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COMMENTARY

PER SE RULES AGAINST VERTICAL RESTRAINTS: DOWN BUT NOT OUT

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The rumors regarding the demise of per se rules are grossly exaggerated.[1] Per se rules, whether applied against price or "nonprice" vertical or horizontal restraints,[2] are still very much alive. Obviously, the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[3] has had a substantial impact on the way lower courts perceive and analyze per se rules. Nonetheless, the Authors contend that *Sylvania* and subsequent decisions leave open several doors through which a so-inclined lower court may easily return to this absolute and predictable world.[4]

Whether rightly or wrongly decided,[5] the *Sylvania* decision has had several practical effects. First, the decision immediately caused a rash of summary dispositions in terminated distributor and dealer cases as overcrowded federal courts quickly seized on its claimed import to

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1. *See, e.g.*, Stewart & Roberts at 727; Flynn at 767; McGee at 763-66; Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171.

2. This commentary is essentially limited to vertical restraints. It should not be inferred, however, that the Authors necessarily agree with Stewart and Roberts or the other commentators regarding their respective analyses of various horizontal restraints.

3. 433 U.S. 36 (1977).

4. Catalano, Inc. v. Target Sales, Inc., 100 S. Ct. 1925 (1980); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Curiously, Stewart and Roberts totally ignore the Supreme Court's decision in *Midcal* and relegate *Catalano* to an obscure footnote citation. Stewart & Roberts at 748 n.150.

5. Although tempted, the Authors will refrain from an extended critique of *Sylvania*. It suffices to say that there is apparent merit in many of the critical comments on *Sylvania* by Professors Stewart, Roberts, and Flynn. On the other hand, the Authors see little substance in the statements by Messrs. McGee and Noel regarding the rule of reason's service to the judiciary and their claims that more just judicial determinations can be obtained through "additional time *and money* expended in trial." McGee at 763 (emphasis added).

clear burgeoning dockets.[6] *Sylvania*'s rush[7] to overrule *United States v. Arnold, Schwinn & Co.*[8] pales in the light of this stampede. The purported "return to the rule of reason"[9] may even result in the total demise of the private antitrust lawsuit for the smaller or impecunious plaintiff who cannot bear the costs of discovery or trial under the expensive and unclear[10] rule of reason standard.

Secondly, *Sylvania* was instantaneously subjected to the same genre of academic criticism and practical aversion as its victim, *Schwinn*. Much of this scorn is justified, of course, when the academic or practitioner attempts to decipher the undefined extent of its application or the meaning of an exception such as that for "demonstrable economic effect."[11]

Third, the myriad of unanswered questions posed by *Sylvania* has resulted in a morass of conflicting and sometimes unintelligible decisions by district and circuit courts. On one side are decisions like *Oreck Corp. v. Whirlpool Corp.*[12] and *Gough v. Rossmoor Corp.*,[13] while on

6. *Accord,* Flynn at 786 n.52. This fact is readily apparent from even a cursory examination of any recent trade regulation reporter. *See, e.g.,* Determined Productions, Inc. v. R. Dakin & Co., [1980-1] Trade Cas. (CCH) ¶ 63,063 (N.D. Cal.). Several circuit courts seem equally disposed to summary dispositions. *See, e.g.,* Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979).

7. *Accord,* Stewart & Roberts, at 729; Flynn at 769.

8. 388 U.S. 365 (1967). As a former chief of the Southern (1948-52) and Midwest (1953-64) offices of the Antitrust Division of the Department of Justice and chief trial counsel in *Schwinn*, one of the Authors instinctively supports the Court's decision and bristles at any distortion of the trial record. At the risk of appearing overly defensive, however, this Author will likewise leave it to the other commentators in this series to review *Schwinn*.

Three comments are nonetheless warranted. First, Stewart and Roberts are incorrect when they assert that "the Government did not proffer a per se illegality standard . . . at trial. . . ." Stewart & Roberts at 730. The Government not only offered extensive evidence of per se price-fixing, but also contended that the totality of conspiratorial restraints constituted a per se violation. United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 325 (N.D. Ill. 1965), *rev'd*, 388 U.S. 365 (1967). With all due respect, Professor Posner, who argued the appeal, simply ignored this ample evidence and argued a different theory. Second, the comments by Messrs. McGee and Noel regarding *Schwinn* must be tempered by their practical predispositions as defense counsel (*e.g.,* the reference to how the rule of reason was "*ravaged* in *Schwinn* by the Warren Court's zeal for *per se* oversimplification"). McGee at 766. (emphasis added). Third, the comments by Professor Flynn must likewise be evaluated in the light of his academic idealism (*e.g.*, the caustic references to the "Burger Court" and its "unartful and inappropriate exercise of judicial process"). Flynn at 770.

9. McGee at 763.

10. *See generally* Stewart & Roberts at 728, n.6.

11. 433 U.S. 36, 58-59 (1977).

12. 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978).

13. 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

the other stand cases such as *Pitchford Scientific Instruments Corp. v. Pepi, Inc.*[14] and *In re Coca-Cola Co.*[15] Decisions such as *Cernuto, Inc. v. United Cabinet Corp.*[16] and *General Beverage Sales Co. v. East-Side Winery*[17] fall somewhere in between.

As a result of this confusion, it is difficult, if not impossible, to predict with any certainty the disposition of any given restraint in any given district or circuit court. Trial lawyers therefore must throw up their hands when confronted by typical clients with the typical questions regarding expected courtroom results. Predictability should not be an end in itself, but some degree of assurance is necessary in order to rationally conduct one's day-to-day business.

Despite all this confusion and uncertainty, the congressional intent to encourage private antitrust litigation remains. The Authors therefore contend that the application of certain per se rules is critical to both the preservation of the private antitrust lawsuit and the general economic welfare. The purpose of this commentary is to demonstrate the continued vitality of per se rules as applied to various vertical restraints.

I. Customer and Territorial Restrictions

Undaunted by *Schwinn*'s apparent breadth,[18] various lower courts delighted defense counsel by devising means and arguments to avoid per se proscription on vertical customer and territorial restrictions.[19] As expected, post-*Sylvania* courts have demonstrated the same ingenuity in developing various exceptions permitting a per se analysis instead of the rule of reason. The following are five of the more frequently employed exceptions.

A. *"Demonstrable Economic Effect"*

The Supreme Court in *Sylvania* stated that per se analysis is still

14. 435 F. Supp. 685 (W.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

15. 91 F.T.C. 517 (1978). Citing the passage of the "Soft Drink Interbrand Competition Act," the Federal Trade Commission recently requested the D.C. Circuit to set aside its cease and desist orders in the Coca-Cola and Pepsi Co. territorial bottling cases and to remand them to the district court for dismissal.

16. 595 F.2d 164 (3d Cir. 1979).

17. 568 F.2d 1147 (7th Cir. 1978).

18. *See* 388 U.S. 365, 379 (1967).

19. *See generally* ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* (1977).

available for customer and territorial restrictions when a "departure from the rule-of-reason . . . [is] based upon demonstrable economic effect. . . ."[20] In *General Beverage Sales Co. v. East-Side Winery*[21] the Seventh Circuit remanded to the district court with the observation that "plaintiff should be afforded the opportunity to prove that this particular type of vertical [territorial] restriction justifies *per se* prohibition 'based upon demonstrable economic effect.' "[22] Plaintiff's counsel was then left the unenviable task of determining what kind of evidence would satisfy this amorphous burden.

B. *Dual Distribution Systems*

The Court in *Sylvania* also noted that "[t]here may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers," and that "[t]here is no doubt that restrictions in the latter category would be illegal *per se* . . . ."[23] Based on an often cited line of pre-*Sylvania* cases,[24] another exception to rule of reason analysis has been carved out for dual distribution systems, *i.e.*, the manufacturer or distributor competes with its distributors or dealers by also selling to the next level of distribution. The most typical situation is when the manufacturer sells to both its distributors or dealers and retail customers. Given such a dual distribution system, several courts have held that what at first blush appears to be a vertical customer or territorial restriction transforms into a horizontal, per se restriction.[25]

20. 433 U.S. at 58-59.

21. 568 F.2d 1147 (7th Cir. 1978).

22. *Id.* at 1154. *Accord,* West Texas Utils. Co. v. Texas Elec. Serv. Co., [1979-2] Trade Cas. (CCH) ¶ 62,851, at 78,925 (N.D. Tex.).

23. 433 U.S. at 58 n.28 (citations omitted).

24. *See* United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); Pitchford Scientific Instr. Co. v. Pepi, Inc., 531 F.2d 92 (3d Cir.), *cert. denied,* 426 U.S. 935 (1976); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y.), *aff'd per curiam,* 417 F.2d 621 (2d Cir. 1969).

25. *See, e.g.,* Copy-Data Sys., Inc. v. Toshiba Am., Inc., [1979-1] Trade Cas. (CCH) ¶ 62,696, at 77,900 (S.D.N.Y.); Pitchford Scientific Instr. Co. v. Pepi, Inc., 435 F. Supp. 685 (W.D. Pa. 1977), *aff'd mem.,* 582 F.2d 1275 (3d Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). *Cf.* Guild Wineries & Distilleries v. J. Sosnick & Son, [1980-1] Trade Cas. (CCH) ¶ 63,258, at 78,266 (Cal. App. Ct.) (under California Cartwright Act). The FTC is presently planning a test case concerning a dual distribution system. *See* ANTITRUST & TRADE REG. REP. (BNA) A-21, no. 968, June 12, 1980.

C. *Part of a Price-Fixing or Resale Price Maintenance Scheme*

The *Sylvania* Court left another door ajar when it commented: "Most important was the jury's rejection of the allegation that the location restriction was part of a larger scheme to fix prices."[26] Quoting that language or citing from a long line of pre-*Sylvania* precedent,[27] including *Schwinn*,[28] several post-*Sylvania* courts have held that per se analysis is justified in analyzing customer and territorial restrictions that are a part of, or ancillary to, a price-fixing or resale price maintenance scheme.[29]

D. *Conspiracy, Agreement, or Cooperation Having A Horizontal Effect or Impact*

A fourth exception to rule of reason analysis stresses the conspiracy, agreement, or cooperation among a manufacturer and its distributors, and takes root in several pre-*Sylvania* decisions involving both territorial and/or customer restrictions and group boycotts or concerted refusals to deal.[30] Several post-*Sylvania* decisions have fashioned this

26. 433 U.S. at 41 n.9.

27. *See, e.g.,* United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975); Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975); Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975).

28. 388 U.S. at 373, 375-76, 380.

29. Cernuto, Inc. v. United States Cabinet Corp., 595 F.2d 164 (3d Cir. 1979); General Beverage Sales Co. v. East-Side Winery, 568 F.2d 1147 (7th Cir. 1978); H. L. Moore Drug Exch. v. Eli Lilly & Co., [1979-1] Trade Cas. (CCH) ¶ 62,674 (S.D.N.Y. 1979); Pitchford Scientific Instrs. Corp. v. Pepi, Inc., 435 F.Supp. 685 (W.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); R.E. Spriggs Co. v. Adolph Coors Co., [1979-2] Trade Cas. (CCH) ¶ 62,764 (Cal. App. Ct.), *cert. denied*, 444 U.S. 1076 (1980). The district court in *Pitchford* stated:

> In the case at bar . . . , it is manifest that defendant's territorial restrictions were part and parcel of a comprehensive price-fixing policy. In the apt words of Judge Wisdom in *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 948 (C.A. 5, 1975), the defendants' restraints "were ancillary to an illegal price fixing scheme."

435 F. Supp. 685, 689 (W.D. Pa. 1977).

The FTC also is planning a test case "to establish the proposition that vertical nonprice restraints are per se illegal when they contribute to the effectiveness of a system of price restraints." ANTITRUST & TRADE REG. REP. (BNA) A-21, no. 968, June 12, 1980.

30. *See, e.g.,* United States v. General Motors Corp., 384 U.S. 127 (1966); Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975); Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963). The Ninth Circuit stated in *Walker*:

> It may be . . . that such contracts, particularly when there is a "horizontal" understanding among the distributors as well as a "vertical" one between the manufacturer and each distributor, can be so anti-competitive, in purpose or effect, or both, as to be an unreasonable restraint of trade.

323 F.2d at 7.

exception,[31] and the Third Circuit's opinion in *Cernuto, Inc. v. United States Cabinet Corp.*[32] is the most frequently quoted:

> [I]f the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.[33]

E. *Offensive Collateral Estoppel*

Finally, innovative counsel may be able to use the doctrine of offensive collateral estoppel to resurrect a pre-*Sylvania* per se holding. This doctrine is grounded in the Supreme Court's decision in *Parklane Hosiery Co. v. Shore*,[34] and it was effectively employed against Coors' territorial restrictions in *R.E. Spriggs Co. v. Adolph Coors Co.*[35] In *Spriggs*, a post-*Sylvania* decision, the state court held that Coors was collaterally estopped by the per se findings on its territorial restrictions

31. *See, e.g.,* Westman Comm'n Co. v. Hobart Corp., 461 F.Supp. 627 (D. Colo. 1978); Eiberger v. Sony Corp., 459 F.Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980); Evanston Motor Co. v. Mid-Southern Toyota Distribs., Inc., 436 F.Supp. 1370 (N.D. Ill. 1977). The district court in *Eiberger* stated:

> Therefore, where dealers enter into an implicit agreement effecting or implementing an anticompetitive scheme, it makes no difference with respect to its illegality that Sony, itself not a dealer, was the one whose acts were needed to put the program into effect.
>
> . . . .
>
> When Sony's authorized dealers complained about discounters, defendant responded by entering into an illegal conspiracy with them, the purpose of which was to discover the sources of supply of the unauthorized dealers, and make it unprofitable for the sources to continue. By debiting of the accounts of extraterritorial wholesalers of Sony equipment, Sony made it impossible for such supplies to continue on a basis profitable both to the reselling authorized dealer, and the discounter. In the words of the Supreme Court in the *General Motors* case (384 U.S. at 145) . . . :
>
> > "There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act."
>
> Therefore, we conclude that the defendant has also committed a *per se* violation of the Sherman Act.

459 F.Supp. at 1284-85.

32. 595 F.2d 164 (3d Cir. 1979). *Accord*, Alloy Int'l Co. v. Hoover-NSK Bearing Co., [1980-1] Trade Cas. (CCH) ¶ 63,148, at 77,708 (7th Cir.).

33. 595 F.2d at 168.

34. 439 U.S. 322 (1979).

35. [1979-2] Trade Cas. (CCH) ¶ 62,674 (Cal. App. Ct.), *cert. denied*, 444 U.S. 1076 (1980).

in two pre-*Sylvania* cases, *Copper Liquor, Inc. v. Adolph Coors Co.*[36] and *Adolph Coors Co. v. FTC.*[37]

II. Resale Price Maintenance

Few propositions are clearer under the antitrust laws than the per se illegality of resale price maintenance.[38] Even Professors Bork and Posner would concede that any post-*Sylvania* doubt[39] regarding the continued per se illegality of vertical resale price maintenance was laid to

36. 506 F.2d 934 (5th Cir. 1975).

37. 497 F.2d 1178 (10th Cir.), *cert. denied*, 419 U.S. 1105 (1974). Coors, somewhat upset by this novel theory, unsuccessfully filed a petition for certiorari in the Supreme Court in which it cited two post-*Sylvania* decisions where Coors' territorial restrictions had been upheld. *See* Del Rio Distrib., Inc. v. Adolph Coors Co., 589 F.2d 176 (5th Cir.), *cert. denied*, 444 U.S. 840 (1979); Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (10th Cir. 1977).

38. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940): "[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se."

The Fifth Circuit's decision in Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), aptly summarizes the following Supreme Court decisions holding that price-fixing or retail price maintenance is per se illegal: United States v. Topco Assocs., 405 U.S. 596 (1972); Albrecht v. Herald Co., 390 U.S. 145 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Other decisions which could be added to that list include: Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Bausch & Lomb Co., 321 U.S. 707 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Sons, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).

The circuit court decisions upholding the per se illegality of price-fixing or resale price maintenance are simply legion. Some of the most frequently cited are: Cernuto, Inc. v. United States Cabinet Corp., 595 F.2d 164 (3d Cir. 1979); Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); Tamaron Distrib. Corp. v. Weiner, 418 F.2d 137 (7th Cir. 1969); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); Girardi v. Gates Rubber Co. Sales Div., Inc., 325 F.2d 196 (9th Cir. 1963); George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960); A.C. Becken Co. v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959). The Eighth Circuit's decision in Arnott v. American Oil Co., [1979-2] Trade Cas. (CCH) ¶ 62,967 (8th Cir.), and the Seventh Circuit's soon to be published opinion in Trabert & Hoeffer, Inc. v. Piaget Watch Corp., No. 80-1081 (7th Cir. July 29, 1980), are recent additions to this long line of precedent.

39. The questions raised by Stewart and Roberts are themselves subject to serious scrutiny in light of their total disregard of *Midcal*. Even McGee and Noel concede that "a substantial body of case law indicates that vertical price restraint, *i.e.*, resale price maintenance, is per se illegal." McGee at 763 n.4.

As previously noted, Stewart and Roberts also relegate the Supreme Court's recent decision in Catalano, Inc. v. Target Sales, Inc., 100 S. Ct. 1925 (1980), to an obscure footnote, despite a reference in their introductory paragraph to *Sylvania*'s possible effect on horizontal price-fixing. Stewart & Roberts at 728.

rest[40] by the Supreme Court's recent decision in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[41] Justice Powell, the spokesman for the majority in *Sylvania*,[42] wrote the following observation on behalf of the 8-0 Court in *Midcal*:

> This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." *See* Albrecht v. The Herald Co., 390 U.S. 145 (1968). . . .
>
> California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. . . . The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such *vertical* control destroys horizontal competition as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other."[43]

If the doctrine of *stare decisis* means anything,[44] vertical resale price maintenance will continue to be per se illegal. Any decision to the contrary by the Supreme Court would require overruling *Midcal* and a plethora of prior decisions,[45] and would strike a devastating blow to this country's competitive system.[46] "[T]he aim and result of every

40. Anthony V. Nanni, Chief of the Trial Section of the Antitrust Division, recently declared that *Midcal* and *Catalano* demonstrate that "the per se rule is alive and as strong as ever." ANTITRUST & TRADE REG. REP. (BNA) A-3, no. 986, Oct. 23, 1980. Sanford M. Litvack, Chief of the Antitrust Division, has announced that the Division intends to concentrate on vertical resale price maintenance. ANTITRUST & TRADE REG. REP. (BNA) AA-1, no. 975, July 31, 1980.

41. 445 U.S. 97 (1980).

42. *Sylvania*, of course, was limited to "nonprice vertical restrictions" and expressly noted that "[t]he per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." 433 U.S. at 51 n.18.

43. 445 U.S. at 102-03 (emphasis added) (citations omitted). As correctly noted by McGee at 763 n.4, the correct or more accurate term for vertical price-fixing is resale price maintenance.

44. The Fifth Circuit declared in Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), that "[n]o rule under that 'charter of liberty' is more firmly established than the ban on price-fixing." 517 F.2d at 647.

45. *See* note 38 *supra*. The guidelines proposed by Stewart and Roberts would likewise require the reversal or modification of a substantial portion of this precedent. In addition, their guidelines are impractical and raise far more difficulties than they resolve.

46. Price is the "central nervous system of the economy." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940). *Accord*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

price-fixing agreement . . . is the elimination of one form of competition."[47]

III. Maximum Vertical Price Restrictions

The per se prohibition against maximum vertical price restrictions is based on two Supreme Court decisions, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*[48] and *Albrecht v. Herald Co.*[49] Any post-*Sylvania* doubt[50] regarding continued per se illegality was somewhat assuaged by the citation of both decisions by the unanimous Court in

47. United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

48. 340 U.S. 211 (1951).

49. 390 U.S. 145 (1968). Justice White, speaking for the majority, reasoned as follows:

> We think *Kiefer-Stewart* was correctly decided and we adhere to it. Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of the seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices. It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.
>
> . . . .
>
> The assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive.

Id. at 152-54. *Accord,* Knutson v. Daily Review, Inc., 548 F.2d 795, 805 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977); Quinn v. Mobil Oil Co., 375 F.2d 273, 274, 276-78 (1st Cir.), *cert. dismissed,* 389 U.S. 801 (1967); Crane Distrib. Co. v. Glenmore Distilleries, 267 F.2d 343, 345 (6th Cir. 1959); Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 134 (S.D.N.Y. 1972).

50. The Authors disagree with the critical comments of Stewart and Roberts and their assertion that *Sylvania* puts the *Albrecht* case "in serious question." Stewart & Roberts at 742. The Authors would not want to appear before the Supreme Court and argue to Justice White that his opinion in *Albrecht* was "absurd" and that "[t]he per se rule, as applied to vertical maximum pricing, was never justified . . . ." *Id.* at 760-61.

The Authors tend to agree, however, with Stewart and Roberts regarding their comment on the "questionable" nature of *Colgate* and their characterization of *Newberry* as "an extremely puzzling opinion." *Id.* at 743-44. It should nonetheless be noted that *Colgate* has received increasing approval in recent lower court opinions. *See generally* Aladdin Oil Co. v. Texaco, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,890, at 79,157 (5th Cir.). The FTC has filed an action against Russell Stover Candies "aimed at testing the continued validity of the *Colgate* doctrine." Antitrust & Trade Reg. Rep. (BNA) A-9, no. 972, July 10, 1980.

Midcal.[51] Although maximum vertical price restrictions are not regularly employed and recent precedent is somewhat rare,[52] there is little indication that the Supreme Court intends to back away from its unequivocal per se holdings in *Kiefer-Stewart* and *Albrecht.*

IV. BOYCOTTS/CONCERTED REFUSALS TO DEAL

As the Ninth Circuit declared in *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, "[g]roup boycotts are just as illegal under the Sherman Act as group price fixing."[53] The pre-*Sylvania* decisions finding per se illegality are legion.[54] The post-*Sylvania* decisions are equally profuse,[55] and court after court has either expressly[56] or impliedly[57] held that *Sylvania* has had no effect on per se illegality.

The dispositive question regarding the per se illegality of a boycott or concerted refusal to deal is not whether it is vertical or horizontal,[58] but

51. 445 U.S. at 102-03. *Albrecht* is cited twice and *Kiefer-Stewart* once.

52. *See, e.g.,* Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191, 1193 n.2 (1st Cir. 1979).

53. 323 F.2d 1, 7 (9th Cir. 1963) (citations omitted).

54. The most frequently cited Supreme Court decisions are United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941). *See generally* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978).

55. *See, e.g.,* Williams v. St. Joseph Hospital, [1980-2] Trade Cas. (CCH) ¶ 63,438 (7th Cir.); United States Trotting Ass'n v. Chicago Downs Ass'n, 487 F. Supp. 1008 (N.D. Ill. 1980); Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, [1980-1] Trade Cas. (CCH) ¶ 63,178 (D.D.C.); Weser v. Professional Golfers' Ass'n, [1979-2] Trade Cas. (CCH) ¶ 62,740 (N.D. Ill.); Evanston Motor Co. v. Mid-Southern Toyota Distribs., Inc., 436 F. Supp. 1370 (N.D. Ill. 1977).

56. *See, e.g.,* Cernuto, Inc. v. United States Cabinet Corp., 595 F.2d 164, 166-67 n.15 (3d Cir. 1979); Mannington Mills, Inc. v. Congoleum Indus., Inc., [1979-2] Trade Cas. (CCH) ¶ 62,790 (4th Cir.).

57. Juneau Square Corp. v. First Wis. Nat'l Bank of Milwaukee, 624 F.2d 798 (7th Cir. 1980); Consolidated Express, Inc. v. New York Shipping Ass'n, [1979-1] Trade Cas. (CCH) ¶ 62,589, at 77,402 (3d Cir.); United States Trotting Ass'n v. Chicago Downs Ass'n, 1008 F. Supp. 487 (N.D. Ill. 1980); Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, [1980-1] Trade Cas. (CCH) ¶ 63,178, at 77,864 (D.D.C.); Weser v. Professional Golfers' Ass'n, [1979-2] Trade Cas. (CCH) ¶ 62,740, at 78,182 (N.D. Ill.); Westman Comm'n Co. v. Hobart Corp., 461 F. Supp. 627, 636 (D. Colo. 1978); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 449 F. Supp. 1158, 1176 (D. Hawaii 1978); Evanston Motor Co. v. Mid-Southern Toyota Distribs., Inc., 436 F. Supp. 1370, 1372 (N.D. Ill. 1979).

58. *Accord,* Flynn at 788-89. The Authors strongly disagree with Stewart and Roberts' horizontal/vertical distinction and suggest that the Second Circuit's decision in Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc), *cert. denied,* 439 U.S. 946 (1978), is an aberration, which does not comport with the Supreme Court's decisions in *Klor's* and *General Motors, supra* note 54. Stewart and Roberts also misstate *Klor's* and misinterpret *Cernuto.* Stewart & Roberts at 745, 747-49.

whether it falls within the following three categories enunciated by the Fifth Circuit in *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*:[59]

> [1] horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. . . . [2] *vertical* combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination. . . . [and 3] combinations designed to influence coercively the trade practices of boycott victims, rather than eliminate them as competitors . . . .[60]

The vast majority of courts, whether pre- or post-*Sylvania*, have held that any horizontal or vertical boycott that falls within these three categories is per se illegal.

V. Conclusion

To the practitioner who thinks that per se rules against vertical price or nonprice restraints are a thing of the past: You may be sadly or happily surprised, depending on whom you represent. Academic speculation and proposals are harmless and may even provide helpful insights. Your client's pocketbook and freedom are far more serious matters.

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59. 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). *Accord*, Smith v. Pro Football Inc., 593 F.2d 1173, 1178 n.18 (D.C. Cir. 1979); Weser v. Professional Golfers' Ass'n, [1979-2] Trade Cas. (CCH) ¶ 62, 740, at 78,182 (N.D. Ill.); Veizaga v. National Bd. for Respiratory Therapy, [1979-1] Trade Cas. (CCH) ¶ 62,497, at 76,907 (N.D. Ill.).

60. 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973)(emphasis added)(citations omitted).