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I. INTRODUCTION

For most of the twentieth century, the federal courts have assumed that they must choose between two extreme methods of analyzing conduct under Section 1 of the Sherman Act:[1] a per se rule that deems certain conduct illegal on its face;[2] or, a rule of reason that inquires into all conceivable circumstances before determining the legality of a particular restraint.[3] Until the 1970s, the courts were

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1. 15 U.S.C. § 1 (1988).

2. See, for example, *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958) (stating that the per se rule avoids a fruitless and costly economic investigation into the history of the industry involved).

3. See *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (listing several factors a court should consider before invoking antitrust sanctions); *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 49 n.15 (1977) (citing the statement of the rule of reason in *Chicago Board of Trade*). As the Federal Trade Commission has stated:

enamored of the clarity, simplicity, and deterrent effects of per se rules.[4] As they have become more knowledgeable about economic theory in the last fifteen years, however, the courts have grown disillusioned with the absolutism of the per se rule and have been more inclined to consider efficiency justifications for competitive restraints. As a result, the courts have narrowed the scope of the per se rule and expanded applications of the rule of reason.[5]

Unfortunately, however, the modern rule of reason has no substantive content. Although the rule of reason has been characterized as the "prevailing standard of [Section 1] analysis,"[6] it is curiously lacking in definition. Indeed, the federal courts have had little experience in applying the standard. Rule of reason trials were rare from the early part of the century through the 1960s because the per se rule dominated Section 1 analysis.[7] Even in recent years, plaintiffs have been reluctant to bring a rule of reason case because its evidentiary hurdles are so difficult to meet. It is particularly burdensome for a plaintiff to prove that a defendant has sufficient market power to adversely affect competition in the relevant market.[8] As a consequence, the courts have had few opportunities to define the rule of reason. It remains a vague listing of factors that gives neither

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> [L]itigants and courts have taken positions that distort *both* ends of this dichotomy—saying that conduct must be condemned automatically, without regard for any redeeming competitive virtues, if it can be categorized as falling into a *per se* category; while conduct falling into the residual rule of reason category cannot be condemned at all until all aspects of definition, market power, intent, and net competitive effect have been analyzed—a process that many consider to be the antitrust equivalent to Chinese water torture.

Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 603 (1988).

4. See notes 10-15 and accompanying text.

5. The so-called Chicago School, which initially gained influence among academics, see Betty Bock, *An Economist Appraises Vertical Restraints*, 30 Antitrust Bull. 117, 120-21 (1985), advocates greater deference to the business judgment of the parties to a competitive restraint and is identified with the rule of reason approach. During the last fifteen years many of the academics who initially advocated the Chicago School *laissez-faire* antitrust approach were appointed to the federal bench and began to apply their economic theory in antitrust cases. See, for example, *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 228 (D.C. Cir. 1986) (Bork, J.) (holding that the antitrust inquiry must focus on whether the effect of the conduct at issue limits or enhances free market competition); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.) (stating that the per se rule is only designed for naked restraints, while the rule of reason is used for agreements that facilitate activity); *Valley Liquors v. Renfield Importers*, 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.) (holding that the plaintiff in a restricted distribution case must show that, after weighing the effects on both intrabrand and interbrand competition, the restriction is unreasonable).

6. *GTE Sylvania*, 433 U.S. at 49.

7. See notes 10-20 and accompanying text.

8. See notes 48, 62, 63 and accompanying text.

courts nor litigants a clear understanding of the types of competitive conduct that will be permitted or precluded. The rule of reason's lack of guidance is currently "one of the more vexing problems of antitrust law."[9]

This Article proposes a new standard of analysis for Section 1 conduct that avoids the extremes of both the per se rule and the rule of reason. The courts can achieve the clarity of per se rules without precluding defendants from demonstrating efficiency justifications for their conduct. The key to such an approach lies in classifying Section 1 conduct into categories according to the conduct's likely impact on competition. The courts have had sufficient experience with most Section 1 restraints to classify them by their most probable competitive effect. Under the proposed standard, the amount of necessary judicial analysis would vary according to the category within which specific conduct falls. In most cases the courts could avoid the complications of market power analysis entirely. Certain types of restraints are almost always anticompetitive. Their illegality can be presumed without unduly prejudicing defendants. On the other hand, there should be a presumption in favor of the legality of those restraints that usually promote efficiency. Such presumptions would simplify antitrust trials and provide better guidance to American firms on the legality of particular competitive restraints. The use of presumptions, however, would not require a return to the arbitrariness of the per se approach. The courts could afford a rebuttal opportunity to the party against whom a presumption was directed. The party would have an opportunity to demonstrate that a particular restraint possessed special competitive characteristics that distinguished it from the ordinary case. Such an approach would ensure that the courts' ultimate decisions in Section 1 cases are grounded upon the substantive economic effect of the conduct at issue.

II. THE TRADITIONAL PER SE STANDARD

The per se rule was dominant throughout the activist antitrust era of the 1960s. By the late 1960s, the Supreme Court had applied the per se rule to tying arrangements,[10] horizontal territorial and

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9. David A. Clanton, *Horizontal Agreements, the Rule of Reason and the General Motors-Toyota Joint Venture*, 30 Wayne L. Rev. 1239, 1249 (1984).
10. *Northern Pacific*, 356 U.S. at 5-7.

customer allocations,[11] and group boycotts.[12] The per se trend reached its peak in 1967[13] when, in *United States v. Arnold, Schwinn & Co.*,[14] the Court extended the per se rule to nonprice vertical restrictions imposed by a supplier on its distributors.[15]

The activist per se approach had many beneficial aspects. Per se rules are easily applied, easily understood deterrents to anticompetitive conduct. The widespread use of per se rules conserved the resources of the judicial system and of private litigants by making trials shorter and less expensive. Because so many restraints were deemed illegal on their face, American firms clearly were aware of the types of competitive conduct that they should avoid.[16]

The dominance of the per se rule, however, also caused some significant problems. The per se approach was rigid and formalistic. By mechanically precluding certain conduct without any consideration of its economic effects, the rule deterred beneficial as well as pernicious business practices.[17] Soon after the *Schwinn* decision, antitrust commentators began to point out the inconsistences between the per se rule and an economics-based approach to antitrust analysis: under certain circumstances, a particular restraint on competition could

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11. *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 355 (1967).

12. *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

13. See Earl E. Pollock, *The "New Antitrust"—Its Implications for the Practitioner*, 54 Antitrust L. J. 51, 52 (1985) (placing *Schwinn* among a group of Supreme Court cases reflecting the antitrust "fever" of the late 1960s).

14. 388 U.S. 365 (1967), overruled by *GTE Sylvania*, 433 U.S. at 57-58.

15. *Schwinn*, 388 U.S. at 382.

16. See *Topco*, 405 U.S. at 609-10 n.10 (stating that "[w]ithout the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act").

17. Supporters of a per se approach argue, however, that its occasional overbreadth is justified by its efficiency. See Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L. J. 135, 157 (1984) (stating that courts accept the occasional overbreadth of the per se rule because most of the practices it condemns are anticompetitive, and a case-by-case approach would allow too many of these anticompetitive practices to persist). In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), the Supreme Court stated: "As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable." See also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 440 (1990) (Brennan, J., concurring in part and dissenting in part) (stating that "[w]e have freely admitted that conduct condemned under the *per se* rule sometimes would be permissible if subjected merely te rule-of-reason analysis").

promote economic efficiency, yet the per se rule left no room for consideration of such beneficial effects.[18]

III. THE TRIUMPH OF THE RULE OF REASON

Disillusionment with the rigidity of the per se rule soon led to limitations on its use and a corresponding broadening of the rule of reason. After the high water mark of per se analysis in the 1967 *Schwinn* case,[19] the federal judiciary began to rethink certain applications of the rule.[20] The most dramatic retreat from per se analysis occurred in 1977 when, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, the Supreme Court reversed its decision in *Schwinn* and decided that nonprice vertical restrictions should be judged by the rule of reason.[21] At issue in *GTE Sylvania* was a contractual requirement that distributors sell Sylvania television sets only from authorized locations.[22] The Court recognized that, although this requirement limited competition among the distributors in the resale of Sylvania televisions ("intrabrand competition"), it also promoted competition with other brands of television sets ("interbrand competition") by inducing Sylvania distributors to make the investments necessary to provide more services to customers.[23] The Court pointed out that, "[d]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[24] The Court concluded that a rule of reason rather than a per se approach was appropriate in light of the potential economic benefits of the location clause imposed by GTE Sylvania.[25]

The history of antitrust analysis since *GTE Sylvania* has been, with only a few exceptions, a steady erosion of the per se approach to

18. See, for example, Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 297 (1975) (noting that the application of the per se rule to resale price maintenance prevents the consideration of beneficial effects such as improved point-of-sale services). See also Donald L. Beschle, *"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 Hastings L. J. 471, 475-76 (1987).

19. See notes 13-15 and accompanying text.

20. This rethinking was a result of the increased exposure of federal judges to economic theory during the 1970s. See note 5 and accompanying text.

21. *GTE Sylvania*, 433 U.S. at 57-58.

22. Id. at 38.

23. Id. at 54-55.

24. Id. at 59.

25. Id. at 54-57.

analyzing Section 1 conduct and an expanded use of the rule of reason to consider a restraint's economic impact.[26] In 1979 the Supreme Court indicated for the first time that it would be willing to apply a rule of reason analysis to a price-fixing arrangement. The Court held in *Broadcast Music, Inc. v. CBS*[27] that a group of copyright holders did not commit a per se violation of Section 1 when they fixed a common price for the licensing of their musical compositions.[28] The Court pointed out that, instead of engaging in a rigid per se analysis, the courts should initially consider whether a restraint "appears to be one that would always or almost always tend to restrict competition and decrease output."[29] The Court concluded that the common license allowed the copyright holders to market their compositions more efficiently and therefore should be upheld under the rule of reason.[30]

During the 1980s the Supreme Court extended the rule of reason to other horizontal agreements with potential efficiency justifications. In *NCAA v. Board of Regents*,[31] the Court used the rule of reason to analyze the NCAA's limitations on the number of times its member college sports teams could appear on television and the fees they could receive from the networks. Despite the fact that these restrictions were similar to the type of price and output restrictions that previously had been considered illegal per se, the Court agreed to consider the defendants' arguments that the restrictions had a procompetitive purpose (that is, making possible the marketing of amateur collegiate athletics).[32]

The Court also declined to apply the per se rule to a group boycott in *Northwest Wholesale Stationers v. Pacific Stationary & Printing Co.*[33] The plaintiff claimed that its expulsion from a whole-

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26. See M. Laurence Popofsky and David B. Goodwin, *The "Hard-Boiled" Rule of Reason Revisited,* 56 Antitrust L. J. 195, 196 (1987) (noting that, since *GTE Sylvania*, courts examine the competitive effects of restraints that would once have been immediately condemned under the per se rule). Indeed, as one commentator has pointed out, "the momentum appears to remain with those who would limit or eliminate per se categories, if not the entire concept of per se antitrust illegality." Beschle, 38 Hastings L. J. at 497 (cited in note 18).

27. 441 U.S. 1 (1979).

28. Id. at 24-25.

29. Id. at 19-20.

30. Id. at 20.

31. 468 U.S. 85 (1984).

32. The Court ultimately found the television restrictions illegal under the rule of reason because they were broader than required to promote amateur collegiate athletics. Id. at 104-20.

33. 472 U.S. 284 (1985). Prior to *Northwest Wholesale*, the per se rule had been firmly established for group boycotts. See *United States v. General Motors Corp.*, 384 U.S. at 145; *Klor's*, 359 U.S. at 212; *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 668 (1941); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 603 (1914).

sale purchasing cooperative for office supplies should be illegal on its face. The Court held, however, that the per se rule should not apply because the plaintiff had failed to make a threshold showing that "the cooperative possesses market power or exclusive access to an element essential to effective competition."[34] Similarly, *FTC v. Indiana Federation of Dentists*[35] involved an association of dentists who refused to supply patient x-rays to insurance companies seeking to evaluate benefit claims. Although it ultimately found this practice illegal under the rule of reason, the Court declined "to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the per se rule."[36]

In a line of cases in the 1980s, the Supreme Court also limited the use of the per se rule in vertical restraint cases. In *Jefferson Parish Hospital District No. 2 v. Hyde*,[37] the Court held that, before invoking the per se rule for a tying arrangement, a plaintiff would have to show that a defendant possessed a significant share of the tying product market.[38] In *Monsanto Co. v. Spray-Rite Service Corp.*,[39] the Court refused to infer a per se illegal resale price-fixing conspiracy from a manufacturer's receipt of price-cutting complaints from its distributors.[40] Furthermore, in *Business Electronics Corp. v. Sharp Electronics Corp.*,[41] the Court concluded that the per se rule should not apply even when a manufacturer and dealer expressly agreed to terminate a competing dealer who was price cutting. According to the Court, the per se rule would be appropriate only when the manufacturer and remaining dealer agreed on the specific prices to be charged by the dealer in the future.[42]

During the last fifteen years, many lower federal courts have followed enthusiastically the Supreme Court's lead in limiting applications of the per se rule and expanding the use of the rule of reason.[43] Indeed, in their desire to consider the potential economic efficiencies

34. *Northwest Wholesale*, 472 U.S. at 296.
35. 476 U.S. 447 (1986).
36. Id. at 458.
37. 466 U.S. 2 (1984).
38. Id. at 16-18.
39. 465 U.S. 752 (1984).
40. Id. at 764.
41. 485 U.S. 717 (1988).
42. Id. at 726-27, 734-35.
43. See, for example, *Rothery Storage*, 792 F.2d 210 (allowing requirement that agents of van lines not deal with other moving companies); *National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986) (upholding interchange fee among members of VISA credit card system); *Polk*, 776 F.2d 185 (upholding noncompetition covenant).

of defendants' conduct, some lower federal courts have gone beyond the Supreme Court's mandate. In *Rothery Storage and Van Co. v. Atlas Van Lines*,[44] for example, Judge Bork concluded that the Supreme Court, by virtue of its decisions in *Broadcast Music, NCAA,* and *Northwest Wholesale*, had implicitly overruled the per se illegality of territorial allocations among competitors.[45]

IV. DEFICIENCIES IN CURRENT RULE OF REASON ANALYSIS

As a result of the revolution in antitrust economics that occurred within the federal judiciary in the 1980s, the rule of reason now has become the dominant form of analysis in Section 1 cases. To date, however, neither the federal courts, enforcement agencies, nor antitrust commentators have been able to devise an effective means of applying the rule.[46]

It is ironic that, in an era of its supposed predominance, the rule of reason has been applied so infrequently at the trial level. Most judicial discussion of the rule of reason standard has occurred in the Supreme Court and federal appellate courts, where the analysis has largely been confined to the issue of whether a rule of reason or per se standard should apply.[47] Once the courts have decided that the rule of reason is appropriate, they have usually neglected to explain how it should be applied on remand.

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44. 792 F.2d 210.

45. Id. at 226. The Supreme Court found horizontal territorial allocation to be per se illegal in *Topco*, 405 U.S. at 611; *United States v. Sealy Corp.*, 388 U.S. 350, 355 (1967); and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 595, 598 (1951). Despite Judge Bork's opinion, these cases are still valid precedents for the analysis of Section 1 conduct. *Topco*, in fact, was cited with approval by the Court in its recent decision in *Sharp*, 485 U.S. at 734.

46. See Clanton, 30 Wayne L. Rev. at 1249 (cited in note 9); see also note 74 and accompanying text.

47. See, for example, *GTE Sylvania*, 433 U.S. at 57-58 (applying rule of reason to nonprice vertical restraints); *Broadcast Music*, 441 U.S. at 24-25 (applying rule of reason to horizontal price-fixing arrangement); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (applying per se rule to horizontal agreement to fix credit terms); *Maricopa*, 457 U.S. at 348 (applying per se rule to maximum price-fixing agreement); *Jefferson Parish*, 466 U.S. at 31 (refusing to apply the per se rule to a tying arrangement where the defendant lacked market power); *Northwest Wholesale*, 472 U.S. at 298 (applying rule of reason to group boycott where the defendant lacked market power or exclusive access to an element essential to competition); *Indiana Federation of Dentists*, 476 U.S. at 458-59 (applying rule of reason te dentists' concerted refusal to deal with insurers); *Sharp*, 485 U.S. at 726 (applying rule of reason to termination of price-cutting distributor at behest of competing distributor); *Bailey's, Inc. v. Windsor America, Inc.*, 948 F.2d 1018, 1031 (6th Cir. 1991) (applying rule of reason to distributor termination); *ES Development v. RWM Enterprises*, 939 F.2d 547, 557 (8th Cir. 1991) (applying per se rule te agreement between dealers).

Trial courts also have had little experience in using the rule of reason because plaintiffs are reluctant to bring rule of reason cases ab initio. Indeed, the risk/reward ratio is prohibitive for plaintiffs considering rule of reason cases. First of all, such cases are extremely expensive to pursue. In order to prove a defendant's market power, the plaintiff must introduce lengthy testimony from economists and extensive documentary evidence from other competitors.[48] Furthermore, a plaintiff's chances of prevailing in a rule of reason case are quite low. The rule of reason, in fact, often has been viewed as a rule of per se legality.[49] Faced with such high costs and uncertain outcomes, many plaintiffs simply have elected not to pursue rule of reason cases.[50]

Because it is used so infrequently, the rule of reason has atrophied in the federal courts. Indeed, most courts' definitions of the rule have not progressed beyond a requirement that the trier of fact consider all the circumstances surrounding a restraint before condemning it.[51] The courts simply quote "'a long list of factors without any indication of priority or weight to be accorded each factor. . . .'"[52] Such a vague approach gives little guidance to litigants, judges, or juries. The classic formulation of the rule of reason, set forth by Justice Brandeis in 1918 in *Chicago Board of Trade v. United States*,[53] included such factors as the circumstances peculiar to the defendant's business, the conditions before and after the restraint, the nature and

48. See note 62 and accompanying text.

49. See William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Cal. L. Rev. 933, 936 (1987) (stating that the application of the rule of reason rarely results in a finding of illegality due to the plaintiff's difficult burden of proof); John J. Flynn and James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. Rev. 1125, 1143 (1987) (stating that the rule of reason as applied in *GTE Sylvania* effectively made vertical customer and territorial restraints per se lawful).

50. For example, during the 18 years since the *GTE Sylvania* decision, very few cases have been brought challenging the legality of nonprice vertical restrictions under the rule of reason. The paucity of such cases is not surprising in light of the fact that, during such period, only two courts have found nonprice vertical restrictions to be illegal, and in each of those cases there was some involvement by competing distributers that brought into question the vertical nature of the restraints. See *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1578 (11th Cir. 1983) (involving airtight territorial restrictions imposed by manufacturer that competed with its distributors in resale of its own product); *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081 (2d Cir. 1980) (involving requirement that distributors pay warranty pass-over fee when selling in each other's territory).

51. Mark Crane, *The Future Direction of Antitrust*, 56 Antitrust L. J. 3, 14 (1987)

52. Popofsky and Goodwin, 56 Antitrust L. J. at 198 (cited in note 26) (quoting Robert Pitofsy, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 34 (1978)).

53. 246 U.S. 231 (1918).

purpose of the restraint, and the competitive effects of the restraint.[54] The rule of reason was no more advanced by the end of the century. The Court in *GTE Sylvania* simply repeated Justice Brandeis' open-ended 1918 formula.[55] Again, in *Sharp* in 1988, the Court merely cited *GTE Sylvania*'s broad definition without any further explanation.[56]

A few courts and commentators have attempted to refine rule of reason analysis. Their approach has been based on the assumption that a defendant must possess market power in order to affect competition adversely in any relevant market.[57] As one commentator has stated, "antitrust policy is aimed primarily at preventing firms from achieving, retaining, or abusing market power."[58] Thus several courts have held that, as a threshold issue, a plaintiff must prove that a defendant had a market share in excess of a particular percentage. If the plaintiff fails to prove market power, the restraint is deemed legal and the analysis is at an end.[59] This so-called market share safe har-

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54. Id. at 238.

55. *GTE Sylvania*, 433 U.S. at 49 n.15.

56. *Sharp*, 485 U.S. at 723.

57. See, for example, *United States v. Brown University*, 5 F.3d 658, 668 (3d Cir. 1993) (stating that "[m]arket power . . . is essentially a 'surrogate for detrimental effects'" (quoting *Indiana Federation of Dentists*, 476 U.S. at 460-61)). See also Wesley J. Liebeler, *1984 Economic Review of Antitrust Developments: Horizontal Restrictions, Efficiency and the Per Se Rule*, 33 UCLA L. Rev. 1019, 1056 (1984) (stating that "[m]arket power is at the heart of any inquiry under the rule of reason"). As then Professor Easterbrook stated:

> Few firms have substantial power over price. Firms that lack [market] power cannot injure competition no matter how hard they try. They may injure a few consumers, or a few rivals, or themselves . . . by selecting "anticompetitive" tactics. When the firms lack market power, though, they cannot sustain deleterious practices. Rival firms will offer the consumers better deals. The process of rivalry is sufficient insurance. Rivals' better offers will stamp out bad practices faster than the judicial process can.

Easterbrook, 53 Antitrust L. J. at 159 (cited in note 17). See also David L. White, *Antitrust Enforcement Through a Sharpened Rule of Reason*, 20 Ariz. St. L. J. 749, 760 (1988) (stating that the economic rationale for a market power requirement is that "[w]ithout market power, the defendant[ ] cannot effectively raise price or restrict output"); Alden F. Abbott, *Joint Production Ventures: The Case for Antitrust Reform*, 58 Antitrust L. J. 715, 732 (1989) (proposing a structured rule of reason for determining the legality of joint ventures that considers the effect of the joint venture on market power); Joe Sims, *Developments in Agreements Among Competitors*, 58 Antitrust L. J. 433, 439 (1989) (noting that the Antitrust Division of the Justice Department will only try to determine if a restriction analyzed under the rule of reason actually will generate efficiencies if the restriction will enhance or create market power).

58. George A. Hay, *Market Power in Antitrust*, 60 Antitrust L. J. 807, 807 (1992).

59. See *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984) (stating that in rule of reason analysis, "the plaintiff first [must] prove that the defendant has sufficient market power to restrain competition substantially. . . . If not, the inquiry is at an end; the practice is lawful").

bor has become standard in nonprice vertical restraint cases.[60] A few courts also have used the approach for horizontal restraints.[61]

The market share safe harbor, however, does not improve the rule of reason standard in any meaningful manner. Indeed, it focuses on the most difficult factor under the rule of reason. By making an analysis of market power the first and most important step under the rule of reason, the courts have imposed an even greater burden on plaintiffs. Proof of market power is "difficult, complex, expensive and time-consuming,"[62] involving a fact-intensive assessment of the relevant product and geographic market, each of the parties' shares of those markets, and their competitors' market shares. Most plaintiffs simply cannot afford the costs of a market power case. If plaintiffs are required to prove market power as a condition to reaching a jury, they "may simply forgo a lawsuit."[63]

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60. Cases requiring that a plaintiff alleging the unreasonableness of a non-price vertical restraint make a threshold showing that the defendant possesses market power include *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1231 (8th Cir. 1987); *Assam Drug Co., Inc. v. Miller Brewing Co.*, 798 F.2d 311, 316 (8th Cir. 1986); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1435 (7th Cir. 1986); *Hand v. Central Transport, Inc.*, 779 F.2d 8, 11 (6th Cir. 1985); *Jack Walters & Sons v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir. 1984); *General Leaseways*, 744 F.2d at 596 (7th Cir. 1984); *Graphic Products*, 717 F.2d at 1568 (11th Cir. 1983); *Valley Liquors, Inc. v. Renfield Importers*, 678 F.2d 742, 745 (7th Cir. 1982); *Muenster Butanc, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 388-89 (9th Cir. 1978).

61. Horizontal cases requiring the threshold market power showing include *Wilk v. American Medical Ass'n*, 895 F.2d 353, 359 (7th Cir. 1990); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.*, 889 F.2d 524, 529 (4th Cir. 1989); *Gencral Leaseways*, 744 F.2d at 596; *Rothery Storage*, 792 F.2d at 217. Use of a market power screen in horizontal cases, however, remains controversial. The courts have been split over the extent to which the defendant's market power should be considered in such cases. As the Eleventh Circuit stated, "[w]hether tbe court . . . must weigh the market power of tbe antitrust defendant is a curiously confused and uncertain area of the law." *National Bancard*, 779 F.2d at 603. The Supreme Court itself has been willing to dispense with market power analysis in certain horizontal restraint cases, while deeming market power a critical issue in others. Compare *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 (1984) (stating that "[a]s a matter of law, the ahsence of proof of market power does not justify a naked restriction on price or output") with *Northwest Wholesale*, 472 U.S. at 294-98 (requiring proof of market power for illegality of collective refusal to deal). In *FTC v. Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411, the Supreme Court criticized the potential for a market share safe harbor to introduce the "enormous complexities of market definition into every price-fixing case." Id. at 430-31 (quoting Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* 298 (Basic Books, 1978)).

62. Philip Areeda, *The Changing Contours of the Per Se Rule*, 54 Antitrust L. J. 27, 28 (1985). See also Richard S. Markovits, *The American Antitrust Laws on the Centennial of the Sherman Act: A Critique of the Statutes Themselves, Their Interpretation, and Their Operation*, 38 Buff. L. Rev. 673, 752 (1990) (arguing that "market-oriented approaches are inevitably cost-ineffective").

63. S. Rep. No. 102-42, 102d Cong., 1st Sess. 17 (1991) (presenting views in support of S. 429 by Senators Metzenbaum, Biden, Kennedy, Leahy, Simon, and Roth). See also Eugene Crew and Richard Grossman, *Antitrust Litigation Reform: A Modest Proposal*, Antitrust 41, 41-

The current rule of reason standard exacts considerable social costs beyond its disadvantage to plaintiffs. Even with the refinement of a market power safe harbor, the rule of reason remains vague and undefined. The market power screen provides no guidance on how a court should balance the potential anticompetitive effects and efficiencies of a restraint once a plaintiff has met its initial burden of proving market power. The courts have not identified the types of efficiencies that would justify defendants' exercise of market power nor the evidentiary weight that should be afforded specific efficiency claims. Defendants as well as plaintiffs incur greater costs in defending cases under a standard which gives so few guidelines for judges and juries to follow.[64] The time and expense of rule of reason cases are an added burden to the federal courts, which with their current backlog of cases can ill afford to waste their limited resources.[65] The current standard provides little guidance to firms attempting to plan their conduct. Antitrust enforcement relies primarily on self-policing by the business community, but voluntary compliance is impossible when antitrust standards are unclear. The "gray area" between per-

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42 (Summer 1993) (explaining that the growing evidentiary burden in antitrust litigation has greatly increased the cost and delay of such suits). A current commissioner of the Federal Trade Commission has described the "exhaustive and exhausting document production by the... parties both in and close to the market, endless debates about elasticity of supply and demand, and all the minutiae that may need to be tied down in a full rule of reason case." Mark L. Azcuenaga, *Market Power as a Screen in Evaluating Horizontal Restraints*, 60 Antitrust L. J. 935, 940 (1992). Indeed, the commissioner concluded that, when a market power inquiry is required under the rule of reason, most "cases would not be brought simply because the litigation cost would outweigh the benefits of the case. . . ." Id. at 936. In *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the court stated that, under the rule of reason, a plaintiff "simply cannot afford the elaborate market analysis and expert witnesses required to make . . . a showing [of adverse market effects]." Id. at 1221.

64. Judge Easterbrook has commented:

> Faced with a list of such imponderables, lawyers must engage in ceaseless discovery (they might find something bearing on a factor, and the factor might be dispositive). The higher the stakes—and stakes are very high in antitrust—the more firms are willing to spend on discovery and litigation. The marginal week of discovery or trial just might mean saving a few million or tens of millions of dollars. Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the rule of reason.

Eastorbrook, 53 Antitrust L. J. at 155 (cited in note 17).

65. As one commentator noted:

> Nor is it just the antitrust plaintiff whose burden has been increased by the Supreme Court decisions. A much greater burden has been imposed on defendants and on the courts as well. To require more evidence to prove a violation is to require more discovery and longer trials and greater resources from plaintiffs, defendants and the courts just to be able to collect, process, and consider the additional evidence now deemed necessary.

Robert B. Reich, *The Work Of Nations: Preparing Ourselves for 21st Century Capitalism* 38-39 (A.A. Knopf, 1991).

missible and illegal conduct is much broader now that a vague rule of reason has supplanted the per se rule for so many types of competitive conduct. Given the high costs of litigation and potential liability under the antitrust laws, businesses likely will take a conservative approach and avoid any conduct that falls within a gray area.[66] Such hesitancy may prevent firms from entering into business arrangements that enhance productivity and benefit consumers.[67]

In their attempts to avoid an arbitrary per se rule, the federal courts have gone to the opposite extreme. They have established, as the prevailing method of analysis for Section 1 conduct, a formless standard that requires the trier of fact to consider all conceivable economic circumstances before rendering a decision on the legality of a particular restraint. The courts have assumed that such a multifaceted approach will allow them to render economically correct decisions.[68] The courts, however, are mistaken in that assumption. It is unrealistic to expect judges and juries to make the complex economic decisions required by the rule of reason. While judges and juries are adept at determining "who did what, when, and why,"[69] they are ill equipped to decide economic issues. They lack the sophisticated economic training necessary to balance the likely anticompetitive effects of a particular restraint against its potential efficiencies.[70]

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66. One commentator has noted how antitrust law has moved from the clear standards of the past "into a gray area where it is possible for a case to come out one way—or another." Betty Bock, *Is Antitrust Dead?* 10 (The Conference Board, 1989). Another commentator has reflected on the high cost to the business community resulting from the confusion over antitrust standards: "Uncertainty is a high-cost commodity. Indeed, the business community . . . might find uncertainty more costly than clear and wrong rules." Sims, 58 Antitrust L. J. at 440 (cited in note 57). See also Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress*, 62 N.Y.U. L. Rev. 1020, 1043-44 (1987) (stating: "[a]ntitrust rules that require complex and convoluted analysis in individual cases reduce planning certainty and thereby raise business costs").

67. Many American firms, for example, have been deterred from entering into joint ventures for the production of new products out of a fear of antitrust liability. See Thomas S. Jorde and David J. Teece, *Innovation, Cooperation and Antitrust*, 4 High Tech. L. J. 1, 36 (1989) (stating that "[c]urrent U.S. antitrust law needlessly inhibits strategic alliances designed to develop and commercialize new technology").

68. "The courts want te render correct judgments. Since economic consequences are hard te predict, the courts should consider all consequences of the allegedly illegal action before condemning it." Crane, 56 Antitrust L. J. at 14 (cited in note 51). See also Flynn and Ponsoldt, 62 N.Y.U. L. Rev. at 1143 (cited in note 49) (explaining that when the Supreme Court applies an "undefinod rule of reason te vertical customer and territorial restraints" it "effectively [makes] them per se lawful").

69. Crane, 56 Antitrust L. J. at 15.

70. "[C]ourts are of limited utility in examining difficult economic problems. . . . [They are] ill-equipped and ill-suited for such decision-making [and cannot] analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to

Economists themselves cannot agree on the economic impact of many types of business conduct.[71] If economists cannot effectively evaluate the market effects of particular competitive practices, judges and juries cannot be expected to do so.[72]

In order to render effective decisions, judges and juries must be given objective standards by which to judge economic behavior. Traditional per se rules may have been too harsh on certain types of conduct, but they did provide triers of fact a clear and consistent means of judging anticompetitive behavior. Yet, the global inquiry required by the rule of reason provides no guidance as to how economic conduct should be judged. Instead, it simply allows judges and juries to "set sail on a sea of doubt" under a "shifting, vague, and indeterminate" standard.[73] In order to achieve consistent results, the courts must adopt a new method for analyzing Section 1 conduct.[74]

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bear on such decisions.'" Easterbrook, 53 Antitrust L. J. at 155 (cited in note 17) (quoting *Topco*, 405 U.S. at 609-12) (alteration in original). See also *Maricopa*, 457 U.S. at 343 (stating that "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition").

71. It is fantastic to suppose that judges (and juries) could carry out the evaluation entailed

> in such a search. The [consumer] welfare implications of most forms of business conduct are beyond the ken of almost all economists. If you assembled 12 economists and gave them all available data about a business practice, plus an unlimited computer budget, you would not soon (or ever) get unanimous agreement about whether the practice promoted consumers' welfare or economic efficiency more broadly defined. They would inevitably discover some gaps in the data, some avenues requiring further exploration. At least one of the economists would construct a new model showing how the practice *could* reduce efficiency if certain things (unknowable from the data) were present. A global inquiry invites no answer; it puts too many things in issue. . . . To get an answer to a practical problem, you must start with some assumptions and fixed points of reference.

Easterbrook, 53 Antitrust L. J. at 153.

72. As Professor Sullivan has concluded, "economics does not comprehend enough and law, without extreme transformations in its own structure, cannot adequately deal with all that economics does comprehend." Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* § 2 at 10 (West, 1977). Judge Bork points out that "the interaction of law and social sciences has been termed a process of cross-storilization." Speech by Judge Robert Bork, Putman, Hayes & Barlett, Inc. Conference on Law and Economics (Sept. 30, 1988).

73. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). As Judge Easterbrook stated more recently, "Of course judges cannot do what such open-ended formulas require. When everything is relevant, nothing is dispositive." Easterbrook, 53 Antitrust L. J. at 155 (cited in note 17).

74. Reformed rule of reason approaches proposed by the federal courts, academics, and the enforcement agencies to date have done little to remedy the deficiencies of the rule. The federal courts' market share safe harbor will simply increase the courts' consideration of the most difficult factor in rule of reason analysis. See note 62 and accompanying text. The Federal Trade Commission set forth a proposed rule of reason approach in its decision in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. at 586-88. The Commission's approach balances a defendant's efficiency justifications against the potential anticompetitive effects of a restraint. Id. at 587-88. The Commission, however, has provided no guidance on how such balancing

The history of Section 1 analysis reveals that neither a traditional per se nor a standard rule of reason approach to the analysis of competitive restrictions is desirable. The per se approach is too arbitrary, while a rule of reason standard is too ambiguous. The ideal analysis of Section 1 conduct would retain the advantages of the per se and rule of reason approaches while avoiding their pitfalls. It would combine the clarity of the per se rule with the substantive economic inquiry of the rule of reason. The approach would provide clear standards under which the courts could determine when the beneficial or anticompetitive aspects of particular Section 1 restraints are predominating. It is now appropriate for courts to implement a new approach to Section 1 conduct that realistically could achieve these goals.

V. A NEW STANDARD FOR SECTION 1 CONDUCT

The purpose of the Sherman Act is to promote the type of competitive behavior that maximizes consumer welfare by delivering the highest possible output of goods and services at the lowest possible prices.[75] Firms are most likely to achieve such goals when they oper-

should be carried out. Id. at 604. The Department of Justice recently proposed a rule of reason analysis for health care joint ventures in its *Enforcement Policy Statements in the Health Care Area*, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,150 (Sept. 15, 1993) ("*Health Care Guidelines*"). Anne Bingaman, the Assistant Attorney General heading up the Antitrust Division, recently stated that the rule of reason approach in the *Health Care Guidelines* "would he applied in other markets." *Interview: Anne K. Bingaman*, Antitrust 8, 10 (Fall 1993). The *Health Care Guidelines*, like the FTC's proposed rule of reason approach, fail to explain how a judge or jury should determine the exact anticompetitive effects or efficiencies that are likely to result from a particular restraint and, once determined, how one should be balanced against the other. They also require a market analysis as the initial step under the rule of reason. *Health Care Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,151 at 20,759, 20,765. Academic suggestions for changes in the rule of reason have been no more effective than the solutions posed by the federal courts and enforcement agencies. Most such suggestions rely on market power as the critical factor in the proposed analysis. See, for example, Thomas H. Jorde and David J. Teece, *Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advanee Innovation and Commercialize Technelogy*, 61 Antitrust L. J. 579, 616 (1993) (proposing "sliding scale" under which "the greater plaintiff's proof of defendants' market power, the greater defendants' burden of establishing pro-competitive benefits").

75. See Rebert H. Bork, *The Role of the Courts in Applying Economics*, 54 Antitrust L. J. 21, 24 (1985) (analyzing the legislative histery of antitrust laws); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1703 (1986) (stating that "[h]owever you slice the legislative history, the dominant theme is the protection of consumers from overcharges. This turns out to be the same program as one based on efficiency" (footnote omitted)); Eleanor M. Fox and Lawrence A. Sullivan, *Antitrust Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev. 936, 945 (1987) (discussing the view that "the sole purpose of antitrust is to prevent inefficient allocation of resources").

ate in highly competitive markets. Firms that are subject to intense rivalry are forced to enhance their productivity in order to survive, and distribution of manufacturers and the development of new products and services occur most frequently in markets with a diversity of players.[76] Such innovations, however, do not always result from a "go it alone" strategy. In many cases firms can enhance their efficiency more effectively by collaborating with others than by pursuing an independent course. By forming strategic alliances with their competitors, firms can access technology, capital, or other assets that will enable them to produce new products, enter new markets, or improve their efficiency in existing markets. By cooperating on programs to offer an increased level of services to customers, manufacturers and their dealers can enhance their effectiveness in the interbrand market. The courts' task in judging Section 1 conduct, therefore, is to distinguish between collaborations that unduly limit competition and those that promote the parties' efficiency in the relevant market. As the Supreme Court stated in *Broadcast Music*: "[O]ur inquiry must focus on whether . . . the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"[77]

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76. Said one commentator:

> Put simply, global competition is a bit like tennis: You get better by playing against people who are better than you. . . . [M]anagers and engineers do not arrive at these innovations because they are smarter, work harder or are better educated than their peers. No. They do so because they must. They are subjected to intense global competition, where constantly pushing the boundaries of productivity is the price of the ticket in the door. The converse is true as well. Most of the productivity laggards have been protected from the painful rigors of global competition by governments.

William Lewis, *The Secret to Competitiveness*, Wall Street Journal A14 (Oct. 22, 1993). See also Warren S. Grimes, *Antitrust Tie-In Analysis After* Kodak: *Understanding the Role of Market Imperfections*, 62 Antitrust L. J. 263, 268 (Wintor 1994) (stating that "[c]ompetition is a force for innovation and its rapid commercialization. A diversified economy with multiple players decreases the control of any one player and the impact of a mistaken market decision. Diversity increases the opportunity for commercialization of innovation and the incentive to be the first to market new products"). A recent study by the Harvard Business School found that companies that are most successful in global competition "compete vigorously at home and pressure each other to improve and innovate." Richard M. Steuer, *Getting It Backward on Antitrust*, New York Times F13 (Dec. 6, 1992). Another study concluded that Japanese companies that had done well in export markets first "honed their teeth in fierce domestic competition." Id.

77. *Broadcast Music*, 441 U.S. at 19-20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

Such a theoretical approach to Section 1 conduct is uncontroversial.[78] The problem arises when courts start to use the rule of reason to balance the anticompetitive effects of a particular restraint against its potential efficiencies. To date, the courts have assumed that the rule of reason, as the antithesis of the per se rule, requires a full-blown analysis of all relevant market factors.[79] The courts can clarify Section 1 analysis by recognizing that the rule of reason and per se rules are not opposite theoretical approaches but simply different evidentiary standards. This recognition would free the courts to adopt new approaches specifically tailored to the competitive characteristics of the restraints at issue.

Although most courts and commentators have assumed that the per se rule and the rule of reason are opposing standards of antitrust analysis,[80] they are in fact points along a continuum. In many instances there is no "bright line" distinction between per se and rule of reason conduct.[81] Indeed, per se rules are no more than an abbrevi-

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78. There is considerable precedent for viewing the rule of reason as a means of balancing the anticompetitive effects of a restraint against its potential efficiencies. In *GTE Sylvania,* the Supreme Court recognized that the legality of a nonprice vertical restraint should be determined by balancing any harm to intrabrand competition against the benefit to interbrand competition. 433 U.S. at 57 n.27. Although *GTE Sylvania* only referred to the balancing test in a cursory manner, nearly all courts and commentaters have construed *GTE Sylvania* to require such an approach. See, for example, *Valley Liquors,* 678 F.2d at 745 (stating that courts have interpreted *GTE Sylvania* to require a balancing of the effects on intrabrand and interbrand compotition in determining the legality of a restraint on distribution); *Muenster Butane,* 651 F.2d at 296 (reading *GTE Sylvania* to impose a duty on the court to determine if the net effect of the defendant's restraint on the plaintiff was anticompetitive); *Eiberger v. Sony Corp. of America,* 622 F.2d 1068, 1076 (2d Cir. 1980) (stating that *GTE Sylvania* requires a court to weigh "any enhancement of interbrand competition against the restrictive effect on intrabrand competition" when examining a vertically imposed territerial restraint under the rule of reason); Mark E. Roszkowski, *The Sad Legacy of* GTE Sylvania *and its "Rule of Reason": The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act,* 22 Conn. L. Rev. 129, 157-58 (1989) (stating that in the "free-floating cost-benefit analysis" of *GTE Sylvania,* "the obvious restraint on intrabrand competition is . . . balanced against purported interbrand benefits"). The FTC used a balancing approach in its analysis of a joint venture between General Motors and Toyota for the production of a compact car in the United States. See *In Re General Motors Corporation,* 103 F.T.C. 374, 386-87 (1984) (stating that "the Commission weighed a number of possible competitive concerns"). See also notes 151-52 and accompanying text. In the *Health Care Guidelines,* the Department of Justice also proposes a "balancing of . . . efficiencies against any potential anticompetitive effects" of joint ventures among hospitals and physicians. *Health Care Guidelines,* 4 Trade Reg. Rep. (CCH) ¶ 13,151 at 20,759, 20,765.

79. See notes 51-56 and accompanying text.

80. One commentator has referred to the "all-too-popular misunderstanding that the rule of reason and per se approaches are polar opposites." Edward Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction,* 60 Wash. L. Rev. 1, 22 (1984).

81. Chief Justice Burger anticipated an end to the "bright-line" distinction between per se and rule of reason analysis in his 1972 dissenting opinion in *Topco,* where he said, "[P]*er se*

ated version of the rule of reason. Per se rules, like the rule of reason, are based on courts' conclusions about the economic purpose and effect of particular competitive restraints. The per se rule simply represents an assumption, based on a long history of judicial experience, that the anticompetitive effects of a particular restraint will almost always outweigh its potential efficiencies.[82] The per se rule and rule of reason differ only in the amount of analysis required to reach a conclusion on the net competitive impact of a restraint. The per se rule does not absolve the courts of the necessity to inquire into the nature of the restraint at issue. Before the per se rule can be applied, a court must determine whether the specific conduct at issue belongs within a per se category. In some cases this determination even involves a market power analysis.[83] At the same time, the rule of reason does not always require an elaborate market inquiry. The rule "can sometimes be applied in the twinkling of an eye."[84] In both *NCAA* and *Indiana Federation of Dentists*, for example, the Supreme

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rules . . . are complimentary to, and in no way inconsistent with, the rule of reason." *Topco*, 405 U.S. at 621 (Burger, C. J., dissenting). In *National Society of Professional Engineers v. United States*, 435 U.S. 679, the Court emphasized that the purpose of both the per se rule and rule of reason was "to form a judgment about the competitive significance of the restraint." Id. at 692. The Court pointed out in *NCAA* that the "ultimate focus of . . . inquiry" under the per se rule and rule of reason should be the competitive impact of the conduct at issue, 468 U.S. at 103, and that "[i]ndeed, there is often no bright line separating per se from [r]ule of [r]eason analysis." Id. at 104 n.26.

82. In *Trial Lawyers Ass'n*, 493 U.S. 411, the Court acknowledged that the per se rule is based on the ultimate economic effect of Section 1 conduct: "The *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" Id. at 433 (quoting *Jefferson Parish*, 466 U.S. at 16). See also *Maricopa*, 457 U.S. at 344 (stating: "[o]nce experience with a particular kind of restraint enables the Court te predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable"); *Northwest Wholesale*, 472 U.S. at 289 (stating: "[t]he *per se* approach permits categorical judgments with respect to certain business practices that have proved te be predominantly anticompetitive"); *NCAA*, 468 U.S. at 103-04 (stating: "*[p]er se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct"); *Broadcast Music*, 441 U.S. at 19-20 (stating that in determining whether to characterize conduct as per se unlawful, the Court considers "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output").

83. See *Jefferson Parish*, 466 U.S. at 13-14 (holding that, before invoking the per se rule for a tying arrangement, a plaintiff must show that defendant possessed a significant share of tying-product market).

84. Areeda, 54 Antitrust L. J. at 30 (cited in note 62). As Professor Areeda has stated: "[T]he rule of reason is not always an open invitation to a decade of discovery and litigation. The rule of reason can sometimes be applied in the twinkling of an eye. In *Realty Multi-List*, [629 F.2d 1351 (5th Cir. 1980)] the Fifth Circuit rejected the government's claim of per se illegality, but then applied the rule of reason as the appellants watched—before their very eyes." Id.

Court found the defendants' conduct illegal upon a rather abbreviated consideration and without a market power analysis.[85]

The federal courts should abandon this false dichotomy between the per se and rule of reason approaches and recognize that the objective of all Section 1 analysis is the same: to determine the substantive economic effect of defendants' conduct. In order to make that determination, however, the courts will have to undertake varying degrees of inquiry depending upon the type of restraint at issue. The legality of certain restraints will be easy to determine because their competitive effects are obvious. Other restrictions will require a more detailed analysis because their competitive impact is more ambiguous.

Section 1 conduct can be divided into a simple three-part continuum based on the degree of analysis necessary to confirm a restraint's impact on competition. Conduct on the continuum would range from the most suspect to the least suspect, with more ambiguous restraints in the middle of the continuum. Conduct within each category would be sufficiently similar to warrant its own special analysis. The courts could allocate evidentiary presumptions according to the location of specific restraints on the continuum. Conduct at the most suspect end of the continuum would be presumptively illegal; conduct at the least suspect end would be presumptively proper; and conduct at the middle of the continuum would require a more detailed market power analysis:

The federal courts have been analyzing Section 1 restraints under the Sherman Act for more than a century. They have enough experience with such restraints to classify them rather easily along an economic continuum. The courts already know what anticompetitive effects and efficiencies likely will result from most types of restraints. Horizontal price fixing, territorial allocations, and group boycotts, for example, have been deemed per se illegal because the courts have

85. In *NCAA*, the Court dispensed with an elaborate market analysis and found the television restrictions te be illegal simply because they were not necessary to promote the NCAA's valid purpose of regulating amateur collegiate athletics. 468 U.S. at 104-20. In *Indiana Federation of Dentists*, the Court condemned the physicians' refusal to supply x-rays to insurance companies after a brief analysis revealed that there was no valid economic purpose for such refusal. *Indiana Federation of Dentists*, 476 U.S. at 460-65. Some lower federal courts have also adopted a shorter form rule of reason. In *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, the court held that the membership criteria adopted by a multiple listing service of real estate brokers did not constitute a per se illegal group boycott. Nevertheless, the Court adopted a "facial unreasonableness" test which would "void on its face any significantly restrictive rule of a . . . trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's legitimate needs." Id. at 1370.

found that they are usually anticompetitive and lack any legitimate justification.[86] Such restraints should be classified at the presumptively illegal end of the continuum. On the other hand, the courts have recognized that vertical restraints independently imposed by a manufacturer on its distributors are almost always procompetitive.[87] Such restraints should be at the presumptively legal end of the continuum.

Thus, for most Section 1 conduct, the courts could retain the simplicity and clear guidance of the traditional per se approach. But the courts also could avoid the arbitrariness of the per se standard by giving litigants an opportunity to rebut the presumptions of legality or illegality. If a litigant failed to present enough evidence to rebut the applicable presumption, the case could be disposed of on summary judgment.

One of the early cases interpreting the Sherman Act provides an effective theoretical basis for determining when a defendant has presented enough evidence to rebut the presumptions at either extreme of the Section 1 continuum. The "ancillary restraints doctrine" was adopted before Section 1 analysis became arbitrarily divided into per se and rule of reason categories. In 1898, in *United States v. Addyston Pipe & Steel Co.*,[88] Judge (later Chief Justice) Taft concluded that a restraint of trade should be permissible when it was "ancillary to the main purpose of a [lawful] contract [and] was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose. . . ."[89] Under Judge Taft's approach, restrictions necessary to promote the procompetitive purpose of an underlying contractual integration would be allowed; however, "naked" restraints unrelated to any such integration would be void. Such a distinction between naked and ancillary restraints implements the fundamental goals of the Sherman Act by encouraging restraints that enhance efficiency while deterring those whose only purpose is to restrict competition.

86. See notes 98-106 and accompanying text.

87. See notes 159-63 and accompanying text.

88. 85 F. 271 (6th Cir. 1898). Judge Taft's opinion in *Addyston Pipe* has been characterized as "one of the greatest, if not the greatest, antitrust opinions in the history of the law." Bork, *The Antitrust Paradox* at 26 (cited in note 61).

89. *Addyston Pipe*, 85 F. at 283.

Although not yet adopted explicitly by the Supreme Court,[90] the ancillary restraints doctrine is consistent with several of the Court's recent decisions. In those cases, the Court permitted horizontal restraints necessary for the effectiveness of an integrated cooperative arrangement but precluded restraints that were broader than required for such a purpose. The price-fixing arrangement upheld by the Court in *Broadcast Music*, for example, was ancillary to the musical composers' integrated efforts to market their compositions.[91] Similarly, the membership restrictions approved in *Northwest Wholesale* were necessary for the effective functioning of the purchasing cooperative.[92] The television restrictions precluded in *NCAA*, however, were not required to promote the NCAA's legitimate interest in amateur collegiate athletics.[93]

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90. The doctrine was, however, discussed extensively in Justice Stevens's dissenting opinion in *Sharp*, 485 U.S. at 736-39. Several lower federal courts and antitrust commentators have concluded that the Supreme Court has implicitly adopted the ancillary restraints doctrine. See *Rothery Storage*, 792 F.2d at 229 (stating that the Supreme Court recognized the validity of the ancillary horizontal restraints in *Northwest Wholesale*, *Broadcast Music*, and *NCAA*); *National Bancard*, 779 F.2d at 599 (citing *Broadcast Music* for the proposition that a court should determine whether a restraint is ancillary to an agreement that will enhance efficiency); *Polk*, 776 F.2d at 189 (citing *Addyston Pipe & Steel*, *Broadcast Music*, and *NCAA* for the validity of ancillary restraints that increase productivity); Beschle, 38 Hastings L. J. at 509 (cited in note 18) (stating that the Supreme Court upheld procompetitive ancillary restraints in *Broadcast Music*); James T. Halverson, *The Future of Horizontal Restraints Analysis*, 57 Antitrust L. J. 33, 47 (1988) (stating that *Polk*, *National Bancard*, and *Rothery Storage* upheld the validity of restraints that were found to be ancillary to productive integration).

91. *Broadcast Music*, 441 U.S. at 20.

92. *Northwest Wholesale*, 472 U.S. at 296. Indeed, Judge Bork concluded in a recent case that *Northwest Wholesale*'s "statement of the law of ancillary restraints is so close to that of *Addyston Pipe & Steel* as to be virtually indistinguishable." *Rothery Storage*, 792 F.2d at 229.

93. *NCAA*, 468 U.S. at 104-20. An ancillary restraints approach would explain certain horizontal restraint cases in which the Supreme Court continued to apply the per se rule during the 1980s. Several commentators have been confused as to the Court's rationale for continuing such a per se approach after *Broadcast Music* appeared te signal a new rule of reason approach to horizontal restraints. See Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago Sehool*, 1982 S. Ct. Rev. 319, 320 (1983) (expressing disappointment with the Court's decision in *Maricopa*); Beschle, 38 Hastings L. J. at 488 (cited in note 18). In *Catalano*, 446 U.S. 643, the Court held that beer wholesalers who had agreed to stop extending credit to beer retailers had committed a per se violation of Section 1. Id. at 650. In *Maricopa*, 457 U.S. 332, the Court applied the per se rule to an agreement among physicians to set the maximum fees they could claim under their patients' insurance plans. Id. at 348. In neither case was the Court willing to consider the defendants' efficiency justifications, as it had in *Broadcast Music*. *Catalano* and *Maricopa* can be distinguished from *Broadcast Music*, however, under an ancillary restraints approach. In *Broadcast Music* the copyright owners had integrated their efforts to market their musical compositions through a common association. *Broadcast Music*, 441 U.S. at 20-21. There was no such integration in either *Catalano* or *Maricopa*. The manufacturers in *Catalano* had not formed any cooperative venture, *Catalano*, 446 U.S. at 643-50, and the doctors in *Maricopa* were independent competing entrepreneurs who had not entered into any partnership beyond the minimal tasks required to develop a maximum fee schedule, *Maricopa*, 457 U.S. at 356-57. There was thus no plausible argument in

An ancillary restraints approach would be an effective method for evaluating evidence introduced to rebut the presumptions of legality and illegality at either end of the Section 1 continuum. Such an approach would focus on the structure and competitive purpose of the restraints at issue and would avoid the need for a more costly market power analysis. At the most suspect extreme of the continuum, a defendant would have to demonstrate that horizontal price fixing, territorial allocations, or refusals to deal were ancillary to a separate integrated arrangement designed to enhance its efficiency.[94] On the other hand, in order to rebut the presumption of legality for vertical restraints, a plaintiff would have to prove that they were not ancillary to a manufacturer's desire to enhance its interbrand efficiency, but rather were a naked attempt by rival dealers to limit intrabrand competition.[95]

The middle of the Section 1 continuum would encompass restraints whose competitive impact is more ambiguous. A conduct-based approach such as the ancillary restraints analysis would be insufficient in such cases. The courts would have to engage in a more detailed balancing of the anticompetitive effects and potential efficiencies of such restraints. Tying arrangements and joint ventures among competitors should be classified at the middle of the continuum because they are just as capable of eliminating competition as enhancing efficiency. Their ultimate competitive effect depends on, among other things, the parties' market power.[96] As under the rule of reason, the plaintiff should have the initial burden of proving the market power of the parties to such restraints. The analysis of such restraints, however, need not be as complicated as under the traditional rule of reason. By adopting a market power threshold, the

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either case that the horizontal restraints at issue were related to a legitimate cooperative arrangement. Indeed, the amicus brief filed by the government in *Maricopa* expressly advocated an ancillary restraints approach:

> Thus, if an agreement on price were necessary to cooperative economic activity, as in a true partnership, joint venture or merger, the elimination of price rivalry would be a facet of an integration of productive resources capable of yielding efficiencies beneficial to competition, and would require further analysis. In the absence of such a necessary relationship to integrated productive activity, however, an agreement among competitors fixing prices properly is deemed a naked restraint with no purpose other than elimination of rivalry. Such a restraint should be held "illegal on its face."

Liebeler, 33 UCLA L. Rev. at 1044 (cited in note 57) (quoting Brief for the United States as Amicus Curiae 11-12, *Maricopa*, 457 U.S. 332).

94. See notes 114-17 and accompanying text.

95. See notes 167-70 and accompanying text.

96. See notes 125-28 and accompanying text.

courts could dispose of many of these cases on summary judgment. The courts can also use objective standards to determine when the efficiency justifications for such restraints outweigh their potential anticompetitive effects.

The following chart summarizes the types of analysis that would apply to specific conduct under the new Section 1 approach. It would be progressively more difficult for a plaintiff to prevail as the continuum moves from the most suspect to the least suspect types of conduct. At the beginning of the continuum, the plaintiff could take advantage of a presumption of illegality. At the middle of the continuum, however, the burden would shift to the plaintiff to prove the defendant's market power. Finally, at the continuum's end, the plaintiff would have to rebut a presumption of legality in order to prevail.

Most Suspect | **Least Suspect**

Conduct	Horizontal price fixing, territorial allocations, and group boycotts	Tying and exclusive dealing	Vertical restraints
Type of Analysis	Ancillary restraints analysis	Market power analysis	Ancillary restraints analysis
Burden of Proof	Burden on defendant to rebut presumption of illegality	Burden on plaintiff to prove market power	Burden on plaintiff to rebut presumption of legality

Easiest for Plaintiff to Prevail | **Easiest for Defendant to Prevail**

VI. THE ANALYSIS OF SPECIFIC TYPES OF CONDUCT

A. Presumptively Illegal Restraints

Horizontal price fixing, territorial allocations, and group boycotts should be classified at the presumptively illegal end of the Section 1 continuum. The courts have traditionally applied the per se rule to such restraints because, in most cases, they have a clear anticompetitive effect and lack efficiency justifications. These practices invariably raise prices, reduce output, and limit consumers' range of choices. Indeed, such direct restrictions on interfirm rivalry strike at the heart of the open competitive system that the antitrust laws were designed to protect.[97]

The adverse effects of horizontal price-fixing agreements are obvious. Competitors restrict the free play of market forces when they agree to raise, lower, fix, or stabilize prices in concert.[98] Indirect price-fixing schemes (such as bans on competitive bidding, restrictions on production, and certain exchanges of price information) have the same anticompetitive impact.[99] Horizontal territorial allocations and group boycotts are no less pernicious. In fact, horizontal territorial allocation often has a more adverse effect on competition than horizontal price fixing.[100] The parties to a price-fixing arrangement may

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97. See notes 75-77 and accompanying text. See also Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. Rev. 1020, 1023 (1987) (stating that "[T]he economic goal of antitrust policy is to increase the material welfare of society through the instrument of interfirm rivalry").

98. See *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (approving per se illegality of any conspiracy among competitors designed to raise, lower, fix, or stabilize prices on the grounds that such conspiracies directly interfere with "the free play of market forces").

99. See *Professional Engineers*, 435 U.S. at 692-96 (holding illegal a ban on competitive bidding); *Indiana Federation of Dentists*, 476 U.S. at 464-66 (holding illegal a refusal by dentists to provide patients' x-rays to insurers); *United States v. Container Corp. of America*, 393 U.S. 333, 337-38 (1969) (holding illegal the exchange of price information); *Chicago Professional Sports Ltd. Partnership v. NBA*, 754 F. Supp. 1336, 1364 (N.D. Ill. 1991) (holding illegal the reduction by a sports leagne of the number of games broadcast).

100. The courts have consistently applied the per se rule to horizontal territorial allocations as well as to horizontal price fixing. See *Topco*, 405 U.S. at 608 (applying per se rule to horizontal territorial allocation); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1089 (5th Cir. 1978) (applying per se rule to horizontal customer allocation); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 574 (2d Cir. 1961) (stating that territorial allocation of markets is unreasonable per se). Before *Topco* all horizontal market division cases decided by the Supreme Court involved ancillary price restraints. See *Sealy*, 388 U.S. at 356 (stating that "[t]he territorial restraints were a part of the unlawful price fixing and policing"); *Timken Roller Bearing*, 341 U.S. at 595-96 (noting that the defendant agreed to allocate trade territories and to fix prices on products sold outside an allocated territory). *Topco*, however, involved horizontal market division without any ancillary price fixing, and the Court indicated that such restraints should be deemed per se illegal. 405 U.S. at 609 n.9. Several commentators have concluded that horizontal market division is as great an evil as horizontal price fixing. See Posner, 75 Colum. L. Rev. at 292 (cited in note 18) (noting that, in some respects, horizontal territorial allocation is an easier method of cartelization than price fixing hocause the participants do not have to agree on a price, and will not dissipate cartel profits through nonprice competition); Peter J. Monter, Comment, *Restricted Distribution After "Schwinn,"* 9 B.C. Indus. & Comm. L. Rev. 1032, 1040-41 (1968) (discussing the effects of horizontal market division); Comment, *Vertical Agreements to Terminate Competing Distributors*: Oreck Corp. v. Whirlpool Corp., 92 Harv. L. Rev. 1160, 1163 (1979) (stating that horizontal exclusionary agreements should be condemned per se).

continue to compete with each other in certain non-price areas, such as customer service. Customer and territorial allocations, however, eliminate all competition among the parties, whether price or non-price.[101]

Group boycotts directly eliminate competition by excluding firms from particular markets. The "group boycott" term has been used rather loosely in antitrust cases and academic literature, and thus there is considerable confusion over what type of conduct should be classified as a boycott.[102] In recent cases, however, the Supreme Court has clarified that the classic group boycott occurs when firms attempt to deny their competitors access to a supplier, customer, or facility necessary to compete in the relevant market.[103] The Court has found group boycotts per se illegal when dealers induced a manufacturer not to deal with a competing dealer,[104] when membership in or the approval of a self-regulatory organization was arbitrarily denied to a particular competitor,[105] or when firms could not access a joint venture essential for effectivecompetition in a particular market.[106]

The anticompetitive effects of horizontal price fixing, territorial allocations, and group boycotts are clear enough to excuse the plaintiff from a demonstration of the defendant's market power. A presumption of illegality for these restraints would preserve the simplicity and deterrent effect of the current per se approach to such conduct. When the detrimental effects of a restraint are apparent,

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101. See Beschle, 38 Hastings L. J. at 479-80 (cited in note 18).

102. As the Supreme Court stated in *Northwest Wholesale*, "[t]here is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine." 472 U.S. at 294 (quoting Sullivan, *Handbook of the Law of Antitrust* § 83 at 229-30 (cited in note 72)).

103. See *Northwest Wholesale*, 472 U.S. at 293-95 (explaining cases in which group boycotts have been invalidated); *Indiana Federation of Dentists*, 476 U.S. at 458 (stating that the per se rule is applied to situations where "firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor").

104. See *General Motors Corp.*, 384 U.S. at 132-36 (involving Chevrolet dealers' inducement of General Motors not to deal with competing discounters); *Klors*, 359 U.S. at 209 (involving an appliance dealer who induced manufacturers and distributors to sell only at discriminatory prices to a competing appliance dealer).

105. See *Radiant Burners v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656, 658 (1961) (involving the denial of a seal of approval by an industry association); *Silver v. New York Stock Exchange*, 373 U.S. 341, 344 (1963) (analyzing an expulsion from the New York Stock Exchange).

106. See *Associated Press v. United States*, 326 U.S. 1, 4 (1945) (involving a denial of access to a news-gathering service); *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383, 404-05 (1912) (addressing a denial of access to railroad terminal). But see *Northwest Wholesale Stationers*, 472 U.S. at 296 (finding that the expulsion of a member from purchasing cooperative could not be per se illegal because the cooperative was not "essential to effective competition" in the relevant market).

there is no need to inquire into market power. The Supreme Court recognized in *NCAA* that "as a matter of law, the absence of proof of market power does not justify a naked restriction on price or output."[107] If a restraint is clearly anticompetitive on its face, the burden should shift to the defendant to come forward with proof of some procompetitive virtue that justifies the restraint.[108]

Some antitrust commentators have argued that plaintiffs should have the initial burden of proving market power even for such horizontal restraints as price fixing. They have emphasized that only firms with market power can injure competition over a meaningful period because the marketplace ultimately will undercut the effectiveness of any anticompetitive restraints as consumers switch to substitutes or new firms enter the market.[109] There are, however, several reasons to dispense with a market power analysis of horizon-

107. *NCAA*, 468 U.S. at 109.

108. See *Brown University*, 5 F.3d at 674 (stating that "the absence or inconclusivity of a finding of actual adverse effects does not mitigate MIT's burden to justify price fixing with some procompetitive virtue"). The court in *Brown University* concluded that three recent Supreme Court cases support shifting the burden to the defendant to prove a justification for conduct that appears to be anticompetitive on its face. In *Professional Engineers*, 435 U.S. at 692-96, the Court concluded that the adverse effects of an engineering society's ban on competitive bidding could be presumed because it "'impede[d] the ordinary give and take of the marketplace.'" Id. at 692 (quoting *United States v. National Society of Professional Engineers*, 404 F. Supp. 457, 460 (D.C.D.C. 1975)). The Court ultimately held the rule illegal because the society offered only a public policy justification (the protection of public safety) and did not demonstrate any valid economic rationale for the ban. Id. at 692-96. In *Indiana Federation of Dentists*, the Court held that the withholding of x-rays from insurance companies was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market" to justify shifting the burden to the defendants to justify the restriction. 476 U.S. at 461-62. Similarly, in *NCAA* the Court concluded that the television restrictions were a "naked restraint on price and output [which] requires some competitive justification even in the absence of a detailed market analysis." *NCAA*, 468 U.S. at 110. Several antitrust commentators have argued that defendants should have the burden of proving a justification for inherently suspect conduct. See John J. Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 Antitrust L. J. 1593, 1608-19 (1980) (indicating that conduct that displaces the competitive process should result in a strong presumption of illegality); Timothy J. Muris, *The New Rule of Reason*, 57 Antitrust L. J. 859, 861-63 (1988) (arguing that, if the conduct is inherently suspect, the defendant should be required to prove efficiency justifications rather than merely state a plausible efficiency rationale); Popofsky and Goodwin, 56 Antitrust L. J. at 205 (cited in note 26) (reading *NCAA* to impose a burden on the defendant in a "naked restraint" case to prove that the restraint has procompetitive virtues); Beschle, 38 Hastings L. J. at 476 (cited in note 18) (suggesting the abandonment of the per se rule in favor of a test for suspect activity that places a strong burden on the defendant to show procompetitive justifications). The government also argued for such a shifting of the burden of proof in its amicus brief in *Maricopa*. See Liebeler, 33 UCLA L. Rev. at 1044-45 (cited in note 57).

109. See, for example, Jorde and Teece, 61 Antitrust L. J. at 602-03 (cited in note 74) (stating that the marketplace will discipline firms lacking substantial market power that act to restrain trade); Popofsky and Goodwin, 56 Antitrust L. J. at 203 (indicating that two firms that agree to a horizontal restraint are unlikely to injure competition if they lack market power).

tal price fixing, territorial allocations, and group boycotts. First of all, markets do not always react as quickly as some commentators have assumed: "For reasons including market inertia and information failures . . . a small conspirator may be able to impede competition over some period of time."[110] Furthermore, there is little to be gained and much to be lost by introducing the complexities of a market power test into the analysis of such inherently suspect conduct. The courts risk few mistakes by dispensing with a market power analysis of conduct which is likely to harm competition in most cases.[111] On the other hand, requiring a market power analysis complicates antitrust trials, wastes judicial resources, and makes plaintiffs more reluctant to bring cases, thus reducing the deterrent effect of the antitrust laws.

Defendants would not be unduly disadvantaged by bearing the burden of proving a justification for horizontal price fixing, territorial allocations, and group boycotts. Indeed, a shifting of the burden of proof would be a vast improvement over the current per se approach, which gives defendants no opportunity to show that they had a legitimato purpose for a horizontal restraint.[112] Placing the burden of proof on the defendant is fair since it has access to the documents and witnesses most probative of the actual competitive effect of an inherently suspect restraint.[113] The defendant's internal documents and testimony from its own employees will usually reveal whether a particular restraint was intended to enhance the parties' efficiency or merely to restrict competition. Firms usually can document in advance their efficiency objectives for particular restraints. A defendant's failure to produce such evidence may indicate that the real purpose for a restraint was anticompetitive.

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110. *Trial Lawyers*, 493 U.S. at 434-35.

111. See Muris, 57 Antitrust L. J. at 864 (cited in note 108) (arguing that "mistakes should indeed be few" from foregoing a market power analysis). As Professor Areeda has stated:

> Once we decide that a class of practice is in the vast generality of cases detrimental and unjustified, why bother with the complicated and expensive inquiry into power? We have certainly learned from merger, monopoly, and rule of reason cases that proving markets and power is difficult, complex, expensive and time-consuming. The courts wisely decline to burden the system with such proof when the only thing the defendants can say for themselves is, "We tried to exploit the public, but failed."

Areeda, 54 Antitrust L. J. at 28 (cited in note 62).

112. See notes 17, 18, and accompanying text.

113. See Dennis A. Yao and Thomas N. Dahdouh, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense,* 62 Antitrust L. J. 23, 27 (1993) (stating that "[e]fficiency considerations and general principles of law suggest that the party with access to the relevant information should bear the burden of proving an issue dependent on that information").

Horizontal price fixing, territorial allocations, and group boycotts do not always have an anticompetitive purpose. In certain cases firms may use such restraints to promote their efficiency in the relevant market. There are enough potentially beneficial uses for such restraints to justify abandoning the arbitrary per se standard. The presumption of illegality for these restraints should be rebuttable rather than conclusive. The defendant should have the opportunity to show that a price-fixing, territorial allocation, or group boycott arrangement was not naked but was ancillary to a separate endeavor designed to enhance its efficiency.

The courts easily can determine the legitimacy of horizontal price fixing, territorial allocations, and group boycotts through an ancillary restraints analysis. Such an approach would concentrate on the structure of the restraint at issue. Courts would avoid having to make complicated inquiries into either market power or the state of the defendant's mind at the time it implemented a restraint.[114] The restraint would be upheld only if the defendant could prove that it was no broader than necessary to promote the legitimate purposes of a separate venture designed to promote its efficiency in the relevant market.[115] A price-fixing arrangement, for example, might be necessary for the effectiveness of an industry-wide venture for the marketing of a unique product (such as the copyrighted musical compositions in *Broadcast Music*).[116] Similar justifications may exist for territorial allocations or group boycotts. For example, in order to induce its competitors to help finance a risky research and development venture for a new product, a firm may have to agree that each competitor could market the product in an exclusive territory for a certain period after it is commercialized. Similarly, the exclusion of certain firms

114. Some courts and commentators have cited the difficulty of determining defendants' motives as a reason for avoiding a purpose-based approach to Section 1 conduct. See *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 594 (8th Cir. 1987) (refusing to draw a distinction between "dealer-inspired" and "dealer-coerced" restraints); *Valley Liquors*, 678 F.2d at 744 (admitting the difficulty of determining the motives of a manufacturer who terminates a distributor); Peter M. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis*, 1981 Duke L. J. 417, 439 (stating that "[f]ocusing on subjective motive . . . is risky and ineffectual: not only can evidence of purpose be manipulated, but the evidence is usually ambiguous").

115. The Supreme Court has held in several cases that ancillary restraints can only be allowed if they are no broader than required to promote the effectiveness of a separate efficiency-enhancing venture. See *NCAA*, 468 U.S. at 113-15; *Broadcast Music*, 441 U.S. at 19-24; *Addyston Pipe & Steel*, 85 F. at 282-83, aff'd, 175 U.S. 211 (stating that "if the restraint exceeds the necessity presented by the main purpose of the contract, it is void").

116. *Broadcast Music*, 441 U.S. at 21-23.

from a joint venture may not have the anticompetitive purpose of a group boycott but may simply be a means of ensuring that the venture does not become unwieldy.[117]

There is some precedent in the Supreme Court for allowing a defendant to prove the potential beneficial effects of price fixing and other inherently suspect restraints. This approach, in fact, has a long history in antitrust law. In 1918, in *Chicago Board of Trade v. United States*,[118] the Court sustained a Chicago Board of Trade rule which froze grain prices during the period the market was closed. The Court pointed out that the defendants had shown that the rule was necessary for the effectiveness of a public trading market.[119] In 1933, in *Appalachian Coals, Inc. v. United States*,[120] the Court upheld an arrangement under which coal producers fixed the price of coal in order to eliminate "destructive trade practices."[121] During the long period in which the per se rule was predominate, the Court refused to expand upon these decisions. Indeed, it consistently refused to consider any of defendants' justifications for horizontal restraints of trade. In a series of cases beginning in the late 1970s, however, the Court began to indicate a willingness to modify its traditional per se approach and again provide defendants an opportunity to explain their rationale for certain horizontal restrictions on price and output.[122]

B. Conduct Requiring Market Power Analysis

The economic impact of certain Section 1 restraints is ambiguous enough to require a more detailed balancing of their potential anticompetitive effects and efficiencies. In certain cases neither the adverse nor the beneficial aspects of a competitive restriction will be obvious on its face, and a conduct-based approach such as the ancil-

117. The Supreme Court recognized in *Northwest Wholesale*, 474 U.S. 284, that, unless a joint venture possesses "exclusive access to an element essential to effective competition," the partners should be permitted to limit access to the joint venture in a reasonable manner. 474 U.S. at 296.

118. 246 U.S. 231 (1918).

119. Id. at 240-41.

120. 288 U.S. 344 (1933).

121. Id. at 359.

122. In *Professional Engineers*, the Court allowed an association of engineers to defend an ethical rule prohibiting compotitive bidding on public projects. 435 U.S. at 692-96. In *Indiana Federation of Dentists*, the Court considered tbe defendants' justifications for withholding x-rays from insurance companies. 476 U.S. at 461-62. Similarly, in *NCAA*, the Court considered the NCAA's arguments that restrictions on broadcast rights were necessary to insure the effectiveness of amateur collegiate athletics. 468 U.S. at 113-20.

lary restraints analysis will be insufficient. In order to confirm such a restraint's actual effects on competition, a court will have to balance the parties' market power against their efficiency justifications for the restraint.

Tying and exclusive dealing arrangements and certain joint ventures among competitors require such a balancing approach. The effect of such arrangements upon competition is dependent upon the parties' market power. The plaintiff should, therefore, bear the initial burden of proving such market power. Once the plaintiff meets that burden, the defendant should have the opportunity to rebut by proving the efficiencies that may result from the arrangement.

The courts can undertake a market power analysis of joint ventures and tying and exclusive dealing arrangements in a relatively simple manner. A market share threshold would avoid unnecessary litigation of cases that pose little threat to competition. Furthermore, the beneficial effects likely to result from a particular arrangement can be inferred from objective factors such as the parties' purpose for the arrangement and the structure of their cooperative endeavor.

1. Tying and Exclusive Dealing Arrangements

Manufacturers can use tying and exclusive dealing arrangements for either benign or pernicious purposes. Such arrangements can enhance a manufacturer's effectiveness in competing against other brands; they can also deprive consumers of choice and competitors of access to important markets. Tying arrangements can promote interbrand competition by assuring the quality of a manufacturer's product. Certain products can only function properly when used in conjunction with another product. In such cases a tying arrangement can insure that consumers do not mix incompatible products. In order to preserve its reputation for quality and safety, a manufacturer may have no choice but to require the purchase of the products as a package.[123]

123. The courts have upheld tying arrangements in cases where two products had to be used in conjunction with one another to insure tbe proper functioning of either product. See *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 556-57 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961) (approving sale of components of television antenna as single system in order to assure effective functioning of system); *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653, 656-57 (1st Cir. 1961) (approving tie-in of unloading device and silo on grounds that separate sales had led to widespread customer dissatisfaction); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1351 (9th Cir. 1987) (upholding requirement that automobile dealers purchase replacement parts from automobile manufacturer). But

Exclusive dealing arrangements also can enhance interbrand competition. By requiring dealers to purchase products only from it and not from its competitors, a manufacturer can ensure that the dealers more aggresively promote its products. Distributors whose profitability is largely dependent upon sales of a single manufacturer's products will be more likely to invest in training, promotion, and point-of-sale services that will make the products more attractive to consumers.[124]

Tying and exclusive dealing arrangements, however, also can be used to restrict competition in the relevant market. Tying arrangements can force consumers to buy products they would not otherwise have purchased or to pay higher prices than they would in a competitive market. When a firm is successful in tying the purchase of one product to another, it can raise costs for its competitors and increase entry barriers into the tied product market.[125] By requiring customers to deal exclusively with it, a supplier can prevent its competitors from accessing potential sales outlets.[126] A buyer also can deprive competitors of a potential source of supply by requiring suppliers to sell solely to it.[127]

Neither competitors nor consumers can be adversely affected by a tying or exclusive dealing arrangement if the parties to such arrangements lack market power. Although the courts have ostensibly applied a per se approach to tying arrangements, they have only found liability in those cases where the firm imposing the tie has

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see *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1040-42 (4th Cir. 1987) (precluding a requirement essentially identical to that in *Mercedes-Benz*). If different products cannot be sold other than as a package (such as a right shoe with a left shoe or an automobile with tires and a steering wheel), the package should be regarded as a single product, and therefore no tie would exist in the first place. See Grimes, 62 Antitrust L. J. at 284 (cited in note 76) (citing a pair of shoes as an example of a product package that is not considered a tie).

124. See *Roland Mach. Co. v. Dresser Industries*, 749 F.2d 380, 395 (7th Cir. 1984) (stating that an exclusive dealing arrangement may encourage a dealer to promote the manufacturer's product more vigerously); Howard P. Marvel, *Exclusive Dealing*, 25 J. Law & Econ. 1, 3 (1982) (stating that exclusive dealing can elicit dealer services); Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 Cornell L. Rev. 101, 125 (1983) (asserting that exclusive dealing can increase a distributor's promotional efforts).

125. See *United States v. Loew's, Inc.*, 371 U.S. 38, 51-52 (1962) (holding that the block booking of films for television raised barriers to entry for potential competitors and was illegal); Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L. J. 209, 215-19, 234-48 (1986) (explaining how ties can raise costs).

126. See *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring) (stating that exclusive dealing can deprive other suppliers of a market for their geods and other buyers of supply sources).

127. Id.

sufficient economic power in the tying product market to force a customer to purchase a product it either did not want or would have preferred to purchase on different terms.[128] In the absence of such market power, a customer will not feel compelled to purchase the tied product or to pay a supra-competitive price. There can be no anticompetitive effect when a buyer purchases two products through a free exercise of choice rather than as a result of the seller's coercion. Because the customer has not altered its normal buying patterns, the firm implementing the tie will be unable to raise competitors' costs or to increase entry barriers in the tied product market.

Exclusive dealing arrangements also have no adverse competitive effects when a manufacturer lacks market power. A firm without market power will be unable to "lock up" a significant number of suppliers or customers through exclusive dealing arrangements. As a result, competitors will have access to sufficient remaining outlets to compete effectively in the relevant market.[129]

Because tying and exclusive dealing arrangements only reduce competition when a defendant has market power, a plaintiff should be required to prove such power as a threshold issue. The courts could prevent unnecessary litigation by establishing a market share threshold for the legality of tying and exclusive dealing. Plaintiffs who fail to prove market power in excess of the threshold should have their cases dismissed on summary judgment. The plaintiff could show the requisite market power for tying arrangements by proving that the defendant's market share was in excess of thirty percent or that the

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128. See *Northern Pacific*, 356 U.S. at 6 (stating that tying arrangements are insignificant when they do not pressure buyers into taking the tied item); *Loew's*, 371 U.S. at 52 (stating that tying arrangements are matters of antitrust concern when they force buyers to purchase the tied product in lieu of a substitute); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 619 (1977) (holding that a tying agreement must give the seller a market advantage not shared by competitors in order to raise antitrust concerns). As the Court stated in *Jefferson Parish*, 466 U.S. 2: "Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Id. at 12.

129. The courts have traditionally judged the legality of exclusive dealing arrangements on the basis of whether they foreclose a significant number of buyer or seller outlets from competitors. See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 344 (1961) (holding a requirements contract legal in the context of the competitive bituminous coal market); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922) (holding that an exclusive dealing contract between a pattern manufacturer and a merchant substantially lessened competition and thus violated the Clayton Act); *Roland Machine*, 749 F.2d at 380 **[explanatory paren]**; *Joyce Beverages of N.Y., Inc. v. Royal Crown Cola Co.*, 555 F. Supp. 271 (S.D.N.Y 1983) (holding that an exclusive cola franchise and licensing agreement did not violate the antitrust laws because it encouraged rather than foreclosed competition).

tying product was uniquely desirable in some way.[130] For exclusive dealing arrangements, the plaintiff should be required to prove that the defendant possessed more than thirty percent of the relevant market.[131]

Once the plaintiff has made a prima facie showing of market power over the safe harbor threshold, the defendant should have the opportunity to rebut by proving that it had a procompetitive purpose for a tying or exclusive dealing arrangement. In the case of tying arrangements, the courts can avoid the complicated task of weighing the defendant's efficiency justifications against the plaintiff's proof of market power. The procompetitive justifications for tying arrangements are limited, but, once proven, they should be decisive. A tying arrangement should be permitted whenever a defendant can demonstrate that the tie was necessary for the quality or safety of its products. The defense should apply regardless of the defendant's market power.

In many cases, however, a manufacturer can achieve its quality objectives by less restrictive means than a tie. The manufacturer may, for example, be able to list approved suppliers and/or specifications for items to be used in conjunction with its products. In order to prevail under a quality control defense, a defendant should first demonstrate that such alternatives are impractical and that a tying ar-

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130. "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *Fortner*, 429 U.S. at 620. In *Jefferson Parish*, the Supreme Court stated that the requisite economic pewer for an illegal tie could be inferred when the defendant possessed a large market share or the tied product was patented or unique in a way that could not he matched by competitors. 466 U.S. at 16-17. The Court then went on to find that a market share of 30% was not sufficient to demonstrate market power. Id. at 26-29. Since *Jefferson Parish*, many lower federal courts have used 30% as a market share threshold for tying arrangements. See *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988); *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387, 399 (W.D. Pa. 1988); *Ezpeleta, M.D. v. Sisters of Mercy Health Corp.*, 621 F. Supp. 1262, 1269 (N.D. Ind. 1985).

Under the Supreme Court's recent opinion in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992), a plaintiff may also be able to prove that it was "locked" into a tying arrangement by unique market conditions. The Court refused Kodak's motion for summary judgment on the claim that it had illegally tied the sale of its replacement parts to repair services for Kodak micrographic equipment. *Kodak*, 112 S. Ct. at 2087-88. The Court emphasized that the costs to customers of switching from Kodak's equipment was high and that, once the equipment was purchased, buyers could be locked into obtaining spare parts and services from Kodak. Id. at 2087.

131. The concurring opinion in *Jefferson Parish* applied a 30% market share threshold to exclusive dealing arrangements. *Jefferson Parish*, 466 U.S. at 46 (O'Connor, J., concurring).

rangement is the only feasible means of insuring the quality or safety of its products.[132]

The courts will have to undertake a more detailed balancing analysis for exclusive dealing arrangements. Such arrangements are capable both of promoting and restricting interbrand competition. Exclusive dealing can enhance such competition by encouraging distributors to promote a manufacturer's products more aggressively, but it can also restrict interbrand competition by denying other manufacturers access to the distributors covered by the exclusive deal. It is therefore insufficient for a defendant merely to show that it had a procompetitive purpose for an exclusive dealing arrangement. The courts must balance such a purpose against the potential foreclosure of outlets resulting from the arrangement. The greater the manufacturer's market share, the more difficult it would be for it to prevail under a balancing analysis. A manufacturer with a large market share has the ability to foreclose a greater number of distribution outlets from its competitors. Moreover, such a manufacturer also would have less need to use an exclusive dealing arrangement to enhance its effectiveness in the interbrand market.

2. Joint Ventures

The courts have applied three conflicting types of analysis to joint ventures: a merger-based approach which concentrates on the parties' market power, a per se analysis that deems certain joint ventures illegal on their face, and a rule of reason approach that considers all possible anticompetitive effects and potential efficiencies of a particular arrangement.[133] These conflicting approaches have con-

132. Several courts have required defendants to prove that less restrictive alternatives to tying arrangements (such as the specification of substitutes) would he impractical. See *Standard Oil Co. of C.A. v. United States*, 337 U.S. 293, 306 (1949) (stating that the protection of good will necessitates the use of a tying clause only when it would be impracticable to describe specifications for substitute products); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971) (stating that tying agreements can by justified only in the absence of less restrictive alternatives); *Susser v. Carvel Corp.*, 332 F.2d 505, 514-15, 519-20 (2d Cir. 1964) (holding that the defendant had the burden of showing that a tying agreement is reasonably necessary to promote its trademark); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1353 n.12 (9th Cir. 1982) (holding that the specification alternative is not available when a tied product is manufactured pursuant to a secret formula). See also Grimes, 62 Antitrust L. J. at 285-86 (cited in note 76) (concluding that the seller should carry the burden of showing that less anticompetitive measures than a tie would not be workable).

133. For a merger-based approach, see *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 175-76 (1964) (analyzing the loss of potential competition among joint venture partners). For a per se analysis, see *Timkin Roller Bearing*, 341 U.S. at 598 (holding that agreements

fused American businesses and deterred them from entering into cooperative arrangements with their competitors that could enhance their efficiency in the global marketplace.[134]

These inconsistent standards are a result of the courts' inability to agree on the type of conduct that should be classified as a joint venture. The courts have applied the joint venture label to conduct "in an infinite variety of structures and durations and forms and scopes."[135] Such conduct has ranged from mere agreements among competitors to coordinate their activities to arrangements that are as integrated as mergers.

A court's first step in analyzing a cooperative arrangement among competitors should be to examine its structure to determine whether a joint venture analysis is appropriate. If the parties have fully integrated their operations, the court should analyze the arrangement in the same manner as a merger. Unintegrated horizontal agreements, on the other hand, should be treated as naked restraints of trade. True joint ventures fall between these two extremes. While they are not as fully integrated as mergers, they do involve some combination of the parties' resources beyond a simple coordination of parallel activities. Such arrangements thus should be analyzed in a different manner than either mergers or naked restraints.

A merger analysis is appropriate when the parties have integrated all of their existing production or marketing operations in a joint venture. Such integrations eliminate all competition between the parties in the relevant market. As in a merger, a single entity (the joint venture) takes the place of the former competitors in the

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between legally separate persons and companies to suppress competition among themselves and others cannot be justified by labeling the project a "joint venture"); *Sealy*, 388 U.S. at 355 (stating that the anticompetitive nature of price fixing is so apparent that the Court will deem it illegal without applying the rule of reason); and *Topco*, 405 U.S. at 608 (holding that a horizontal territorial allocation among an association of grocery store owners is illegal per se). For a rule of reason approach, see *Broadcast Music*, 441 U.S. at 24 (applying the rule of reason to the issuance of blanket licenses by an association of musical composers); *Northwest Wholesale*, 472 U.S. at 296 (analyzing an expulsion from a wholesale purchasing cooperative under the rule of reason); and *NCAA*, 468 U.S. at 100-01 (stating that horizontal restraints are analyzed under the rule of reason if they are necessary to make the product of a cooperative venture available to consumers).

134. See Jorde and Teece, 4 High Tech. L. J. at 36 (cited in note 67) (stating that the ambiguity of rule of reason analysis needlessly inhibits strategic alliances).

135. J. Paul McGrath, *Antitrust Problems in Negotiating a Joint Venture Agreement*, 54 Antitrust L. J. 971, 973 (1985). As one commentator has stated, "[a] joint venture could involve any business enterprise in which two or more persons collaborate to achieve some commercial goal—a definition that includes all of antitrust except, perhaps, some single firm attempts to monopolize. . . ." Robert Pitefsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Georgetown L. J. 1605, 1605 (1986).

market. These arrangements have the same economic impact as an acquisition of one partner's business by the other, and thus they should be analyzed in the same manner.[136] Like mergers, complete integrations effected through joint ventures should be analyzed under Section 7 of the Clayton Act to determine whether their effect "may be substantially to lessen competition" in any relevant market.[137] The guidelines adopted by the Department of Justice for mergers, which consider such factors as the parties' market shares, changes in industry concentration levels resulting from a merger, ease of entry into the relevant market, and the efficiencies likely to result from a merger, are also appropriate for fully integrated joint ventures.[138]

An ancillary restraints approach should be used, however, to analyze a venture that amounts to no more than a coordination of

136. A recent alliance between a domestic and a foreign airline provides a good example of such a fully integrated arrangement. In 1992, Northwest Airlines and KLM Royal Dutch Airlines asked the Department of Transportation to approve an agreement under which they would operate, in effect, as a single airline. See Agis Salpukas, *Plan Set in Northwest KLM Link*, N.Y. Times at D1 (Sept. 10, 1992). The two airlines agreed to coordinate pricing, combine their sales forces, share information on seat availability, and share revenue. Id. They even stated that they might fly under the same name. Id. at D17. When competitors join their production and marketing operations in such a complete manner, courts should analyze the arrangement as a merger.

137. 15 U.S.C. § 18 (1988). Although mergers are usually analyzed under § 7 of the Clayton Act, they also may be challenged as unreasonable restraints of trade under § 1 of the Sherman Act. The courts have held that the competitive analysis should be similar under either statuto. See *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665, 671-72 (1964) (holding that the elimination of competition by merger or consolidation violates § 1 of the Sherman Act); *United States v. Rockford Memorial Corp.*, 893 F.2d 1278, 1282-83 (7th Cir. 1990) (holding that judicial interpretations of violations of § 7 of the Clayton Act and § 1 of the Sherman Act have converged); *McCaw Personal Communications v. Pacific Telesis Group*, 645 F. Supp. 1166, 1173 (N.D. Cal. 1986) (stating that the standard by which mergers and acquisitions are judged under the Sherman Act is similar, if not identical, to the Clayton Act standard). Many courts have applied merger analysis to joint ventures that eliminate all commercial rivalry between their partners. In *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), the combination of two newspapers' advertising and circulation functions precluded future competition. Id. at 134. In his concurring opinion, Justice Harlan noted that if the operating agreement between the two papers had provided that it would continue indefinitely "we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger." Id. at 141 (Harlan, J., concurring). In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), competition was eliminated by a joint committee's pooling of the profits of formerly competitive movie theaters. Id. at 149. In *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989), the district court applied a merger analysis to a joint venture to which two manufacturers contributed their entire railroad track equipment business. Id. at 1414-30. The court distinguished its analysis from the more permissive approach that would have been appropriate if the companies merely had entered into a limited venture for research and development that left them free to compete in other areas of the railroad track equipment business. Id. at 1426.

138. See *Horizontal Merger Guidelines—1992*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at Sec. 1, Sec. 3, Sec. 4 (April 2, 1992).

competitors' parallel efforts. Such an arrangement is incapable of producing efficiencies because the partners have not shared any resources or risks. The mere coordination of parallel activity without any corresponding integration amounts to no more than a naked restraint of trade. For example, agreements by buyers on the prices they will pay, without any integration of purchasing operations that will reduce the buyers' costs, create no cognizable efficiencies. Similarly, producers may organize for the simple purpose of resisting buyers' demands for discounts or other cost reduction measures. Because such arrangements are not ancillary to any productive integration, their predominate effect will be anticompetitive. Such conduct should be classified at the presumptively illegal end of the Section 1 continuum and analyzed in the same manner as horizontal price fixing.

Most modern joint ventures are neither naked attempts by competitors to coordinate parallel conduct nor complete integrations of their existing operations. During the last decade, American firms have begun to form partially integrated strategic alliances with their competitors at an unprecedented rate.[139] Rather than integrating all of their partners' operations, these alliances combine only a small portion of each partner's total resources. The alliances usually are formed for a limited purpose (such as research and development of a new product) and are designed to last only long enough to accomplish such purpose. Because the parties to such ventures share certain resources and risks, these arrangements cannot be analyzed as naked restraints; at the same time, because the parties do not completely integrate their operations, the ventures cannot be treated like mergers.

Because of their unique competitive characteristics, such partially integrated arrangements should qualify for a special analysis. A balancing approach is appropriate for modern strategic alliances. Because such alliances are capable of producing both anticompetitive effects and efficiencies, the courts should consider both aspects of a joint venture before determining its legality. The antitrust analysis of such arrangements, however, can be carried out rather simply. In many cases the procompetitive effects of such arrangements will be

139. Indeed, the number of new strategic alliances in the United States has nearly doubled in each of the last ten years. Jeremy Main, *Making Global Alliances Work*, Fortune at 121, 126 (Dec. 17, 1990). One author has described strategic alliances as "*the* competitive weapon of the 1990's." Jordan D. Lewis, *Competitive Alliances Redefine Companies*, 80 Mgmt. Rev. 14, 14 (April 1991).

outwardly evident, and the outcome of the balancing approach will be obvious.

Joint ventures should be upheld on their face when they enable firms to develop new products or enter new markets that would have been beyond their individual capabilities. A joint venture may provide a vehicle for firms to share technology, capital, or certain unique assets necessary for the production or development of a new product. IBM and Apple, for example, recently entered into a joint venture that will permit them to develop a new computer operating system that combines the best characteristics of each company's software.[140] Boeing and several European firms have pooled their capital resources for the $10 billion development of a new jumbo jet that none of the firms could have afforded to produce on its own.[141] Several pharmaceutical companies joined forces to share the patents required to produce a "multi-valent" childhood vaccine that would be effective against several diseases at once.[142] Such ventures are procompetitive because they permit "the introduction of a new competitor that otherwise might never have come into being."[143] Such ventures also have no anticompetitive effects. No commercial rivalry is eliminated by the formation of a joint venture in a market in which the partners do not currently compete or, absent the joint venture, could not have competed. The only competitive effects of such ventures are beneficial. Therefore, plaintiffs will be unable to make out a prima facie

140. See Evelyn Richards, *IBM, Apple Plan Cooperation*, Washington Post at A1 (July 4, 1991).

141. Jeff Cole and Brian Coleman, *Boeing, Four Members of Airbus to Study Jointly Developing Jet*, Wall Street Journal at A10 (Jan. 28, 1993).

142. See Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures, Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L. J., 937, 940 n.18 (1993) (citing Request for Commission Approval of Proposed Joint Venture Between Pasteur Merieux Serums et Vaccins and Merck & Co., Inc. 2-6 (Federal Trade Commission, filed Oct. 10, 1991)).

143. Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of* Penn-Olin, 82 Harv. L. Rev. 1007, 1018-19 (1969). A recent marketing joint venture among 170 distributors of electrical equipment is another example of a joint venture that brings a new competitor into a market. The dealers formed the joint venture for the purpose of competing for "national acconnts" with large industrial customers who have several plants in various parts of the country. None of the members of the joint venture had operations in enough locations to bid on the national accounts. The Department of Justice approved the joint venture because it allowed these firms to compete for business from which they would otherwise have been foreclosed. See Letter from James T. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Charles F. Rule, Esq. (May 5, 1992) (on file with the Author) (stating that the Department of Justice "has no current intention to challenge the implementation of the proposed program" because, among other things it enabled "members to compete for national accounts they could not otherwise serve").

case of their illegality, and the courts will be free to dispose of such cases on summary judgment.

More serious antitrust issues are raised by joint ventures that combine competitors' existing operations at a particular stage of the product cycle. Although not as fully integrated as mergers, such arrangements do eliminate competition at the relevant production stage. If, for example, several firms combine their ongoing research and development efforts for a particular product, they may forego "promising independent approaches" to new technology.[144] Such ventures "conceivably could substitute a large and leisurely project for a number of smaller, more energetic ones."[145] When competitors combine existing production facilities, total output in the market may be reduced. At the marketing stage, joint ventures among competitors can have a significant adverse effect. Such ventures increase the market power of the participants and present an opportunity for collusion on pricing by giving each partner access to the others' cost, pricing, and marketing information.

A market power analysis is appropriate for joint ventures that integrate competitors' current operations at any stage of the production cycle. The adverse competitive effects of such arrangements are dependent upon the parties' market power. Substantial reductions in research and development, production output, or price competition will only occur when the joint venture partners collectively can exercise market power. Thus, as part of its prima facie case, the plaintiff should be required to prove that the partners to joint ventures in existing markets have a market share above a particular threshold. Because "[t]he potential for price-fixing and market domination grows as a company moves closer to the marketplace,"[146] the market share threshold should be higher for "upstream" than for "downstream" joint ventures. Upstream joint ventures limited to research and development, industry standards setting, joint buying, or other "inputs" into the production process usually do not affect the partners' decisions on pricing and output.[147] Thus a relatively high

144. William E. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors,* 58 Antitrust L. J. 1059, 1095 (1990).

145. William J. Murphy, *Interfirm Cooperation in a Competitive Economic System,* 26 Am. Bus. L. J. 29, 46 (1988).

146. Joel B. Eisen, *Antitrust Reform for Production Joint Ventures,* 30 Jurimetrics 253, 263 (1990).

147. See Walter J. Winslow, *Joint Ventures—Antitrust Problems and Opportunities,* 54 Antitrust L. J. 979, 983-84 (1985); Pitofsky, 82 Harv. L. Rev. at 1040 (cited in note 143).

market share threshold of thirty-five to forty percent would be appropriate for such ventures. Downstream production and marketing joint ventures, however, have a greater potential for anticompetitive effects. A market share threshold of twenty to twenty-five percent should apply to such ventures.[148]

Once a plaintiff makes a prima facie case of market power, a defendant should be allowed to rebut by showing circumstances that mitigate a joint venture's adverse effect on competition. Even if the parties have a large collective market share, the joint venture will not have a significant adverse effect if it is of limited scope and duration. If a joint venture has a limited term, the parties will be acutely aware that their self interest lies in maintaining their individual competitive capacities. If the venture covers only an upstream phase of the production cycle, the parties will retain their incentive to compete in the production and marketing phases. The "Big Three" automobile companies, for example, have entered into several research and development consortia for such products as an electric car, pollution control equipment, safety devices, and lightweight materials to replace steel in automobiles.[149] These consortia have not prevented Ford, General Motors, and Chrysler from competing just as fiercely against each other in the production and sale of automobiles.

A defendant also can rebut the plaintiff's prima facie case by proving that the efficiencies of a joint venture are likely to outweigh its anticompetitive effects. Traditionally, the courts have given little weight to efficiency defenses in merger and joint venture analysis, believing that such arguments are easy to assert but difficult to confirm.[150] The courts should have no trouble, however, distinguishing

148. In the vertical restraints area, the courts "appear to be converging on a definition of safe harbor for firms possessing less than a 20-25% market share in a relevant market." Jorde and Teece, 4 High Tech. L. J. at 45 (cited in note 67). See note 60 for the cases defining a market share safe harbor for vertical restraints. The Department of Justice has defined a safe harbor for mergers in cases where the post-merger "concentration ratio" is less than 1000 on the Herfindahl-Hirschman Index. This ratio corresponds to approximately a 50% market share for the four largest firms in the relevant market. See *Merger Guidelines—1984*, 4 Trade Reg. Rep.(CCH) ¶ 13,103 at 20,552-53 ("*DOJ Merger Guidelines*"). In light of the unique competitive advantages of joint ventures, the market share safe harbor for these arrangements should be higher than for vertical restraints or for mergers.

149. See Oscar Survis, *Big Three Win Joint Patent, Marking a First*, Wall Street Journal B1 (April 13, 1993); Christopher Jensen, *Big 3 Work Together on Research*, Cleveland Plain Dealer E1 (Feb. 28, 1993).

150. See Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 Antitrust L. J. 217, 221 (1993). See also Joseph Kattan, *Efficiencies and Merger Analysis*, 62 Antitrust L. J. 513, 514 (1994) (stating that "[t]he problem of proof is the principal reason why, in an antitrust era that has been quite hospitable to efficiencies claims in a wide variety of other contexts,

genuine from sham efficiency arguments. First of all, the defendant, who will have access to the relevant documents and witnesses, will have the burden of proving a legitimate efficiency justification. Furthermore, the efficiencies likely to result from a particular joint venture often will be evident from the degree to which the venture integrates the parties' resources. As one commentator has pointed out, "the assumption that higher levels of integration are likely to be associated with more substantial efficiencies . . . is a premise underlying all of antitrust. . . ."[151]

The amount of integration present in a joint venture is an objective standard from which the courts should easily be able to infer the most probable efficiencies of the venture. If the partners contribute substantial technology, assets, or capital and share the risks of a joint venture's success or failure, they are likely to create a new competitive entity with capacities beyond those of the individual partners. Research and development ventures, for example, are more likely to achieve technical advances when the partners are willing to share freely with the venture all of their relevant proprietary know-how. Production joint ventures are most efficient when the partners invest significant amounts of their own capital to improve the production process. Marketing joint ventures benefit consumers if the partners combine their sales networks to enhance point-of-sale services. Conversely, when partners contribute little to joint ventures, they are more likely acting for their own competitive benefit rather than to enhance general economic efficiency. An agreement by purchasers to pool their bargaining power or a joint marketing agreement among competing sellers, unaccompanied by any other efforts at integration,

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efficiencies have yet to play an outcome-determinative role in any litigated merger case"). The merger cases in which courts have declined to consider efficiency defenses include *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963); *RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979); *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 936 (9th Cir. 1975). The *DOJ Merger Guidelines*, which do not give efficiencies a high status in merger analysis, provide: "[E]fficiencies do not constitute a defense to an otherwise anticompetitive merger but are one of many factors that will be considered by the Department in determining whether to challenge a merger." See *DOJ Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,554 (cited in note 148). Some commentators believe, however, that the judicial attitude toward efficiency defenses is undergoing a change and that such defenses will have a higher status in the future. Professor Pitofsky believes that after World War II Americans assumed that "our efficiency was so vastly superior to other parts of the world that . . . incentives to increase efficiency were not necessary.'" *Bingaman Stresses Role of Antitrust in Markets with Evolving Technologies*, [January-June] Antitrust & Trade Reg. Rep. (BNA) No. 1646, 3, 5 (Jan. 13, 1994). Since this assumption is no longer widely held, Pitofsky foresees a greator receptivity toward efficiency arguments, beginning in the lower courts. Id.

151. Pitofsky, 74 Georgetown L. J. at 1623 (cited in note 135).

may very well enhance the profitability of individual partners. These arrangements, however, will do little to create substantial overall efficiencies in the relevant market.

Substantially integrated joint ventures of limited scope and duration should easily pass muster under the balancing test. Such arrangements generate significant efficiencies and have minimal anti-competitive effects even when the parties have large market shares. The FTC's analysis of a recent joint venture between Toyota and General Motors is instructive. The joint venture involved the production of a compact car at a plant in Fremont, California.[152] The FTC recognized that such a downstream venture between the first and third largest automobile manufacturers in the world could have an adverse effect on competition.[153] However, the FTC also pointed out that such effects would be limited because the venture only covered the production of a single automobile, and the parties were free to continue to compete in the marketing phase.[154] Furthermore, any adverse competitive effects would be outweighed by the efficiencies that could result from the parties' integration of their production capacity.[155] The FTC emphasized in particular that General Motors would have the opportunity to learn more efficient Japanese manufacturing techniques.[156]

Once a court has determined the legality of a joint venture itself, it may be called upon to determine the legality of related restraints on competition among the parties to the venture. Such restrictions can be analyzed under the ancillary restraints doctrine described in Part VI.A above. Most joint ventures, for example, include certain restrictions on membership. If such restrictions are necessary for the effective operation of the venture, they can be upheld as ancillary restraints. If, however, the membership restrictions are broader than necessary (arbitrarily precluding, for example, competitors' access to an essential facility or asset), they should be deemed illegal as a naked group boycott.[157] Territorial

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152. *In the Matter of General Motors Corporation*, 103 F.T.C. 374, 378, 386 (1984).

153. Id. at 386-87.

154. Id. at 386.

155. See id.

156. Id. at 387-88. This assumption has been borne out by later events, for General Motors bas assigned alumni of the joint venture to oversee changes in manufacturing techniques at many of its plants. See Paul Ingrassia and Joseph B. White, *Major Overhaul: Determined to Change, General Motors is Said to Pick New Chairman*, Wall Street Journal A1, A4 (Oct. 23, 1992).

157. See note 106 and accompanying text.

grants made to the members of a joint venture can be analyzed in a similar manner. If, for example, a research and development venture is particularly risky, its partners may only be able to induce investments from other firms by promising them the exclusive right to market the technology developed by the venture in a particular territory. In such a case the territorial grants should be upheld as ancillary restraints rather than being deemed illegal as naked territorial allocations among competitors.[158]

C. Presumptively Legal Restraints

With the category of vertical restraints, the continuum of Section 1 analysis comes full circle. Like inherently suspect conduct at the beginning of the continuum, vertical restraints at the continuum's end can be judged under the ancillary restraints doctrine. Vertical restraints imposed independently by a manufacturer are ancillary to the integration between the manufacturer and its distribution network. Such restraints should be afforded a presumption of legality because they promote the manufacturer's competitiveness in the interbrand market. If, however, a manufacturer imposes a restraint simply as a concession to its distributors, the restraint is not ancillary to the manufacturer's distribution network. Rather, such horizontal restraints constitute a naked restriction of intrabrand competition. Thus a distributor adversely affected by such a restraint should be permitted to rebut the presumption of legality by proving that the restraint was imposed horizontally by other distributors rather than vertically by the manufacturer.

The relationship between a manufacturer and its distributors constitutes a type of partnership designed to insure the effectiveness of the manufacturer's distribution system. In order to maintain the efficiency of that system, a manufacturer may impose many different requirements on its distributors. Distributors may have to agree to hire a particular number of salespeople, maintain a sales office, attend sufficient training programs to become familiar with the manufacturer's products, or meet an annual sales quota. Such requirements do not raise antitrust issues because their only effect is to enhance the distributors' effectiveness in promoting the manufacturer's products. Other requirements, however, are suspect from an antitrust standpoint. Requirements that distributors sell

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158. See notes 115-17 and accompanying text.

only from a particular location or to specified customers or territories, for example, limit distributors' rights to compete freely in the resale of the manufacturer's products.

The Supreme Court pointed out in *GTE Sylvania* that such vertical restraints can have beneficial as well as adverse competitive effects.[159] Although territorial and customer restraints limit intrabrand competition among dealers, they also can promote interbrand competition by encouraging the dealers to provide point-of-sale services that make a manufacturer's products more attractive to consumers.[160] Indeed, it is by virtue of their restriction of intrabrand competition that such restraints enhance interbrand competition. Freedom from intrabrand competition helps assure distributors that they will have a sufficient resale margin to afford point-of-sale services.[161] The Court concluded in *GTE Sylvania* that the rule of reason should be used to balance such beneficial interbrand effects against any reduction of intrabrand competition resulting from a vertical restraint.[162]

Since the *GTE Sylvania* decision, most courts have concluded that the beneficial effects of nonprice vertical restraints outweigh their adverse effect on intrabrand competition.[163] Still, many uncertainties remain in the courts' analysis of vertical restraints. The courts have never explained how a judge or jury should balance the adverse intrabrand effects of a vertical restraint against its beneficial impact on interbrand competition. Indeed, it is impossible for a court to conduct such a balancing test in any effective manner. Interbrand and intrabrand competition have completely different characteristics. Interbrand competition encompasses the entire phase of the production process from research and development through the final sale of a product. It includes all firms capable of producing a particular type of product. Intrabrand competition, on the other hand, is much narrower in scope. It is limited to the resale phase of a single manufacturer's product. Intrabrand competition is, in fact, entirely the creation of a single manufacturer. If it wishes, a manufacturer can, without violating the antitrust laws, eliminate all intrabrand competition simply by electing to sell products directly to consumers instead of through dealers.

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159. *GTE Sylvania*, 433 U.S. at 54-57.
160. Id. at 54-55.
161. Id. at 55.
162. Id. at 59.
163. See note 50 and accompanying text.

Because interbrand competition is more important than intrabrand competition, it is not surprising that the courts have required distributors to prove an adverse effect in the interbrand market in order to prevail in a vertical restraint case. Terminated distributors have had their cases dismissed when they have been unable to prove a manufacturer's interbrand market power.[164] However, by concentrating exclusively on interbrand competition, the courts have overlooked the advantages of intrabrand competition. Although intrabrand competition is not the primary concern of antitrust law, it can provide important benefits to consumers. Free competition among distributors reduces resale prices and encourages marketing innovations and more efficient forms of retailing. Such competition also stimulates a greater output of services and adds to the variety and range of choices available to consumers.[165] Because intrabrand competition can be beneficial to consumers, its restriction should only be tolerated when there is a compensating benefit in the interbrand market.

Whenever a manufacturer acts independently to impose a vertical restraint, a court can be assured that it is attempting to enhance its interbrand efficiency. In such cases the interbrand benefit of the restraint clearly outweighs any restriction of intrabrand competition. A manufacturer may, however, impose a restraint on its dealers simply to placate a rival dealer attempting to avoid intrabrand competition. A large distributor may, for example, be able to induce a manufacturer to terminate a smaller rival or to prevent it from selling to customers or territories served by the larger distributor. Such an unjustified restriction of intrabrand competition should be illegal regardless of the manufacturer's share of the interbrand market. Such conduct has nothing to do with promoting the manufacturer's efficiency in the interbrand market. When a manufacturer acquiesces to a distributor's anticompetitive demands and imposes a restraint on a rival distributor, the restraint's source becomes horizontal rather than vertical. Such a restriction has no beneficial purpose, for, unlike

164. In *Robinson-Bock Distributing Co., Inc. v. Pionser/Eclipse Corp.*, 285 Trade Reg. Rep. (CCH) at 2-4 (Oct. 19, 1993) (7th Cir. 1993), for example, the court held that a terminated janitorial supply store could not prevail in a rule of reason case because the manufacturer held only four percent of the "janitorial supply industry as a whole." See also *The Jeancry, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1986); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986).

165. Justice Stevens stated in his dissent in *Sharp* that "fostering intrabrand competition has been recognized as an impertant goal of antitrust law." *Sharp*, 485 U.S. at 749 n.14 (Stevens, J., dissenting).

a manufacturer, a dealer is not motivated to enhance interbrand competition and is usually driven by a desire to restrict intrabrand competition as much as possible in order to protect its profit margins.[166]

By requiring proof of a manufacturer's interbrand market power, the lower federal courts have unduly limited dealers' remedies for horizontally induced restraints. In many cases a dealer will be unable to show that a manufacturer had a sufficient share of the interbrand market to raise an inference of anticompetitive effects. Thus dealers could have their cases dismissed on summary judgment even when they were denied access to a market by one of their competitors. Given the expense and uncertainties of a market power case, dealers may be reluctant to initiate lawsuits even against manufacturers with a substantial share of the interbrand market.

There is precedent, however, for an approach that would recognize the pernicious effects of horizontally induced restraints in the intrabrand market. The Supreme Court held in a recent case that an adverse impact on intrabrand competition alone was sufficient to prove the illegality of a vertical restraint. In *Eastman Kodak Co. v. Image Technical Services*,[167] the Court considered whether Kodak had illegally tied the purchase of its replacement parts to the purchase of repair services for Kodak micrographic equipment. Kodak had adopted a policy under which it would only sell replacement parts to purchasers who would also agree to have Kodak repair the equipment. The Court concluded that the intrabrand market for Kodak replacement parts was the relevant market for determining whether Kodak had sufficient economic power to coerce equipment owners into purchasing both replacement parts and repair services.[168]

An ancillary restraints approach would, as required by *Kodak,* recognize the intrabrand as well as interbrand market effects of vertical restraints. Any restraints imposed independently by a manufacturer would be upheld as ancillary to the partnership among a manufacturer and its dealers to enhance efficiency in the interbrand market. Even manufacturers with large market shares would not be

166. One dissenting opinion has recognized that, when a manufacturer acts at a dealer's behest in implementing a vertical restraint, "the harm to intrabrand competition . . . is both immediate and apparent, with no countervailing stimulation of interbrand competition, the usual saving grace of a vertical restraint." *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 141 (2d Cir. 1978) (en banc) (Mansfield, J., dissenting).

167. 112 S. Ct. 2072.

168. Id. at 2080.

precluded from implementing restrictions designed to make their distribution systems more efficient.[169]

An ancillary restraints analysis, however, also would preclude distributors from coercing manufacturers into imposing undue limits on intrabrand competition. In such a case the distributor is not acting as a partner with the manufacturer in the interbrand market. Instead, it is promoting its own interest as an independent entrepreneur by avoiding intrabrand competition from a rival.[170] The vertical restraint is therefore unrelated to any legitimate integration. The imposition of vertical restraints as a result of the inducement of competing dealers constitutes a type of naked restraint whose only effect is to limit intrabrand competition. The manufacturer's participation may lend a superficial vertical appearance to the scheme, but such conduct is just as harmful to competition as the horizontal price fixing, territorial allocations, and group boycotts at the presumptively illegal end of the Section 1 continuum.

Distributor cartels, however, are relatively rare.[171] In most cases a manufacturer will be acting independently to promote its interbrand efficiency when it imposes a vertical restraint. It is therefore appropriate to presume the legality of vertical restraints and put a heavy burden on the plaintiff to prove that a restraint was actually

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169. Under the current judicial approach, manufacturers with a significant market share are at some risk of antitrust liability when they implement vertical restraints. Some courts have adopted a market share threshold of 20-25% for vertical restraints. See notes 60, 148 and accompanying text. The threshold does not, however, protect suppliers with larger market shares.

170. As Professor Areeda has stated:

> From the policy viewpoint, it can matter greatly whether manufacturer or dealer interests are being served. The former is more likely to seek efficient distribution, which stimulates interbrand competition; the latter is more likely to seek excess profits, which dampen interbrand competition. Accordingly, antitrust policy can be more hospitable toward manufacturer efforts to control dealer prices, customers, or territories than toward the efforts of dealers to control *their* competitors through the manufacturer.

Philip A. Areeda, 7 *Antitrust Law: An Analysis of Antitrust Principles and Their Applications* § 1457 at 167-68 (Little Brown, 1986). See also *Girardi v. Gates Rubber Co.*, 325 F.2d 196, 200 (9th Cir. 1963) (stating that "it is normally the competitor who is being hurt by pricecutting who is likely to seek coercive action against the competitor who is hurting or likely to hurt him"); *Arnold Pontiac-GMC v. General Motors Corp.*, 700 F. Supp. 838, 841 (W.D. Pa. 1988) (stating that "A horizontal agreement by dealers . . . is only motivated by the dealers [sic] desire to eliminate intrabrand competition within the region and thereby to maximize profits. Such agreements have no procompetitive motivation, and are consistently found illegal per se").

171. See *Sharp*, 485 U.S. at 727 n.2 (stating that retail market power is rare because of the presence of interbrand competition and other dealers (citing *GTE Sylvania*, 433 U.S. at 54)). See also *Red Diamond Supply v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1005 n.5 (5th Cir. 1981) (stating that divergent interests of a manufacturer and its distributors keep manufacturers from becoming parties to distributor-created conspiracies).

imposed horizontally by other distributors. Indeed, the plaintiff should be required to prove that, but for the inducement of a rival distributor, the manufacturer would not have implemented a vertical restraint.[172] Under such a standard, the plaintiff would need to demonstrate that the anticompetitive demands of competing distributors were the proximate cause of the imposition of a vertical restraint. Such an approach would protect manufacturers against undue liability for implementing legitimate vertical restrictions.[173]

An ancillary restraints approach would resolve another serious deficiency in the courts' current approach to vertical restraints: the artificial distinction between price and non-price restraints. The price/non-price dichotomy originated in *GTE Sylvania*, where the Supreme Court abandoned its ten-year-old rule on the per se illegality of non-price vertical restraints.[174] The Court, however, was unwilling to forego its sixty-six-year-old precedent applying the per se rule to resale price maintenance.[175] There is no economic basis for the distinction made in *GTE Sylvania*. Restrictions on resale prices have the same economic effect as the customer and location clauses to which the Court applied the rule of reason. Like non-price vertical restraints, resale price maintenance can be used by a manufacturer to encourage distributors to more aggressively promote its products. Resale price restraints are simply another way of protecting dealers from the type of intrabrand competition that discourages them from providing point-of-sale services. Both price and non-price restraints

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172. See Thomas A. Piraino, Jr., *Distributor Terminations Pursuant to Conspiracies Among A Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297, 310-11 (1982) (explaining that group boycotts are sometimes induced by a single firm at one competitive level that uses its economic power to induce a horizontal plurality of firms at another competitive level).

173. The Court in *Monsanto* concluded that it would be unfair to infer the existence of a resale price-fixing conspiracy from a manufacturer's termination of a price-cutting dealer following complaints from other distributors. *Monsanto*, 465 U.S. at 763. The Court pointed out that manufacturers need to receive feedback from distributors on the efficiency of their distribution system: Inferring a conspiracy merely from the receipt of complaints would deter beneficial communications between a manufacturer and its dealers. Id. A "but for" standard should eliminate any concerns about such adverse effects. Under such an approach, courts would be forced to consider how a manufacturer would have acted in the absence of the complaints. A distributor would have to prove that another distributor's complaints were the determinative factor in the implementation of a vertical restraint. If the supplier would have implemented a vertical restriction in any event to enhance the efficiency of its distribution system, the supplier could not be held liable. See Piraino, 67 Cornell L. Rev. at 311.

174. 433 U.S. at 57.

175. The Court first applied the per se rule to resale price maintenance in *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 408-09 (1911). The Court expressly retained the per se rule for resale price fixing in *GTE Sylvania*, 433 U.S. at 51 n.18.

limit intrabrand competition, raise distributors' resale margins, and thereby encourage them to invest more heavily in the promotion of a manufacturer's products. Resale price maintenance, in fact, is less restrictive of intrabrand competition than are territorial restrictions. Territorial restrictions preclude all competition among dealers for certain customers or in particular territories; resale price restraints, on the other hand, allow dealers to continue to compete in quality, service, and other non-price areas.[176]

If the courts truly want to follow an economics-based approach to antitrust policy, they should eliminate the distinction between price and non-price vertical restraints. The current approach has the perverse effect of discouraging manufacturers from adopting the least restrictive means of assuring efficiency in their distribution systems. Courts treat internal growth or vertical mergers by manufacturers into the resale level leniently under the antitrust laws.[177] Contract integrations achieved through resale price restrictions should receive at least as much deference.[178] Such restraints are preferable to vertical integration, for they can achieve the productive purposes of such integration without eliminating all intrabrand competition. Manufacturers have no interest in hurting themselves by limiting intrabrand competition in a manner that will give their distributors a larger resale margin than necessary to encourage the optimum level of customer services. Why would a manufacturer want to risk raising resale prices above the level that assures the sale of the maximum amount of its products? If the manufacturer errs and adopts overly restrictive resale price restraints, the manufacturer will lose market share to competing brands and should ultimately be forced to revise the restraints.[179] As long as a manufacturer acts independently of its

176. One commentator has stated that "The territorial restriction affects both price and service competition; the price restriction affects only price competition." Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 9 (1981). See also Panel Discussion, *Antitrust Dos and Don'ts of Distribution*, 53 Antitrust L. J. 363, 377-78 (1984) (comments of Harry H. Reasoner) (stating that territorial restrictions are arguably more restrictive of intrabrand competition than resale price maintenance). In *Eastern Scientific Co. v. Wild Heerbrugg Instruments*, 572 F.2d 883, 885-86 (1st Cir. 1978), the First Circuit held that a manufacturer could preclude a dealer from selling at less than a fixed price outside the dealer's territory because the impact on competition was less than if the manufacturer had required an airtight territorial restriction.

177. See Bork, *The Antitrust Paradox* at 264 (cited in note 61).

178. Id.

179. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 32 (1984); Posner, 48 U. Chi. L. Rev. at 21 (cited in note 176). Such market discipline should only be lacking when the manufacturer is a monopolist. In such a case there is no interbrand competition to restrain a manufacturer from implementing vertical restrictions that cause

dealers in imposing resale price restraints, it can be relied upon to pursue its own self-interest in minimizing the adverse competitive effect of the restraints. A manufacturer would not proceed on its own with a restraint whose only effect was to reduce intrabrand competition and increase retail prices. When a manufacturer independently decides to adopt resale price restrictions, and thus to reduce intrabrand competition, it can safely be assumed that it expects, in return, some offsetting benefit to consumers in the form of increased services.

Following the *GTE Sylvania* case, many antitrust commentators pointed out that there was no valid economic rationale for applying the per se rule to resale price restraints and the rule of reason to non-price restraints.[180] Indeed, the Supreme Court itself conceded in *Monsanto* and *Sharp* that the economic effects of price and non-price restraints are similar.[181] Nevertheless, since *GTE Sylvania* the Court has not been able to bring itself to overrule its long-standing precedent against resale price maintenance. The Court, in fact, reaffirmed the per se illegality of such conduct in three different decisions in the 1980s.[182] The Court's awareness of the economic similarity of price and non-price restraints, however, has created an ambivalence in its recent decisions on vertical restraints. Instead of confronting the issue directly, the Court has attempted to limit the practical reach of the per se rule by redefining the offense of resale price maintenance. The Court's approach has been based more on semantics than on economic substance. In *Monsanto,* for example, the Court concentrated on the formal elements for proof of a resale price fixing conspiracy.

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higher resale prices than those desired by consumers. There is some precedent for finding vertical restrictions illegal when they are imposed by manufacturers with market shares in excess of 70%. See *Graphic Products,* 717 F.2d at 1570 (citing, among other things, the defendant's 70% to 75% market sbare as evidence that the defendant enjoyed significant market power). Some commentators have argued, however, that even monopolists want to produce a product mix attractive to consumers and thus would be no less interested than nonmonopolists in ensuring the efficiency of vertical restrictions. See Wesley J. Liebeler, *Intrabrand "Cartels" under* GTE Sylvania, 30 UCLA L. Rev. 1, 26 n.78 (1982); Panel Discussion, *Counseling Your Client on Horizontal and Vertical Restraints,* 55 Antitrust L. J. 293, 307 (1986) (comments of Donald F. Turner).

180. See Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 Colum. L. Rev. 1, 2 (1978) (arguing that "*Sylvania* went too far in swinging from an overly rigid and sweeping per se doctrine all the way to a flexible rule of reason for all non-price vertical restraints"); Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision,* 45 U. Chi. L. Rev. 1, 19 (1977) (proposing a test for the legality of distribution restrictions to be applied to both price and non-price restraints).

181. *Monsanto,* 465 U.S. at 762; *Sharp,* 485 U.S. at 724.

182. See *California Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 (1980); *324 Liquor Corporation v. Duffy,* 479 U.S. 335, 341 (1987); *Sharp,* 485 U.S. at 723.

The Court concluded that, in order to invoke the per se rule, a terminated price cutter would have to prove that the manufacturer and rival distributors had a "'conscious commitment to a common scheme'" to effect the termination.[183] In *Sharp* the Court created an artificial distinction based on the number of distributors that induce a manufacturer to terminate a price-cutting rival. The Court held that the rule of reason would be appropriate when only one distributor induces the termination, but that the per se rule should apply when the inducement comes from a group of distributors.[184]

The Court's approach to resale price fixing in these cases violated its own admonition in *GTE Sylvania* that antitrust analysis "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[185] The distinctions created by the Court have little to do with the actual economic effects of defendants' conduct. The critical issue in such cases should not be whether the manufacturer and rival distributors had a "conscious commitment to a common scheme," as required by *Monsanto*,[186] for both the manufacturer implementing a termination and the distributor requesting it obviously desired that the termination be consummated. Nor should the number of distributors on the inducing level be determinative.

183. *Monsanto*, 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). After *Monsanto*, many federal courts dismissed claims by terminated distributors on the grounds that they had failed to present sufficient evidence of a conspiracy among the manufacturer and other distributors. See, for example, *The Jeanery*, 849 F.2d at 1157; *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905, 911 (4th Cir. 1986); *McCabe's Furniture*, 798 F.2d at 330.

184. *Sharp*, 485 U.S. at 733-36. Lower federal court cases after *Sharp* have applied the per se rule to terminations induced by more than one distributor. See *Big Apple BMW v. BMW of North America*, 974 F.2d 1358, 1376 (3d Cir. 1992) (characterizing a restraint as horizontal rather than vertical because a number of dealers participated); *ES Development*, 939 F.2d at 556-57 (concluding that a letter writing campaign by dealers to a manufacturer was the result of horizontal agreement and applying the per se rule); *Lovett v. General Motors Corp.*, 769 F. Supp. 1506, 1513-19 (D. Minn. 1991), rev'd on other grounds, 998 F.2d 575 (8th Cir. 1993) (holding that a manufacturer's participation in a dealer's conspiracy to eliminate a competing dealer did not change the horizontal nature of the restraint). See also *Denny's Marina*, 8 F.3d at 1220 (applying per se rule when boat dealers combined to exclude competing dealer from boat show). However, adopting the artificial distinction in *Sharp*, the courts have denied a per se approach when only one distributor has induced a termination. See *Bailey's*, 948 F.2d at 1031 (holding that the defendant did not participate in a group boycott or conspire with firms at its own competitive level); *Ben Elfman Sons, Inc. v. Criterion Mills, Inc.*, 774 F. Supp. 683, 686 (D. Mass. 1991) (refusing to apply the per se rule where one distributor asked a manufacturer to terminate another price-cutting distributor); *Toys "R" Us, Inc. v. R.H. Macy & Co.*, 728 F. Supp. 230, 135 (S.D.N.Y. 1990) (refusing to apply the per se rule to a vertical restraint absent a showing of a price-fixing agreement).

185. *GTE Sylvania*, 433 U.S. at 59.

186. *Monsanto*, 465 U.S. at 764.

The termination of a price cutter induced by a single rival distributor restricts intrabrand competition just as effectively as a termination induced by several dealers. The most important issue is the manufacturer's purpose for the termination, that is, whether the manufacturer implemented the termination to enhance the efficiency of its distribution system or merely to gratify the anticompetitive purposes of its other distributors.

An ancillary restraints approach to vertical restraints makes more economic sense than the current approach of the federal courts. Under an ancillary restraints approach, the courts would focus, not on artificial distinctions between price and non-price restraints, unilateral and conspiratorial conduct, or single and multiple inducements, but upon whether the restraint at issue was necessary to promote an efficiency enhancing arrangement. Whether price or non-price, restrictions independently imposed by a manufacturer to enhance its distribution system would be upheld. Regardless of the number of firms on the inducing level, restrictions imposed as a result of the inducement of a rival distributor would be prohibited.[187]

Such an approach would reduce the time and expense of antitrust litigation and provide clearer guidance to manufacturers contemplating various restrictions on intrabrand competition. In contrast to the vague rule of reason standard, executives could easily understand an ancillary restraints approach because it is based upon their own purpose for a vertical restraint. The antitrust bar could counsel its clients to proceed with price or non-price restraints intended to enhance the efficiency of their distribution systems and to avoid acceding to distributors' demands to impose restraints on a rival. Such a clear standard would encourage manufacturers to proceed with beneficial restraints while deterring them from restraints that unjustifiably deprive consumers of alternative outlets for a manufacturer's products.

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187. The federal courts should be free to adopt such an ancillary restraints analysis even after *Monsanto* and *Sharp*. The Court only held in *Sharp* that the rule of reason rather than the per se rule should apply when a single distributor induces a manufacturer to terminate a price-cutting rival. *Sharp* did not hold that the plaintiff cannot prevail in a single inducement case. Neither did it preclude adoption of a new rule of reason approach which considers whether a distributor termination was naked or ancillary to a manufacturer's attempt to enhance the efficiency of its distribution system. See Thomas A. Piraino, Jr., *A Reformed Antitrust Approach to Distributor Terminations*, 68 Notre Dame L. Rev. 271, 325 (1992) (proposing a rule of reason test for distributor terminations that does not "turn on formalistic distinctions between 'single' and 'multiple' inducements").

VII. Conclusion

For nearly a century, the analysis of conduct under Section 1 of the Sherman Act has been driven by the assumption that all restraints of trade should be judged either by a harsh per se standard or permissive rule of reason approach. During the last two decades, the courts have begun to abandon the arbitrary categories of the per se rule in favor of a more substantive analysis of the economic effects of particular restraints of trade. Unfortunately, most courts have perceived a traditional rule of reason analysis as the only alternative to the per se rule. Despite efforts for reform by judges, academics, and the enforcement agencies, the modern rule of reason remains vague and undefined. As a result, the line between permissible and illegal competitive behavior has become blurred. Judges and juries have found it more difficult to render consistent decisions, businesses have been deterred from entering into efficiency-enhancing arrangements, and antitrust compliance in general has declined.

The per se and rule of reason standards have lost much of their meaning, but the courts can adopt a new standard that preserves their best traditions and avoids their most serious problems. The new standard need be neither arbitrary nor vague. It can provide clear guidance to American businesses and still ensure consideration of the economic impact of the conduct at issue. The basis for the new approach would be the simple recognition that the courts can limit their analysis to the minimum factors necessary to confirm the competitive effects of particular restraints. In most cases the courts will have enough experience to presume the likely efficiencies and anticompetitive effects of the conduct at issue, and they will be able to avoid the complications of a market power analysis entirely. At the same time, litigants could be given the opportunity to rebut the applicable presumption in a manner that would preserve an economics-based antitrust policy. Such an approach would provide American companies with a clear understanding of the types of competitive conduct which they could safely pursue and those which they should avoid.