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RESALE PRICE MAINTENANCE AND THE PRIVATE ANTITRUST PLAINTIFF

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I. INTRODUCTION

How does the law reconcile the per se illegality of an economically ambiguous practice with enforcement doctrines that permit only those directly suffering anticompetitive harm to sue and require them to prove damages coherently? The question is critical in resale price maintenance ("RPM") cases because the practice, though illegal per se, may produce no anticompetitive harm, injure parties more proximate to the violation than the plaintiffs, or cause damages resistant to reasonable estimation.

In 1911, the Supreme Court held in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[1] that an agreement between a seller and its customer specifying the minimum price at which the customer may resell the product is illegal per se. No more need be proven to establish a violation of the antitrust laws than the fact of the so-called RPM agreement.[2] For practices

1. 220 U.S. 373 (1911).

2. Specifically, a resale price maintenance agreement violates Section 1 of the Sherman Act, 15 U.S.C. § 1. Resale price maintenance can be defined broadly as any practice used by a seller to induce a purchaser to set a higher resale price than it otherwise would. So defined, RPM would encompass a manufacturer's practice of announcing that it will stop selling to any dealer that charges a price less than one specified by the manufacturer, if dealers respond by charging higher prices than they otherwise would have charged. But that practice would not constitute an "agreement," which is

that are not per se lawful, the antitrust alternative to per se condemnation is rule of reason analysis, which requires a more or less detailed examination of a practice in the commercial setting in which it is challenged in order to determine its competitive effects.[3] Per se invalidation is supposed to be reserved for "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[4] Once the Court is convinced that a kind of restraint has "predictable and pernicious anticompetitive effect" and "limited potential for procompetitive benefit,"[5] per se condemnation facilitates business planning by reducing legal uncertainty, and it promotes efficiency in the administration of the law by eliminating the need for a costly inquiry into the effects of the practice in individual cases.[6]

The economic effects of RPM, however, are not "plainly anticompetitive." Indeed, economic theory establishes that RPM can be procompetitive, and empirical evidence indicates that it usually is.[7] What,

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required for a Section 1 violation. *See infra* notes 124–68 and accompanying text. Alternatively, RPM can be defined narrowly as antitrust agreements having the described effect on resale prices. In general, we use the term RPM in its broad sense.

3. In fact, though the per se rule and the rule-of-reason standard are recognized categories of antitrust analysis, the appropriate review of any given case falls somewhere on a continuum defined by an increasing level of scrutiny of the anticompetitive harm alleged and the procompetitive justifications offered. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999) ("[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."). On the difference between per se and rule-of-reason analysis, see RICHARD A. POSNER, ANTITRUST LAW 39–40 (2d ed. 2001) ("A rule singles out one or a few facts and makes it or them legally determinative. A standard allows a more open-ended inquiry.").

4. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978). *See also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) ("[C]ertain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful *per se*.") (citations omitted).

5. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

6. The Court has explained the value of the per se rule as follows:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). *See generally* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 194 (3d ed. 2005) (noting that antitrust "has had to devise shortcuts for evaluating business practices" and that the per se rule "requires little or no inquiry into market power or actual anticompetitive effects"); KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 116 (2003).

7. *See infra* notes 213–47 and accompanying text.

then, to make of *Dr. Miles*? In 1911, the Court's conception of "competition" was ill-formed. Any practice that restricted the freedom of rivals could be termed "anticompetitive," and RPM unquestionably limited the pricing discretion of competing resellers, even if resellers agreed to the restraint. In addition, the Court misapprehended the effect of RPM on consumers, reasoning that consumers *must* be injured when a practice prevents a retailer from lowering a price. Over the next ninety-plus years, the Court came to view the antitrust laws as promoting the goal of economic efficiency or consumer surplus.[8] "Competition" came to be understood as a process that promoted that goal, rather than merely a process of rivalry, and so a practice was anticompetitive only when it reduced the relevant measure of welfare.[9] Simultaneously, the Court's analysis of the competitive effects of business practices became more sophisticated.[10] The Court began to recognize the welfare-increasing capacity of practices that once appeared obviously welfare-reducing, and it gained more confidence in the judiciary's ability to identify truly anticompetitive arrangements in litigation at tolerable costs.

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8. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 427 (2d ed. 1993) ("By and large, with some ambiguity at times, the more recent cases have adopted a consumer welfare model."); POSNER, *supra* note 3, at ix ("Almost everyone professionally involved in antitrust today . . . not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal."); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); Herbert Hovenkamp, *Reckoning of Post-Chicago Antitrust*, *in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 1–3 (Antonio Cucinotta et al. eds., 2002); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989). There is a technical difference between efficiency and consumer surplus. It usually has no antitrust policy implications, but it can in some circumstances, including the situation in which a practice is used to price discriminate. *See infra* notes 271–82 and accompanying text. Consumer surplus is the amount above the price paid that a consumer would be willing to pay for the units purchased; producer surplus is the maximum amount of revenue a producer would be willing to lose and still produce the product. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 71 (3d ed. 2000). Total welfare can be defined as the sum of consumer surplus and producer surplus. *Id*. Economic efficiency is the combination of allocative and productive efficiency. *Id*. at 69–70. In most cases, a practice that reduces consumer surplus, or consumer welfare, reduces efficiency, or total welfare. But consumer welfare can be reduced without affecting efficiency, if any losses absorbed by consumers become gains for producers. In those cases, the appropriate antitrust standard matters, and the Court has never definitively identified it. *See generally* Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 425–26, 430–33 (2005).

9. *See* BORK, *supra* note 8, at 427; POSNER, *supra* note 3, at 28–29.

10. *See, e.g.*, BORK, *supra* note 8, at 429 (observing that the "law's vision of economic reality has greatly improved" since the 1970s); POSNER, *supra* note 3, at x (noting that "antitrust law has almost since its beginning been much influenced by economics, and economics is an improving discipline").

As a result of this process, the Court repudiated the rule of per se illegality of non-price vertical restraints, such as territorial restrictions imposed by a manufacturer on a distributor.[11] It repudiated the rule of per se illegality of vertical *maximum* price fixing.[12] It explicitly limited the scope of the per se rule as applied to boycotts.[13] It specified a "per se" analysis of tying arrangements that incorporated much if not all of a reasonableness inquiry.[14] It retained the per se rule against horizontal price fixing, but it required a significant analysis of a restraint's commercial context before the restraint can be characterized as price fixing.[15]

The process of reforming substantive antitrust law also touched the treatment of RPM. The Court made an RPM agreement more difficult to prove. It held that dealers' complaints to a manufacturer that a rival is undercutting a suggested minimum resale price followed by the manufacturer's termination of the discounting dealer is insufficient to establish an agreement on resale price.[16] And it held that an agreement between a manufacturer and one dealer that the manufacturer would terminate a rival, price-cutting dealer does not imply an illegal RPM agreement.[17] But the Court has never retreated from the rule that an RPM agreement, once found, is per se illegal.[18] Indeed, it distinguished vertical price restraints in overturning the per se illegality of vertical non-price restraints,[19] and in a later case explicitly declined the government's request that it repudiate the rule.[20]

While the process of substantive law reformation was occurring, the Court embarked on a parallel effort to develop rules of private enforcement that would conduce toward the welfare-maximization objective of antitrust law. The Court recognized that the deleterious effects of inefficient substantive rules could be lessened by reducing the penalties for their violation.[21] The Court held, therefore, that a private plaintiff may recover

11. *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

12. *See* State Oil Co. v. Khan, 522 U.S. 3 (1997).

13. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).

14. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

15. *See, e.g.*, Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 9 (1979).

16. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

17. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

18. *See, e.g.*, BORK, *supra* note 8, at 436 (noting that "the Court retains the rule of per se illegality for vertical price fixing mistakenly laid down in the 1911 *Dr. Miles* decision"); POSNER, *supra* note 3, at 189 ("The per se rule against resale price maintenance remains. It is a sad mistake. There is neither theoretical basis, nor empirical support, for thinking the practice generally anticompetitive.") (footnote omitted).

19. *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977).

20. *See Monsanto*, 465 U.S. at 761 n.7.

21. *See* John E. Lopatka & William H. Page, *Antitrust Injury and the Evolution of Antitrust Law*,

damages not for just any loss caused by an antitrust violation, but only for an antitrust injury—the kind of injury the antitrust laws were designed to prevent.[22] An efficient practice might be illegal as a matter of substantive law, but because it causes no antitrust injury, the offender will not face the deterrent of treble damage liability. Further, the Court recognized that damage liability even for truly anticompetitive conduct could be excessive,[23] and that private antitrust enforcement is more effective when the right to recover damages is limited to and concentrated in relatively direct victims.[24] The Court held, therefore, that not all those suffering antitrust injury may recover, but only a subset, the victims who have antitrust standing.[25] The doctrine decreases the risk of excessive antitrust penalties by preventing remote victims from recovering. The Court also held that, when an anticompetitive overcharge contained in the price of a good is imposed on buyers who pass on part of the overcharge in the resale price of the good, only the direct purchasers have antitrust standing, and they may recover damages measured by the full overcharge.[26] Thus remote purchasers cannot recover damages from an unlawful monopolist or cartel, even if they absorb the bulk of the overcharge.

The idea that a per se illegal practice might be immune from private enforcement seems incongruous, but that is the implication of a rigorous antitrust injury doctrine grounded in an efficiency-based conception of antitrust law coupled with an overbroad rule of liability. One purpose of this Article is to apply economic theory to identify antitrust injuries caused by RPM in various settings. In addition, antitrust law has long required plaintiffs to estimate reasonably if not precisely the magnitude of the harm they suffered as a result of the violation,[27] and we apply this mandate to claims of injury caused by RPM. We demonstrate that plaintiffs will often be hard-pressed—if not unable—to prove damages in an economically coherent fashion. We also explore the implications of the prohibition against indirect

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ANTITRUST, Fall 2002, at 20.

22. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). The Court later held that a private plaintiff seeking equitable relief must prove threatened antitrust injury. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113 (1986).

23. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979) ("A central premise of our holding in *Hawaii* was concern over duplicative recoveries."); Hawaii v. Standard Oil Co., 405 U.S. 251, 263–64 (1972) (refusing to allow an action by a state for injury to its general economy because such an action would "open the door to duplicative recoveries").

24. *See generally* William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985) [hereinafter Page, *Scope of Liability*].

25. *See* Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983).

26. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 734–35 (1977).

27. *See, e.g.*, Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946).

purchaser suits in the context of RPM. In all, the Article provides a comprehensive examination of the major issues involved in private actions to obtain damages for illegal RPM agreements.

We begin in the next Part with an overview of the legal requirements for plaintiffs to establish antitrust injury and antitrust standing. We briefly survey the history of RPM law in Part III, demonstrating that the Court's failure to provide a coherent economic case for per se condemnation creates nearly insurmountable problems for private plaintiffs in proving antitrust injury and damages. We illustrate these problems in Part IV through an examination of various business motivations for using RPM—some with anticompetitive effects, some with procompetitive effects, and some with confounding effects. Sorting out the competitive effects of a particular RPM plan is no mean feat. Consequently, the private plaintiff faces a substantial, if not insurmountable, barrier in proving antitrust injury and damages. Because of the formidable impediments faced by private antitrust plaintiffs, one might expect that a defendant would be reluctant to pay anything to settle a private RPM action. But a large number of RPM cases do settle, and Part V addresses the possible reasons for this surprising outcome. We offer some final thoughts in Part VI.

II. LEGAL REQUIREMENTS OF PRIVATE ENFORCEMENT

The federal antitrust laws are enforced concurrently by the Antitrust Division of the Department of Justice,[28] the Federal Trade Commission,[29] state attorneys general,[30] and private plaintiffs. Section 4 of the Clayton Act authorizes private actions for treble damages: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the

28. *See* 15 U.S.C. §§ 4, 15a, 25 (2000).

29. *See* 15 U.S.C. §§ 11, 45 (2000).

30. When a state is injured or threatened with loss in its proprietary capacity by an antitrust violation, it can sue, typically through its attorney general, and in that setting occupies the procedural position of a private plaintiff. It is a "person" injured in its property or threatened with loss for purposes of Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (2000). But Section 4C of the Clayton Act, 15 U.S.C. § 15c (2000), also allows state attorneys general to act as *parens patriae* on behalf of their citizens and to recover treble damages. *See generally* ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 85–86 (1985); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, *in* COMPETITION LAWS IN CONFLICT 252 (Richard A. Epstein & Michael S. Greve eds., 2004); Kevin J. O'Connor, *Antitrust Enforcement Regarding Vertical Restraints by States Attorneys General*, SE47 ALI-ABA 257, 265 (2000). In this capacity, state attorneys general function as public enforcers of the federal antitrust statutes. Of course, state attorneys general may also have authority to enforce state antitrust laws. *Cf.* California v. ARC Am. Corp., 490 U.S. 93 (1989) (holding that state antitrust laws inconsistent with the federal rule barring indirect purchaser suits are not preempted).

antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[31] The right to obtain treble damages creates a powerful economic incentive for private antitrust enforcement. Given that an antitrust violation has occurred, the expected value of a suit to a risk-neutral victim will be positive as long as the probability of winning times the trebled damages exceeds the probability of losing times the plaintiff's litigation costs.[32] In that event, a private antitrust suit may appear *ex ante* to be quite profitable and surely will be so *ex post* if the plaintiff is successful.[33]

Although Section 4 appears expansive, the Court has interpreted it to impose strict limits on the universe of antitrust claimants. To be cognizable, not only must the antitrust violation cause an injury in fact to the plaintiff's business or property,[34] but the harm must be an antitrust injury, and only those persons suffering relatively direct antitrust injuries have antitrust standing to recover.[35] Further, the plaintiff must offer a coherent method of estimating damages. As we explain below, the requirements of an antitrust

31. 15 U.S.C. § 15 (2000). Private parties also are authorized to sue for equitable relief. *See* 15 U.S.C. § 26 (2000). Most private antitrust plaintiffs seek damages, and this Article is confined to damage actions.

32. The expected value of a private suit is $E[V] = p(3D) + (1 - p)(0) - (1 - p)(C)$, where E is the expectations operator, p is the (subjective) probability of winning the suit, D is the sum of the monetary damages, $(1 - p)$ is the probability of losing, and C is the plaintiff's cost of litigation. This expression simplifies to $E[V] = p(3D) - (1 - p)(C)$.

In the case of contingent fees, the arithmetic is a bit more complicated. For example, the contract between the plaintiff and his attorney may have the following provisions: (1) if the suit is unsuccessful, the attorney bears all of the litigation costs; (2) if the suit is successful, (a) the attorney's fee will be a share of the treble damages, or $\alpha(3D)$ where α equals the fraction of the award that goes to the attorney, (b) the court's award will include a reasonable attorney's fee (A), and (c) the amount awarded by the court will be deducted from the attorney's share of the trebled damages, or $\alpha(3D) - A$. Thus, the expected value of the suit in this scenario to the plaintiff is $E[V] = p(3D) - p[\alpha(3D) - A]$, which simplifies to $E[V] = p[(1 - \alpha)(3D) + A]$.

Because α is the fraction of the award that goes to the attorney, $(1-\alpha)$ is therefore the plaintiff's share of the award. Other contractual arrangements are possible as well and will have somewhat different results. Further complications are added by including indirect costs of litigation, such as the time and attention of the plaintiff's managers and staff, which the plaintiff will bear in any event.

33. There is an obvious potential for abuse due to the possible profit that can be earned. For more fundamental concerns regarding the threat of antitrust suits to *reduce* the competitive vigor of rivals, see Arthur D. Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353; William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

34. Once the Court held that an overcharge paid by consumers as a result of an antitrust violation is injury to their "property" (*see* Reiter v. Sonotone Corp., 442 U.S. 330 (1979)), the "business or property" limitation became largely inconsequential. *See generally* 11 JOSEPH P. BAUER, FEDERAL ANTITRUST LAW 18–20 (1998). We will not discuss this limitation further.

35. *See generally* 2 PHILLIP E. AREEDA, HERBERT HOVENKAMP & ROGER D. BLAIR, ANTITRUST LAW ¶ 335–61, ¶ 337 (2d ed. 2000); 11 BAUER, *supra* note 34, at 6–18, 20–21, 47–48.

injury and a sound method of calculating damages may pose significant problems for private plaintiffs alleging injury from RPM.

A. Antitrust Injury

Once the Court recognized that the antitrust laws are intended to accomplish a specific objective, the promotion of some kind of economic welfare, it was able to hold that only losses closely connected to that objective are compensable. In the 1977 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[36] case, the Court held that a plaintiff may only recover damages for antitrust injuries:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."[37]

As the Court later described the requirement, the plaintiff must show that it was "adversely affected by an anticompetitive aspect of the defendant's conduct."[38] The antitrust injury requirement thus connects the plaintiff's injury to the economic rationale of the antitrust laws.[39]

Brunswick involved an allegation that the defendant unlawfully acquired failing bowling alleys that would otherwise have gone bankrupt.[40] The plaintiffs operated competing bowling centers and sued to recover the profits they would have earned had the acquired alleys left the market.[41] The economic perversity of the plaintiffs' claim was unmistakable: the plaintiffs wanted to recover immediate losses suffered not from a reduction in competition, but from a continuation of it.[42] Any increase in competition is

36. 429 U.S. 477 (1977).

37. *Id*. at 489 (alteration in original).

38. ARCO v. USA Petroleum Co., 495 U.S. 328, 339 (1990) (emphasis omitted).

39. *See* 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶ 337c; Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273, 286 (1998); William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980) [hereinafter Page, *Antitrust Damages*]; Page, *Scope of Liability*, *supra* note 24. *See also* Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539 (1989); Roger D. Blair & William H. Page, *The Role of Economics in Defining Antitrust Injury and Standing*, 17 MANAGERIAL & DECISION ECON. 127 (1996).

40. *See Brunswick*, 429 U.S. at 479–80.

41. *See id*. at 479–81.

42. *See id*. at 488.

likely to injure suppliers in a market as it benefits consumers. In subsequent cases, the Court defined the *Brunswick* principle broadly and applied it widely, turning the antitrust injury doctrine into a powerful force to rationalize private antitrust enforcement. The Court applied the doctrine again in the merger area, holding that a private plaintiff must assert threatened antitrust injury in order to seek equitable relief under Section 16 of the Clayton Act[43] to prevent an acquisition.[44] It applied the doctrine to allegations of predatory pricing,[45] price discrimination,[46] and maximum vertical price fixing.[47]

As the doctrine was shaped, the Court made clear that it does not merely disallow losses that flow from an increase in competition. Rather, even a practice that reduces competition may be accompanied by losses that are not compensable because they do not flow from the competition-reducing aspect of the practice. The practice must reduce welfare and predictably increase the probability of the kind of harm the plaintiff asserts.[48] The antitrust injury doctrine poses no conceptual problem when a challenged practice reduces the relevant measure of welfare. A claim may be dismissed because a particular plaintiff did not suffer an antitrust injury as a result of the practice, or because a plaintiff who did suffer an antitrust injury is asserting a loss that is not antitrust injury. Even so, antitrust injury, by definition, is suffered by someone. But if a practice causes no welfare loss and is nevertheless unlawful, the antitrust injury doctrine implies that no private party can establish the right to sue. And that conundrum is not merely a theoretical possibility: The pre-1970s history of the antitrust laws is marked by decisions outlawing practices that reduced producer welfare or were mistakenly thought to injure consumers.[49]

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43. 15 U.S.C. § 26 (2000).

44. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986).

45. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–86 (1986).

46. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).

47. ARCO v. USA Petroleum Co., 495 U.S. 328, 331 (1990).

48. This is an application of the tort principle that defendant's misconduct must be "causally linked" to the plaintiff's harm. *See generally* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71–72 (1975) ("There is a causal link between an act or activity and an injury when we conclude on the basis of the available evidence that the recurrence of that act or activity will increase the chances that the injury will also occur."); Zuchowicz v. United States, 140 F.3d 381, 388 n.7 (2d Cir. 1998).

49. Books analyzing the extent to which the Supreme Court failed to reach decisions promoting economic welfare include BORK, *supra* note 8, and POSNER, *supra* note 3. Some of the more prominent decisions are United States v. Topco Assocs., 405 U.S. 596 (1972) (condemning a cooperative arrangement among small competitors); Albrecht v. Herald Co., 390 U.S. 145 (1968) (condemning a vertical maximum price fixing agreement); United States v. Von's Grocery Co., 384 U.S. 270 (1966) (condemning a horizontal merger); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (condemning a horizontal and vertical merger); N. Pac. Ry. v. United States, 356 U.S. 1 (1958)

Maximum, non-predatory resale price fixing posed the problem starkly. Unless the resale price fixed is really a price floor,[50] the practice actually *increases* consumer welfare.[51] In 1968, however, when the Court was inclined to place independent value on the welfare of suppliers, the Court held the practice illegal per se.[52] The Court revisited the practice twenty-two years later in *ARCO v. USA Petroleum Co.*,[53] after it had adopted a different conception of the laws' purpose, but chose not to reconsider the merits of the per se rule. The Court also might have held that the antitrust injury doctrine is simply inapplicable to per se antitrust violations, but it did not.[54] Rather, it held that a competitor of the dealer subject to the price ceiling who loses profits as a result of the fixed maximum price does not suffer antitrust injury.[55] True enough, but does *anyone* suffer antitrust injury? One lower court scratched its head, reasoning that if the practice causes no relevant welfare loss but must cause antitrust injury, then antitrust injury must embrace losses that are not connected to inefficiency.[56] The conclusion that the practice causes antitrust injury was virtually mandated by *ARCO* itself, where the Court in dicta said that dealers subject to the constraint and consumers may sue.[57] Another lower court, taking its cue from *ARCO*, found, with little economic support, that the practice is inefficient and held that a dealer subject to the maximum price constraint does suffer antitrust injury.[58] The Court revisited maximum resale price fixing again, but not to resolve the apparent anomaly in its relation to the antitrust injury doctrine.[59] Rather, the Court repudiated per se treatment of it. Indeed, the Court indirectly sustained the anomaly by stating pointedly that the practice is not

(condemning a tying arrangement).

50. If it is a price floor, the practice can and should be analyzed as *minimum* resale price fixing. *See* Roger D. Blair & John E. Lopatka, *The* Albrecht *Rule After* Khan*: Death Becomes Her*, 74 NOTRE DAME L. REV. 123, 139 (1998) [hereinafter Blair & Lopatka, *Death Becomes Her*]. Whether and when minimum resale price fixing causes antitrust injury is discussed later in the Article. *See infra* notes 177–300 and accompanying text.

51. For an extended analysis, see Blair & Lopatka, *Death Becomes Her*, *supra* note 50, at 151–67; Roger D. Blair & John E. Lopatka, Albrecht *Overruled—At Last*, 66 ANTITRUST L. J. 537 (1998) [hereinafter Blair & Lopatka, *Overruled*].

52. Albrecht v. Herald Co., 390 U.S. 145, 151 (1968).

53. 495 U.S. 328 (1990).

54. *ARCO*, 495 U.S. at 341.

55. *Id*. at 335.

56. Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996), *vacated and remanded*, 522 U.S. 3 (1997).

57. *ARCO*, 495 U.S. at 345.

58. Caribe BMW, Inc. v. Bayerische Motoren Werke AG, 19 F.3d 745, 752–54 (1st Cir. 1994).

59. *See* Khan v. State Oil Co., 522 U.S. 3 (1997).

per se lawful,[60] thereby arguably implying that the practice does cause antitrust injury in some cases.

As we will see, applying an efficiency-based antitrust injury doctrine to RPM is not as paradoxical as is applying the doctrine to maximum resale price fixing. In some circumstances, RPM can reduce consumer and total welfare. But the doctrine must be applied carefully. Despite RPM's status as per se unlawful, when a private plaintiff asserts an RPM claim for damages, the court must determine whether RPM can cause anticompetitive harm in the particular factual context alleged, and if so, whether the plaintiff's loss was antitrust injury. If the court were to find antitrust injury when anticompetitive harm was impossible or undetectable, "antitrust injury" would be cut loose from its economic mooring.

B. Antitrust Standing

At the time the Court announced the antitrust injury doctrine, it began to develop the corollary principle of antitrust standing.[61] In effect, the principle is that only those persons suffering antitrust injuries that are in some sense proximate to the offense are entitled to recover damages.[62] The doctrine has an economic rationale: It restricts the universe of compensable claims to those that form a part of the optimal penalty, and it concentrates the right to recover in those who can most efficiently identify the antitrust violation and seek redress.[63] The concept of optimality implies a standard and the possibility of excess. An optimal antitrust penalty can be economically

60. *See Khan*, 522 U.S. at 22.

61. "Antitrust standing" is distinct from constitutional standing. *See* U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir. 2003) (noting that unlike antitrust standing, "Article III standing . . . requires only injury in fact plus redressability.").

62. *See* Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 535–46 (1983). Courts and commentators use the term "antitrust standing" in conflicting ways. Some use the term to subsume the requirement of antitrust injury; others use it to identify prerequisites for suit separate from antitrust injury. *See, e.g.*, Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56, 72–73 (1st Cir. 2005) (setting forth elements of antitrust standing); 2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 739 (3d Cir. 2004) (noting that antitrust standing and antitrust injury are often confused); Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1201 (7th Cir. 1986) (observing that "[s]ome courts have considered 'antitrust injury' as an additional element of standing, while others have considered the two requirements as analytically distinct") (citations omitted). What is clear is that antitrust injury is a necessary but not a sufficient condition for antitrust standing. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons."); *2660 Woodley*, 369 F.3d at 739; *Local Beauty Supply*, 787 F.2d at 1201. *See generally* 11 BAUER, *supra* note 34, at 3 n.14.

63. *See* Page, *Scope of Liability*, *supra* note 24, at 497–500; Page, *Antitrust Damages*, *supra* note 39, at 1484.

specified. It is the net harm caused by an antitrust offense to those other than the offenders.[64] Thus, for example, a supplier to a cartel that fixes sales prices suffers antitrust injury as a result of reduced sales to the cartel, but those losses are offset by costs avoided by the cartel in reducing output. The Supreme Court, too, has recognized that antitrust damages imposed on a violator by multiple claimants can be cumulatively excessive and has adopted policies that avoid duplicative recoveries.[65]

In *Illinois Brick Co. v. Illinois*,[66] the Court imposed a limitation on the private right to recover for antitrust violations, which is an aspect of the general principle of antitrust standing. The Court held that when an antitrust violator causes an overcharge in the price of a good, indirect purchasers—those to whom the overcharge is passed on by other purchasers up the distribution chain—may not recover damages.[67] Prior to *Illinois Brick*, the Court had held in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[68] that an antitrust violator causing an unlawful overcharge may not assert as a defense to an action by a direct purchaser that the plaintiff passed on the overcharge.[69] The Court in *Hanover Shoe* reasoned that determining the effect of an overcharge on the prices charged by the direct purchaser would be difficult and would therefore complicate treble-damages actions.[70] Further, it believed that permitting the defense would weaken enforcement, for direct purchasers would be allowed to recover only a portion of the overcharge, and indirect purchasers, because their claims would be tiny, would not bother to sue.[71]

The Court reaffirmed and extended the reasons for rejecting defensive use of the pass-on theory in *Illinois Brick*, a decision in which the Court rejected offensive use of the pass-on theory. The Court reasoned that asymmetrical application of the pass-on theory, which prevents defendants from avoiding

64. *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 655–56 (1983). In a typical case of collusion, the optimal penalty equals the monopoly profits plus the deadweight loss. In cases of exclusion, the penalty would also include the loss in value of any market-specific assets of the excluded firms. *See* Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 465 (1985).

65. *See supra* note 23; Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (prohibiting damage claims by indirect purchasers in part in order to avoid the risk of duplicative recoveries).

66. 431 U.S. 720 (1977).

67. *Id*. at 746.

68. 392 U.S. 481 (1968).

69. *Id*. at 494.

70. *Id*. at 492–93.

71. *Id*. at 494. On this score, the Court was unduly pessimistic. Where state antitrust laws permit indirect purchasers to sue, these purchasers have not been diffident, using the class action device to aggregate claims. *See* John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 ANTITRUST BULL. 531, 534 (2003).

liability to direct purchasers but allows indirect purchasers to recover damages, poses an unacceptable risk of multiple liability.[72] If both plaintiffs and defendants were allowed to assert the theory, treble-damage litigation would become exceedingly complex and hence costly: elasticities of demand and supply would have to be estimated in order to determine the amount of overcharge absorbed at each distribution level.[73] Unless all claimants were joined in one action, symmetrical application might still lead to multiple liability because of inconsistent judgments.[74] Forcing all claimants to join in a single action, even if possible, would "transform treble-damages actions into massive multiparty litigations."[75] Further, symmetrical use of the theory would undermine enforcement: direct purchasers would have less incentive to sue if their damages were reduced by the amount of overcharge passed on, but indirect purchasers would still have little incentive to sue because their injuries are so small.[76] The Court therefore concluded that, in the interests of simplifying treble-damage litigation and bolstering antitrust enforcement, the right to sue for overcharge damages should be concentrated in direct purchasers.[77] If the right to recover was going to be concentrated, it made sense to concentrate the right in direct purchasers, who by virtue of their proximity to the violation were best situated to detect it.[78]

The Court in *Hanover Shoe* and *Illinois Brick* recognized possible exceptions to the pass-on rule. Both defensive and offensive use of the theory might be allowed when the sales by the direct purchaser to the indirect purchaser are subject to a "cost-plus" contract, under which the full amount of the overcharge would be added to whatever price the direct purchaser would otherwise have charged, and the indirect purchaser would buy no less because of the higher price.[79] Further, an exception might be made when the direct purchaser is owned or controlled "by its customer."[80] But the Court

72. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 730–31 (1977).

73. *See id*. at 737. Elasticities of demand and supply are notoriously difficult to estimate in practice. *See, e.g.*, *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997) ("Tracing a price hike through successive resales is an example of what is called 'incidence analysis,' and is famously difficult.").

74. *See Ill. Brick*, 431 U.S. at 737 n.18.

75. *Id*. at 740, 731 n.11.

76. *See id*. at 745.

77. *Id*. at 745–46.

78. *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602, 608–09 (1979).

79. *See Ill. Brick*, 431 U.S. at 736; Hanover Shoe v. United Shoe Machinery, 392 U.S. 481, 494 (1968). *See generally*, Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990).

80. *Ill. Brick*, 431 U.S. at 736 n.16. The Court likely meant that an exception might apply if the

emphasized that exceptions to the rule would not be permitted on an industry-specific basis,[81] and it later demonstrated its commitment to the rule by rejecting an exception for direct purchasers who are regulated utilities allowed by a state agency to increase rates in the amount of the illegal overcharge.[82]

Notably, both *Hanover Shoe* and *Illinois Brick* involved allegations that an antitrust violator unlawfully raised price and reduced output. In *Hanover Shoe* the defendant had monopolized,[83] and in *Illinois Brick* the defendants had participated in a horizontal price-fixing conspiracy.[84] The plaintiffs were purchasers of the products whose prices were inflated because of the antitrust violation, and they sought to recover damages on an overcharge theory. The rule of *Illinois Brick* may be limited to that context. For example, one court pointed out that plaintiffs might avoid the *Illinois Brick* bar by casting their price-fixing claim for overcharge damages as a boycott claim for lost profits.[85] As we will see, because RPM usually does not involve an output restriction and a price set above the competitive level, the application of *Illinois Brick* to RPM is problematic.[86]

C. Estimating Damages

Long before the Court held that only certain types of injuries are compensable under the antitrust laws, it recognized that an antitrust plaintiff seeking damages has to prove with reasonable certainty that the violation in fact caused the plaintiff an injury.[87] The Court held that the fact-finder may

> conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs'

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direct purchaser is owned or controlled by its *supplier*, the antitrust violator. The cases cited by the Court for general support dealt with an argument that an antitrust violator is insulated from liability by dealing directly with an intermediary the violator owned or controlled. *See* Perkins v. Standard Oil Co. of Cal., 395 U.S. 642, 648 (1969); *In re* Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973). *Cf. In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997) (noting that the exception for a direct purchaser owned or controlled by its customer presumably also applies "vice versa").

81. *See Ill. Brick*, 431 U.S. at 743–44.

82. Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990).

83. *See Hanover Shoe*, 392 U.S. at 483.

84. *See Ill. Brick*, 431 U.S. at 727.

85. *In re Brand Name Prescription Drugs*, 123 F.3d at 606.

86. *See infra* notes 219–30, 238–47 and accompanying text.

87. *See* Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561–66 (1931). *See also* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 123–24 (1969); Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696–702, 697 n.7 (1962). *See generally* PROVING ANTITRUST DAMAGES 31–35 (William H. Page ed., 1996).

> business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.[88]

The Court also recognized, however, that plaintiffs often cannot prove the amount of damages suffered as confidently as they can prove the fact of injury. "The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."[89] Moreover, "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."[90] Therefore, the standard of proof for establishing damages is less demanding than the standard of proof for establishing injury in fact.[91] Nevertheless, the plaintiff's calculation of damages cannot be speculative.[92] It must be based on a reasonable theory of recovery and be supported by relevant, available data.[93] A closely related doctrine is that a plaintiff generally must prove the amount

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88. *Bigelow*, 327 U.S. at 264.

89. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566–67 (1981).

90. Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 379 (1927).

91. For example, in *Story Parchment*, 282 U.S. at 562, the Court observed:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.

See also New York v. Julius Nasso Concrete Corp., 202 F.3d 82, 88 (2d Cir. 2000) (recognizing that burden of proof in establishing amount of antitrust damages is less rigorous than burden in establishing fact of injury or amount of damages in non-antitrust cases); Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc. 773 F.2d 1506, 1509 (9th Cir. 1985) (noting that "evidence linking the alleged violation of the antitrust laws to [plaintiff's] injury must be more precise than the evidence establishing the amount of injury which it has suffered"). *See generally* 11 BAUER, *supra* note 34, at 12 (noting that once the plaintiff proves by a preponderance of the evidence that it suffered an injury in fact as a result of the defendant's antitrust violation, "a far lower threshold is placed on the degree of certainty of proof regarding the extent, or dollar value," of the injury).

92. *See, e.g.*, Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 813 (3d Cir. 1984) (noting that the damages claimed by an antitrust plaintiff may not be "based upon speculation or guesswork"); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 695 (5th Cir. 1975) ("We recognize that leniency should be permitted in showing damages in private antitrust actions, however, a damage assessment based wholly on speculation and guesswork is improper.").

93. *See, e.g.*, McGlinchy v. Shell Chem. Co., 845 F.2d 802, 808 (9th Cir. 1988); Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 995 (5th Cir. 1983); Yentsch v. Texaco, Inc., 630 F.2d 46, 59 n.19 (2d Cir. 1980); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46 (5th Cir. 1972); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 436 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980). *See generally* Roger D. Blair & William H. Page, *"Speculative" Antitrust Damages*, 70 WASH. L. REV. 423, 427 (1995) (arguing that "a projection is 'speculative' if it fails to account rationally for factors other than the defendant's illegal conduct that may have caused (or significantly contributed to) the asserted difference between" the plaintiff's actual and but-for conditions).

of damages caused by each alleged anticompetitive act.[94] Under this so-called disaggregation rule, the plaintiff cannot recover for losses that are found not to flow from anticompetitive conduct. Both of these doctrines help to insure that the plaintiff's cognizable antitrust loss, as measured coherently, is caused by the antitrust violation.[95] As demonstrated below, when consumers complain about RPM, their calculation of damages can be hopelessly speculative and impermissibly aggregated.

III. ANTITRUST POLICY REGARDING RPM

The judicial analysis of RPM went wrong from the outset and has never recovered. When the Court first held in *Dr. Miles*[96] that RPM is illegal per se,[97] it had not adopted wealth maximization as the fundamental norm of

94. *See, e.g.*, Infusion Res., Inc. v. Minimed, Inc., 351 F.3d 688, 696 (5th Cir. 2003) (recognizing that the disaggregation requirement applies to antitrust actions); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1054 (8th Cir. 2000) (setting aside a jury verdict on damages because the jury was not required to segregate losses caused by different alleged antitrust violations); Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1243 (7th Cir. 1982) (noting that an antitrust plaintiff generally must "disaggregate the damage sum and apportion the amount of damage caused by each of [the challenged] business practices"), *aff'd*, 465 U.S. 752 (1984); S. Pac. Communications Co. v. AT&T Co., 556 F. Supp. 825, 1090 (D.D.C. 1983) ("The trier of fact must be able to determine from the damage evidence whether each of the particular actions alleged to form an antitrust violation 'materially contributed' to plaintiffs' injury."); Northeastern Tel. Co. v. AT&T Co., 497 F. Supp. 230, 247–48 (D. Conn. 1980) (noting that absent proof of "the amount of damages flowing from each separate area of anticompetitive conduct," the factfinder would not have "a rational basis on which to correlate the damages to the particular conduct found to be predatory or anticompetitive"), *rev'd on other grounds*, 651 F.2d 76 (2d Cir. 1981). *See generally* M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 ANTITRUST L.J. 311 (1997); James R. McCall, *The Disaggregation of Damages Requirement in Private Monopolization Actions*, 62 NOTRE DAME L. REV. 643 (1987).

95. Causation is a requirement in any private antitrust action. *See, e.g.*, Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) ("Establishing causation, or 'fact of damage,' requires the plaintiff to demonstrate a causal connection between the specific antitrust violation at issue and an injury to the business or property of the antitrust plaintiff."); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1054–55 (8th Cir. 2000) (noting that "[a]ntitrust injury, causation, and damages all are necessary parts of the [plaintiff's] proof"); Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 41 (2d Cir. 1986) (noting that "lack of causation in fact is fatal to the merits of any antitrust claim"). Of course, *Brunswick* establishes that not just any injury to business or property will suffice, but rather the relevant injury is an antitrust injury.

96. Dr. Miles Med. Co. v. John D. Park & Sons, Co., 220 U.S. 373 (1911).

97. The Court did not use the per se terminology, which is not surprising because the explicit distinction between the rule of reason and per se illegality did not begin to emerge until *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), decided in the same year. *See, e.g.*, HOVENKAMP, *supra* note 6, at 277; E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 121–22 (3d ed. 1998). But the Court's analysis was tantamount to per se treatment. *See Dr. Miles*, 220 U.S. at 408. Commentators overwhelmingly trace the per se treatment of RPM to *Dr. Miles*. *See, e.g.*, HYLTON, *supra* note 6, at 254 (indicating that the Court's ruling established the per se illegality of RPM); HOVENKAMP, *supra* note 6, at 451; SULLIVAN & HARRISON, *supra*, at 219. Likewise, in subsequent RPM cases, the Court has indicated that *Dr. Miles* established per se illegality. *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724

antitrust, but even so, its economic analysis of the practice was flawed. In subsequent cases, after it had grounded antitrust in efficiency, it refused to correct its mistakes in economic analysis. Out of allegiance to *stare decisis*, a desire to thwart legislative intervention,[98] or sheer stubbornness, the Court maintained the per se rule. But in tacit recognition that the per se illegality of RPM lacked an economic foundation, it adopted doctrines to minimize the rule's harm. We briefly trace that history here.

A. The Foundation: Dr. Miles

The antitrust treatment of vertical price restraints began with a private dispute between Dr. Miles Medical Company, a manufacturer of proprietary medicines, and John D. Park & Sons ("Park"), a wholesale druggist.[99] Dr. Miles entered into contracts with wholesale and retail drug firms that specified minimum resale prices for its proprietary medicines.[100] The wholesalers were obligated to sell only to other wholesalers or retailers approved by Dr. Miles, which were those who also had entered into the contracts.[101] Park refused to sign a contract and instead purchased Dr. Miles' medicines from other wholesale and retail dealers through allegedly "false and fraudulent representations," thereby inducing the "authorized" dealers to violate their contractual obligations.[102] Park sold these medicines at discounted prices. Dr. Miles filed a complaint against Park alleging that the defendant had "maliciously interfere[d]" with the contracts between Dr.

(1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

98. One explanation of the Court's unwillingness to repudiate the per se illegality of RPM is that political forces were intent upon retaining the status of the practice, and the Court wanted to head off an anticipated statutory amendment declaring RPM illegal per se. *See generally* BORK, *supra* note 8, at 436 (opining that it is perhaps "just as well" that the Court retain the misguided rule of per se illegality because "if the Court were to legalize resale price maintenance, Congress, at the instance of organized retail discounters who do not like competition from other modes of distribution, might well freeze the rule of per se illegality in the law by statute"); Richard E. Day, *Dealer Terminations and Resale Price Maintenance: Paradox Revisited*, 40 S.C. L. REV. 339, 374 (1989) (speculating that the Court is unlikely to overrule *Dr. Miles* in light of potential action by Congress to codify the per se rule against RPM agreements); Robert Pitofsky, *Antitrust in the Next One Hundred Years*, 75 CAL. L. REV. 817, 831 (1987) (speculating that Congress would codify the rule of per se illegality were the Court to overturn *Dr. Miles*). In fact, a number of bills to codify the per se rule against RPM agreements were introduced in Congress even though the Court did not overrule *Dr. Miles*, but none was successful. *See generally* Margaret A. Dillenburg, Note, *The* Dr. Miles *Doctrine and Vertical Per Se Rules:* Business Electronics Corp. v. Sharp Electronics Corp., 11 GEO. MASON L. REV. 111, 128, 128 n.115 (1989) (listing several bills).

99. *See Dr. Miles*, 220 U.S. at 394.

100. *See id*.

101. *See id*. at 396–98.

102. *Id*. at 382.

Miles and some of its customers.[103] Park responded that the contracts were invalid as against public policy because they violated the antitrust laws.[104]

The Court identified "the validity of the restrictive agreements" as the central question for review.[105] In support of its agreements, Dr. Miles argued that: (1) the proprietary nature of its medicines conferred upon it the right to exert extensive control; and (2) irrespective of the proprietary nature of its medicines, "a manufacturer is entitled to control the prices on all sales of his own product."[106] The Court rejected both arguments, emphasizing the importance of an individual dealer's freedom to trade in promoting the public interest. For example, to Dr. Miles' first argument, the Court responded:

> [This argument] implies that, if for any reason monopoly of production exists, it carries with it the right to control the entire trade of the produced article, and to prevent any competition that otherwise might arise between wholesale and retail dealers. . . . But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title.[107]

Just why the Court believed that the public interest is served by ensuring "freedom of trade" is not entirely clear. The Court seemed to believe that the protection of dealers from restrictions on the way they disposed of their property was a value in itself.[108] But it also equated freedom of pricing by dealers with enhanced consumer welfare. The Court stated: "The complainant having sold its product at prices satisfactory to itself, the public

103. *Id*. at 394.

104. *See id*. at 392–93.

105. *Id*. at 395.

106. *Id*. at 400. Hylton offers an *ex post* economic rationalization for the Court's dismissal of these arguments. *See* HYLTON, *supra* note 6, at 254–57.

107. *Dr. Miles*, 220 U.S. at 403. This reflects a misunderstanding of vertical integration and control. *See* BLAIR & KASERMAN, *supra* note 30, at 295–301. If there were monopoly in production, downstream control of resale prices would foster consumer welfare.

108. For example, Peritz argues that the decision was more heavily influenced by common law concerns with the allocation and exercise of property rights than with efficiency or consumer welfare. Rudolph J. Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511, 516–27 (1989). *See also* Alan H. Silberman, *Vertical Price, Customer and Territorial Limitations*, 1180 PLI/Corp. 821, 869–70 (2000) ("[T]he Court was concerned with maximizing the individual decisional freedom of participants in the distribution chain as a matter of liberty, rather than considered economic judgment."). Limiting the ability of distributors to make independent pricing decisions appears to have concerned the Court years later in its treatment of consignment sales as well. *See* Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 16 (1964) (holding that an agreement setting the price to be charged by independent consignees for a fungible product is illegal per se).

is entitled to whatever advantage may be derived from competition in the subsequent traffic."[109]

According to Dr. Miles, the source of its injury lay in the use of its products as loss leaders by Park: The discounted prices were employed "'to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit' from the sales of the remedies."[110] Dr. Miles argued that most retail druggists were unable to earn "sufficient profits" on its medicines at the discounted price.[111] As a result, some dealers no longer stocked Dr. Miles' medicines, and those that did promoted rival brands more heavily, to the detriment of Dr. Miles.[112] Consequently, Dr. Miles argued that Park's discounting injured its business by harming the reputation of its products and thereby decreasing its overall sales.[113]

The Court was unconvinced that Dr. Miles was injured by Park's price cutting, but it was also unable to explain how Dr. Miles profited from resale price controls. Instead, it asserted that the benefits of the restrictive agreements accrued to the dealers, not Dr. Miles.[114] The Court observed that "the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant."[115] Because the Court believed that the benefits of resale price constraints inured to the dealers, it could equate Dr. Miles' *vertical* restraints to a per se illegal *horizontal* combination among the dealers:[116] "[T]he complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other."[117] The irony

109. *Dr. Miles*, 220 U.S. at 409.

110. *Id*. at 381–82 (quoting Dr. Miles' complaint).

111. *Id*. at 375 (quoting Dr. Miles' complaint).

112. *Id*.

113. *Id*.

114. *Id*. at 407. This statement may be a vague allusion to a dealer cartel as the motivation for Dr. Miles' RPM plan. But the Court did not offer any reason why Dr. Miles went to court to protect those benefits on behalf of its dealers.

115. *Id*.

116. Pitofsky makes the same mistake. *See* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1490 (1983). He also appears to prefer per se rules because "it is very difficult for a plaintiff . . . to win a rule of reason case." *Id*. at 1489. If true, this suggests that plaintiffs must be filing weak—if not frivolous—cases.

117. *Dr. Miles*, 220 U.S. at 408. Thus, the Court confused horizontal and vertical restraints, a mistake that lasted for more than half a century until the decision in Cont'l T.V., Inc. v. GTE Sylvania Inc.**,** 433 U.S. 36 (1977).

is that, if RPM agreements are tantamount to a dealers' cartel, prohibiting RPM cannot benefit both dealers and consumers.

Notably, the Court offered no economic analysis to support its conclusion that the effects of the *vertical* restraints in question were identical to the effects of a dealer cartel. Professor Hovenkamp has argued that "the *Dr. Miles* decision first condemning RPM was the byproduct of one of the biggest cartels in American history—an agreement by members of national associations of wholesale and retail druggists to fix the price of proprietary medical drugs" and that "RPM was clearly being used to facilitate horizontal collusion."[118] Moreover, the Court may have been aware of the cartel. First, Justice Lurton, who was on the Supreme Court when it considered *Dr. Miles* (though he played no part in the decision), wrote an earlier decision while on the Sixth Circuit addressing a portion of the cartel.[119] Second, the cartel was well documented in the literature and in the case law.[120] But the fact remains that the Court never explicitly identified a cartel and did not address the theoretical possibility of using RPM as a facilitating device for a retailer cartel.[121] In the end, the Court provided no substantial economic rationale for condemning RPM in *Dr. Miles*, and therefore no basis to distinguish future welfare-enhancing instances of RPM from welfare-reducing ones.

Once the Court found that agreements to engage in RPM are illegal per se, efficiency justifications for the practice were generally not raised or considered in subsequent cases. Rather, litigants and courts focused primarily on whether an "agreement" existed.[122] If there is an agreement, RPM is illegal per se; if there is no agreement, there is no violation.[123]

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118. HOVENKAMP, *supra* note 6, at 451 (citation omitted), 471 n.1.

119. *See* John D. Park & Sons Co. v. Hartman, 153 F. 24 (6th Cir. 1907).

120. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, ch. 25 (1991); Brown & Allen v. Jacobs Pharmacy Co., 41 S.E. 553 (Ga. 1902); Hartman v. John D. Park & Sons Co., 145 F. 358, 380 (C.C.E.D. Ky. 1906), *rev'd*, 153 F. 24 (6th Cir. 1907); Klingel's Pharmacy of Baltimore City v. Sharp & Dohme, 64 A. 1029 (Md. 1906); Dr. Miles Med. Co. v. Jaynes Drug Co., 149 F. 838 (C.C.D. Mass. 1906); John D. Park & Sons Co. v. Nat'l Wholesale Druggists Ass'n, 67 N.E. 136, 137 (N.Y. 1903); Loder v. Jayne, 142 F. 1010, 1014 (C.C.E.D. Pa. 1906), *rev'd on other grounds*, 149 F. 21 (3d Cir. 1906).

121. Posner also notes that the Court did not find the presence of a dealer cartel. POSNER, *supra* note 3, at 177.

122. *See* William Breit, *Resale Price Maintenance: What Do Economists Know and When Did They Know It?*, 147 J. INST. & THEORETICAL ECON. 72, 77 (1991).

123. *See, e.g.*, DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1189 (11th Cir. 1993) ("Resale price maintenance agreements are, of course, *per se* illegal restraints of trade within § 1 of the [Sherman] Act. Absent such *per se* illegality here, defendants concededly would prevail.").

B. "Agreement" and Colgate

Eight years after *Dr. Miles*, the Court revisited RPM in *United States v. Colgate*.[124] Relying on *Dr. Miles*, the government charged Colgate with engaging in an unlawful combination with its wholesalers and retailers to fix resale prices.[125] Section 1 of the Sherman Act outlaws only *agreements* in restraint of trade,[126] and the Court's analysis turned on what, precisely, constitutes an agreement.[127] Among the methods used to encourage compliance with the specified resale prices, Colgate (1) issued various communications to its dealers indicating the uniform prices to be charged, (2) refused to deal with those dealers who did not adhere to these price schedules, (3) conducted investigations to discover who was and was not charging the specified prices, and (4) requested assurances from non-complying dealers for future compliance with the price lists.[128] Unlike Dr. Miles, however, Colgate did not require its dealers to sign written contracts signifying an agreement to comply with the pricing schedules. The Court found the distinction significant, noting that in *Dr. Miles*, "the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell."[129] The Court's concern with dealers' freedom to trade[130] once again factored prominently into its decision:

> The retailer after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action

124. 250 U.S. 300 (1919).

125. *Id*. at 302.

126. Literally, Section 1 proscribes "[e]very contract, combination . . . , or conspiracy" in restraint of trade. 15 U.S.C. § 1 (2000). Courts do not distinguish among the words, however. *See, e.g.*, *In re* Baby Food Antitrust Litig., 166 F.3d 112, 117 n.3 (3d Cir. 1999) ("The phrase 'concerted action' is often used as shorthand for any form of activity meeting the Section 1 'contract . . . combination or conspiracy' requirement." (internal citations omitted)); POSNER, *supra* note 3, at 262 ("[T]he courts sensibly have not worried about whether the terms 'contract,' 'combination,' and 'conspiracy,' in section 1, have nonoverlapping meanings."). What is required is an agreement, or "concerted action," which has become a term of art in antitrust law. *See, e.g.*, Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277, 281 (4th Cir. 2002) (noting that "courts must treat [the phrase 'concerted action'] as a term of art in the context of the Sherman Act").

127. *Colgate*, 250 U.S. at 306–07.

128. *Id*. at 303.

129. *Id*. at 307–08.

130. The Court commented: "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade." *Id*. at 307.

> incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do.[131]

The Court, deferring to the trial court's interpretation, concluded that "the indictment does not charge Colgate & Company with selling its products to dealers under *agreements* which obligated the latter not to resell except at prices fixed by the company."[132] Consequently, the government had failed to allege the requisite "agreement" for a Section 1 violation. In addition, the Court commented on a *manufacturer's* right to make unilateral decisions about the terms on which it will deal with others:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[133]

Thus, *Colgate* stands for the proposition that a manufacturer may (1) announce the prices and terms on which it will deal and (2) refuse to deal with those who do not comply with those terms—as long as those decisions are made unilaterally.

The *Colgate* decision unquestionably conflicts with *Dr. Miles* on economic grounds, and the tension between the two decisions is evident in the Court's subsequent attempts to clarify precisely what constitutes agreement. During the decades immediately following *Colgate*, the Court

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131. *Id*. at 306.

132. *Id*. at 307 (emphasis added). Some courts subsequently interpreted the language in *Colgate* to mean that express contracts or written agreements were required to find the "agreement" necessary for a Sherman Act violation. *See, e.g.*, United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99 (1920) (indicating that "[t]he court below misapprehended the meaning and effect of the opinion and judgment in [*Colgate*]"); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921) (commenting that *Colgate* "was misapprehended"). This interpretation is understandable given the language in *Colgate*. For example, the Court quotes the following passage from the trial court's opinion: "The pregnant fact should never be lost sight of that no averment is made of any *contract* or *agreement* having been *entered into* whereby the defendant, the manufacturer, and his customers, *bound* themselves to enhance and maintain prices . . . ." *Colgate*, 250 U.S. at 305 (emphasis added) (quoting United States v. Colgate & Co., 253 F. 522, 527 (D.C. Va. 1918)). But in both *Schrader's* and *Frey*, the Court clarified that there is an unlawful combination when a manufacturer enters into agreements, "whether express or implied," with its customers. *See Schrader's*, 252 U.S. at 99 (indicating that there is an unlawful combination when a manufacturer enters "into agreements—whether express or implied from a course of dealing or other circumstances—with [its] customers"); *Frey*, 256 U.S. at 210 (reiterating its ruling in *Schrader's* that "the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances").

133. *Colgate*, 250 U.S. at 307.

narrowed the scope of *Colgate* and commensurately expanded the scope of RPM per se illegality.[134] A seller intent upon restricting the resale prices of its customers could avoid liability only by simply refusing to deal with those who refuse to charge suggested resale prices.[135] Thus, in *United States v. Parke*, *Davis & Co.*,[136] the Court held that a manufacturer exceeds the protection of *Colgate* if it refuses to deal with wholesalers who sell to retailers who fail to adhere to suggested retail prices or if it attempts to persuade resellers to comply. It declared:

> [W]hatever uncertainty previously existed as to the scope of the *Colgate* doctrine, . . . an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. . . .
>
> When the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, . . . he has put together a combination in violation of the Sherman Act.[137]

Together, *Colgate* and *Parke, Davis* provide no guidance to private plaintiffs regarding antitrust injury and damages. They also reveal the economic incoherence of RPM law. From the standpoint of consumer or economic welfare, it makes no difference whether minimum resale prices are secured through express agreements or through a series of "unilateral" actions that communicate just as effectively. The economic effects are precisely the same.[138] But from a legal standpoint, this distinction is critical.

134. The Court did open up one additional avenue for circumventing *Dr. Miles*, holding that resale price maintenance provisions in consignment agreements were not per se illegal. *See* United States v. Gen. Elec. Co., 272 U.S. 476 (1926). However, the Court all but closed this avenue in Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964) (holding that minimum resale price constraints in consignment contracts are illegal per se).

135. *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920). In *Parke, Davis*, the Court observed that *Beech-Nut* and *Bausch & Lomb* "teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements." *Parke, Davis*, 362 U.S. at 44.

136. 362 U.S. 29 (1960).

137. *Parke, Davis*, 362 U.S. at 43–44.

138. Indeed, this did not go unnoticed by all federal judges. In *Schrader's*, the district court judge opined:

> Personally, and with all due respect, . . . I can see no real difference upon the facts between the *Dr. Miles Company Case* and the *Colgate Company Case*. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and

Because vertical price restraints fall under the per se rule, once agreement is established, the defendant's case crumbles. The disparate legal consequences predictably result in extraordinary efforts by defendants to prove that their conduct was unilateral, and conversely by plaintiffs to prove an "agreement."

C. Proof of Agreement: Monsanto *and* Business Electronics

In its most recent RPM decisions, the Court reaffirmed the principle that agreement is a necessary element of a Section 1 offense, but it made the requisite agreement more difficult to prove. In *Monsanto Co. v. Spray-Rite Serv. Corp.*,[139] the plaintiff, Spray-Rite, was a wholesale distributor of agricultural chemical products, including herbicides manufactured by Monsanto.[140] After an eleven-year distribution relationship, Monsanto refused to renew Spray-Rite's distributorship.[141] Spray-Rite subsequently filed suit against Monsanto, alleging that the termination was pursuant to a conspiracy between Monsanto and its other distributors to fix resale prices.[142] Though the Court ultimately found in favor of Spray-Rite, it disagreed with the proposition that proof of conspiracy could be inferred simply from the termination of "a price-cutting distributor in response to or following complaints by other distributors."[143] The Court then clarified the appropriate standard of proof for finding unlawful collaboration:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he antitrust plaintiff should present direct or

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> retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement.

Shrader's, 252 U.S. at 97 (quoting United States v. A. Schrader's Son, Inc., 264 F. 175, 183 (N.D. Ohio 1919) (alteration in original)). The Court of Appeals expressed similar difficulty in distinguishing *Dr. Miles* and *Colgate* in *Beech-Nut Packing Co. v. FTC*, 264 F. 885, 889 (1920), *rev'd*, 257 U.S. 441 (1922): "It is difficult to say why a different conclusion should be reached, if the same result is attained by acquiescence and co-operation without express agreement between the manufacturer and his purchasers severally."

139. 465 U.S. 752 (1984). *See generally* David F. Shores, *Narrowing the Sherman Act Through an Extension of* Colgate*: The* Matsushita *Case*, 55 TENN. L. REV. 261 (1988) (arguing that the Court in *Monsanto* and *Matsushita* narrowed the concept of an antitrust agreement and criticizing the decisions); Wesley J. Liebeler, *1983 Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restraints*, 31 UCLA L. REV. 384 (1983); Robert W. Beattie, Note, *The Procrustean Approach Remains:* Monsanto Co. v. Spray-Rite Service Corp., 10 DEL J. CORP. LAW 733 (1985).

140. *Monsanto*, 465 U.S. at 756.

141. *Id*. at 756–57.

142. *Id*. at 757.

143. *Id*. at 759.

> circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[144]

The Court observed that though unilateral and concerted vertical price setting are legally distinguishable, the economic effects may be identical.[145] Citing its earlier *Continental T.V., Inc. v. GTE Sylvania, Inc.*[146] decision, the Court noted, however, that there are legitimate and procompetitive reasons for a manufacturer and distributor to discuss prices and that such discussions do not, by themselves, indicate the presence of concerted action.[147] Consequently, the Court expressed its concern that "[p]ermitting an agreement to be inferred merely from the existence of complaints . . . could deter or penalize perfectly legitimate conduct."[148] *Monsanto* thus places a heavy evidentiary burden on plaintiffs in RPM cases.[149]

In *Business Electronics Corp. v. Sharp Electronics Corp.*,[150] the Court edged further away from its earlier hostility toward RPM. It held that a per se illegal vertical price restraint cannot be found without an explicit agreement on price, even if a manufacturer and a dealer agree that the manufacturer will stop doing business with a rival dealer for failure to adhere to suggested resale prices.[151] Business Electronics was a distributor of Sharp Electronics products in Houston.[152] A second distributor, Hartwell, was approved by Sharp for the Houston market.[153] Though Sharp published a list of suggested minimum retail prices, there were no explicit agreements of the *Colgate* variety requiring that the distributors adhere to those prices.[154] Hartwell priced below the suggested retail prices at least occasionally.[155] Business

144. *Id*. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980) (other citations omitted)).

145. Specifically, the Court observed: "[T]he economic effect of all of the conduct described above—unilateral and concerted vertical price setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical." *Id*. at 762 (citations omitted). Though the Court was invited to reconsider the per se treatment of vertical price restraints in *Monsanto*, it declined to do so. *Id*. at 761 n.7.

146. 433 U.S. 36 (1977).

147. *Monsanto*, 465 U.S. at 762–63.

148. *Id*. at 763.

149. For an example of the burden borne by plaintiffs, see Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1156–61 (9th Cir. 1988) (finding evidence insufficient to support a jury verdict in favor of a dealer alleging that manufacturer and other dealers conspired to fix minimum resale prices).

150. 485 U.S. 717 (1988).

151. *Id*. at 726–27.

152. *Id*. at 721.

153. *Id*.

154. *Id*.

155. *Id*.

Electronics not only did so frequently, it also priced below Hartwell.[156] Hartwell complained about Business Electronics' price discounts and eventually presented Sharp with an ultimatum: terminate Business Electronics or Hartwell would cease distributing Sharp products.[157] Following its termination, Business Electronics brought suit against Sharp alleging that Sharp and Hartwell had conspired to terminate it and that this conspiracy constituted a per se violation of the Sherman Act.[158] The jury found that Sharp and Hartwell did agree to the termination of Business Electronics's distributorship.[159] The Court granted *certiorari* to determine whether an agreement between a manufacturer and a distributor to terminate a second "price cutting" distributor was sufficiently likely to result in anticompetitive effects that it should be deemed illegal per se.[160] The Court held that without an actual agreement on price, such an agreement did not warrant per se treatment.[161]

Although the Court can rightly be criticized for lapsing "into formalistic line drawing,"[162] its decision was consistent with *Colgate*. Certainly an agreement to terminate a price cutter implies that the surviving dealer will not cut price. But a strong likelihood that resale prices will correspond to a price floor set by the manufacturer does not establish an agreement; a practice of setting suggested resale prices and refusing to sell to dealers who do not adhere to them is also likely to result in actual prices that correspond to the suggested prices, yet *Colgate* held that such conduct does not constitute an RPM agreement. The agreement to terminate the price cutter does not supply the necessary element of an agreement on resale prices, even if supported by further evidence that the remaining dealers are charging the suggested resale prices.

Significantly, the Court reasoned that RPM agreements are illegal per se "because they 'facilitate cartelizing.'"[163] Of course, the capacity of a practice

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156. *Id*.

157. *Id*.

158. *Id*.

159. *Id*. at 722.

160. *Id*. at 720.

161. The Court stated: "There has been no showing here that an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output." *Id*. at 726–27.

162. Wesley J. Liebler, *Resale Price Maintenance and Consumer Welfare:* Business Electronics Corp. v. Sharp Electonics Corp., 36 UCLA L. REV. 889, 906 (1989).

163. *Bus. Elecs.*, 485 U.S. at 725 (quoting Continental T.V. v. GTE Sylvania, 433 U.S. 1, 36, 51 n.18 (quoting, in turn, 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, 294 (1975))).

to produce anticompetitive effects is not enough to justify per se illegality, and the Court correctly implied that per se condemnation is inappropriate unless a practice "*almost always* tends to restrict competition and reduce output."[164] But nowhere did the Court cite any evidence that RPM agreements "almost always" facilitate cartelizing. Rather, the Court held that an agreement to terminate a price cutter, by itself, does not almost always have anticompetitive effects.[165] The Court was skeptical that either a manufacturer cartel or a retailer cartel could be established or maintained in the absence of an explicit agreement on price. Moreover, the Court was concerned that a finding of per se illegality would subject manufacturers to greater liability by increasing the likelihood that the implementation of vertical nonprice restraints would be "attacked as designed to allow existing dealers to charge higher prices."[166] The Court found that "[i]n the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price cutting and some measure of service cutting usually go hand in hand."[167] As a result, "[m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties."[168]

D. The Continuing Legacy of Dr. Miles

Although *Monsanto* and *Business Electronics* make it more difficult for plaintiffs to prove the fact of an unlawful agreement, RPM agreements, once found, remain per se illegal. Recent cases, brought by both the antitrust enforcement agencies and private plaintiffs, demonstrate the continuing vitality of the per se rule with a *Colgate* exception.[169] In recent years, public

164. *Bus. Elecs.*, 485 U.S. at 726–27 (emphasis added).

165. *Id*.

166. *Id*. at 728. Such a claim was made in *Ezzo's Invs., Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980 (6th Cir. 2001), which involved a vertical distribution restraint by Matrix Essentials, a manufacturer of hair care products. The restraint at issue was Matrix's policy of allowing its hair care products to be sold only by salons that derived more than 50 percent of their revenue from hair-care services (as opposed to product sales). The plaintiff beauty salon, Ezzo's, argued that this policy was simply a pretext for vertical price fixing. Relying on *Business Electronics*, the Sixth Circuit found that the district court appropriately applied a rule of reason analysis to the "50 percent rule" because there was no evidence of an agreement on price. *Id*. at 985.

167. *Bus. Elecs.*, 485 U.S. at 727–28. By this time, the Court was obviously aware of the procompetitive effects of vertical restraints (which we examine in the next Section), but continued to treat price and nonprice restraints differently even though the economic effects may be identical.

168. *Id*. at 728.

169. Keds and Reebok both signed consent orders with the FTC and settled companion *parens patriae* suits with the fifty states plus the District of Columbia. *See, e.g.*, New York *ex rel*. Vacco v. Reebok Int'l Ltd., 903 F. Supp. 532 (S.D.N.Y. 1995); New York *ex rel.* Koppell v. Keds Corp., No. 93

enforcement and private enforcement efforts appear to have gone hand-in-hand. Some of these efforts also stimulated separate class action lawsuits.[170] None of these cases sheds new light on the economic concerns with RPM. As we illustrate in the next Section, there are procompetitive as well as anticompetitive explanations for RPM, and sorting out the economic effects will prove difficult for private plaintiffs.

IV. PRIVATE ENFORCEMENT: PROBLEMS OF PROOF

To recover treble damages, a private plaintiff must prove the antitrust violation, the existence of antitrust injury and antitrust standing, and, through reliable methodology, the amount of damages sustained.[171] Often courts can resolve a case most expeditiously by addressing the issue of antitrust injury or standing first, using the two requirements as litigation screens. If the plaintiff is disqualified on one of these grounds, the court need not resolve liability issues or evaluate the damages calculation. As demonstrated in the last Section,[172] unlawful RPM requires a finding of an agreement within the technical definition of the law, and the existence of such an agreement may be hotly disputed. Damage calculations, which are fact-intensive, tend to be more difficult to assess than assertions of antitrust injury and standing, which are more theoretical in nature. For example, in *ARCO*,[173] the Court assumed that maximum vertical price fixing was illegal per se,[174] then concluded that a competitor of a dealer bound by a non-predatory maximum price constraint suffers no antitrust injury.[175] The Court was not required to consider liability issues or the reasonableness of the plaintiff's damage calculation. Of course, if the plaintiff suffered no antitrust injury, no calculation of damages could be reliable, for any methodology that results in a positive estimate of nonexistent harm is per se unreasonable. Nevertheless, the Court was spared the burden of demonstrating the flaws in the methodology. But the Court was able to use antitrust injury as an effective filter only because non-predatory

CIV. 6708 (CSH) 1994 WL 97201 (S.D.N.Y. Mar. 21, 1994); Reebok Int'l Ltd., 120 F.T.C. 20 (1995) (Complaint, Decision and Order, Dissenting Statement of Commissioner Starek); Keds Corp., F.T.C. File No. 9310067, 1993 WL 767043 (Aug. 31, 1993) (Consent Order and Complaint).

170. *See* Gross v. New Balance Athletic Shoe, Inc., 955 F. Supp. 242, 243 (S.D.N.Y. 1997) ("Plaintiffs filed the instant action, relying extensively on the allegations used by the FTC in the Consent Order."). *See also* New Balance Athletic Shoe, Inc., 122 F.T.C. 137 (1996) (Complaint, Decision and Order, Concurring Statement of Commissioner Azcuenaga, Dissenting Statement of Commissioner Starek).

171. *See supra* notes 34–96 and accompanying text.

172. *See supra* notes 124–68 and accompanying text.

173. ARCO v. USA Petroleum Co., 495 U.S. 328 (1990).

174. *See id*. at 335 n.5.

175. *See id*. at 346.

maximum vertical price fixing can be shown in theory never to inflict antitrust injury on competing dealers. An entire category of persons—the one to which the plaintiff belonged—could be excluded on antitrust injury grounds.[176]

By contrast, as we demonstrate in this Section, no class of plaintiffs alleging RPM can be disqualified on the ground that as a matter of theory RPM can never cause them antitrust injury. RPM can inflict antitrust injury on both of the relevant classes—consumers and dealers—in some circumstances and not in others, because RPM can have procompetitive as well as anticompetitive effects. Moreover, because RPM is illegal per se, courts do not typically require plaintiffs to allege that RPM was used for a particular economic purpose in their case. The implication is that, even though the claims of a class of actors could be dismissed on antitrust injury grounds when RPM is used for certain purposes, the court will not have the information necessary to make the determination. In RPM cases, therefore, where the practice has no anticompetitive consequences, the plaintiffs' complaint will not be dismissed immediately for failure to allege antitrust injury, but the plaintiffs should ultimately lose for failure to prove damages adequately. Having rejected the plaintifffs' damages calculation, the court might turn around and declare that the plaintiffs also failed to prove antitrust injury. But there would be little point to that. Thus in RPM cases, damage measurement obviates the need to address antitrust injury directly, but the principle of antitrust injury lurks in the background. Antitrust standing, as embodied in *Illinois Brick*, is a more promising screen, but as we show below, that doctrine applied to RPM cases is also problematic.

Courts could usefully resuscitate antitrust injury as a litigation screen in RPM cases by requiring plaintiffs to identify in their complaints, and support with some evidence, the alleged function of RPM in their particular case. If a plaintiff could not plausibly assert that RPM was being used for an anticompetitive purpose, the court could dismiss the suit on antitrust injury grounds; a practice that is not anticompetitive causes no one antitrust injury. Even if antitrust injury were incorrectly defined to include loss unconnected to an inefficiency, the court might be able to determine whether the alleged use of RPM could have caused the plaintiff a cognizable injury. Such a requirement would also allow for a more sensible application of the antitrust standing doctrine.

176. Arguably consumers and the restricted dealers themselves should also be excluded for want of antitrust injury. *See supra* notes 36–60 and accompanying text.

To be sure, the requirement that plaintiffs allege a relevant theory of RPM would be in tension with the doctrine that RPM agreements are illegal per se, for some per se illegal RPM agreements would be held to inflict no antitrust injury; presumably, plaintiffs would eventually stop bringing actions based on economically unobjectionable uses of RPM. But the conflict would not be intolerable. The Court in *ARCO* rejected the contention that "any loss flowing from a per se violation of § 1 automatically satisfies the antitrust injury requirement."[177] And a tying arrangement is declared per se unlawful only after a substantial analysis of the context in which it is used.[178] The per se rule is not as stark as its name implies, and courts could undo much of the economic mischief of the per se rule against RPM agreements without overruling it by foreclosing private suits based on RPM that is not anticompetitive. But this is only a proposal, and, to boot, one that lower courts would likely feel incompetent to adopt. Even if plaintiffs do not identify the relevant rationale for RPM, their obligation to prove damages will force courts implicitly to determine whether the rationale was anticompetitive.

When a manufacturer supplies its product to retail distributors who resell to the ultimate consumer, its RPM plan may be attacked by consumers or distributors. For consumers, the prices they actually pay will almost certainly exceed the prices they would have paid (at least on average) absent the RPM program.[179] After all, the point of any RPM plan is to keep the price higher than it would otherwise be. Consequently, a consumer may sue for damages alleging that he or she was overcharged pursuant to an agreement between the manufacturer and the retailer. In overcharge cases, the proper measure of damages is the difference between the actual price paid and the price that would have been paid "but for" the antitrust violation.[180] To prove antitrust

177. *ARCO*, 495 U.S. at 335.

178. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–18 (1984). Product liability law offers an interesting parallel. Courts came to apply a negligence test to determine whether products contain design and warning defects. If a defect were found, however, courts nominally imposed strict liability—the courts "call[ed] a pig a mule." *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 749.

179. RPM will not always result in higher prices, however. For example, Perry and Besanko describe a situation in which the retail price with RPM may be *lower* than it would be without RPM. *See* Martin K. Perry & David Besanko, *Resale Price Maintenance and Manufacturer Competition for Exclusive Dealerships*, 39 J. INDUS. ECON. 517 (1991). *See infra* note 258–63 and accompanying text. In addition, actual prices may not be higher if dealers price below the suggested prices.

180. *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487–88 (1968) (accepting trial court's measure of damages in monopolization case as difference between the defendant's actual rental prices and the price plaintiff would have paid to buy the machines); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (affirming an award of damages in a price fixing case based on "the difference between the price paid and the market or

injury and properly estimate damages, however, one must net out of the overcharge any benefits that the consumer received as a result of the RPM program.[181] This, of course, requires knowing much more than simply whether an RPM plan existed.

A distributor may sue under one of two circumstances, and in both, the measure of damages is net lost profits. First, if the distributor was terminated for failing to adhere to the manufacturer's specified price (i.e., for being a discounter), the distributor may recover the profits that he or she would have earned but for the termination.[182] Second, if the distributor acquiesced to the vertical price restraint, the distributor may recover the difference between the profits earned while charging the actual, fixed prices and the profits he or she would have earned by charging lower prices.[183] In that case, profits lost

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fair price that the city would have had to pay under natural conditions had the combination been out of the way"); Burlington Indus. v. Milliken & Co., 690 F.2d 380, 385 (4th Cir. 1982) (recognizing that the "overcharge" from an illegal combination is "the difference between the prices actually paid and the prices that would have been paid absent the conspiracy").

181. As a general proposition, any private antitrust plaintiff is entitled to damages based only on the *net* effect of the defendant's unlawful conduct. *See, e.g.*, Perma-Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 140 (1968) ("The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages . . . ."); Los Angeles Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1366–67 (9th Cir. 1986) ("[G]eneral principles of damages . . . limit a plaintiff's recovery under the antitrust laws to compensation for the 'net' injury incurred as a result of the defendant's antitrust violation . . . . [I]n order to put a plaintiff in the position it would have been, absent the defendant's antitrust violation, the plaintiff's gross recovery for the antitrust violation must be reduced by any benefits that plaintiff would not have received had there been no anticompetitive conduct by the defendant"); *Burlington Indus*., 690 F.2d at 390–91 (reducing overcharge damages in conspiracy case by amount of "support services" provided by defendant). *See also* Blair & Page, *supra* note 93, at 429 ("The principle of individual net harm guides the definition of the plaintiff's actual and but-for conditions."); Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1136 (1976) (arguing for offset of "injuries which plaintiffs may have suffered at the hands of defendants with benefits which they may have derived from the very activities they attack"). This general proposition applies fully to RPM cases.

182. *See, e.g.*, Pierce v. Ramsey Winch Co., 753 F.2d 416, 429 n.15 (5th Cir. 1985) (recognizing lost profits as an appropriate measure of damages for dealer terminated as part of RPM agreement between manufacturer and other dealers); Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1240–44 (7th Cir. 1982) (affirming judgment based on lost profits where dealer was terminated pursuant to RPM agreement between manufacturer and other dealers), *aff'd*, 465 U.S. 752 (1984); Greene v. Gen. Foods Corp., 517 F.2d 635, 660–66 (5th Cir. 1975) (permitting recovery based on lost profits where distributor was terminated for failure to adhere to resale prices fixed by defendant).

183. A dealer that merely acquiesces in a vertical price restraint, thereby participating in an unlawful agreement, is not because of that participation precluded from suing the manufacturer. Such a dealer does not "aggressively support and further the monopolistic scheme as a necessary part and parcel of it." Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 140 (1968). Only a "plaintiff's 'complete, voluntary, and substantially equal participation' in an illegal practice under the antitrust laws precludes recovery for that violation." Sullivan v. NFL, 34 F.3d 1091, 1107 (1st Cir. 1994) (citation omitted). *See also* Greene 517 F.2d at 645–47 (5th Cir. 1975) (rejecting in pari delicto defense where dealer acquiesced in vertical restraint); *In re* New Motor Vehicles Canadian Export Antitrust Litig., 307 F. Supp. 2d 136, 141 (D. Me. 2004) (noting that dealers allegedly participating in an antitrust conspiracy with manufacturers could sue the manufacturers unless they "engaged in

because of an increase in the prices charged by the dealer consist of two components: the profits lost on sales made and the profits lost on sales forgone. Any calculation of lost profits, however, must take into account any benefits that the distributor earned as a result of the RPM program.[184]

RPM is used to increase profits, of course, but profits can be increased in both procompetitive and anticompetitive ways. Law and economics scholars have offered various economic theories to explain the use of RPM.[185] Some motivations for using RPM, such as facilitating horizontal collusion, are plainly anticompetitive. In these cases, prices are higher and output lower because of RPM. But RPM can also be used to increase profit by influencing demand. The result is often procompetitive—prices and output are higher—though consumer welfare may be adversely affected.[186]

Below, we explore the classic anticompetitive explanations for RPM: facilitating a manufacturer cartel or a dealer cartel. We also explore two classic procompetitive explanations: product-specific, or special, services and quality certification. We then examine more recent economic explanations for RPM. These models are used first to illustrate the difficulties encountered by consumers in proving antitrust injury and antitrust damages. We then address the challenges facing distributors claiming antitrust damages in RPM cases.

A. Anticompetitive Motives for RPM and the Consumer Plaintiff

The principal anticompetitive explanation of RPM is that it is used to enforce either a manufacturer cartel or a dealer cartel.[187] The use of RPM as a facilitating device for horizontal collusion is plainly objectionable on economic grounds, because horizontal collusion causes a deadweight social-

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complete, voluntary and substantially equal participation in the conspiracy"). The acquiescing dealer is entitled to recover as damages the profits lost because of the resale price restraint. *See, e.g.*, *Greene*, 517 F.2d at 660.

184. *See* Blair & Page, *supra* note 93, at 428–32.

185. The seminal paper is Lester G. Telser, *Why Should Manufacturers Want Fair Trade?* 3 J.L. & ECON. 86 (1960). For an interesting historical account of the economic learning prior to Telser's analysis, see Breit, *supra* note 122.

186. Posner points out that RPM may be used by the manufacturer to promote brand loyalty among consumers and thereby obtain a competitive advantage over its rivals. Obviously, this strategy will have limited success if the manufacturer faces competition from differentiated products. *See* POSNER, *supra* note 3, at 174.

187. *See* Telser, *supra* note 185. Rey and Verge analyze the situation where manufacturers and retailers negotiate their own wholesale and retail prices in the context of interlocking relationships. *See* Patrick Rey & Thibaud Verge, Resale Price Maintenance and Horizontal Cartel (Mar. 11, 2002) (unpublished manuscript, *available at* http://idei.fr/doc/by/rey/resalepricemaintenance.pdf). They find that RPM reduces both interbrand as well as intrabrand competition. In the limit, industry-wide monopoly pricing may result.

welfare loss.[188] If the per se rule against RPM can be justified on economic grounds,[189] it would have to be because RPM is most often used to facilitate horizontal collusion.[190]

1. Manufacturer Cartel

Suppose the manufacturers of a product form a cartel to restrict output and charge the monopoly price. In any cartel, each manufacturer has an incentive to cheat by slightly reducing its price and substantially increasing its output.[191] RPM may be used to deter cheating where deviations from the agreed-upon resale price are easier to detect than deviations from the agreed-upon wholesale price. A price reduction by the manufacturer will not directly increase its sales if the retail price does not drop; the primary beneficiary of the wholesale price decrease is the dealer, whose profit margin increases.[192]

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188. Price fixing cartels are designed to raise price above the competitive level in an effort to earn profit. The effects are similar to those of monopoly: higher prices and reduced consumer (and total) welfare. *See*, *e.g*., BLAIR & KASERMAN, *supra* note 30, at 132–51. *See also* HYLTON, *supra* note 6, at 68 ("A cartel . . . seeks to increase profits by restricting price and output competition . . . ."). In *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927), the Court observed that "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."

189. Some commentators, of course, justify the per se rule against RPM agreements or similarly harsh treatment of them on grounds other than efficiency, such as the protection of dealer freedom. *See, e.g.*, John J. Flynn, *The "Is" and "Ought" of Vertical Restraints After* Monsanto Co. v. Spray-Rite Service Corp., 71 CORNELL L. REV. 1095, 1144 (1986) (arguing that a strong presumption of illegality in vertical price-fixing cases is justified because the conduct "impairs a central goal of antitrust policy—the independence of traders to set their own price and the concomitant public interest in receiving the benefit of one's individual effort"). We disagree with that justification as well as the vision of antitrust objectives on which it is based. We note that this view is out of step with current orthodoxy and the justification of the per se rule provided by the Court itself in *Business Electronics*. *See Bus. Elecs. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726–27 (1988).

190. In *Dr. Miles*, which established the per se illegality of RPM, the Court likened Dr. Miles's vertical restraint to a horizontal cartel of its dealers. *See supra* notes 114–21 and accompanying text. Hylton observes:

> [T]he law has been settled since *Dr. Miles*. Over the same period, the reasonableness justifications for resale price maintenance have filtered their way to the Court from various directions. . . . [T]he Court has essentially accepted all of the reasonableness justifications that might have been asserted by *Dr. Miles*. However, the rule of *Dr. Miles* remains the law. How long this rather strange state of affairs will continue is an open question.

HYLTON, *supra* note 6, at 257. The Court has suggested that the continuing per se condemnation of RPM is based on the practice's capacity to facilitate cartels among manufacturers or dealers, though the Court has not asserted that RPM is used to facilitate cartelization often enough to justify per se treatment. *See supra* notes 163–68 and accompanying text. The fact is that the per se rule lacks empirical support.

191. *See* BLAIR & KASERMAN, *supra* note 30, at 141–45.

192. RPM is unlikely to eliminate all cheating, however. Suppose manufacturer A could cheat on the cartel by offering a lower price on its brand of widgets to a dealer. Though the dealer cannot lower the price of Brand A to the consumer, the higher profit margin may lead the dealer to carry more of Brand A than other brands and/or to promote Brand A at the expense of other brands. Thus, while the

By reducing the gains from cheating, RPM diminishes the incentive to cheat.[193]

When a cartel raises price and reduces output, the overcharge paid by consumers who buy the product unquestionably constitutes antitrust injury; consumers who do not buy the product but would have bought it at the competitive price or who buy less of the product at the higher price also suffer antitrust injury, but their claims are insusceptible of proof and therefore generally incognizable. If RPM perfects a manufacturer cartel, therefore, consumers purchasing the product suffer antitrust injury, because they pay a higher price than they would have paid absent RPM, and the loss is connected to the inefficiency of the practice.

Consumers appear to lack antitrust standing, however. Under *Illinois Brick*,[194] a plaintiff must be a direct purchaser in order to recover for overcharges.[195] In the case of a manufacturer cartel, the direct purchasers are the distributors while consumers are indirect purchasers. The anticompetitive conduct is the horizontal agreement among the manufacturers, and that generates the antitrust injury. Any overcharge absorbed by the consumer represents a "pass on" of part of the overcharge suffered by the distributor. Thus, the consumer's injury is indirect. The vertical restraint has no independent competitive consequences beyond facilitating the manufacturers' conspiracy.

Consumers alleging RPM nevertheless typically manage to avoid the *Illinois Brick* bar under one of two theories.[196] Some courts recognize a co-

dealer's overall sales of widgets may not increase, the sales of Brand A widgets increase at the expense of other brands. Moreover, the manufacturer and/or the dealer can offer nonprice concessions while still complying with the resale price restrictions. As a result, to be highly effective, RPM would have to be accompanied by other vertical restrictions, such as exclusive dealing. *See* Telser, *supra* note 185, at 97. This is a cumbersome way to enforce a cartel arrangement, however, which suggests infrequent use.

193. Jullien and Rey offer another theory of how RPM may facilitate a manufacturer cartel. They argue that RPM makes retail prices less responsive to random shocks to retail demand. By making retail prices more uniform, RPM makes it easier to detect cheating among the manufacturers and thereby enhances cartel stability. In this event, RPM decreases social welfare. *See* Bruno Jullien & Patrick Rey, Resale Price Maintenance and Collusion (May 9, 2000) (unpublished manuscript, *available at* http://idei.fr/doc/wp/2000/102_00.pdf).

194. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977). For a recent analysis, see Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1 (1999).

195. Some states, however, permit indirect purchaser suits under their own laws. *See generally* Lopatka & Page, *supra* note 71; William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 ANTITRUST L.J. 1 (1999); Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America*'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 ANTITRUST L.J. 375 (1997).

196. *See generally* 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶ 346h.

conspirator exception to *Illinois Brick*.[197] When a dealer acquiesces—even upon threat of termination—in a manufacturer's RPM plan, the antitrust law treats the arrangement as an agreement,[198] and, according to these courts, *Illinois Brick* contains an exception for those who purchase from a co-conspirator. Other courts hold that no co-conspirator exception is necessary because *Illinois Brick* simply does not apply; the plaintiff is a direct purchaser from a conspirator. As one court explained:

> The right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator 'exception' to *Illinois Brick*, but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages.[199]

Yet the argument that, for one reason or the other, *Illinois Brick* does not bar a consumer action alleging RPM is based on a wooden reading of the case. A principal rationale of the indirect purchaser rule is that it prevents multiple liability. If RPM facilitates a manufacturer cartel, the consumers will seek to recover the overcharge passed on to them, but dealers will also have absorbed some of the overcharge. Even though dealers can be considered conspirators by acquiescing in an RPM arrangement imposed by manufacturers, their unwilling participation does not preclude them from suing the manufacturers.[200] If consumers recover and dealers thereafter sue to recover overcharge damages, the dealers will be able to recover one hundred percent of the overcharge, for *Hanover Shoe* will prevent the manufacturers from asserting that the dealers passed on any of the overcharge. The manufacturers will be liable for as much as two hundred percent of the overcharge.

In order to eliminate the potential for excessive liability, many courts require consumers asserting the co-conspirator exception to *Illinois Brick* in an RPM case to join the dealers as defendants.[201] The dealers could cross-

197. *See, e.g.*, Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1211–14 (9th Cir. 1984); Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478, 481 (7th Cir. 1980); Rozema v. Marshfield Clinic, 977 F. Supp. 1362, 1375 (W.D. Wis. 1997).

198. *See* Albrecht v. Herald Co., 390 U.S. 145, 149–50 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 45–47 (1960).

199. Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 631–32 (7th Cir. 2002) (Easterbrook, J.).

200. *See* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) (holding that the *in pari delicto* doctrine does not bar a participant in an antitrust violation from recovering against another participant so long as the plaintiff is not equally at fault).

201. *See, e.g.*, Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 n.4 (8th Cir. 1998); Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 931–33 (3d Cir. 1986); *In re* Midwest Milk Monop.

claim against the manufacturers, and the manufacturers would be subject to liability for no more than the full overcharge. The same logic would compel joinder of the dealers if the court took the position that *Illinois Brick* does not apply to the first purchaser from a vertical conspiracy. Though this procedural requirement eliminates the potential for duplicative recovery, it does so at the cost of litigation complexity, something that the *Illinois Brick* Court explicitly sought to avoid. The Court recognized that multiple liability could be avoided by joining all purchasers, direct and indirect, in a single action, but it adopted the indirect purchaser rule precisely to avoid the complexity of massive, multi-party litigation.[202]

Thus, where manufacturers engage in horizontal price fixing unaided by RPM, consumers are barred by *Illinois Brick* from joining a suit by direct purchasers against manufacturers even though they pose no risk of duplicative recovery. Allowing consumers to recover by naming dealers as defendants simply because the manufacturers use RPM to perfect their cartel does an end-run around *Illinois Brick*.

Some commentators argue, however, that dealers would not sue manufacturers for overcharges in an RPM case, but rather for lost profits, and that "lost profits damages for the intermediary and overcharge damages for the consumer are not in any way duplicative."[203] The apparent implication is that not only does *Illinois Brick* not bar recovery by consumers, but dealers need not be joined as defendants,[204] because courts require the joinder of dealers only to avoid duplicative recovery. But if RPM facilitates manufacturer collusion, the dealers will be able to assert a claim for overcharges. And even though dealers almost always suffer lost profits when they are forced to pay an unlawful overcharge to their suppliers, they will prefer to assert a claim for overcharge damages. Under *Hanover Shoe*, they will be able to recover one hundred percent of the overcharge on sales made even though they passed on a portion of it, and that amount will almost always exceed the profits actually lost on sales made and sales not made because of unlawfully inflated costs. Their injury will not flow from the RPM agreement itself, but from the collusion enforced by the RPM program.

Litig., 730 F.2d 528, 532 (8th Cir. 1984); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1160–63 (5th Cir. 1979).

202. *See Ill. Brick*, 431 U.S. at 740, 731 n.11.

203. 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶ 346h.

204. Areeda, Hovenkamp, and Blair argue that "*Illinois Brick* does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's resale price" because "[t]here is no problem of duplication or apportionment." *Id*. ¶ 369. And they note that "courts generally hold that if a vertical conspiracy is alleged, the alleged conspirators must be named as parties" in order to avoid duplicative liability. *Id*. ¶ 370. They do not criticize the requirement, but their observation about the lack of a duplication problem implies that the requirement is misguided.

But that does not matter. By hypothesis, the only function of RPM in this case is to raise price and reduce output; the result is a single overcharge; and if the dealers recover one hundred percent of that overcharge in damages from the manufacturers for price fixing, and the consumers recover some amount of the overcharge from the manufacturers for the RPM agreements, the manufacturers will be liable for more than one hundred percent of the overcharge imposed.[205]

The implication of this analysis is that *Illinois Brick* should bar claims by consumers alleging RPM agreements between dealers and manufacturers where RPM is used to support horizontal collusion among manufacturers. But when plaintiffs are not forced to identify the purpose of the RPM agreement they allege, courts are hard-pressed to dismiss their claim on *Illinois Brick* grounds, because as we show below, *Illinois Brick* does not bar consumer claims where RPM accomplishes a purpose other than enforcement of a manufacturer cartel. *Illinois Brick*, then, is an imperfect litigation filter.

Apart from the *Illinois Brick* hurdle, consumers face the formidable problem of estimating the overcharge due to the antitrust violation. Technically, the injury *caused by RPM* is measured by the difference between the actual price and the unperfected cartel price, not the competitive price. Of course, the cartel itself is illegal. Therefore the measure of damages from *some* antitrust violation is the difference between the actual price and the competitive price, and there is little reason to assign portions of the total overcharge to discrete, though connected, violations. If the plaintiffs cannot or do not prove the horizontal price-fixing agreement, however, they are not entitled to damages based on a competitive price.[206]

205. Although a risk of duplicative recovery exists when RPM is used to facilitate a manufacturer cartel, it does not exist when RPM is used for other purposes, and this may be what Areeda, Hovenkamp, and Blair have in mind. Lost profits generally are measured by the difference between selling price and average variable cost. *See infra* note 285 and accompanying text. In the absence of an anticompetitive overcharge in the wholesale price, if the manufacturer merely increased the dealer's resale price and the dealer's variable costs were unaffected, the dealer's profit margin on sales actually made would *increase*; the margin would remain the same if variable costs increased the same amount as the price increase. The dealer, therefore, would suffer no lost profits on sales made; he might in fact enjoy an increase in profits on sales made. But the higher resale price might result in lost volume, and the profit forgone on sales not made would represent lost profits. The profits lost on lost volume would have to be reduced by any profit gained on sales made at the higher price in order to calculate net lost profits. Crucially, so long as the only source of lost profits is sales not made, there is no potential of duplicative recovery, for the lost profits on sales not made by the dealer do not overlap with the overcharge paid by consumers for units actually purchased. Therefore, consumers would not need to join all dealers as defendants in order to avoid a risk of duplicative recovery.

206. This is an example of the need for disaggregating antitrust damages. *See supra* note 94. If a damage claim is based on the total overcharge and the plaintiffs fail to prove a horizontal conspiracy, the fact-finder will have no reliable basis on which to award damages for the resale price maintenance.

Proving the actual price paid is a fairly simple matter, but all relevant discounts, rebates, and any other price-reducing concessions (such as free credit) must be deducted. Estimating the "but for" price is more difficult as one would have to control for other factors at the manufacturing stage and at the distribution stage that contributed to the observed price increase.[207]

Inferring "but for" prices is difficult for another reason. Suppose the minimum resale price specified by the manufacturer is $50.00. If this is a binding constraint, the empirical evidence should show all distributors charging $50.00, for they would presumably charge less absent the RPM plan. But what if few $50.00 price tags are observed in the market? Often, many sellers charge actual prices *above* the specified price, a condition suggesting that RPM had no effect on those distributors' pricing decisions.[208] It may be true, of course, that retailer A can charge, say, $60.00 knowing that retailer B cannot charge less than $50.00, but proving this in an adversarial setting and estimating the "but for" price would be extremely difficult.

2. Dealer Cartel

Suppose instead of a manufacturer cartel that the distributors conspire to raise prices above the competitive level. First, if this dealer cartel is for a single manufacturer's brand, as is often assumed, then collectively the dealers must have sufficient market power to charge a supracompetitive price. That is, an RPM-induced increase in the price of, say, Levi's jeans will not result in an increase in profit if a large proportion of Levi's customers respond to the price increase by switching to Lee, Gap, or Wrangler jeans. Assuming that a dealer cartel could be profitable, it also would face the classic cheating problem. To address that problem, the dealers may solicit the manufacturer's participation by demanding that it require dealers to charge a minimum resale price equal to that which maximizes the distributors' joint profits.[209]

See 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶ 391g.

207. For a discussion of proving antitrust damages and the need to control for factors other than the conspiracy, see 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶¶ 391a–391c.

208. Hylton also points out that an RPM plan that does not constrain a dealer has no effect. *See* HYLTON, *supra* note 6, at 253.

209. But there is a problem with this explanation: Why would the manufacturer agree to participate? A dealer cartel that increases the price and decreases the sales of the manufacturer's product will increase the distributors' profits while decreasing the manufacturer's profit, whether the manufacturer faces some competition or is a pure monopolist. The manufacturer's profit is maximized when its dealers charge competitive prices, and so the manufacturer would hardly want to help its dealers collude. *See* Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59, 59 (1994) (concluding that the dealer collusion theory of RPM is "now clearly implausible.").

In this case, the consumer unquestionably suffers antitrust injury and has antitrust standing to bring suit for overcharge damages; consumers pay an overcharge related to a real inefficiency caused by the practice, and they are direct purchasers from the horizontal conspirators.[210] Once again, the presence of RPM—a vertical price restraint—does not have any independent competitive significance. All of the injury flows from the horizontal agreement among the *distributors* and, therefore, the consumer is the proper party to sue for damages. Indeed, the consumer will likely be the only private party that can recover.[211] Of course, the consumer will face the usual problems of estimating damages.[212]

3. *Empirical Evidence of Horizontal Collusion*

There is scant empirical evidence, however, that RPM is primarily, or even frequently, employed to facilitate collusive arrangements among manufacturers or dealers. For example, many of the cases involving vertical price restraints have been brought against manufacturers with relatively small market shares where there is no evidence of horizontal collusion.[213] For instance, in *In re Agricultural Chemicals Antitrust Litigation*,[214] Zeneca was accused of devising a rebate program that amounted to an illegal RPM plan. The plaintiffs did not allege horizontal collusion. Moreover, Zeneca had less than ten percent of the market, suggesting that it probably could not have charged noncompetitive prices.[215] In another case, New Balance, whose resale pricing practices were challenged by the FTC and in a class action

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In the event that the manufacturer is a monopolist, the result is a variant of the successive monopoly problem in which the sum of manufacturer and dealer profit is smaller than that obtained when monopoly power is exercised at only one stage. *See, e.g.*, BLAIR & KASERMAN, *supra* note 30, at 295–304; CARLTON & PERLOFF, *supra* note 8, at 398–401. Typically, successive monopolies lead to *maximum* resale price controls. *Cf.* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (discussing a situation in which affiliated distillers imposed maximum resale price restrictions on wholesalers exercising monopoly power). Maximum vertical resale price fixing, once illegal per se, is now accorded rule-of-reason treatment. *See* State Oil Co. v. Khan, 522 U.S. 3 (1997). For an analysis of *Khan*, see Blair & Lopatka, *Death Becomes Her*, *supra* note 50; Blair & Lopatka, *Overruled*, *supra* note 51.

210. *See* 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶ 346h.

211. The manufacturer is harmed by the collusion of its distributors, and its loss is antitrust injury. But suppliers to a cartel typically do not have standing to sue for damages. *See* 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶ 350c.

212. For an examination of these problems, see *id.* at 477–587; PROVING ANTITRUST DAMAGES, *supra* note 87, at 198–201; Blair & Page, *supra* note 93, at 423.

213. *See* HOVENKAMP, *supra* note 6, at 449; Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 347 n.4 (1984).

214. No. 94-40216-MMP, 1995 WL 787538 (N.D. Fla. Oct. 23, 1995).

215. *See id*. at *5 n.7 ("Zeneca's market share fluctuated between 8 and 9 percent during the years pertinent to this complaint.").

lawsuit, was found to have a market share of only two percent.[216] In an extensive empirical analysis of cases involving vertical price restraints, Pauline Ippolito found that only about ten percent of private enforcement cases and about thirteen percent of all cases (private and public) involved allegations of horizontal collusion.[217]

In all, the empirical evidence does not support a presumption that RPM typically restricts competition and decreases output. The foundation for per se illegality, therefore, is missing.[218]

B. Procompetitive Motives for RPM and the Consumer Plaintiff

Several efficiency rationales have been offered to explain RPM. Generally, these theories view RPM (and other vertical restraints) as a means of correcting some sort of externality problem. An externality can loosely be defined as a positive or negative effect of an action on individuals other than the actor that the actor does not take into account.[219] A retailer makes decisions about price, quality, and service to maximize its own profit without regard to the manufacturer's profit. But these same decisions do affect the manufacturer's profit. A vertical externality occurs when the retailer fails to account for the extra profit that accrues to the manufacturer when the retailer provides demand-enhancing services.[220] A horizontal externality occurs, for example, when one retailer can "free-ride" on the services provided by other retailers; in this case, the services provided by some dealers produce beneficial externalities for others.[221] Both types of externalities result in the

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216. *See* Gross v. New Balance Athletic Shoe, Inc., 955 F. Supp. 242, 243 (S.D.N.Y. 1997). In *Gross*, the district court found that the class lacked standing, and New Balance signed a consent order with the FTC. *See* New Balance Athletic Shoe, Inc., 122 F.T.C. 137 (Complaint, Decision and Order, Concurring Statement of Commissioner Azcuenaga, Dissenting Statement of Commissioner Starek).

217. Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263, 281 (1991). A sample of *litigated* cases may not be representative of all of the disputes involving RPM. But even if one assumes that Ippolito's findings understate the true extent of collusive uses of RPM, it is clear that RPM is often used for noncollusive, and quite possibly procompetitive, purposes.

218. As the Court explained in *BMI*, the per se rule applies to those business practices in which "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 19–20 (1979).

219. The air pollution that accompanies electric power generation is a classic example of a negative externality. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 40–42 (3d ed. 2000); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 71 (6th ed. 2003).

220. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 177–78 (1989); Victor P. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736, 737–44 (1984); G.F. Mathewson & R.A. Winter, *An Economic Theory of Vertical Restraints*, 15 RAND J. ECON. 17, 32–33 (1984).

221. Telser applies this argument to the provision of product-specific services. *See* Telser, *supra* note 185. For a nice description of the free-rider problem, see Malcolm B. Coate & Jeffrey H. Fischer,

provision of too little service. In the pursuit of increased profit, the manufacturer may employ RPM as a means of increasing demand, which will *increase output*. The result is that the manufacturer's interest is aligned with consumer interest, and the vertical price restraint may enhance consumer welfare. When the RPM plan has procompetitive effects, therefore, a consumer's ability to demonstrate *net* injury is at best problematic. We explore two classic efficiency explanations for RPM: (1) the provision of product-specific services; and (2) quality certification.

1. Product-Specific Services

Product-specific services include product-specific information from knowledgeable salespeople (often tailored to a consumer's individual needs), product demonstrations, consumer trials (e.g., test drives of automobiles), and the like.[222] If the services create value for the consumer, they will increase demand and thereby increase the sales of the product. Product-specific services are often valuable for complex products purchased infrequently, because consumers typically desire information on product specifications, appropriate operation of the product, and the various applications of the product, and they will not be able to call on information gleaned from earlier purchases. For example, many high-technology goods, such as personal digital assistants ("PDAs") and web cameras ("webcams"), require product-specific services for optimal sales and are not purchased often. Because retail dealers are the point of contact with consumers, they play a crucial role in communicating information and providing product demonstrations.

The provision of these services is costly, however. If the consumer were able to obtain these services only on the condition that she buy the product, then the dealer would have an incentive to provide the desired product-specific services up to the point where the additional value the consumer places on one more unit of service is equal to the incremental cost of the

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Can Post-Chicago Economics Survive Daubert*?* 34 AKRON L. REV. 795, 810 n.64 (2001): "The concept of 'free riding' involves the willingness of economic agents (such as retailers) to exploit investments of others for their own profit." Marvel and McCafferty extend the analysis to "quality certification" services. *See* Marvel & McCafferty, *supra* note 213. Mathewson and Winter develop a model in which advertising spillovers result in horizontal externalities when retailers are spatially differentiated. *See* Mathewson & Winter, *supra* note 220.

222. *See* Telser, *supra* note 185. Bowman earlier set out the rudiments of the "special services" theory. *See* Ward S. Bowman, Jr., *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 841–42 (1955) ("If the item sold is of such nature that a customer may get his service from a service dealer and a cut price from a non-service dealer, the manufacturer may suffer because of the elimination of service outlets.").

service. But when a consumer can obtain these services from one dealer prior to the purchase and buy the product from a different dealer, the consumer and a discounting dealer can take a "free ride" on the efforts of full-service dealers. The selling dealer offers minimal or no services and is able to offer a lower price to the consumer. The full-service dealers will experience a decrease in the return on their investment in providing services and, as a result, will eventually provide fewer services. The end result is a sub-optimal amount of services to the detriment of the manufacturer and, possibly, to consumers.[223] Though consumers pay lower prices, they also receive less, as they lose access to valued services.[224] Moreover, the quantity sold decreases because some consumers who would have bought the product with the services provided by the full-service dealer will not buy the product absent these services.

RPM is a mechanism by which manufacturers can induce the provision of optimal services. If all dealers must charge a minimum price—one that reflects the costs of providing the optimal amount of services—they will be forced to compete on nonprice terms.[225] Of course, some dealers could still opt not to provide the desired services, but because they must charge the same price as the full service dealers, they will not be as attractive to consumers.[226]

223. By "sub-optimal," we mean relative to the level that would maximize the manufacturer's profits.

224. Mathewson and Winter recognize the free ride that discounters take on high-price retailers that provide point-of-sale information. *See* G. F. Mathewson & R.A. Winter, *The Incentives for Resale Price Maintenance Under Imperfect Information*, 21 ECON. INQUIRY 337 (1983). They show that RPM improves welfare by eliminating free-riding and thereby enhances the flow of information.

225. Posner observes that the dealers will not enjoy excess profit. Whatever extra margin existed will be dissipated by nonprice competition. *See* POSNER, *supra* note 3, at 173.

226. RPM does not completely eliminate free riding since some dealers could offer "free" tie-ins (e.g., a free memory upgrade with each PDA), which effectively lowers the purchase price of the product and thereby allows the dealer to circumvent the vertical price restriction. Consequently, manufacturers also may monitor their dealers' service provision and threaten termination if the service provision is found to be inadequate. But for termination to be costly to the dealer, the dealer must enjoy rents from selling the manufacturer's product. In perfectly competitive retail markets, various forms of nonprice competition will drive the dealers' economic profits to zero. Klein and Murphy develop a model in which RPM may allow dealers to earn a premium in markets characterized by *imperfect* competition: "[I]f we assume that sales cannot be increased by an arbitrarily large amount with an arbitrarily small decrease in the effective price to consumers, then dealers will not have the incentive to engage in a broad range of nonprice competition." Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 278 (1988). Termination, then, is costly to the dealers. Klein and Murphy's analysis was criticized by Telser. *See* Lester G. Telser, *Why Should Manufacturers Want Fair Trade II?* 33 J.L. & ECON. 409 (1990). Telser argues that RPM as a method of inducing pre-sale services is self-policing, in that, if the fixed resale price is observed, competition will force dealers to provide the services the manufacturer desires. But if RPM is used to promote efficiency in the ways suggested by other theories, it is not self-enforcing; the manufacturer would have to ensure that the desired services are being offered, and if monitoring is

Under this theory, the purpose of specifying a minimum resale price is promotional; it is designed to *increase* output. The manufacturer has determined that the product-specific services will increase the demand for its product more than the cost of providing those services. This is depicted in Figure 1, where D_1 represents the demand for PDAs without product-specific services. The supply of PDAs is given by S_1. Thus, the equilibrium price and output are P_1 and Q_1, respectively, when no services are provided by the dealers.

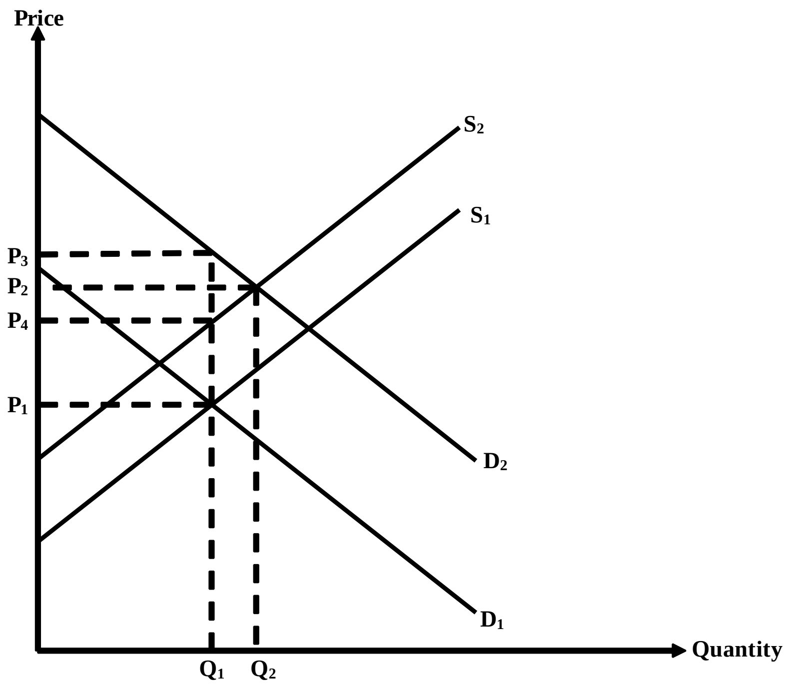

Figure 1

Now suppose that the manufacturer wants its distributors to provide product-specific services that lead to a shift in the demand curve for its product. A PDA is worth more to consumers when thorough operating instructions and a demonstration of product features are provided than when they are not. Because the value of the PDA increases when these services are

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necessary with RPM, RPM is unnecessary—it could be replaced by contractual specification and monitoring alone.

provided, the demand shifts from D_1 to D_2. But because the provision of product-specific services is not free, the supply curve shifts from S_1 to S_2 to reflect the increase in cost. The new equilibrium is P_2 and Q_2. The provision of product-specific services not only leads to an increase in price from P_1 to P_2, but to an increase in quantity from Q_1 to Q_2 because the vertical shift in demand exceeds the vertical shift in supply. This can be seen at Q_1: the value of Q_1 with the services increases from P_1 to P_3 whereas the cost of Q_1 with the services increases by the smaller amount P_1 to P_4.

Recall the purpose of RPM in this context: RPM is used to prevent free riding. When consumers can receive the benefits of the full-service distributors, but are lured to discounters by lower prices, the discounters are able to free ride on the efforts of the full-service distributors.[227] As formerly full-service distributors begin to reduce their services, the demand curve will shift back toward D_1. This reduction in demand will result in fewer sales and lower profits for the manufacturer. By imposing RPM, the manufacturer can blunt the consumer's incentive to shop around for a lower price. There will be no reward for consuming product-specific services at one location while buying the product somewhere else.

If RPM successfully prevents discounting, the prices paid by some consumers will be higher than they would have been if discounting had been permitted. But the consequences of discounting may be the elimination of product-specific services and a consequent reduction in the value of the product. Clearly, the marginal consumer[228] at a quantity of Q_1 is no worse off paying P_2 and getting services along with the product than he or she would be paying P_1 but not getting the service. In fact, the consumer who was just willing to pay P_1 without receiving any services (i.e., the marginal consumer) is better off paying the higher price P_2 and getting the services. This can be seen in Figure 1. The marginal consumer at a quantity of Q_1 is just willing to pay P_1 without receiving services. At Q_1, the height of D_2, which measures the willingness to pay when product-specific services are provided, exceeds the higher price of P_2. Consequently, the consumer arguably has suffered no injury in fact. Any conception of antitrust injury assumes injury in fact, and so the consumer suffers no antitrust injury.[229]

227. Breit observes that one should identify the opportunistic consumers as the free riders; they get the product-specific services without paying for them by frequenting the discounters. *See* Breit, *supra* note 122, at 86. For our purposes, it makes no difference which group free-rides because the manufacturer imposes RPM in an effort to assure the provision of the services.

228. The "marginal consumer" is the person who is just willing to pay the market price.

229. In the case depicted in Figure 1, consumer surplus is higher with the services than without in spite of the price increase. This, of course, raises the question of why the practice is illegal, but that is a different problem.

Ordinarily, the overcharge measure of damages is understood as the difference between the actual price paid and the price that would have been paid but for the violation.[230] In this case, however, it is not clear that there is an overcharge in the usual sense of the term. One possible measure of the "overcharge" would be the difference between the actual price paid and the price that a discounter would charge. If there are no discounters, it will be impossible to estimate the "but for" price because there will be no evidence. If there are discounters, the discounted prices will provide a benchmark of sorts. The consumer plaintiff still faces two problems. First, if there are discounted prices and the plaintiff did not frequent the discounter, the plaintiff would seem to have failed to mitigate her damages. Even if the discounted prices were only available for a short period, those prices arguably provide a "but for" price to compare to the actual price, but that raises a second, more important problem: The manufacturer should be entitled to an offset for the value of the product-specific services that RPM made possible. After all, the consumer did not get just the product; she got the product and the service. This offset, however, may well cause the *net* harm to evaporate.

Due to the per se illegality of RPM, courts and juries may disregard the value-enhancing services provided, however, and award damages based on calculations that do not account for the value and costs of the services. Consequently, plaintiffs may be awarded damages for business practices that, in fact, caused no economic harm. For example, in the scenario described in Figure 1, a consumer might claim an overcharge equal to the difference between P_1 and P_2. The consumer, however, enjoyed product-specific services that were made possible by RPM, and the consumer is only entitled to recover an amount equal to the *net* harm suffered. This means that the value of the services must be deducted from the gross "overcharge" of $P_2 - P_1$ in order to compute the net harm. Because the value of the services is $P_3 - P_1$, which exceeds $P_2 - P_1$, there is a net *benefit* rather than a net *harm*. This result follows from the fact that consumer surplus has actually increased as a result of the product-specific services.

If all consumers value the product-specific services equally, the demand curve exhibits a parallel shift, as shown in Figure 1, and there is no harm to anyone. But all consumers may not value them equally. For example, a first-time buyer of a PDA may want more help than a purchaser who is simply replacing an older model. In our economic model, this means that the shift in

230. In *horizontal* price fixing cases, this measure is sound. *See, e.g.*, 2 AREEDA, HOVENKAMP & BLAIR, *supra* note 35, ¶ 394; Page, *Antitrust Damages*, *supra* note 39, at 472.

demand will not be parallel. In Figure 2, the provision of product-specific services leads to a counter-clockwise rotation of demand from D_1 to D_2. In this case, consumer surplus without the product-specific services is equal to area acP_1 and with the product-specific services is equal to area abP_2. In some cases (like the one depicted in Figure 2), consumer surplus will decline; in other cases, it will not.[231] As a result, the appropriate antitrust policy is unclear.[232]

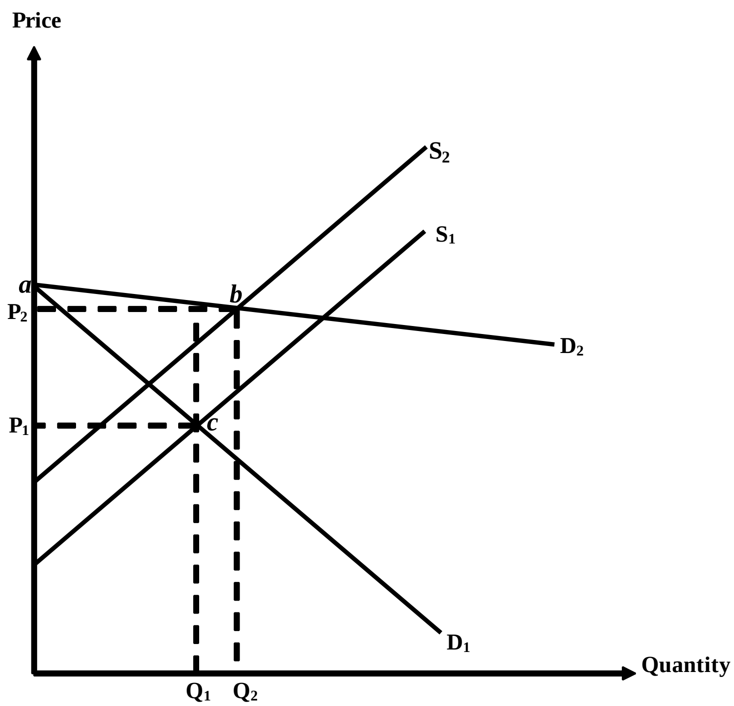

Figure 2

231. *See* William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions and the New Antitrust Policy*, 98 HARV. L. REV. 983, 990–1000 (1985); F.M. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 692–700 (1983).

232. *See* Roger D. Blair & James M. Fesmire, *The Resale Price Maintenance Policy Dilemma*, 60 S. ECON. J. 1043 (1994). *See also* POSNER, *supra* note 3, at 176 (arguing that this distinction can not be handled in a judicial setting and should be ignored); Comanor, *supra* note 3, at 1001–02 (arguing that vertical restraints applied to established products should be illegal per se or treated under a stringent rule of reason because they are likely to result in net consumer harm); Scherer, *supra* note 231, at 707 (concluding tentatively that RPM “ought to be presumed legal only for relatively small upstream firms and in situations where its use is not ubiquitous”).

The possibility that RPM reduces both consumer surplus and total welfare implies that it might be condemned on economic grounds when it has these effects. And if RPM is inefficient, some parties must suffer antitrust injury. The marginal consumer has not suffered any injury in fact, as shown in Figure 2: The increase in the value to that consumer is the vertical distance between D_1 and D_2 at Q_2 whereas the increase in price is only $P_2 - P_1$. Even at the original output of Q_1, the shift in demand exceeds the increase in price. But infra-marginal consumers—those who derive a smaller increase in value from the services than the increase in price—have suffered a loss in consumer surplus that can be attributed directly to RPM. The measure of the loss is the increase in price minus the increase in value.

Despite the fact that some consumers may have suffered antitrust injury, no consumer should be allowed to recover. First, when different consumers value services disparately, an RPM agreement that induces the provision of services may still increase efficiency. All that any individual consumer could possibly prove in litigation is that she did not value the additional services as much as the increase in price,[233] but that showing would not prove that RPM reduced total welfare. No court would be able to distinguish between welfare-increasing and welfare-reducing RPM based on the injury to an individual consumer, and then allow recovery by the individual consumer where RPM reduced total welfare but deny recovery by the individual consumer for precisely the same kind of injury where RPM increased total welfare. Indeed, any seller configures his products in ways that are desirable to some consumers and undesirable to others; some consumers, for example, might like to buy an Infiniti with a digital clock but are not given that choice.[234] A seller chooses a configuration that pleases the greatest number of consumers, recognizing that the administrative costs of creating multiple versions can be prohibitive. Efficiency requires that a seller be able to select a product configuration—or a level of service—with impunity.[235]

Second, the problem of proving that any given individual in fact valued the services less highly than the increase in price and the amount of any loss she suffered is intractable. Anyone could claim *ex post* that she placed very little—if any—value on the services, but determining the truth of the claim in

233. Even proving this much, of course, would be extremely difficult. Just what evidence could be offered beyond mere assertion is not obvious.

234. Infiniti automobiles long came equipped with analog clocks. When the manufacturer replaced them in new models with digital clocks, consumer opposition supposedly was so strong that the manufacturer returned to the analog style.

235. *See generally* Bowman, *supra* note 222, at 842–43 (noting that if some consumers prefer service and others no service, and if the manufacturer cannot segregate the markets, the manufacturer must choose between supporting the service dealers or the non-service dealers).

litigation would impose costs wildly disproportionate to the trivial stakes at issue. Moreover, calculating the amount of loss would be all but impossible. These problems of proof escalate for consumers seeking relief through a class action, for the class faces the additional and formidable obstacle of demonstrating common impact.[236] This is especially significant given the prevalence of class actions in private enforcement efforts.[237] Thus, even consumers who have experienced a loss should not be able to recover because they will be able to prove neither the existence nor the magnitude of their loss.

2. *Quality Certification*

The quality certification explanation for vertical price restraints arose in response to the observation that the "special services" theory fails to explain the use of RPM by manufacturers of products that do not appear to require product-specific services.[238] For example, manufacturers of blue jeans,[239] china,[240] boxed candy,[241] and electric grills[242] have imposed RPM on their dealers, yet consumers of these goods would not seem to require the knowledgeable salespeople, product demonstrations, or other product-specific services that might be necessary for a PDA or a webcam. But the use of vertical price restraints for these goods also does not appear to be motivated by either manufacturer or dealer collusion.

Quality certification, therefore, was offered as another explanation for RPM. Under this theory, the retailer is viewed not as the agent of the manufacturer but as the consumer's agent. In this capacity, the retailer carries only those products that meet or exceed the minimum standard of quality that is consistent with the retailer's reputation. For example, Neiman Marcus is widely recognized as a high-quality retailer—one renowned for carrying only

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236. *See, e.g.*, *In re* Agric. Chems. Antitrust Litig., No. 94-40216-MMP, 1995 WL 787538, at *4 (N.D. Fla. Oct. 23, 1995) (refusing to certify a class of purchasers in action against manufacturer and distributors for inability to prove common impact).

237. *See, e.g.*, Lopatka & Page, *supra* note 71, at 561 n.114 (collecting antitrust class action cases brought by direct and indirect purchasers).

238. This section relies on Marvel & McCafferty, *supra* note 213.

239. *See* Levi Strauss & Co., 92 F.T.C. 171 (1978) (Complaint, Decision and Order), *modified*, 118 F.T.C. 1218 (1995).

240. *See* Lenox, Inc., 73 F.T.C. 578 (1968) (Complaint, Initial Decision by the Hearing Examiner, Commission Opinion and Order), *modified*, 77 F.T.C. 860 (1970), *and set aside in part*, 111 F.T.C. 612 (1989).

241. *See* Russell Stover Candies, Inc., 100 F.T.C. 1 (1982) (Final Order), *rev'd*, Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983).

242. The manufacturer of George Foreman grills was charged with exclusive dealing as well as RPM. *See* New York v. Salton, Inc., 265 F. Supp. 2d 310, 312 (S.D.N.Y. 2003).

high-quality products.[243] If consumers observe that Neiman Marcus carries handbags by Kate Spade, shoes by Marc Jacobs, or scarves by Loro Piana, that certifies that the quality of those products is on a par with the Neiman Marcus reputation.[244] Presumably, this quality certification involves some cost. The merchandise buyers at Neiman Marcus must continually evaluate new product offerings and must engage in ongoing monitoring of the quality of the products on which Neiman Marcus stakes its reputation. For many products, such as apparel, style as well as quality will be considered. Neiman Marcus may send its buyers to fashion shows to identify the latest styles and to evaluate the comfort, fit, and workmanship of different brands, whereas another retailer may make its purchasing decisions largely based on the cost of obtaining inventory.

The free-rider problem arises if consumers look to Neiman Marcus for quality certification, but purchase from a lower-priced retailer that simply copies Neiman Marcus's product offerings. The loss of sales to the copycat will erode the return to Neiman Marcus from engaging in quality certification. To preserve the quality-certification service provided by Nieman Marcus, the manufacturer may use RPM, guaranteeing Neiman Marcus a sufficient profit margin to cover its costs and denying the copycat the ability to profit from free-riding.[245] In this case, the manufacturer "simply wishes to ensure that its product is distributed by retailers whose decision to carry that product provides consumers with valuable information about the product's characteristics."[246] When RPM is used to protect the quality certification of a manufacturer's product by a retailer, information costs incurred by consumers are reduced. Uncertainty regarding product quality is largely (if not entirely) removed. As a result, the demand for the manufacturer's product expands.[247] Consumers are willing to pay more for a

243. For an argument that prestige goods need to carry a high price and, therefore, should be exempt from the ban on RPM, see George R. Ackert, Note, *An Argument for Exempting Prestige Goods from the Per Se Ban on Resale Price Maintenance*, 73 TEX. L. REV. 1185 (1995).

244. This does not apply to luxury goods alone. Sears, for example, has a reputation for dependable quality. When Sears stocks a brand, it also certifies that the product is dependable. *See, e.g.*, *Where to Buy*, CONSUMER REP., July 2002, at 11 (reporting the results of a survey of subscribers to Consumer Reports regarding their shopping experiences at "mass merchants" and concluding that Sears stood out for its high rankings on product quality).

245. Another way to do this is to offer Neiman Marcus a discount so it can recover its quality certification costs. This alternative would invite private suits under the Robinson-Patman Act, which prohibits price discrimination under certain conditions.

246. Marvel & McCafferty, *supra* note 213, at 349.

247. Marvel and McCafferty observe: "Raising [the resale price] . . . will raise demand by inducing higher quality retailers to enter the market with no consequent reduction in outlets." *Id.* at 353. Springer and Frech show that RPM can be used to eliminate a retailer's incentive to substitute lower-cost, inferior goods for higher-cost, superior brands. *See* Roger F. Springer & H.E. Frech, III,

product with quality certification than without quality certification. In essence, the consumer is getting more than just the physical product when there is some assurance (if not a guarantee) of quality. For the private plaintiff, the difficulty of proving net harm and, therefore, injury in fact is the same as it was with the product-specific services situation examined above.[248] Proving antitrust injury is problematic at best, and proving damages coherently is virtually impossible.

C. Additional Motives for RPM and the Consumer Plaintiff

Because many uses of RPM can be neither attributed to facilitating collusion nor explained by the special services or quality certification rationales, the academic analysis of RPM has continued beyond the models reviewed above. We examine some of the subsequent research on economic motivations for RPM. First, we examine the use of RPM in response to demand uncertainty. Next, we review models in which manufacturers must compete for distribution services.[249] Finally, we consider an explanation of RPM based on price discrimination.

1. Demand Uncertainty

David Butz analyzes the effect of uncertain demand on a manufacturer's ability to earn profit.[250] To obtain a benchmark solution, he solves the profit-maximization problem for a monopoly manufacturer that is vertically integrated and distributes its product through two company-owned outlets.[251] He then shows that the manufacturer can earn the same profit by selling to an

Deterring Fraud: The Role of Resale Price Maintenance, 59 J. BUS. 433 (1986). In their model, quality is preserved and consumers are not misled. This, of course, is socially efficient as misinformed consumers do not make optimal decisions. In this case, RPM leads to higher demand than would otherwise be the case.

248. *See supra* notes 222–38 and accompanying text.

249. There are other relatively recent economic explanations as well. For example, Yongmin Chen examines RPM as a response to oligopoly price discrimination in the retail market that "makes it impossible for the manufacturer to set a wholesale price that would induce the retail prices (or retail margins) that maximize the joint profits of the manufacturer and retailers." Yongmin Chen, *Oligopoly Price Discrimination and Resale Price Maintenance*, 30 RAND J. ECON. 441, 442 (1999).

250. David A. Butz, *Vertical Price Controls with Uncertain Demand*, 40 J.L. & ECON. 433 (1997). For an earlier effort, see Patrick Rey & Jean Tirole, *The Logic of Vertical Restraints*, 76 AM. ECON. REV. 921 (1986). For other analyses of RPM and uncertain demand, see Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, 87 AM. ECON. REV. 619 (1997) [hereinafter Deneckere et al., *Destructive Competition*]; Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q. J. ECON. 885 (1996).

251. *See* Butz, *supra* note 250, at 436–38.

independent, two-outlet chain.[252] The manufacturer's profit may be threatened, however, if the two distribution outlets are independent of the manufacturer, are separately-owned, and face uncertainty in the demand for the product.[253] The two independent distributors commit to quantities before the resolution of the demand uncertainty. When demand is low, the distributors will sell off their inventory at market-clearing prices that are below the joint profit-maximizing price, thus reducing their expected returns. In turn, this reduces the amount that they will pay the manufacturer for the product, which reduces the manufacturer's profit. By setting a minimum resale price at the appropriate level, the manufacturer prevents intrabrand competition and thereby raises the expected returns at the distribution stage. This raises the price that the distributors are willing to pay for the product and, correspondingly, the profits of the manufacturer. In this case, RPM is used in lieu of vertical integration.[254]

When RPM is used to increase manufacturer profits in the presence of demand uncertainty, consumers face considerable problems in proving injury in fact and damages. Consumers can, of course, identify the prices that they actually paid for the good in question, but proving the prices "but for" the RPM contract is problematic. When demand is low, the "but for" price will be lower than the price specified by the manufacturer. But when demand is high, the "but for" price is *higher* than the price specified by the manufacturer; the price specified by the manufacturer is not binding, and distributors charge the same price that they would charge in the absence of an RPM plan. RPM, therefore, imposes costs on consumers only when demand is low. In related research, Raymond Deneckere, Howard P. Marvel, and James Peck demonstrate that when demand is high, the price obtained under the manufacturer's RPM plan may, in fact, be lower than that obtained in the absence of RPM.[255] In this case, determining damages becomes even more complicated because the damages suffered by plaintiffs during periods of low demand must be offset by the benefits that they received during periods of

252. *See id*. at 438–42.

253. By assumption, the distributors do not collude—tacitly or otherwise.

254. Butz, *supra* note 250, at 446. Using RPM to induce profit-maximizing behavior is not seamless, however. When demand is low, the distributors will have unsold inventory at the specified price. Thus, the manufacturer will welcome the assistance of the distributors in monitoring prices to be sure that there are no discounted sales.

255. This result occurs when there is not a large disparity between the high- and low-demand states. When the two states are sufficiently close, distributors have an incentive to accumulate a smaller amount of inventory since price is driven to zero in the low-demand state. RPM prevents the price from falling to zero, and distributors compete by expanding their inventories; therefore, distributors' inventories rise, which results in a lower price in the high-demand state. *See* Deneckere et al., *Destructive Competition*, *supra* note 250, at 625.

high demand. Additionally, these authors show that it is possible for RPM to result in a net improvement in consumer welfare.[256] Even if consumers could establish an injury in fact based on purchases made during periods of low demand, demonstrate a net loss, and quantify the damages, the use of RPM to address demand uncertainty produces no antitrust injury. *Ex ante*, RPM is used to increase efficiency by allocating risk, and at most an inefficiency can be detected only in an *ex post* sense. The proper perspective in assessing the effects of a practice is *ex ante*.[257]

2. Competition for Exclusive Distributorships

Martin Perry and David Besanko consider two competing manufacturers that rely upon exclusive distributors and, therefore, must compete indirectly for customers by competing for retail distributors.[258] The products are not perfect substitutes and, therefore, each manufacturer has some market power that will allow it to earn positive economic profit. This profit can be captured through a franchise fee, a wholesale price that is greater than marginal cost, or some combination of the two. Perry and Besanko examine the impact of RPM on equilibrium outcomes under different combinations of franchise fees and wholesale prices.[259] In one variant of their model, Perry and Besanko assume that the wholesale price is equal to marginal cost and that each manufacturer earns its profit solely through a franchise fee.[260] When RPM is used in this case to prevent intrabrand competition among a manufacturer's exclusive dealers, the equilibrium retail price is higher than it would be in the absence of RPM.[261]

When the manufacturers can both set wholesale prices above marginal cost and charge franchise fees, Perry and Besanko reach an interesting result. If RPM is not permitted, the manufacturer will earn its profit by charging a franchise fee in combination with a wholesale price above marginal cost.[262] The retail price to consumers will be the monopolistically competitive markup over the wholesale price. If RPM is permitted and the manufacturers

256. *See id*.

257. In these models, distributors earn only competitive (expected) returns no matter what they do because the manufacturer fully appropriates any supra-competitive profits. As a result, disgruntled, acquiescing dealers and terminated dealers have no damages. For a general discussion of the challenges that distributors face in proving damages, see *infra* notes 283–300 and accompanying text.

258. *See* Perry & Besanko, *supra* note 179, at 520.

259. Perry and Besanko evaluate the impact of both maximum and minimum resale prices. *See id*. at 527–30, 533–35. Because our focus is on minimum resale prices, we include only those cases here.

260. *See id*. at 530.

261. *See id*. at 534.

262. *See id*. at 539.

choose to earn their profit solely through a franchise fee (and, therefore, charge a wholesale price equal to marginal cost), the use of RPM *decreases* the retail price. This seemingly counterintuitive outcome results because the manufacturers obtain part of their profit by setting the wholesale price above marginal cost in the non-RPM equilibrium, and the retail price is a markup over the wholesale price. In the RPM equilibrium, manufacturers obtain their profit solely through a franchise fee, setting the wholesale price equal to marginal cost. As a result, the retail price is lower than in the non-RPM equilibrium even though the manufacturer imposes a minimum resale price to preserve retailer profits.[263] In this case, consumers sustain no antitrust injury and have no cognizable claim for damages. The central point to be learned from the Perry and Besanko analysis is that the effect of an RPM program is *a priori* ambiguous; whether RPM enhances or diminishes consumer welfare depends on the specific circumstances.[264]

3. RPM and Slotting Allowances

Manufacturers may compete for customers by competing for the shelf space of retail distributors. One way of competing for shelf space is to offer slotting allowances to the retail distributors, i.e., initial, lump-sum fees that are paid to retailers for shelf space.[265] The manufacturer charges wholesale prices that are above marginal cost, but the slotting fees offset the markup to some extent. An alternative to slotting allowances is RPM.[266] Both of these business strategies are used to enhance the profits of the retailers, who have scarce shelf space, by reducing intrabrand price competition.[267] In this

263. Thus, the legal prohibition of RPM in some circumstances will lead to higher prices for consumers, surely a perverse result of antitrust enforcement.

264. This point has been demonstrated in other contexts as well. Chen, in another seemingly counterintuitive result, finds that consumer welfare can be higher under an RPM program in retail markets characterized by oligopoly price discrimination even when total output is reduced when it "raises output to those consumers with higher expected valuations while it reduces output to those consumers with lower expected valuations." Chen, *supra* note 249, at 451. Chen notes that the "effect of RPM on welfare turns out to be ambiguous in general," *id*. at 451, and he concludes that "[a] careful examination of the economic factors is often needed to determine the effects of RPM in a particular situation." *Id*. at 454–55.

265. Slotting fees appear to be most commonly found in retail groceries. *See* Greg Shaffer, *Slotting Allowances and Resale Price Maintenance: A Comparison of Facilitating Practices*, 22 RAND J. ECON. 120, 120–21 (1991).

266. Shaffer has analyzed the use of RPM by manufacturers as an alternative to slotting allowances in a perfectly competitive industry. *See id*.

267. When retailers agree to an RPM plan, they commit directly to charging a higher price. Because manufacturers require nonnegative profits, slotting allowances are accompanied by a wholesale price that exceeds marginal cost. Therefore, when retailers accept slotting allowance contracts, they implicitly commit to higher retail prices. *Id*. at 121, 130–31.

context, RPM—as well as slotting allowances—may be anticompetitive.[268] Prices to consumers are higher than they would be if neither RPM nor slotting fees were permitted.[269] As a result, consumers may have a valid claim for damages. Any injury in fact suffered by consumers would be an antitrust injury, and because the plan is designed to benefit retailers, consumers are not barred from recovery by *Illinois Brick*. Nevertheless, consumers face significant challenges. First, consumers must identify this motivation for using RPM. Second, consumers must prove that they would have been better off without RPM, taking into account that slotting allowances, which are not prohibited, might have been used instead. If RPM relative to lawful alternatives did not make consumers worse off, they did not suffer injury in fact. Finally, consumers would have to estimate the prices that would have prevailed but for the RPM agreement, again taking into account the possibility of slotting allowances.[270]

4. RPM and Price Discrimination

If a manufacturer with some monopoly power sells a product without restriction to a competitive level of dealers at a monopoly wholesale price, and the dealers resell to consumers, the manufacturer earns a measure of monopoly profits, dealers earn no economic profit, consumers receive a measure of surplus, and society suffers a deadweight loss. Consumer surplus arises because different consumers place different values on any product, and infra-marginal consumers value the product more highly than the monopoly price. If the manufacturer could charge each consumer a different price set at the value placed on the product by that consumer, as long as the price is no lower than marginal cost, the manufacturer could turn all of the consumer surplus and all of the deadweight loss generated at the monopoly price into monopoly profits.[271] Such a practice would constitute a type of price discrimination—charging different consumers different unit prices for a product where the costs incurred by the seller in supplying the consumers do

268. In this case, the higher price paid by consumers is not offset by value-enhancing services.

269. *See* Shaffer, *supra* note 265, at 130–35. Shaffer shows that public policy should prefer RPM to slotting allowances. A per se rule against RPM makes no sense in the absence of a prohibition of slotting allowances.

270. If the non-RPM equilibrium includes slotting allowances, the “but for” price may be higher than the actual price paid with RPM. In that event, there would be no injury in fact and therefore no antitrust injury.

271. Technically, monopoly power exists when the firm faces a downward-sloping demand curve. That is the condition necessary to earn monopoly profits and to price-discriminate. The monopoly power need not rise to the level that is normally required to raise antitrust concern.

not change.[272] For price discrimination to succeed, not only must the manufacturer ascertain the value placed on the product by different consumers and prevent arbitrage among consumers,[273] it must, of course, actually charge different prices. When the manufacturer sells to dealers, who themselves are free to sell to any consumer, the manufacturer has no mechanism to induce consumers to pay the full amount they are willing to pay. No dealer can engage in price discrimination because, in a competitive dealer market, no dealer has monopoly power.

One way for a monopolist manufacturer to practice price discrimination is to divide the consumer market into categories based on the value placed on the product, confine dealers to particular categories, and set different wholesale prices for each category.[274] The result is imperfect price discrimination.[275] But another way is to set individual resale prices to charge particular consumers or consumer classes. Any dealer can sell to any consumer, but the manufacturer sets different wholesale prices for resales to different consumers, and the dealer agrees to charge the consumer a resale price set by the manufacturer specifically for that consumer. The manufacturer could not merely set disparate wholesale prices, because without imposing some form of customer restriction on dealers, the manufacturer could not easily determine whether wholesale purchases at low prices were being diverted to high-value consumers.[276] Critically, price discrimination cannot explain an instance of RPM unless the manufacturer sets nonuniform resale prices.

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272. *See generally* CARLTON & PERLOFF, *supra* note 8, at 274.

273. *See generally id*. at 277. If arbitrage is possible, consumers who are charged a low price could buy more than they want and resell the excess to consumers facing a high price from the manufacturer; these high-value consumers will prefer the lower price offered by other consumers, and the manufacturer will lose sales.

274. For example, in *United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926), the manufacturer attempted to divide the consumers of incandescent lamps into two markets and charge industrial users a lower price than domestic users. *See* Bowman, *supra* note 222, at 839–40. The success of the plan required that industrial users be prevented from reselling to domestic users, and industrial users were contractually bound not to resell. *See General Electric*, 272 U.S. at 482–84. But success also required that dealers be prevented from diverting low-cost lamps destined for industrial users to domestic users. *See* Bowman, *supra* note 222, at 840.

275. This kind of price discrimination is sometimes called third-degree price discrimination. *See* A.C. PIGOU, THE ECONOMICS OF WELFARE (1920). The economic welfare effects of this kind of price discrimination are ambiguous. *See generally* Benjamin Klein & John Shephard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599, 612 (2003).

276. Bowman points out that RPM likely could not have been an effective method of price discrimination in *General Electric* because dealers were not prevented from diverting lamps intended for low-value, industrial users to high-value, domestic users. *See* Bowman, *supra* note 222, at 840. Where diversion can be prevented, however, price discrimination is possible.

If RPM is used to price-discriminate, the welfare implications are ambiguous. Perfect price discrimination eliminates the allocative inefficiency caused by single-price monopoly pricing. In this respect, it is more efficient than a single-price monopoly and just as efficient as perfect competition.[277] But imperfect price discrimination need not have these effects, and price discrimination of either kind can reduce productive efficiency as the seller uses resources to operate the price-discrimination system.[278] Perhaps because the effects of price discrimination in individual instances are uncertain, antitrust law contains no general prohibition of price discrimination.[279] Rather, price discrimination is outlawed in certain settings, such as in the sale of commodities where the requirements of the Robinson-Patman Act are met,[280] and certain practices, such as tying, which may be used to price discriminate are condemned even when used for that purpose.[281]

The possibility of RPM being used to price-discriminate poses difficult issues of antitrust injury and damage calculation. Assuming the monopoly power possessed by the seller is lawful, a consumer who pays more for a product than she would have paid had a single monopoly price been set is injured. But if price discrimination is perfect, RPM causes no total welfare loss; indeed, it increases total welfare relative to the single-price monopoly outcome.[282] If antitrust injury is defined as a loss that is connected to the inefficiency of a practice, the consumer's loss is not antitrust injury. The consumer suffers an antitrust injury only if the purpose of the antitrust law is defined more narrowly as the promotion of consumer welfare, rather than social welfare. If as a result of price discrimination a consumer buys the product at a price below the single monopoly price and above the competitive price—a consumer represented in the deadweight-loss triangle

277. There are, however, distributive effects. With perfect price discrimination, the monopolist extracts all of the potential consumer surplus; with competition or a single-price monopoly, he does not.

278. *See* POSNER, *supra* note 3, at 83.

279. *See, e.g.*, USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 512 (7th Cir. 1982) ("[N]o general principle of antitrust law forbids charging different prices to different customers, what is often but loosely called 'price discrimination.'"). Thus, if a method of price discrimination is otherwise lawful, a manufacturer may engage in price discrimination and enlist the aid of distributors, even if the distributors act collectively. *See In re* Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 784–85 (7th Cir. 1999).

280. *See* 15 U.S.C. § 13(a) (2000).

281. Tying is nominally treated as per se illegal. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984). It is now well understood that tying can be used to price discriminate. *See, e.g.*, BORK, *supra* note 8, at 376–78; POSNER, *supra* note 3, at 199–200. The Court has never suggested that tying avoids condemnation if it is used as a method of price discrimination.

282. Perfect price discrimination is sometimes called first-degree price discrimination. *See* PIGOU, *supra* note 275.

produced by single-price monopoly pricing—the consumer suffers no injury in fact from RPM. The consumer gains as a result of RPM. Overcharge damages must be limited to transactions that occur at a price above the single monopoly price, not the competitive price. And estimating the single monopoly price may be more difficult than estimating a competitive price, which is the typical "but for" condition. Indeed, if the defendant could have resorted to a lawful, alternative form of price discrimination, though one less perfect than RPM, even the single monopoly price would overstate damages.

D. Distributor Claims in RPM Cases

Whether a dealer subject to, or presented with, an RPM plan may maintain an action depends initially on the rationale for RPM in his particular case. Just as antitrust process would benefit if consumers were forced to assert an economic rationale for RPM in any complaint alleging the practice, so too would the process benefit if dealers were required to do so. In any event, the plaintiff may sometimes offer an explanation, and sometimes certain explanations can be excluded as an implication of the plaintiff's allegations. A court might or might not be able to dismiss the action for failure to satisfy the prerequisites of private recovery based on the viable theories of RPM disclosed by the complaint. Moreover, discovery may lead to uncontroverted facts that are consistent or inconsistent with various theories of RPM, and summary judgment may be appropriate at that time.

Dealers that seek damages for RPM agreements will generally fall into one of two categories: dealers that are terminated for failure to comply with the minimum price set by the manufacturer, or dealers who claim to have been injured by unwillingly charging the minimum price. Of course, a dealer who does not adhere to the minimum price set by the manufacturer and is not terminated suffers no injury in fact from an RPM agreement between the manufacturer and other dealers, which is the only RPM agreement that might be established.[283] We examine in this Section the potential claims of terminated dealers and dealers adhering to minimum resale prices in the context of the major economic rationales for RPM set out above.

283. *See* Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc., 246 F.3d 752, 756–57 (5th Cir. 2001). Though a dealer might be able to assert an agreement between himself and the manufacturer as of the date he unwillingly complies with a minimum resale price demand, *see* Albrecht v. Herald Co., 390 U.S. 145 (1968), if he does not comply then he does not enter into an agreement with his supplier.

1. Anticompetitive Rationales

The cartel explanations have straightforward implications for dealer plaintiffs. If RPM is used as a method of facilitating a manufacturer cartel, a dealer that acquiesced in the specified price would by assumption have paid an overcharge on the units purchased. The difference between the actual price and the noncollusive price multiplied by the number of units the dealer purchased would constitute injury in fact and antitrust injury, and the dealer, as a direct purchaser, would have antitrust standing. The calculation of the but-for, noncollusive price might be difficult, but no more so than in any other cartel case. In this situation, the overcharge injury is not caused by the RPM agreement, but rather by the collusion the RPM agreement facilitates. The dealer might claim that he is entitled to lost profits because of the inflated resale price.[284] The proper measure of lost profits involves estimating the contribution margin on the lost business.[285] But allowing the dealer to recover both lost profits and overcharge damages would result in greater liability than would be imposed if the cartel had charged the same supra-competitive price without the aid of an RPM agreement. In the latter case, only full overcharge damages are allowed, even though they do not account for the deadweight loss caused by cartel pricing. The RPM agreement has no independent significance, and it cannot be the basis of the dealer's claim.

A dealer that is terminated for refusal to adhere to a minimum resale price where RPM is used to enforce a manufacturer cartel is in a different position. The defendants' conduct unquestionably reduces welfare, but the dealer does not suffer antitrust injury in the standard way. The dealer, by assumption, suffers no overcharge injury. Further, because other dealers presumably

284. "Lost profits" when used as a measure of damages in an antitrust case is an accounting concept. The claim that a dealer loses profits when his costs are anticompetitively increased implies that he earns profits when costs are determined competitively. Yet in competitive markets, firms earn no economic profits. Therefore, if wholesale prices are competitive, competitive dealers earn no economic profits; if wholesale prices are supra-competitive, competitive dealers earn no economic profits. Collusion among manufacturers in setting wholesale prices causes no loss of economic profits. The economically shaky justification for the award of lost profits in antitrust cases has led some scholars to argue that lost profits should not be used as a general measure of antitrust damages. *See, e.g.*, Easterbrook, *supra* note 64, at 462–63; William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 417–18 (1985). *But see* Jeffrey L. Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 MINN. L. REV. 751, 753 (1980) (arguing that "lost profits rather than gross overcharge or pass-on adjusted overcharge is the most appropriate measure of damages in price enhancement cases").

285. The contribution margin is the difference between the lost revenue and the costs that were avoided by not making the lost sales. These avoided costs include the cost of goods sold and the direct selling costs, but do not include overhead costs. They can be thought of as average variable costs. Hence, the contribution margin typically exceeds—sometimes substantially—the average profit margin because the latter does include overhead costs.

acquiesce in the RPM plan, the refusal of the terminated dealer to participate causes no loss in consumer welfare. If the dealer is allowed to recover lost profits while dealers adhering to the RPM agreements recover overcharge damages, the manufacturer faces a risk of excessive liability. If the manufacturer had not imposed RPM and had charged a noncollusive wholesale price, the dealer would have earned accounting profits on a certain volume of sales. But some of those sales were in fact made by dealers acquiescing in the RPM agreements, who can recover as overcharge damages the monopoly profits earned from the collusion. Awarding lost profit damages to the terminated dealer on the entire volume of sales he would have made absent RPM at the noncollusive price would to some extent duplicate the potential recovery of acquiescing dealers suing as direct purchasers. There is no way in litigation to allow the dealer to recover only the profits that would have been made on the sale of additional units if the cartel had not restricted output. The dealer stands in much the same position as any individual who did not purchase a product but claims she would have had the price been lower. Those claims are routinely rejected. The one kind of antitrust injury the terminated dealer may suffer is a loss in value of any assets tailored specifically to the market from which he is excluded.[286]

If dealers are using RPM to facilitate their own cartel, they would have no cause of action. A dealer first would have to establish injury in fact. A dealer terminated by the manufacturer for cheating on the dealer cartel would lose the profits of cheating; a dealer adhering to the RPM agreement might lose profits if enough of his customers shift to other products he does not sell. Neither loss represents antitrust injury. It is one thing to refuse to enforce cartel agreements[287] and quite another to award damages to a defecting cartelist. In any event, the dealers in these cases would be barred from suing other members of the cartel by the doctrine of equal responsibility.[288]

2. Procompetitive Rationales

The efficiency-enhancing explanations of RPM have less obvious implications for suits by dealers. In all of these explanations, RPM is used by

286. *See* Easterbrook, *supra* note 64, at 465. In effect, these are "sunk" costs that can only be recovered by conducting business in that particular market.

287. *See, e.g.*, Bement v. Nat'l Harrow Co., 186 U.S. 70, 88 (1902) (observing that a party may successfully defend a breach of contract action by proving that the contract violates the Sherman Act); McMullen v. Hoffman, 174 U.S. 639, 670 (1899) (refusing to enforce a bid-rigging contract against a breaching party).

288. *See* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 146 (1968) (White, J., concurring).

manufacturers to induce dealers to perform some productive economic function. Where all consumers benefit, there is a loss neither of efficiency nor of consumer surplus.[289] Nevertheless, dealers can suffer actual injuries. Suppose a manufacturer imposes RPM in order to induce dealers to provide product-specific services. A dealer might fail to provide the services, shade the fixed resale price, and earn as profits the difference between his relatively low costs and the revenue generated by the fixed resale price. If he is terminated, he suffers a loss.[290] Or a dealer might adhere to the fixed resale price but thereby lose profits on additional sales he might have made at a lower price. In neither case, however, does the loss satisfy an economic definition of antitrust injury.

The terminated dealer skimping on services earned profits by free-riding on the services provided by others. These lost profits, however, cannot be connected to any inefficiency caused by RPM, because RPM in these circumstances increases efficiency. Indeed, if rampant free-riding forced the manufacturer to abandon RPM, and if no substitute mechanism was available or was as efficient, the resulting loss of product-specific services would injure consumers. Recognizing the loss of terminated free-riding dealers as antitrust injury would perversely injure consumers. Of course, absent RPM or an alternative, the product-specific services would disappear, and the formerly free-riding dealer would have to compete with other dealers, none of whom would be providing services. One could argue that loss of profits made possible by an illegal arrangement—here, the RPM agreements—cannot constitute antitrust injury.[291] But that analysis relies woodenly on the illegality of RPM agreements, even though RPM in these circumstances causes no anticompetitive harm. The better position is that the injury is unconnected to any anticompetitive harm. While some courts have held on one basis or another that dealers terminated for failing to adhere to RPM agreements suffer no antitrust injury,[292] others have reached the opposite result.[293]

289. If only some consumers benefit, RPM may reduce efficiency and consumer surplus, but these instances cannot be isolated in litigation.

290. A dealer that provides the services and shades the resale price is not likely to be terminated.

291. *See* Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1202 (7th Cir. 1986) (observing that a free-riding dealer "was profiting from the antitrust violation itself").

292. *See, e.g.*, Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc., 51 Fed. Appx. 786, 803 (10th Cir. 2002); *Local Beauty Supply*, 787 F.2d at 1202–03.

293. *See, e.g.*, Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 121–23 (3d Cir. 2000); First Med Representatives, LLC v. Futura Med. Corp., 195 F. Supp. 2d 917, 923–25 (E.D. Mich. 2002). In *DeLong Equip. v. Wash. Mills Electro Minerals Corp.*, 990 F.2d 1186, 1198–99 (11th Cir. 1993), the court found that a terminated dealer suffered antitrust injury in an unusual setting in which the dealer was not free riding. The RPM agreement allegedly was used to dupe a customer into

Suppose, however, that a dealer provides all of the services of other dealers, but is terminated for charging less than the minimum resale price. That dealer is more efficient than his competitors, and he suffers an actual injury in the form of loss of the economic profit he was able to earn while selling the product. The manufacturer, of course, has an incentive to distribute its products through the most efficient dealers; the lower the distribution costs, the higher the manufacturer's potential profits. The manufacturer, therefore, would seem to have no reason to terminate the dealer. But if the dealer cannot expand sufficiently, and if his efficiencies cannot be quickly duplicated, the manufacturer may prefer to sacrifice the dealer in order to retain the rest of its dealers. In that event, part of the loss suffered by the dealer is connected to an inefficiency. The dealer might have charged the stipulated minimum resale price and earned a larger margin of accounting profits than his competitors. If he had been terminated anyway, his exit from the market would have worked a loss of productive efficiency, but not allocative efficiency. The hypothetical dealer shading the resale price would have wanted to increase total accounting profits by increasing volume, largely at the expense of less efficient dealers. His exit causes a loss of both productive and allocative efficiency. The problem with allowing the dealer to recover, however, is that his presence in the market threatened the viability of other distributors, and his removal from the market may in fact result in greater consumer surplus. Perhaps not. But normally where the interests of the manufacturer are aligned with the interests of consumers, the manufacturer's judgment is the best guide to efficient results.

Some consumers may not value the services induced by RPM, however, and as discussed above, RPM in these circumstances may even result in a net loss of consumer surplus.[294] Whether RPM increases or decreases consumer welfare, terminating a discounting dealer injures both the dealer and the consumer who does not value the services. By assumption, there is no free-riding in this situation, and if RPM actually reduces consumer welfare, the dealer's injury in fact is connected to the inefficiency caused by RPM. But the predicate cannot sensibly be proven in litigation, and if RPM on balance increases consumer welfare, the dealer's injury, by definition, cannot flow from an anticompetitive loss in the market. Just as practical constraints prevent consumers from establishing that they did not value services, they prevent dealers from establishing that consumers did not value services.

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paying excessive prices for a product. *See id*. at 1191.

294. *See supra* note 231 and accompanying text.

One could argue, of course, that antitrust injury should not be limited to losses that flow from an anticompetitive aspect of a practice, economically defined. Indeed, antitrust injury *must* be broader than an economic concept because RPM is illegal per se, and if a dealer is required to prove some inefficiency and link his injury to it, RPM is transformed into a rule-of-reason violation.[295] Therefore, the protection of dealer freedom should be recognized as an independent antitrust goal, and any loss suffered by a dealer terminated for exercising his freedom is connected to that which makes the practice unlawful. But the Court no longer takes seriously the idea that a restriction on dealer freedom by itself justifies per se illegality;[296] the Court in *Business Electronics* observed that RPM is illegal per se because it can facilitate cartels.[297] The logical flaw in *Business Electronics* is the implicit assumption that cartel facilitation accounts for a large percentage of the times RPM is used. Requiring a dealer to establish that RPM in a particular case has an adverse economic impact—the kind of impact that justifies per se illegality—is a second-best alternative to holding that only some instances of RPM are unlawful.[298] But it respects the fundamental rationale for outlawing the practice. Moreover, to divorce antitrust injury from economic impact is to destroy the significance of the requirement. Any injury in fact caused by RPM becomes antitrust injury.

Even if the harm suffered by terminated dealers is considered antitrust injury, calculating damages would be immensely difficult. The dealer would at most be entitled to recover lost profits, and their calculation would require an estimate of the profits the dealer would have earned had no RPM plan been used. For the reasons suggested above, that but-for world is resistant to proof.

A dealer that acquiesces in an efficiency-enhancing RPM agreement cannot establish antitrust injury for essentially the same reasons that a terminated dealer cannot prove it. The dealer claims injury in fact on the ground that he could have sold more volume at a lower price. The acquiescing dealer *wanted* to free-ride on the services provided by other

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295. *See, e.g.*, *Pace Elecs.*, 213 F.3d at 123 (reasoning that to require a dealer to establish that RPM "caused an actual, adverse effect on a relevant market in order to satisfy the antitrust injury requirement comes dangerously close to transforming a per se violation into a case to be judged under the rule of reason").

296. For example, maximum resale price fixing inhibits dealer freedom, and yet the Court found that the effect was not enough to justify per se illegality. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

297. *See supra* note 163 and accompanying text.

298. *See, e.g.*, Liebeler, *supra* note 162, at 903 (arguing that *Business Electronics* should be interpreted to hold that the "*per se* rule . . . appl[ies] to intrabrand RPM only when it is likely to facilitate interbrand cartels").

dealers, exploit its efficiency advantage, or cater to customers who did not value the services; the terminated dealer actually lowered price to accomplish one of the objectives, and was cut off for the effort. And just as terminated dealers would struggle to prove damages coherently, so too would acquiescing dealers.

3. Other Rationales

As indicated above, some models of RPM have ambiguous welfare effects.[299] The use of RPM to address demand uncertainty produces no antitrust injury for consumers,[300] and it produces no antitrust injury for dealers. A dealer could be injured in fact only during periods of low demand—when the fixed resale price is higher than the but-for price—if he would have earned profits from lowering price. RPM performs a productive economic function in responding to risk, and any loss suffered by interfering with that function cannot be antitrust injury. If RPM used in conjunction with franchise fees by manufacturers competing for distributors causes any welfare loss, the cognizable injury is suffered by consumers; any harm suffered by a dealer stems from free-riding. Dealers subject to RPM agreements that are used in lieu of slotting allowances to allocate scarce shelf space suffer no harm.

Finally, RPM used as a method of price discrimination does not cause dealers antitrust injury. Price discrimination enables the manufacturer to extract more consumer surplus than it could earn by charging a single monopoly price. But the manufacturer wants a competitive dealer market whether it price discriminates or not. The only dealer that could suffer injury in fact is a dealer who circumvents or wants to circumvent the manufacturer's strategy by selling product intended for low-value users to high-value users at low prices. The dealer would thereby divert some of the consumer surplus to itself. A wealth transfer without an accompanying deadweight loss may or may not contravene the purposes of the antitrust law. If it does not, a dealer's loss of the profits that the manufacturer was entitled to earn cannot be connected to that which makes RPM unlawful. If it does, no dealer has the right to claim damages based on the assumption that he would be the only dealer breaking the RPM agreement. If RPM agreements were ignored generally by dealers, and price discrimination thereby thwarted, no dealer would earn economic profits.

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299. *See supra* notes 249–82 and accompanying text.
300. *See supra* notes 250–57 and accompanying text.

E. Summary

Both consumers and distributors face substantial difficulties in proving injury in fact, antitrust injury, antitrust standing, and damages. No single economic theory explains all uses of RPM. Moreover, the evidence is that RPM can be either anticompetitive or procompetitive. What is apparent is that the competitive effects of any specific instance of RPM cannot be assessed without an evaluation of market structure, the specific RPM plan employed, and the likely effects on the performance of the industry overall.[301] Such an evaluation presents a formidable hurdle for the private plaintiff, whether consumer or dealer, in pursuit of a treble damage award.

V. SETTLEMENTS

In spite of the enormous difficulties associated with establishing antitrust injury and constructing an economically sound damage model in an RPM case, many cases settle. Typically, RPM cases on behalf of consumers are filed as class actions.[302] Though it is our view that class certification is problematic in most instances,[303] some classes are certified and settlement usually follows. If the plaintiffs were required to put forward an economically sound damage model, it is likely that the defendant would prevail due to the significant difficulties faced by plaintiffs that we have outlined in the preceding Section. But the fact that settlements often follow class certification is not necessarily a sign that the defendant fails to recognize these difficulties or that it has a weak case. Instead, these settlements may reflect informed economic reasoning.

From a defendant's perspective, there may be some (subjective) probability (p) that the class would prevail on liability *and* damages. If the plaintiff prevails, it will receive three times the damages (D) plus the costs of suit (C_P). In addition, the defendant will have its own (considerable) litigation costs (C_D). For a defendant, there is little upside to litigation. The expected loss (L) of proceeding to trial is

$$E[L] = p\,(3D) + p\,C_P + C_D,$$

301. This, of course, implies that a rule of reason approach should be applied to RPM cases if the goal of the antitrust laws is to promote consumer welfare. But RPM remains per se illegal.

302. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330 (1979); Beckers v. Int'l Snowmobile Indus. Ass'n, 581 F.2d 1308 (8th Cir. 1978); Gross v. New Balance Athletic Shoe, Inc., 955 F. Supp. 242 (S.D.N.Y. 1997). Because a consumer's injury is likely to be too small to justify the costs of litigation, it stands to reason that consumers would not sue unless their claims could be aggregated in a class action.

303. *See* Roger D. Blair & Jill Boylston Herndon, *Class Actions in Resale Price Maintenance Cases*, 48 ANTITRUST BULL. 571 (2003).

where *E* denotes the expectations operator. If the defendant can settle the suit for less than the expected loss, it is economically rational to do so (even when the defendant did not violate the law). Similarly, the plaintiff will settle if the settlement amount is more than the expected gain from litigation.[304] In the preceding Sections, we outlined the formidable difficulties in proving damages in RPM cases. These difficulties decrease the probability of a successful outcome from the plaintiff's perspective.

VI. CONCLUSION

Despite the vast academic literature demonstrating that RPM often has procompetitive effects and should be evaluated under the rule of reason, the Supreme Court continues to condemn it as per se illegal under the antitrust laws. The per se rule, coupled with the lure of treble damages, presents a seemingly lucrative opportunity to recover damages when the fact of RPM can be established. The paradox is that though plaintiffs may be able to prove a per se violation and, therefore, prove liability, they may be unable to prove actual injury, antitrust injury, or antitrust damages when RPM plans, in fact, have no net adverse impact on consumer welfare. This incongruity arises because RPM plans may have anticompetitive effects, procompetitive effects, or confounding effects. To prevail on their damage claims, private plaintiffs must sort out these effects. Identifying the underlying motivation for a particular RPM plan and its competitive effects is no mean feat, and private plaintiffs in RPM cases often face difficult, if not insurmountable, hurdles in proving their eligibility to recover. *Dr. Miles* set the stage for the vexing problems of private enforcement by declaring RPM per se unlawful without clearly identifying the competitive ill the Court was trying to prevent. The current confusion could be lessened significantly if the Court would either single out the anticompetitive uses of RPM programs for per se condemnation or scrap the rule of per se illegality altogether, replacing it with the rule of reason or a rule of per se legality.

How does the law reconcile the per se illegality of an economically ambiguous practice with enforcement doctrines that permit only those

304. It is possible to model the decision to settle more formally. In a relatively simple model where the parties are risk-neutral and there are no settlement costs, a settlement occurs when the expected loss of going to trial for the defendant exceeds the expected gain for the plaintiff. In the event of a settlement, the defendant will pay a sum that is less than (or equal to) the expected loss. This is the result in the text. Several models employ the theory of rational expectations to analyze settlements. *See* John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

directly suffering anticompetitive harm to sue and require them to prove damages coherently? Uncomfortably.