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COMMENTARY

A RETURN TO THE RULE OF REASON

GLENN W. MCGEE*

Professors Stewart and Roberts have done an excellent job in tracing the impact of *Continental Television, Inc. v. GTE Sylvania, Inc.*¹ on various antitrust violations previously considered to be subject to the per se rule. They are not alone, of course, in applauding the reversal of the *United States v. Arnold, Schwinn & Co.*² decision. I believe the vast majority of practitioners viewed *Schwinn* as a decision supported more by judicial convenience than by logic. Trial of a rule of reason case normally is more complex and time consuming than trial of a per se case. The additional time and money expended in trial, however, should yield a more just determination of the restraints at issue.

As the post-*Sylvania* cases cited by Professors Stewart and Roberts demonstrate,³ the return to the rule of reason has created some unsettled conditions in the practice of antitrust law. Major courtroom struggles will continue to occur over characterization of a restraint as horizontal or vertical, price or nonprice.⁴ As in *Oreck Corp. v. Whirlpool Corp.*⁵ and *Cernuto, Inc. v. United Cabinet Corp.*,⁶ courts undoubt-

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1. 433 U.S. 36 (1977).

2. 388 U.S. 365 (1967).

3. See *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979); *Golden Gate Acceptance Corp. v. General Motors Corp.*, 597 F.2d 676 (9th Cir. 1979); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1978); *In re Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *Pitchford Scientific Instruments Corp. v. Pepi, Inc.*, 435 F. Supp. 685 (W.D. Pa. 1977).

4. Although *Sylvania* makes clear that a vertical nonprice restraint should be judged by the rule of reason, a substantial body of case law indicates that a vertical price restraint, i.e., resale price maintenance, is per se illegal. See, e.g., *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). The importance of nonprice characterization was most recently recognized by the Supreme Court in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8-10 (1979).

5. 579 F.2d 126 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1979).

6. 595 F.2d 164 (3d Cir. 1979).

edly will classify similar restraints differently, causing significant differences in trial presentations and results.⁷

This state of confusion is exemplified in some recent cases not cited in the Article. In *Catalano, Inc. v. Target Sales, Inc.*⁸ the Ninth Circuit decided that an agreement among beer wholesalers terminating credit advances to retailers was not a price agreement, and therefore was not subject to scrutiny under the per se rule. Although the Supreme Court reversed that decision, the Ninth Circuit's difficulty was generated, in part, by the misapplication of *Sylvania*.

The Ninth Circuit also departed from the per se rule in ruling on an alleged horizontal joint refusal to deal in *Neeld v. National Hockey League*.⁹ In affirming a decision that found "reasonable" a National Hockey League (NHL) rule, which excluded one-eyed hockey players from the league, the court showed no concern for classifying the restraint as vertical or horizontal. The court suggested, after citing *Sylvania*, that a plaintiff must establish an "arguably demonstrable anticompetitiveness"¹⁰ as a pre-condition to application of the per se rule. This language suggests that the court was mixing the issue of per se treatment of the alleged restraint with the issue of whether there even existed an "antitrust injury" under the *Brunswick* test.¹¹

Although the *Neeld* court attempted to downplay its decision by referring to the NHL as a self-regulated industry, the Fifth Circuit made no such attempt in two reported decisions. In those cases, the Fifth Circuit required the plaintiff to show a "minimal indicia of anticompetitive behavior" before application of the per se rule to allegations of concerted refusals to deal.¹² The court in both actions seemed to indi-

7. In the trial of a per se case, a number of viable rule of reason defenses are foreclosed to defendants. See 16 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 6.02[3], at 6-100, 6-102 (1979).

8. 605 F.2d 1097 (9th Cir. 1979), *rev'd*, 100 S. Ct. 1925 (1980).

9. 594 F.2d 1297 (9th Cir. 1979).

10. *Id.* at 1299 n.4.

11. See *Brunswick, Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The *Neeld* court could have reached the same result without discussing the per se rule by holding that *Neeld's* injury was not an injury to competition at all, and therefore not subject to the antitrust laws. See, e.g., *Herrin v. L. M. Collins & Assocs.*, 483 F. Supp. 288 (W.D. Pa. 1980); *Gross v. University of Tenn.*, 448 F. Supp. 245 (W.D. Tenn. 1978), *aff'd*, 620 F.2d 109 (6th Cir. 1980).

12. See *W. W. Blackburn v. Crumm & Forster*, 611 F.2d 102 (5th Cir. 1980); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1980).

cate that it was appropriate for the trial court to receive evidence of justification and reasonableness, and thereafter decide whether the per se rule should be applied. In *Feminist Women's Health Center v. Mohammad*¹³ the Fifth Circuit remanded the case for trial based on the foregoing ground rules. In *W. W. Blackburn v. Crum & Forster*¹⁴ the court affirmed the district court's grant of summary judgment to the defendants. Plaintiff, an insurance agent, had claimed that he was the victim of a group boycott, but the court classified the alleged restraint as a vertical refusal to deal and applied the rule of reason.

Other interesting decisions in which courts have wrestled with the effect of *Sylvania* include *Grams v. Boss*,¹⁵ where the court refused to classify allegations of conspiratorial termination of an insurance agent as per se or rule of reason while upholding the sufficiency of the complaint. In *Engine Specialties, Inc. v. Bombadier, Ltd.*¹⁶ the First Circuit applied the per se rule to an agreement between a new dealer and a manufacturer to terminate an old dealer who became a prospective competitor of the manufacturer. The Ninth Circuit in *Las Vegas Sun, Inc. v. Summa Corp.*¹⁷ rejected application of the per se rule only after examination of the intent of the agreement.

All these cases illustrate not only that *Sylvania* has made antitrust practice more complex, albeit more interesting, but also that the introduction of additional threshold issues into the determination of unreasonable restraints is unwise. Professors Stewart and Roberts would require a court in adjudging vertical territorial restrictions to make a market dominance finding before choosing the per se or rule of reason approach. The guidelines suggested would require a court to determine the appropriate market or submarket and the defendant's market share, as if the court were hearing a monopoly or attempted monopoly case under section 2 of the Sherman Act. I do not believe that such findings would materially improve the ability of a court and the parties to do justice to the vertical territorial claims at issue. On the other hand, the suggested guidelines would certainly make preparation and trial of such a case more complex.

13. 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

14. 611 F.2d 102 (5th Cir. 1980).

15. [1980-2] Trade Cas. (CCH) ¶ 63,410 (Wis.).

16. 605 F.2d 1 (1st Cir. 1979).

17. 610 F.2d 614 (9th Cir. 1979).

Ever since its promulgation in the *Standard Oil Co. v. United States*¹⁸ and *United States v. American Tobacco Co.*¹⁹ cases, the rule of reason has served the judiciary, as well as the Nation's economy, more than adequately by providing a flexible, yet realistic legal standard within which the country as a whole has been able to grow and prosper. Standing alone, the rule may not provide the precision of other legal standards. Nevertheless, the rule should not be dissected to a point where its interpretation is more complex than useful, any more than it should have been ravaged in *Schwinn* by the Warren Court's zeal for per se oversimplification. This Author, at least, would favor a complete return to the thorough rule of reason analysis for all manufacturer-distributor dealer relationships that existed before the unfortunate *Schwinn* decision.

18. 221 U.S. 1 (1911).

19. 221 U.S. 106 (1911).