power” bringing about a departure from competitive behavior.

It may also seem curious to suppose that retail prices can be forced above competitive levels when no one dealer possesses any power over price or over the manufacturer. Leaving aside express conspiracies among the dealers and even loosely coordinated quasicollective action, several kinds of market failure may be present. Economies of scale in distribution make the manufacturer dependent upon multibrand, multiproduct dealers, such as drug stores. And druggists willing to sell Pepsodent for less may find the cost of advertising that fact unduly expensive relative to the incremental sales likely to be won, especially when consumers will not travel very far to get a bargain on a single, relatively inexpensive product like toothpaste. Ultimately, discount stores may arise and sell a full range of drugstore products at lower prices that can be effectively advertised and to which consumers will make a special journey to purchase toothpaste along with other products.

Dealers have the greatest leverage over a manufacturer when they handle multiple brands, when consumers do not insist upon a particular brand, and when the dealers have reason to punish only one or a few manufacturers by stocking and featuring the brands of other manufacturers that do restrict distribution as the dealers prefer. Convenience goods enjoying modest brand preferences are good illustrations. Of course, if all manufacturers simultaneously reject new restrictions or abandon old ones, the dealers cannot punish them all. But such procompetitive unanimity does not often

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[52] Thomas R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence 145-146 n.2 (FTC Bureau of Economics 1983), quoting an earlier FTC report.

occur. If termination of a price cutter is at issue, the several manufacturers may estimate their ultimate prospects differently or feel differing degrees of insecurity. Or one manufacturer may adopt distribution restraints in the first instance in order to encourage dealers to try to shift consumers to its brand. Once the manufacturer's rivals follow, none gain any advantage from the restraints, but the first to abandon them may be punished by the dealers, such that none can afford to lead the manufacturers away from a system of restraints that no longer serves their interests.[53] Similarly, a restraint may arise to encourage dealer services during the early "life cycle" of a new product but then may be continued later into the cycle,[54] when that particular restraint has become unnecessary and inefficient, because no one manufacturer acting alone can risk taking the lead to abandon the practice. This may indeed be the explanation for the continuation of some restraints beyond the time when they might have made distribution more effective.[55]

Detection and Significance of Dealer Power

A provable agreement among dealers to seek or abide by resale price maintenance—whether or not it specifies the resale price—is unlawful regardless of the dealers' market power. The accompanying vertical agreements should also be considered unlawful, even though they might possibly have an independent justification and may be enjoined temporarily but not permanently. Nevertheless, to condemn only detectable horizontal dealer agreements would immunize many vertical restraints reflecting anticompetitive dealer interests. A dealer cartel might achieve its objective without revealing itself, such as when a dealer association organized for other purposes exerts subtle collective pressure on one or more manufacturers. Or key dealers might individually threaten or "persuade" a manufacturer that effective distribution requires an intrabrand restriction. Even an informal or loosely organized group can bring pressure on the manufacturer to eliminate intrabrand competition. Apart from the express dealer cartel, antitrust law's horizontal restraint rules do not adequately control the vertical restraint that implements dealers' desire for restricted competition for its own sake. Accordingly, we need to examine whether and how we can identify the restraint that is ostensibly vertical but that actually serves anticompetitive dealer interests.

"Horizontal" *Characterization of Vertical Restraint*

When dealer interests rather than manufacturer interests appear to be served, many

[53]Of course, the first to abandon the restraint might gain a competitive advantage if discounting dealers were sufficiently numerous and substantial.

[54]The "lifecycle" explanation of vertical restraints is pursued by Robert L. Steiner, Vertical Restraints and Economic Efficiency (FTC Bureau of Economics Working Paper No. 66, 1982).

[55]See the study of audio components summarized by Overstreet, supra, at 123-124, who also mentions "mistakes, inertia and risk aversion" as possible explanations.

courts describe a vertical restraint as "horizontal,"[56] even in the absence of collective action by dealers.[57] Such a classification is meant to express a finding that the restraint before the court serves a dealer's desire for excess profits rather than a possible manufacturer's desire for more efficient distribution through, for example, point-of-sale services. Once classified as horizontal, the restraint may then be said to be per se unlawful.[58] That per se characterization is meant to express three propositions. (1) A restraint serving dealer interests opposed to those of the manufacturer is unjustified. (2) Hence, finding that a restraint is explained solely by dealer power excludes the possibility of justification and thus obviates any further inquiry into that subject. (3) Such a restraint is so inherently likely to have anticompetitive effects that it should be condemned without regard to market share or other proof of effects. In other words, there is little reason to undertake complex inquiries into power or effect merely because the restraint might have failed to achieve its anticompetitive object of bringing dealers excess profit. Each of these propositions may be persuasive, but using "horizontal" and "per se" labels is objectionable on several grounds. *First*, the horizontal label, as the Supreme Court observed, "introduces needless confusion into antitrust terminology."[60]*Second*, the labels do not reveal what the court is doing as clearly as propositions like the three stated above. *Third*, stating explicitly one's factual and legal propositions exposes the important issues buried beneath the labels.[61]

For example, if the proper legal rule is captured by proposition 2, the tribunal knows that it cannot dispense with further analysis until it rejects any legitimate justifications claimed—that is, until it focuses on the strength or weakness of the indicators of dealer power and concludes that dealer power alone explains the restraint. Moreover, the horizontal label perniciously invites the tribunal to forgo analyzing the policies underlying the three propositions (or whatever should be substituted for them), disposing of the case merely by citing precedents condemning genuine horizontal conspiracies between

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[56]See, e.g., *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979). Cf. *O'Dell v. General Motors*, 122 F. Supp. 2d 721 (E.D. Tex. 2000) (agreement under which GM terminated parts distribution contracts with Delco dealers to be treated as vertical, because there was no proven agreement among the remaining dealers).

[57]E.g., *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1225-1226 (7th Cir. 1980).

[58]E.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 736, 744 (1988) (Stevens, J., dissenting); *Cernuto*, 595 F.2d 164.

[60]*Business Electronics*, 485 U.S. at 728-729 (majority opinion).

[61]Particularly noteworthy is the failure of many such courts to identify the parties to or the subject matter of the "contract, combination, or conspiracy" required by Sherman Act §1. The Fifth Circuit pointed this out in criticizing the *Cernuto* case, *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1216-1218 (5th Cir. 1986), aff'd, 485 U.S. 717.

competitors.[62] Nevertheless, the shorthand “vertical” or “truly vertical” may be used with caution to describe restraints serving the manufacturer's interest in efficient distribution. Unfortunately, it is hard to know whose interests a vertical restraint serves without examining market and behavioral factors.

Identifying vertical restraints compelled by a powerful dealer or dealer cartel would be pointless if condemnation merely channeled such dealer pressure into lawful alternatives that were equally anticompetitive. But prohibiting such restraints would not be futile. Alternative cartel activities will be closely monitored, if not forbidden, by the law. Although a powerful individual dealer might instead bargain for lower wholesale prices or for an exclusive territory, the former is not ordinarily anticompetitive,[63] and the latter will often be impractical for the manufacturer. Of course, a dealer might simply drop a brand in which price competition had erupted, and a manufacturer fearing this might keep its product out of the hands of price cutters. Still, forbidding distribution restraints motivated by dealer power usefully obstructs the process of restraining competition to appease dealers.

Dealer power is not likely to be the explanation for a vertical restraint if dealers in that brand cannot profit from elevating price above the competitive level, cannot obtain the vertical restraint from an unwilling manufacturer—or have not in fact done so—or if the restraint is no more intensive than necessary to achieve a legitimate manufacturer interest that cannot otherwise be adequately achieved. Hence, to assess the likelihood that a vertical restraint serves dealer interests, we must explore three areas. (1) We need to identify the circumstances in which a hypothetical “monopolist” dealer in one brand could gain excess profit through a vertical restraint.(2) If that hypothetical dealer could do so, dealers in that brand would have the anticompetitive incentive to obtain a vertical intrabrand restraint. Thus, we need to identify the circumstances in which dealers could extract such a restraint from an unwilling manufacturer. Because the answers to these first two questions are often ambiguous, we will often be forced to look for other observable indicia in the parties' actual behavior or performance suggesting that a vertical restraint reflects dealer power. (3) If these inquiries suggest a significant danger that dealer power is present, we need to determine whether a legitimate manufacturer interest explains the restraint instead.

Detecting Dealer Power: Interbrand Retail Market Structure

Dealers cannot win excess profit through a distribution restraint unless a manufacturer who is conscripted to serve them has sufficient market power to make a restriction of

[62]The *Business Electronics* dissent, 485 U.S. at 742-744 (Stevens, J., dissenting), did rely on such precedents. Although it also advanced other reasons for its conclusion, it may have been too quick to read a jury verdict as finding dealer power.

[63]Perhaps a powerful dealer could obtain a discriminatory discount, using the resulting cost advantage to destroy his retailing rivals. Discriminatory preferences for one dealer are controlled to some extent by the Robinson-Patman Act.

output feasible and profitable.[64] Interbrand competition at the retail level obviously limits (1) the ability of dealers to profit from an intrabrand restraint and, consequently, also limits both(2) their incentive to use any power they may have over a manufacturer to obtain a restraint, and (3) the adverse public results of any such restraint.

Dealers have the incentive to limit competition among themselves via a vertical restraint (if they can obtain one from a reluctant manufacturer) when interbrand competition is weak because (1) the vertically price-fixed brand is dominant or otherwise enjoys market power, (2) dealers in all brands are concentrated, or (3) most brands are subject to similar vertical restraints. Of course, these factors do not necessarily indicate an unreasonable restraint. A brand may be locally dominant and yet need distribution restraints for legitimate purposes. Dealers may be concentrated and yet be unable to act anticompetitively. Or a distribution restraint might be so essential to solve common business problems that all manufacturers of a product feel compelled to use it. Still, there is a significant danger that restraints covering important brands, or all of them in a concentrated market, serve dealer power.

We will seldom be able to observe the strength of interbrand competition directly or to know whether a vertical restraint serves dealers rather than manufacturers. Most often, the best we can do is to examine the market or behavioral evidence to see whether dealer power is a danger. There are several indicators, some suggesting a greater danger than others. Arbitrary lines will be drawn based, for example, on market shares. Obviously, the justification for drawing an arbitrary line at one place rather than another depends upon the consequences. If defendants falling on the adverse side of the line are to be punished heavily, the line should be "higher" than if such defendants are merely to be required to offer some evidence of justification without bearing the burden of persuasion on that issue. Of course, the consequences could also be somewhere in between. It is too early to specify the possible legal consequences, which depend both upon one's assessment of the possible justifications and upon precedents dealing with particular distribution restraints. At the very least, factors indicating a significant danger of anticompetitive effects warrant requiring a restraint's defenders to offer evidence of a plausible and legitimate business purpose reasonably served by a challenged restraint.

The ability of dealers to profit from a vertical restraint on one brand and thereby to prejudice consumers is clearest when that brand dominates the market.[65] As usual, defining the market is the preliminary step.[66] The product class, rather than a particular brand, forms the product market.[67] The geographic dimension is often obscure. In asking whether dealers can profit from a distribution restraint, we must examine their power vis-à-vis consumers, who often confine their purchases to nearby suppliers—because transport costs are significant relative to the value of the product, because they

[64]See, e.g., Richard A. Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 16-18 (1981); Robert H. Bork, Vertical Restraints: *Schwinn* Overruled, 1977 Sup. Ct. Rev. 171, 190-191.

[65]In such a case the manufacturer may be too powerful to be coerced by dealers. But we focus here on the incentive for dealers to extract a vertical restraint from a manufacturer.

[66]See 2B Antitrust Law, Ch. 5 (3d ed. 2007)..

[67]On the general inappropriateness of single-brand markets, see id.,

wish to deal face-to-face, because they need pre- or post-sale service, or simply because of conventional shopping habits. Hence, the relevant geographic market within which consumers can find alternative suppliers will often be local. The true boundaries of the market are not easily defined, for coordinated interbrand prices within a major shopping mall may benefit the dealers, notwithstanding more modest concentration levels in the city as a whole. Moreover, buyers obviously cannot turn to dealers who are restrained from selling to them; thus, the market must exclude dealers who, although within a reasonable distance from the customers, are prevented by distribution restraints from supplying them. Thus, the relevant market is limited not only by the usual cost-distance standards but also by any distribution restraints that prevent other dealers from supplying any significant grouping of buyers.[68]

Although any market-share test for dominance is arbitrary, 50 percent is a reasonable measure. To require dominance in this sense, however, may demand too much. Significant market power can exist without dominance. The mere existence of a distribution restraint ordinarily implies significant product differentiation. While the resale prices of homogeneous products, like sugar, have sometimes been fixed vertically,[69] the usual distribution restraint involves differentiated products that consumers do not regard as perfect substitutes. There is thus some degree of pricing discretion that can be exploited by a manufacturer or its dealers.

Dealer Concentration

Even if a restrained brand does not itself enjoy market power, its dealers within a retail market can profit from a vertical restraint if other brands or dealers are few enough to achieve noncompetitive prices through explicit or tacit coordination. If the retail market is concentrated, supracompetitive prices by dealers insulated from intrabrand competition by a vertical restraint might not be constrained by rival-brand dealers who choose to coordinate their prices tacitly with the restrained dealers.

To assess concentration, we turn again to the relevant retail market. Although many factors impede or facilitate the ability of firms to coordinate their behavior anticompetitively, market structure is a customary index of relative degrees of risk. We regard an HHI exceeding 1200 as an indication of potentially troublesome concentration.[72] Note, moreover, that if concentration is high enough to permit the vertically restrained dealers to coordinate their prices with other dealers in the local market, those other dealers need not themselves be vertically restrained.

Cumulative Market Coverage

When used by all manufacturers, distribution restraints could severely narrow

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[68]For the same reason, we should normally exclude firms that might be able to adapt themselves to distributing the product, for they cannot obtain the products unless manufacturers are willing to supply them.

[69]Vertical restraints on homogeneous products lack most of the justifications considered later and are therefore very likely to be horizontally motivated and anticompetitive.

[72]See 4 Antitrust Law ¶930 (3d ed. 2008) for a definition and discussion of the HHI.

interbrand competition at the dealer level and thereby increase the restraint's attractiveness to the dealers and magnify any adverse welfare consequences the restraint might have. On the other hand, widespread use might merely reflect a common business problem, which all manufacturers faced and solved with a similar vertical restraint. Nevertheless, widespread coverage indicates a significant likelihood that the restraint serves anticompetitive dealer interests, and even those who are sympathetic to vertical distribution restraints acknowledge that this danger increases with market coverage.

Observe that modest market coverage does not guarantee that manufacturer interests are being served, although it both increases the likelihood that they are[74] and minimizes the adverse public consequences when dealer interests are served. Even without wide market coverage, however, we have already seen that a brand may enjoy market power; in addition, dealers in one brand may be able to profit if the retail market is concentrated.

Economic Performance

Evidence that costs[75] and price-cost margins were at competitive levels would indicate that the brand lacked market power and that anticompetitive dealer interests were not being served by a distribution restraint. At the other extreme, persistent excesses over competitive levels for the manufacturer would indicate brand power, and such excesses for dealers generally would indicate that a vertical restraint serves their anticompetitive interests; this would be true even if other brands were also generating supracompetitive profits. But reliable data about "competitive levels" or dealer margins are often unavailable. In addition to the usual difficulties of gathering and assessing evidence about price-cost margins, it is not practicable to collect profit data from many dealers, whose profits will vary; and accounting records do not reveal true economic profits by brand in situations where (1) dealers handle several products or brands, (2) compensation for the dealer's own (and perhaps family) labor is a residual, or (3) an excess return is obscured by excess costs. The administrative burden of relying on dealer profits seems disproportionate to the social stake in preventing or allowing restricted distribution. It also seems unfair to impose liability on parties who could hardly know in advance what such a profit survey would show. The legal rules governing intrabrand restraints should be devised without relying, one way or the other, on analysis of dealer profits.

A vertical restraint cannot completely insulate dealers from intrabrand competition

[74]See, e.g., *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1387 (9th Cir.), cert. denied, 454 U.S. 831 (1981); *Oreck Corp. v. Whirlpool Corp*., 579 F.2d 126, 130 n.5 (2d Cir.), cert. denied, 439 U.S. 946 (1978).

[75]Costs may not be at competitive levels if dealer-inspired vertical restraints divert rivalry into service or other forms of nonprice competition, which raise costs and thereby erode profit, while nonetheless distorting the price-service mix desired by manufacturer and consumers. Accordingly, the absence of excess dealer profits would not disprove dealer power, for dealers might prefer the quiet life of nonprice competition even if they failed to secure excess profits.

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when services or other nonprice rivalries are important. On that account some writers hesitate to infer that dealer power accounts for a vertical restraint unless such nonprice competition is also restrained.[77] But that hesitation rests on the faulty premise that firms do not seek to eliminate competition on, say, price unless they can also eliminate all other competition as well. After all, horizontal cartels often fix prices without limiting services, and dealer-inspired resale price maintenance often occurs in the face of service competition. Of course, the presence of substantial dealer services of the kind desired by manufacturers may mean that enhanced service competition is the legitimate object of the restraint.

To the extent that an inference of dealer power is based on market concentration, might that inference be rebutted by showing that other market circumstances impede tacit price coordination among dealers? The general answer would be negative for the reasons given elsewhere, although a strong policy preference in favor of distribution restraints, or some of them, would call for greater hospitality toward that inquiry.

Permanent excess profits are also prevented by easy entry at the manufacturing or distribution level. With easy entry at the former level, dealers in existing brands will not be able to elevate the price above competitive levels—at least not for long. And with easy entry at the distribution level, incumbent dealers will not be able to maintain high prices against the manufacturer's will. If dealers cannot earn excess profits, they presumably will not try—at least not successfully—to obtain a distribution restraint for that purpose. Accordingly, a distribution restraint in retail markets in which entry requires a scarce governmental license —as liquor sales often do—would be especially dangerous. But this does not mean that proof of substantial entry barriers is a prerequisite to worrying about dealer power or that proof of low entry barriers should rebut a presumption or inference of dealer power.

Modest entry barriers reduce but do not eliminate the dealer power problem. New entry at the manufacturing level may erode an existing brand's power only slowly and may be irrelevant if dealers are concentrated or if multibrand dealers find widespread resale price maintenance attractive and hesitate to handle a new product that is not vertically restrained. Although entry at the dealer level is generally thought to be relatively easy, it may not be attractive in some thin local markets. More important, manufacturers may suffer substantial transaction costs in replacing existing dealers, may be unable to replace enough of them simultaneously to abandon a system of vertical restraints,[80] and may be constrained by state statutes from altering existing dealerships.

Apart from their significance in principle, entry barriers are hard to quantify, and there is no way to relate any general assessment— low, moderate, or high barriers—to the magnitude or duration of price-raising power held by market incumbents. As a

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[77]E.g., Stanley I. Ornstein, Resale Price Maintenance and Cartels, 30 Antitrust Bull. 401, 407, 413, 431-432 (1985).

[80]If a manufacturer can be coerced into restraining resale prices, that restraint would presumably apply to new dealers as well, until they are sufficiently numerous to allow the manufacturer to abandon not only the restraint but also, if necessary, those dealers who demand the restraint.

practical matter, therefore, we doubt that entry barriers are worth assessing in order to judge distribution restraints, except in those rare cases where the barriers are clearly so low as to be nonexistent.

Dealers cannot force an unwilling manufacturer to restrict intrabrand competition to their advantage unless they possess some power over it.[81] Of course, there is no better demonstration of power than its exercise. Suppose, for example, that a manufacturer explicitly declared that distribution restraints would be inefficient but nevertheless adopted them after dealers threatened, “Restrain intrabrand competition or we cease handling your product.” The resulting restraint could then be readily attributed to dealer power and fairly judged unreasonable. Few actual cases will be so clear.

That dealers may possess substantial bargaining power vis-à-vis manufacturers may seem surprising. Not only are dealers typically smaller than manufacturers, but the tremendous number and variety of retailers nationally implies atomistic competition. But there may be relatively few of them in the local area within which a relevant group of consumers shop. Moreover, a dealer's bargaining power varies not with its size relative to the manufacturer but with the manufacturer's cost of switching dealers or integrating forward; as that cost is greater, so is the dealer's bargaining power. Even where dealers are fungible and plentiful, the cost of finding and training new dealers and the delay before they become fully effective may be substantial. Where a local market is served by a small number of well-entrenched dealers, finding an effective substitute or integrating forward may burden a manufacturer even more.

Thus, when one or a few powerful dealers—either single- or multibrand—request protection from intrabrand competition, they need not be “more powerful” than the manufacturer in any absolute sense. It suffices that they, and perhaps others who share their sentiments, have the will and ability to inflict greater harm on the manufacturer than its loss from limiting intrabrand competition. When that limitation applies only to a few local markets or when it takes the form of modest spatial or temporal separation of other dealers from the powerful dealer(s), the manufacturer's loss may be relatively insignificant. For example, a downtown department store may be satisfied when the manufacturer, at little loss to itself, supplies only those discounters located in the suburbs or delays supplying discounters with newer models or fashions. In addition, those dealers capable of “certifying” a product's quality or fashion need not account for a large share of a manufacturer's local sales.

Even when dealers are not individually powerful, they may respond so predictably to a manufacturer's rejection or termination of distribution restraints that the manufacturer must view them as a collectivity, which probably has sufficient power to warrant concern. This is most likely to occur on products distributed through multibrand dealers,

[81]Of course, a manufacturer might willingly restrain intrabrand competition in order to allow dealers to secure and retain (rather than compete away) excess profit in order to obtain something he wants, such as exclusive dealing to the detriment of other manufacturers, misleading dealer recommendations to consumers, or faithful performance of dealership obligations.

who can readily shift their patronage or "selling enthusiasm" among brands.[83] If many manufacturers limit intrabrand competition—when multibrand dealers are involved the most common restriction is resale price maintenance—others may feel compelled to follow them, and none may be able individually to afford to abandon the restraint. If only one or very few manufacturers employ the restriction, dealer power is unlikely to be the reason, unless those manufacturers are relatively weak, as a modest market share might indicate.

We are not confident that we can tell when resale price maintenance is a response to dealer power, although a relatively weak indicator would be a dealer's market share—say, 30 percent of a manufacturer's local or total sales—local when the manufacturer restrains competition on its brand in only a few local markets and broader when it practices the restraint more generally.

Dealer Initiatives: Possible Congruence With Manufacturer Interest

Obviously, the absence of dealer initiatives does not disprove dealer power, for unreasonable restraints may be adopted without any visible threats or demands. Dealer pressure may manifest itself in ways subtle as well as ways overt, and changing economic circumstances—such as an increase in dealer power—may render a once-reasonable restraint unreasonable without a word being said.

Nor does the presence of a dealer initiative guarantee that the restraint is illegitimate. A manufacturer does not necessarily bow to dealer power when the manufacturer adopts or enforces a distribution restraint individually or collectively requested by dealers.[85] It is difficult to tell when the restraint is a masquerade for dealer power,[86] precisely because the manufacturer's interest may be congruent with that of the dealers. For example, when the product requires costly pre-sale demonstrations, which some dealers forgo while using the costs thus saved to undercut the retail prices of demonstrating dealers, both the latter dealers and the manufacturer have a common incentive to moderate the "free ride" of the nondemonstrating dealers. When the manufacturer does so on its own initiative, the intrabrand restriction looks "truly vertical." It may be no less so when the manufacturer imposes restrictions after complaints, arguments, or persuasion—"We can't continue demonstrating or handling if this goes

[83]Single-brand dealers who can easily shift to other brands could have the same kind of power, although we may doubt that other brands could quickly absorb the bulk of a particular manufacturer's dealers who became disappointed because the manufacturer dropped or refused to adopt distribution restraints.

[85]Dealer initiatives bear on distribution restraints in two ways. First, a dealer initiative might indicate that a restraint serves dealer power rather than a legitimate manufacturer interest, which is the subject of the present discussion. Second, action by a manufacturer in response to dealer initiative might be the only evidence of the "contract, combination, or conspiracy" necessary to trigger Sherman Act §1. Though related, the two inquiries are separate: an initiative might suffice to show dealer power without implying any agreement by the manufacturer with anyone.

[86]The *Sylvania* Court acknowledged "occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.28 (1977).

on"—from one dealer, many dealers individually, or even a dealer trade association. Even when dealer action can fairly be characterized as a "demand," the manufacturer's acquiescence does not necessarily mean that any resulting restraint is unreasonable. The dealer may simply be unable to survive or to continue to offer good service without some protection from intrabrand competition.[87] And even if the dealer's survival is not in danger, it may have more profitable alternatives, which may or may not promise monopoly profits.

The Supreme Court recognized this ambiguity in its *Monsanto* decision.[89] The Court held that a conspiracy between a dealer and the manufacturer may not be inferred from the latter's termination of a rival price-cutting dealer after the former's complaint. In reaching this conclusion, the Court expressed a policy judgment favoring the movement of information from dealers to manufacturers:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. As Monsanto points out, complaints about price-cutters "are natural—and from the manufacturer's perspective, unavoidable— reactions by distributors to the activities of their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate illegal concerted action." Moreover, distributors are an important source of information for manufacturers. … To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.[90]

Furthermore, we must take care not to penalize the manufacturer who initially chooses intrabrand competition and turns to restraints only after dealer representations about, say, substantial free riding. It is for this reason that many courts have insisted that no adverse inferences should be drawn from dealer initiatives in the absence of proof that dealers induced the manufacturer to act contrary to its own best interests.[91] Nevertheless, we need to consider whether weak inferences may properly be based on some dealer initiatives.

Dealer power is easy to recognize and should be decisive in the rare case in which a

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[87]If the manufacturer reluctantly accedes, has it been "coerced" by dealer power or by reasonable market necessity?

[89]*Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984). See also *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725-727 (1988).

[90]*Monsanto*, 465 U.S. at 763-764.

[91]E.g., *Blankenship v. Herzfeld*, 661 F.2d 840 (10th Cir. 1981); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), cert. denied, 454 U.S. 1083 (1981).

manufacturer rejects a dealer association's request for intrabrand restraints until it threatens the manufacturer with a collective withdrawal of its members' patronage. Although any organized dealer activity might be viewed with suspicion,[93] dealers are allowed to form trade associations, to develop and exchange certain kinds of information, and to promote common interests in a single brand or in a class of goods. Their joint complaints or requests might merely evidence the obvious fact that they cannot continue to advertise, promote, and demonstrate the product when many nondemonstrating dealers undercut their prices. But perhaps we should distinguish enforcement of ongoing restraints from their original creation.

Collective monitoring and reports of dealer compliance with existing intrabrand restraints apparently imposed voluntarily by the manufacturer do not indicate any dealer interests opposed to those of the manufacturer. Once a system of restraints is in place, it is in the interests of all complying dealers to detect and report violations to the manufacturer. Accordingly, we should not infer dealer power from subsequent enforcement by the manufacturer of its vertical restrictions,[94] although joint complaints might imply a threat of collective reprisal. The tribunal would, of course, be reassured if the defendant came forward with evidence of legitimate purposes.

More suspicious—and therefore perhaps warranting imposition on the defenders of the burden of persuasion as to justification—is the restraint that was first adopted or significantly intensified after collective dealer requests. Although the manufacturer's failure to restrain distribution before receiving concerted instruction from dealers is, as we have seen, not decisive, the danger that a dealer conspiracy has coerced the manufacturer is severe in such cases.

To be sure, even dealers acting collectively would have difficulty coercing an unwilling manufacturer if they account for a trivial portion of its sales in a local market or can be readily replaced without delay, disruption, or other transaction costs. Accordingly, should the law withhold its concern about dealers acting collectively unless they account for a substantial share of the manufacturer's local sales or cannot be readily replaced? A simpler approach could merely acknowledge that an inference of dealer power based on collective requests is relatively weak and allow it to be overcome when the defenders offer some evidence of a legitimate manufacturer purpose, perhaps bearing the burden of persuasion as well in cases of initial adoption (or intensification) after collective action.

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[93]All joint action by a dealers' association with an actual or potential detrimental effect on competition constitutes a "contract … in restraint of trade," which can be appraised for reasonableness. If antitrust courts believe that such an association's representations to manufacturers about distribution restraints create an undue risk of coercing an unwilling manufacturer, they should deem these joint activities unreasonable.

[94]The restraint in such a situation was held to constitute an illegal horizontal restraint in *United States v. General Motors Corp.*, 384 U.S. 127 (1966). We may doubt that Chevrolet dealers, even organized Chevrolet dealers in the Los Angeles area, compelled that powerful manufacturer to adopt and enforce customer restraints. However, the Court focused exclusively on the concerted activities of the dealers without relating them to the manufacturer's independent interest in the vertical restraints it had created without input from the Los Angeles dealers.

A “dominant” dealer's request for adoption or enforcement of a restraint might coerce a manufacturer in the same way as a collective request. Dominance for this purpose would be indicated by, say, 30 percent of a manufacturer's local or total sales of the product in question—local when the manufacturer employs the restraint only in an occasional local market and broader when the manufacturer employs it generally. Still, individual initiatives indicate coercive power only weakly, and dealers should have greater latitude to speak individually than collectively.

Form of Restraint

The scope of a manufacturer's restraint might suggest its function. If it is used in only a few regions, a restraint probably does not address any pervasive free-rider problem or other market failure and may instead respond to the power of dealers in those areas. On the other hand, dealer power might not explain a national restraint, for such power is unlikely to exist in every local market. Upon analysis, however, the scope of a restraint indicates its function only weakly.

A generalized restraint may point away from dealer power, for it is unlikely that a manufacturer restraining distribution in all of its local markets is subject to dealer power in each of those markets. But a manufacturer subject to dealer power in major markets may conclude that the simplicity of uniform distribution arrangements outweighs its losses from using the restraint in those markets where it could be avoided. And dealers might comply more readily with a restraint that applies equally to all.

In any event, a generalized restraint would not itself disprove an inference of dealer power based on other factors. Manufacturers employing a formal system of resale price maintenance have usually applied it generally rather than locally. But a customer or territorial restraint or a refusal to supply particular local discounters sometimes occurs on an ad hoc and entirely localized basis. Such a localized restraint may indeed respond to the power of a local dealer demanding it. On the other hand, such differences among markets may simply reflect different stages in their evolution. Pioneering effort may be required in some local markets but not in others. Or the severity of free-riding problems may vary with the number and aggressiveness of dealers of the same brand selling within each geographic market and thus vary from area to area. Without taking such variations into account, interregional comparisons will be misleading. At most, therefore, a localized restraint in a market that does not apparently differ from a manufacturer's other markets calls for some explanation or evidence of its legitimate function—especially in the case of a local system of formal resale price maintenance.

The form of restraint most likely to reflect dealer power is resale price maintenance. On the many common products requiring “saturation” distribution, customer and territorial restraints are simply not suitable. In addition, multibrand dealers, who possess the more subtle power independently to disadvantage a nonrestraining manufacturer, are not often suitable for nonprice distribution restraints. Furthermore, resale price maintenance has in fact been used on products that do not involve the point-of-sale services that might justify the restraint. Finally, manufacturers have often been observed to discipline discounters who have not failed to provide the services provided by other dealers who have complained about the discounts. The reason for such discipline often seems obscure, unless a manufacturer fears its brand will be dropped or downgraded by the complainant and those of similar disposition.

However, there are several respects in which customer or territorial restraints might indicate a greater likelihood of dealer power. Where nonprice restraints are practiced, there usually are far fewer dealers in each market than in cases of “saturation” distribution often found with resale price maintenance. Informal collaboration is easier to achieve and maintain where the number of dealers is smaller. Also associated with such restraints are single-brand dealers, who are often organized into associations pursuing legitimate common interests in joint advertising or in relations with the manufacturer. Such lawful collaboration may provide a forum or other vehicle for pressuring the manufacturer. With relatively few dealers, moreover, the restraint may manifest itself here and there—unlike resale price maintenance, which, if practiced at all, is likely to be used in all the local markets in which a brand is sold. So informal dealer pressure may be more of a danger here, and its manifestations may be less obvious to the enforcement authorities.

All of these inquiries could be avoided if we learn that the intention of the manufacturer or of dealers was to suppress intrabrand competition for its own sake in order to serve the anticompetitive interests of dealers.[96] When actual effects are not known or readily inferred, an anticompetitive purpose indicates probable effects or, at least, that condemnation would sacrifice no social benefits. A known anticompetitive intention is thus probative but difficult to see. Perhaps a manufacturer's file will disclose that a distribution restraint has been adopted solely in response to dealer power, but that would be a rare find. Dealer files are apt to be highly ambiguous. For example, a dealer's intention to enhance its profits is not only the usual motive of business persons but is entirely consistent with the procompetitive functions of distribution restraints.

A restraint that is no more intensive than necessary to serve a legitimate manufacturer interest cannot be serving antimanufacturer dealer interests in excess profit or the quiet life.[98] Such a justification need not be weighed to determine whether it offsets “dealer power,” for it means that dealer interests simply do not account for the restraint at all.

Observe that the dealer power explanation for a vertical restraint is not disproved merely by showing that the restraint promotes a legitimate manufacturer's goal, for the manufacturer's might otherwise have chosen a less restrictive way to achieve that goal. To exclude dealer power altogether, the business problem addressed by the restraint must be significant, and the restraint must solve it better than any less restrictive alternative available to the manufacturer. Unfortunately, the evidence on these matters will seldom allow the tribunal to make a confident judgment. Accordingly, the legal rules

[96]See Donald I. Baker, Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?, 44 Antitrust L.J. 537, 545 (1975) (suggesting that restraints that are intended to eliminate price cutting should be condemned). See also Robert Pitofsky, The *Sylvania* Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1, 28 (1978).

[98]Of course, a distribution restraint desired by a manufacturer may bring excess dealer profits as an incidental spillover.

will have to specify what each party has to prove.

Of course, if the defenders of a restraint were merely required to come forward with some evidence of a plausible justification without having to persuade the tribunal on this issue, much dealer power would probably survive. So long as there are many theoretically valid efficiencies associated with vertical restraints, at least one of those offered by a particular defendant will often appear plausible. Nevertheless, at least those restraints without any plausible justification—such as those on homogeneous goods like sugar or on some convenience goods like toothpaste—would fail. In any event, if requiring some evidence of justification were the only consequence of finding that dealer power is a danger, weak indications of the danger should suffice to create a prima facie case. Strong indicators of dealer power might require more of a restraint's defenders—perhaps persuasion of the tribunal that the restraint serves a significant and legitimate function. Policy judgments about the different classes of restraints would then determine whether the defenders should also have to persuade the tribunal that a less restrictive alternative suggested by the challenger is significantly more costly or less effective.

Conclusion

Our underlying concern about dealer power does not itself support a per se rule for the general run of vertical restraints cases or even for resale price maintenance. Dealer power is not itself sufficiently ubiquitous to justify total prohibition of any type of distribution restraint. At the other pole, organized dealer requests, powerful individual dealers, and constrained manufacturer choice remain enough of a danger to reject a rule of total legality for distribution restraints. In between lie many options.

Requiring the plaintiff to prove that the challenged restraint is explained solely and exclusively on cartel, dealer power, or other non-efficiency grounds would be an attractive policy option for those who think such instances are rare. This option allows prompt validation of many such restraints. On the other hand, requiring the defenders to offer a plausible and legitimate business reason for every restraint would allow the antitrust tribunal easily to condemn those restraints obviously lacking justification but would complicate many cases in which dealer power is unlikely. Depending on the restraint, challengers might be required to prove specified indicia of dealer power, or, for legally less favored restraints, such power might be presumed subject to rebuttal by disproof of the same specified indicia. If the challengers prevail at that initial stage, it would have to be decided what other rebuttals (such as legitimate functions) would be allowed and with what proofs.

What suffices to indicate dealer power depends, of course, on the consequences. A plausible consequence is that the defendant must offer some evidence that the restraint serves a legitimate function; the defendant might even bear the burden of persuasion on this issue when the inference of dealer power appears especially strong.

Although multibrand dealers might seem especially able to coerce new entrants—either new firms or, to a lesser extent, old firms introducing a new product and expanding into new market areas— condemning the coerced restraint in such cases might make new entry even more difficult and thus worsen rather than improve competition. Therefore, the usual rules designed to cope with dealer power might be suspended for a few years in the case of new entrants.