BUSINESS ELECTRONICS AND THE COERCED SUPPLIER

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Business Electronics Corp. v. Sharp Electronics Corp.[1] is one of those rare Supreme Court decisions which so strikes at the core of a special interest group that the push for legislative repeal is almost immediate.[2] The case dealt a blow to retailers' ongoing struggle with manufacturer-suppliers over control of their resale prices.[3] The issue addressed by the case—the legality of vertical price fixing, or resale price maintenance, under the Sherman Act[4]—has long engendered controversy.[5] The opinion discloses a clever, but ultimately

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1. 485 U.S. 717 (1988).

The Price Fixing Prevention Act of 1989, H.R. 1236, would provide that resale price maintenance conspiracies may be inferred in civil cases from termination of a discounting retailer in response to complaints by competing retailers. As of this writing, the bill has passed the House. The Consumer Protection Against Price Fixing Act of 1989, S. 865, is of similar effect.

2. *See* "Congress Moving to Overturn Court Decision on Price Fixing," 46 *Cong. Quarterly Weekly Rep.* 1244 (May 7, 1988).

3. H.R.585, which passed the House November 9, 1987, would have amended the Sherman Act with regard to vertical price fixing by specifying the type of evidence required to prove a violation.

The 1984 Appropriation Bill barred the Justice Department from using appropriate funds to challenge the antitrust prohibiting vertical price fixing. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, Pub. L. No.98–166, Sec. 510, 97 Stat. 1071, 1102 (1983).

In 1975, Congress repealed federal antitrust exemptions for State "Fair Trade" Laws which permitted manufacturers to dictate minimum resale prices. Consumer Goods Pricing Act 1975, Pub. L. No.94– 145, 89 Stat. 801 (1975).

See also 45 Pub. Admin. Rev. 718–22 (November, 1985).

4. 15 U.S.C. sec. 1.

5. *Compare* Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing,* 71 GEO.L.J. 1487 (1983); Flynn, *The 'Is' and 'Ought' of Vertical Restraints after Monsanto Co. v. Spray-Rite Service Corp.,* 71 CORNELL L. REV. 1095 (1986); Gerla, *Discounters and the Antitrust Laws: Faces Sometimes Should Make Cases,* 12 J. CORP. L. 1 (1986); Cann, *Vertical Restraints and the 'Efficiency' Influence,* 24 AM. BUS. L.J. 483 (1987); *with* R. Bork, *The Antitrust Paradox* 280–98 (1978); Baxter, *Vertical Restraints and Resale Price Maintenance: A 'Rule of Reason' Approach,* 14 ANTITRUST L. & ECON. REV. 13 (1982); Hovenkamp, *Vertical Restrictions and Monopoly Power,* 64 B.U.L. REV. 521 (1984); Phillips and Mahoney, *Unreasonable Rules and Rules of Reason: Economic Aspects of Vertical*

unsuccessful, effort to compromise both sides of the question, in retaining the per se[6] ban on vertical price fixing agreements, but making them virtually impossible to prove.

The case is a paradigm of the metamorphosis which antitrust law has undergone in the past two decades, an evolution from slavish championing of the freedom of traders at every market level to a more searching analysis of effects on market efficiency. *Business Electronics* is a step in the evolutionary process, but not a straight one. This article discusses the deviance from the path and suggests a different approach which is more in keeping with the concerns of the antitrust laws.

I. THE CASE

The facts of *Business Electronics* reveal a common scenario. Sharp Electronics has many dealers nationwide, which compete with each other on price and on service in reselling Sharp products to consumers—so-called "intrabrand" competition—and which compete with each other and with another set of dealers on price and on service in reselling electronics products manufactured by other companies—so-called "interbrand" competition.[7] Sharp dealers, seeking as great a profit on the Sharp line of products as possible, face the usual competitive choice between discounting their prices and providing greater services in connection with their sales. Business Electronics chose to reduce its prices below those charged by a competing Sharp dealer, Hartwell. Hartwell complained to Sharp that Business Electronics was undercutting the suggested resale prices promulgated by Sharp, prices to which Hartwell generally adhered. Sharp them terminated Business Electronics as a Sharp dealer, and was sued on the theory that Sharp had entered into a resale price maintenance agreement with Hartwell. Under established precedent, such an agreement, if proven, would be declared per se illegal.[8]

The Supreme Court affirmed a decision of the Fifth Circuit Court of Appeals[9] that the jury's finding of an agreement between Sharp and Hartwell to terminate Business Electronics because of its price cutting was insufficient to make out a per se violation of the Sherman Act. The Court held that only an agreement as to the price or price level to be charged by Hartwell would render the agreement per se illegal.[10] Evidence that the termination was dealer-induced, for purposes which have nothing at all to do with promotion

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Price Fixing, 30 ANTITRUST BULL. 99 (1985); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. CHI.L. REV. 6 (1981).

6. An agreement in restraint of trade is 'per se' unlawful when the reasonableness of the restraint will not be considered by the Court. *Northern Pacific Railroad Co. v. United States,* 356 U.S. 1, 5 (1958) (per se rule design to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved").

7. *See Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977).

8. *Dr. Miles Medical Co. v. John D. Park & Sons,* 220 U.S. 373 (1911).

9. 780 F.2d 1212 (5th Cir. 1986), *aff'd,* 485 U.S. 717 (1988).

10. 485 U.S. at 726–27.

of efficiency, is not enough.[11] Termination of a discounter solely because of a competing dealer's desire to eliminate price competition is not per se illegal absent an express or implied agreement between the supplier and the complaining dealer to set resale prices at some level.[12]

The Court apparently reached this conclusion based largely on its observation that "a quite plausible purpose" of such termination is "to enable [the complaining dealer] to provide better services under the sales franchise agreement."[13] Rather than let claimants disprove the presence of such a presumed purpose, the Court in effect made the presumption irrebutable except by direct evidence of a price fixing agreement.[14]

Perhaps the clearest example of the practical effect of *Business Electronics* may be found in *Corrosion Resistant Materials v. Steelite, Inc.*[15] In 1986, the court had denied defendant's motion for summary judgment on plaintiff's price fixing claim,[16] but defendant renewed its motion on the strength of *Business Electronics*, and this time it was granted. The disputed facts were consistent with a finding that plaintiff was terminated (1) as a result of an agreement between defendant supplier and a competing dealer, and (2) for a price-related end, *i.e.*, because plaintiff was discounting. The court found that after *Business Electronics*, this was not sufficient:

> [P]laintiff has failed to allege, as required under *Business Electronics*, that Steelite in any way forced its distributors to sell at a certain price level...
> [P]laintiff's argument that plaintiff intends to establish a violation of the Sherman Act by introducing at trial circumstantial evidence as to an implied agreement between Steelite and Oxhandler clearly runs counter to the logic, and indeed the law, of *Business Electronics*. The Supreme Court acknowledged that:
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> > Any agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's 'price cutting.' In 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 go hand in hand.[17]

The message picked up by the District Court is clear: since the Supreme Court has concluded that juries are too sophisticated to separate a motive to eliminate a price cutter from a motive to eliminate a free rider,[18] plaintiffs

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11. *Id.* at 727.
12. *Id.* at 735–36.
13. *Id.* at 729.
14. *Id.* at 727–28 ("In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate service, since price cutting and some measure of service cutting usually go hand in hand.").
15. 692 F.Supp. 407 (D.N.J. 1988).
16. *Id.* at 410–411.
17. *See* text *supra* at note 14.
18. *Steelite*, 692 F.Supp. at 414–415 ("[P]laintiff does not make the factual showing necessary to support the inference of an agreement to set prices, either express or implied...").

will no longer be permitted to get to the jury purely on circumstantial evidence that defendants had the first and not the second motive. Only evidence of the first motive—in the form of an express agreement on price or price levels—will be permitted.[19]

Analyzing the distinction between the two motives discloses that while price cutting and service cutting usually do go hand in hand, this is not always the case.[20] Moreover, there are ways to ascertain whether a supplier desires higher resale prices independently of a desire for increased services, and therefore tests to determine whether the per se rule applies, and whether the case gets to the jury.

II. THE CONSPIRACY REQUIREMENT AND RESALE PRICE MAINTENANCE

Since the Supreme Court's 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[21] it has been law that resale price maintenance is a per se violation of Section 1 of the Sherman Act. The Court reasoned that the effect of resale price maintenance was identical to a dealer-level price fixing cartel, and therefore should be treated identically in law.[22] As long as resale price maintenance *agreements* were demonstrated, they were embraced by Section 1 to the same extent as a dealer cartel would be,[23] and no conceptual problem arose under this reasoning. Where, however, a manufacturer suggests a resale price to its dealers, and then terminates the dealer who fails to comply, finding a "contract, combination or conspiracy" becomes problematical, even though the effect can be the same as resale price maintenance generally.[24]

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19. As the Solicitor General, as amicus in *Monsanto,* had stated:

> If a supplier adopts a bona fide distribution program that includes nonprice restraints and if that program is reasonably addressed to distribution problems, the case must be judged by the rule of reason unless the plaintiff can show—by direct or circumstantial evidence—an *explicit* agreement about the prices distributors are to charge.

Summary of Argument Before the Court, 52 U.S.L.W. 3448 (Dec. 13, 1983).

20. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143, 153 (1985).

21. 220 U.S. 373 (1911).

22. *Id.* at 408 ("[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.").

23. *See, e.g., Albrecht v. Herald Co.*, 390 U.S. 145, 151, *reh'g denied,* 390 U.S. 1018 (1968) ("[R]esale price fixing is a per se violation of the law whether done by agreement or combination.").

24. "Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to sec. 1 liability." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984), *mot. denied,* 469 U.S. (1984).

See also United States v. Colgate & Co., 250 U.S. 300, 307 ("[T]he act does not restrict the long recognized right of trader or manufacturer...freely to exercise his own independent

The termination of dealers who undercut suggested resale prices has long been defended as a means of fostering nonprice competition.[25] Economists have identified elimination of free riders—discounters selling the same product as higher-priced dealers who provide pre-sale services (*e.g.*, advertising), point-of-sale services (*e.g.*, display, demonstration) or post-sale services (repair, instruction) which the discounter does not provide—as the most plausible explanation for manufacturer insistence on minimum resale prices.[26] When a manufacturer believes that his success in the marketplace is tied to the provision of the such services, he must find a method to encourage such services on the part of his dealers.[27] Contracting with dealers for the provision of a given level of services is frequently an inefficient method, since the contracts must be policed.[28] Often the preferred method is to ensure that the dealers have a sufficient margin to cover the costs of providing desired services, thus encouraging them to increase the level of services themselves.[29] This method must, however, assuage their fear of being undercut by other dealers of the same brand of products.[30]

Since the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[31] one such method has been removed from the reach of per se illegality: the establishment of territorial exclusivity for dealers. The logic adopted by the Court, that insulating dealers from intrabrand competition encourages provision of desired services by eliminating free riders,[32] is compelling. The same logic would arguably justify elimination of the per se ban on resale price maintenance,[33] but the Supreme Court has not yet gone this

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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.").

25. Bork, *Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (Part 2), 75 YALE. L.J. 373, 397, 453–469, 475 (1966); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283–299 (1975). *But see* Comment, *Spray-Rite v. Monsanto Co.: The Justice Department Challenges the Per Se Rule Against Resale Price Maintenance*, 46 U. PITT. L. REV. 171, 190–1 (1984) (less restrictive ways to ensure services and nonprice competition); Gerhart, *The 'Competitive Advantages' Explanation for Intrabrand Restraints: An Antitrust Analysis*, 1981 DUKE L.J. 417 (1981) (resale price maintenance reduces efficiency from manufacturer to dealer, and less restrictive means exist).

26. Telser, *Why Should Manufacturers Want Fair Trade?* 3 J.L. & ECON. 86 (1960); Mathewson and Winter, *An Economic Theory of Vertical Restraints*, 15 RAND J.L. ECON, 27 (1984); Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U.L. REV. 736 (1984); Comanor, *Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 986–89 (1985); Kelly, *The Role of the Free Rider in Resale Price Maintenance: The Loch Ness Monster of Antitrust Captured*, 10 G.M.U.L. REV. 327 (1988).

27. *See* Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91, 107–8 (1979).

28. *Id.* at 109–11. *See also*, Bork, *supra* note 25; Posner, *supra* note 25.

29. *See* Posner, *supra* note 25, at 284, 294.

30. *Id.* at 285.

31. 433 U.S. 36 (1977).

32. *Id.* at 54–5, *quoted in Business Electronics*, 485 U.S. at 724–25.

33. *See* Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania A Way Out?* 67 VA. L. REV. 1457, 1467 (1981) ("Virtually all of the

far. Apparently this reluctance on the part of the Court is based on the view that horizontal cartels are facilitated by vertical price fixing.[34]

In the context of dealer termination, the distinction between an agreement to terminate a discounter and an agreement on resale prices was never considered a crucial one by the Supreme Court before *Business Electronics. Sylvania* contained no issue regarding whether an agreement had been demonstrated; this was taken as a given, and the only issue was whether a per se rule should be imposed.[35] *Monsanto Co. v. Spray-Rite Services Corp.*[36] held that mere termination in response to price complaints by competing dealers will not support the inference that termination was a result of dealer coercion, and, therefore, the result of an agreement with one or more dealers.[37] *Monsanto*, unlike *Sylvania*, was fundamentally concerned with proof of conspiracy, specifically with whether a supplier will be deemed to have conspired with complaining dealers who pressured it to terminate the plaintiff. The Court did not expressly determine different standards of proof for agreements to maintain resale prices and agreements to terminate discounters, and indeed noted that their economic effects would normally be virtually indistinguishable.[38] The case left open the possibility that in appropriate circumstances an agreement to terminate a discounter can itself be viewed as an agreement to maintain resale prices.[39] Stated another way, *Monsanto* left intact the rule that once sufficiently proven, manufacturer-dealer agreements to terminate a competing dealer because of its discounting are per se illegal.[40]

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justifications for vertical nonprice restrictions endorsed in *Sylvania* assume an indirect effect on price"); Liebeler, *Intrabrand 'Cartels' Under GTE Sylvania*, 30 U.C.L.A. L. REV. 1, 47 (1982) ("[T]he purpose and effect of all so-called non-price restrictions—the facts on which any implied agreement to fix prices would have been based—is to affect, stabilize, or maintain resale prices by eliminating or confining price-cutting free riders."); Posner, *supra* note 25, at 293 ("[If the free rider problem] is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another way of dealing with the free rider problem.").

34. Business Electronics, 485 U.S. at 725 ("[V]ertical price restraints reduce interbrand competition because they 'facilitate cartelizing'," *quoting* GTE Sylvania, *supra* note 31, at p.51 n.18 [emphasis in the original]). *See also* Klein and Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 280 n.20 (1988) ("It is important to recognize that there is also a collusive theory of vertical restraints with widely different implications for price and nonprice restraints. While the simultaneous imposition by all firms in an industry of vertical resale price maintenance is equivalent in form to a horizontal price fix, the simultaneous imposition of vertical exclusive territories is not equivalent in form to a horizontal market sharing agreement. Therefore, industrywide price restraints may serve as an enforcement device for a cartel arrangement and represent more of a potential antitrust problem than nonprice restraints.")

35. Sylvania, 433 U.S. at 43–44, 57, 59.

36. 465 U.S. 752 (1984).

37. *Id.* at 763–64.

38. *Id.* at 762.

39. *See, e.g., United States v. Parke, Davis and Co.*, 362 U.S. 29, 49 (1960) (Termination of a discount retailer, through program involving wholesalers, for failure to adhere to suggested minimum resale price held to be "an illegal combination to maintain resale prices," per Stewart, J., concurring).

40. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 700 F. Supp. 1485, 1490 n. 5 (N.D. Ill. 1988) (under *Monsanto*, it is still true that once an agreement between dealers and

Business Electronics significantly modifies this rule. The jury had found "an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting."[41] The Supreme Court held that this was insufficient.[42] Standing alone, such a holding would have been quite defensible. The Court could have reasoned that an *agreement* to terminate a discounter, while unprotected by the *Colgate* doctrine, is simply not a *price fixing* agreement when its purpose is to foster resale prices which are *independently* desired by the manufacturer, and therefore such an agreement standing alone cannot make out a per se violation of the Sherman Act consistently with the rationale of *GTE Sylvania.* If the termination agreement was the product of dealer coercion, however, this rationale falls apart.

III. USING THE COERCED AGREEMENT ANALOGY

The "coercion" method of proving a Sherman Act "contract, combination or conspiracy" between a supplier and a dealer is well established in case law.[43] When a terminated dealer is unable to prove an agreement between this supplier and other competing dealers, it will often point to an agreement between itself and the supplier, claiming that *prior to termination* it unwillingly complied with the supplier's demand.[44] Indeed, in tying arrangement cases,[45] this is the paradigm method of proving conspiracy.[46]

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the manufacturer is shown, termination of one dealer following competing dealer's complaints could be sufficient to prove casualty), *aff'd*, 806 F.2d 722, 726 (1988).

41. *Business Electronics*, 485 U.S. at 721.

42. *Id.* at 726–27 ("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.").

43. *See, e.g., Isaksen v. Vermont Castings, Inc.* 825 F.2d 1158, 1160–62 (7th Cir. 1987), *cert. denied* 108 S.Ct. 1728–29 (1988); *United States v. Paramount Pictures,* 66 F. Supp. 323 (S.D.N.Y. 1946), *aff'd in part, rev'd in part,* 334 U.S. 131, 161 ("[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."). *See also* Bork, *supra* n. 24, at 405–6 ("The dealer cartel objection is grounded in the theory that some restraints which appear vertical may actually be horizontal cartels among resellers which they coerce or induce a manufacturer to administer and police.").

44. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968) ("In any event each petitioner can clearly charge a combination between [the manufacturer] and himself, as of the day he unwillingly complied with the restrictive franchise agreements"); *Albrecht v. Herald Co.*, 390 U.S. 145, 150 M. 6 ("Petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price."); *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163 (7th Cir. 1988) ("[T]he fact that Isaksen may have been coerced into agreeing is of no moment; an agreement procured by threats is still an agreement for purposes of sec. 1."); *Flintkote Company v. Lysfjord,* 246 F.2d 368, 375 (9th Cir. 1957) ("Because one is coerced by economic threats to participate in or aid and abet an illegal scheme does not excuse the actor."); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1321–22 (D. Conn. 1977) ("Courts have uniformly rejected any defense that an antitrust violation was 'forced' onto the defendant"). *But see International Logistics Group v. Chrysler Corp.,* 884 F.2d 904, 907 (6th Cir. 1989) ("a conspiracy may not

The starting point in analyzing the "coerced agreement" theory is *United States v. Colgate Co.*,[47] which announced the rule that absent an attempt to create or maintain a monopoly, a firm does not engage in a contract, combination or conspiracy in restraint of trade when it announces a policy of not dealing with retailers who fail to adhere to its suggested resale prices, and then refuses to deal with such retailers. Almost immediately, however, the Supreme Court began to chip away at the *Colgate* doctrine, and over the next fifty years had all but destroyed it.[48] The evisceration of the *Colgate* doctrine culminated in the Supreme Court's decision in *United States v. Parke, Davis & Co.*,[49] which held that a supplier's announcement of a policy of refusing to deal with resellers who failed to charge suggested resale prices, coupled with its involvement of wholesalers to induce retailers to acquiesce, violated the Sherman Act. The Court stated that "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 disinclination to sell to a customer who will not observe his announced policy."[50]

Thus, after *Parke, Davis* announcement of the policy plus any other conduct designed to secure compliance, if successful in securing that compliance, is unprotected by *Colgate*. As one lower court put it, "[t]he Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."[51]

Monsanto widened the channel considerably. In the course of affirming a judgment for the plaintiff dealer based on sufficient evidence of conspiracy between the supplier and other dealers, the Court stated that "[u]nder *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."[52] In such a case, there would be no contract, combination or conspiracy unless there were also evidence "both that the distributor communicated its acquiescence

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evolve under circumstances where a dealer or distributor involuntarily complies to avoid termination of his product source").

45. A tying arrangement is an agreement to sell one product (the "tying" product) only on condition that the buyer also purchase another product (the "tied" product). L. Sullivan, *Handbook of the Law of Antitrust* 431 (1977).

46. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 13–14 (1984) ("[W]e have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market").

47. 250 U.S. 300 (1919).

48. *See Yentsch v. Texaco*, Inc., 630 F.2d 46, 51 (1980) ("Since the advent of *Colgate* both the Court and commentators have been grappling to recast or limit its reach."); *see also FTC v. Beech-Nut Packing Company Co.*, 257 U.S. 441 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

49. 362 U.S. 29 (1960).

50. *Id.* at 43 [emphasis in the original].

51. *George W. Warner & Co. v. Black & Decker Co.*, 277 F.2d 787, 790 (2d Cir. 1960).

52. 465 U.S. at 760.

or agreement, and that this was sought by the manufacturer."[53] This element was deemed necessary in order to protect manufacturers' *Colgate* rights in the face of adverse inferences from inevitable complaints by other dealers.[54]

The analysis of a termination "agreement" in the context of a supplier who is "coerced" to terminate one (price cutting) dealer by other dealers is admittedly somewhat tortured. Manufacturers have no need to secure the compliance of a complaining dealer in order to do what they have power to do unilaterally—terminate discounters.[55] But the converse is not also true—dealers do require the compliance of the manufacturer in order to terminate another dealer. Only when the complaining dealer and *not* the manufacturer wish to terminate the discounter is such compliance essential.[56] The supplier's *coercively secured* compliance elevates the conduct to the level of an "agreement" for Sherman Act purposes.[57] Such a distinction is quite reasonable,[58] and *Business Electronics* might have simply disposed of the issue by finding insufficient evidence of an agreement because the requisite supplier coercion

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53. *Id.* at 764 n.9.

54. *Id.* at 763 ("If an inference of such agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded.

"The flaw in the evidentiary standard adopted by the Court of Appeals in this case is that it disregards this danger. Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct. As Monsanto points out, complaints about price cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the actions of their rivals.")

55. *Id.* at 760.

56. *See, e.g., The Supreme Court: 1987 Term*, 102 HARV. L. REV. 297, 303 n.40 (1988). Some commentators have suggested that when termination of a discounter is caused by a competing dealer's complaint to the manufacturer, agreement should not be found if the manufacturer would have terminated the dealer however the discounting had been discovered, but should be found "if the termination is in the manufacturer's interest only because it pleases the complaining dealer." Anderson, *Vertical Agreements Under Sec. 1 of the Sherman Act: Results in Search of Reasons*, 37 U. FLA. L. REV. 905, 939–40 and n. 186 (1985); Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis,* 67 CORNELL L. REV. 297, 320 (1982). *See also A.H. Cox & Co. v. Star Machinery Co.*, 653 F.2d 1302, 1305 n.3 (9th Cir. 1981) ("a per se violation might be established if a manufacturer's decision to terminate a dealer was prompted by dealer coercion, either by a single dealer or by a group of dealers").

57. *Barnosky Oil v. Union Oil Company*, 665 F.2d 74, 79–80 (6th Cir. 1981) (no 'coerced' agreement where the plaintiff's agreement would add nothing to the defendant's ability to achieve its own ends through unilateral action).

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

"Of course, manufacturer and dealer interests are not necessarily antagonistic. Like the manufacturer, dealers might also believe that restricted distribution increases dealer services and sales and strengthens interbrand competition. However, this objection seems unlikely when the manufacturer is forced to violate the distribution policy he thinks best." 7 P.Areeda, Antitrust Law, sec. 1557, pgs. 167–68 (1986).

was not shown. Significantly, the Fifth Circuit in *Business Electronics* had explicitly rejected an interpretation of *Monsanto* as stating that termination of a discounter is permissible provided that the manufacturer was not succumbing to pressure from the complaining dealer for reduced price competition.[59] This interpretation was implicitly rejected by the Supreme Court in its affirmance.

The logical gap in the Court's analysis is the lack of any rationale for rejecting the coerced agreement analogy. *Business Electronics* identified cartel facilitation as a possible reason to apply a per se rule to vertical restraints.[60] When one views the competitive evil as manufacturer-level cartelization,[61] the conclusion that a specific agreement on price or price levels must be demonstrated is sound; as the Court states, vertical price agreements are used to "reduc[e] the manufacturer's incentive to cheat on a cartel, since its retailers could not pass on lower prices to consumers."[62] Absent the vertical price agreement, the manufacturer-level cartel does not reduce the incentive to cheat. When dealer-level cartelization or monopsonization is of concern, however, there is no similar rationale for requiring a specific agreement on price before finding facilitation,[63] and the Court suggests none. As one lower court has recognized,

> *Sharp* devotes its entire discussion of policy considerations to the economic desirability of protecting the ability of *manufacturers* to fashion distribution system of their own choosing. The opinion discusses 'legitimate and competitively useful conduct' on the part of manufacturers to ensure adequate services by dealers and to prevent 'free-riding' by discounters. 485 U.S. at 727-31, 108 S.Ct. at 1521. The majority devotes no attention to the question of how a *dealer* is economically justified in pressuring a manufacturer into denying merchandise to a competing dealer. . . . One must candidly recognize that the policy justifications given by the majority in *Sharp* have no discernable bearing upon the conduct of Macy in the present case.[64]

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59. *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1218 (5th Cir. 1986), *aff'd* 485 U.S. 717 ("[T]he manufacturer which desires to terminate a price cutter because of its free riding will be deterred from this legitimate action because it is indistinguishable, except perhaps to a mind reader, from...termination of a price cutter because of its price cutting.").

60. 485 U.S. at 726 ("[T]here is a presumption in favor of a rule-of-reason standard...departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing...").

61. Bork, *supra* note 25, at 411 ("It has been suggested that manufacturers may agree to use resale price maintenance as a means of policing their own horizontal agreement on prices. The idea is simply that a manufacturers' cartel may break down more easily in industries in which the prices charged by the manufacturers are not very visible so that defection becomes difficult to detect"), *citing to* Telser, *supra* note 26, at 96–104.

62. 108 S.Ct. at 725.

63. Comanor, *Vertical Arrangements and Antitrust Analysis,* 62 N.Y.U.L. REV. 1153, 1159 (1987) ("The imposition of vertical restraints when distributors are exercising monopsony power imposes efficiency costs rather than gains").

64. *Toys "R" Us, Inc. v. R.H. Macy & Co., Inc.*, 728 F.Supp. 230, 236 (S.D.N.Y. 1990).

Dealers can, even in the absence of explicit resale price agreements, persuade manufacturers to terminate price discounters for reasons that have nothing to do with the primary concern in *Sylvania*: elimination of free riders in order to ensure the provision of adequate services.[65] If instances of such persuasion are identifiable, the per se rule should be retained whenever, and however, the terminated discounter satisfies the finder of fact that no efficiency-enhancement motive was also present.

In the dealer-induced termination setting, an agreement with the manufacturer on the price or price level to be charged by the coercive dealer may be counterproductive to efficiency. Such an agreement would at least cap the resale price and thereby act as a check on the ability of the remaining dealer(s) to exploit the new-found absence of a maverick competitor. The resulting dealer margin may be very much higher without such an agreement, without corresponding increase in services offered to consumers. The very possibility of this result, coupled with the absence of any reason to condemn only such agreements on price or price levels, renders the rule of *Business Electronics* wholly inappropriate when dealer coercion is present.

IV. A FRAMEWORK FOR ANALYSIS

If dealer-coerced terminations are in fact anticompetitive and inefficient, it does not follow that their blanket per se condemnation is sound policy—one would first wish some assurance that their detection did not depend on a test which sweeps too broadly, perhaps penalizing significant numbers of innocuous or even procompetitive dealer terminations not genuinely dealer-coerced. As *Monsanto* put it, "[i]f an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded."[66]

Nevertheless, the standard for proving agreements announced in *Monsanto* need not be adopted *in toto* when dealer coercion of the supplier, rather than the opposite, is to be proved. Contrary to *Monsanto*, a manufacturer should be "free to acquiesce in" the dealer's demand in order to avoid losing a desired customer[67] only if there is also evidence that the manufacturer's marketing policies are otherwise being furthered by the termination of the discounter. Proof of independent reasons for desiring a discounter's termination, besides a competing dealer's threatened refusal to deal, should be required of the manufacturer whenever the circumstances indicate a likelihood that the manufacturer is in fact succumbing to coercion.

The easiest case, of course, is that in which no services are being provided by dealers of a particular manufacturer.[68] If a discounter is terminated in

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65. Sylvania, 433 U.S. at 55.

66. Monsanto, 465 U.S. at 763.

67. *Id.* at 760.

68. *See, e.g.*, Hovenkamp, *Antitrust Policy, Restricted Distribution, and the Market for Exclusionary Rights*, 71 MINN. L. REV. 1293, 1317 (1987) ("If a practice obviously has no efficiency value whatsoever, then any reasonable possibility for harm makes condemnation appropriate...").

such a case in response to competitor complaints about price, it can generally be presumed that the manufacturer had no efficiency-enhancing rationale, and the finder of fact may infer that its motive was solely to satisfy the complaining dealer(s). A literal application of *Business Electronics* prevents application of the per se rule here, unless an explicit agreement on price is also shown.

More common is the case in which some level of services is provided by the dealers, although perhaps no contract with the manufacturer obligates them to provide any particular level of services. Since free ridership is a potential concern here, courts must proceed with caution. It may be, however, that the terminated dealer can demonstrate that it had provided the same level of services as the complaining dealer(s) or as other dealers, with the same or superior sales success.[69] This removes the force of the free rider argument, and should be enough to get to the jury on the question of whether a coerced agreement is present.[70] Any other rule will discourage the more efficient dealer from passing on cost savings to consumers.

A conclusion that the manufacturer-supplier succumbed to the coercion of a higher-priced dealer or dealers who offered similar services should, in general, be drawable from evidence that the manufacturer would not otherwise have terminated the plaintiff for discounting even after the discounting was brought to his attention by the competing dealer(s). This is a reasonable inference only when the manufacturer, as a practical matter, needs the complaining dealer(s) to remain part of its marketing force because the complaining dealer(s)' purchases as a percentage of the manufacturer's total sales are substantial.[71] The inquiry in such a situation should be the same as in tying cases, namely, whether the coerced party had reasonable alternatives.[72] If the plaintiff in a tying case independently desired to purchase the tied product from the defendant, the arrangement would pass muster.[73] The same should be true of the supplier-defendant in a dealer termination case: if its decision to terminate the plaintiff would have been reached independently of the pricing complaints, its conduct should be legal. However, just as coercion may

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69. There was some evidence of this in *Business Electronics*, *see* 780 F.2d at 1219.

70. The Fifth Circuit subsequently characterized its own decision in *Business Electronics* as holding that "a jury could reasonably infer a price-maintenance conspiracy from these facts: (1) the manufacturer sought the price-cutting distributor's adherence to a price list before it appointed a rival distributor; (2) the rival distributor followed the manufacturer's price list; (3) the rival distributor 'complained vigorously' to the manufacturer about the price-cutting distributor; (4) the manufacturer responded by immediately terminating the price-cutter; and (5) the price-cutter produced evidence that it was not free-riding and that its sales performance was equal to that of its rival." *Sharp*, 780 F.2d at 1219. *Culberson, Inc. v. Interstate Elec. Co., Inc.*, 821 F.2d 1092, 1094 (5th Cir. 1987), *reh'g en banc denied*, 827 F.2d 768 (1988).

71. *See Battle v. Lubrizol*, 673 F.2d 984, 993 (8th Cir. 1982), *on rehearing*, 712 F.2d 1238 (8th Cir. 1983), *cert. denied*, 466 U.S. 931 (1984).

72. *See Jefferson Parish*, *supra* n. 45, 466 U.S. at 14.

73. *Tic-X-Press, Inc. v. Omni Products Co. of Ga.*, 815 F.2d 1407, 1417 (11th Cir. 1987); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Sports Farm, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 754 (9th Cir. 1982); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1327–28 (5th Cir. 1978).

be established in tying cases by showing that as a practical matter circumstances forced the buyer to buy the tied product,[74] coercion should be provable in a dealer termination case by showing that as a practical matter the supplier had to comply. As in tying cases, that inference ought to be drawable from market (monopsony) power.[75]

In this context, proof of market power at the dealer level should focus on relative bargaining strength as between resellers and suppliers of the brand in question.[76] A substantial body of literature has developed on the determinants and measurement of power and control in distribution channels.[77] The "rule of thumb" suggested by Steiner is useful here: if consumers are more apt to switch brands within store than stores within brand, retailers dominate manufacturers.[78] This is another way of saying that the retailer enjoys significant economies of scale in retailing which the manufacturer could not otherwise exploit.[79] Whether demonstrated by consumer survey evidence or otherwise, this should be a datum tending to show dealer coercion.

There will also be rare cases in which the plaintiff has uncovered not only complaints by a competing dealer, but direct evidence of coercion by a competing dealer. Under the standard announced in *Monsanto*, pricing complaints and threats to stop distributing the supplier's products probably would not be sufficient to get the jury on the question of *conspiracy* to terminate a dis-

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74. *Tire Sales Corp. v. Cities Service Oil Co.*, 637 F.2d 467, 474 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 (5th Cir. 1977).

75. The majority in *Business Electronics* brushed off the possibility that Sharp's termination was the result of "Hartwell's assertion of dominant retail power" by noting that "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers [citation omitted] and it should therefore not be assumed but must be proved." 485 U.S. at 727 n.2. Because "this case was not prosecuted on the theory, and therefore the jury was not asked to find, that Hartwell possessed such market power," *id.*, the majority did not consider the issue further.

76. *See* Comanor, *supra* n. 63 at 1158 ("Many consumers, because of their ignorance of some product characteristics, rely on particular distribution outlets to provide the necessary certification. However, they pay little attention to brand designation precisely because of their reliance on the distributor . . . Where style or quality certification attributes are essential to many consumers, these distributors may achieve a substantial measure of monopsony power in regard to their suppliers. One way to exercise this power is to require supplying manufacturers to enforce vertical restraints on all who distribute their products").

77. Skinner and Guiltinan, *Perceptions of Channel Control*, 61 J. RETAILING 65 (Winter 1985); Frazier, *On the Measurement of Interfirm Power in Channels of Distribution*, 20 J. MARKETING RES. 158 (1983); Lusch and Brown, *A Modified Model of Power in the Marketing Channel*, 19 J. MARKETING RES. 312 (1982); Etgar, *Channel Domination and Countervailing Power in Distributive Channels*, 13 J. MARKETING RES. 254 (1976).

78. Steiner, *supra* n.20.

79. "For example, the monopolist manufacturer of men's lizard belts would probably not find it economical to open its own stores that sell nothing but the belts. The manufacturer must rely on multi-brand, multi-product men's stores or department stores to distribute its product. As a result the manufacturer cannot vertically integrate in order to circumvent a retailer cartel." Hovenkamp, *Economics and Federal Antitrust Law* 252 (1985).

counter.[80] If the conspiracy or agreement is otherwise proved, however—as it was in *Business Electronics*—the pricing complaints and threatened refusal to deal should be sufficient to get to the jury on the question of whether the termination was part of a resale price maintenance scheme imposed for non-efficiency reasons (*i.e.*, not related to provision of services). This is not the case after *Business Electronics*, which was overly concerned that a manufacturer's intent in this setting would be too difficult for a jury to ascertain.[81]

At first blush, the difficulty of divining a manufacturer's true intent in terminating a discounter who violates the manufacturer's announced resale price policy may seem insuperable. Post-*Monsanto* cases tend to presume that there will always be a business justification for the termination purely by virtue of "the manufacturer's business judgment that it is important to its marketing strategy and the maintenance of its dealer network not to have its goods sold at less than the suggested retail price."[82] If this were an accurate presumption, however, there would be no need for the manufacturer to enter into an *agreement* with the complaining dealer to terminate the discounter.[83] Where dealer coercion is indicated, it should be within the province of the finder of fact to determine whether the manufacturer's marketing strategy really was furthered, or intended to be furthered, independently of the risk of loss of the coercive dealer.

The absence of concerted action at the dealer level is not a valid basis for imposing a different standard. That a supplier is succumbing to pressure from a single important dealer in terminating a discounter does not make the effect of the restraint any less pernicious despite the absence of a horizontal agreement.[84] The debate in *Business Electronics* on the proper identification of a horizontal restraint, which set apart the majority and the dissent,[85] is a red herring. *All* adverse effects sought to be combatted by the Sherman Act are, at bottom, horizontal.[86] The *agreement*—be it horizontal or vertical—is an element of the Sherman Act offense precisely because the Congress recognized the additional risks attending the loss of independent decisionmaking

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80. *See, e.g., Garment Dist., Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905, 909 (4th Cir. 1986), *cert. denied*, 108 S.Ct. 1728 (1988).

81. *Supra* at n.14.

82. *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988).

83. Justice Stevens' dissent in Business Electronics makes the telling point that "the manufacturer should have an independent motivation for acting and need not enter into any agreement with a dealer to do so." 485 U.S. at 743–44 n.6.

84. Piraino, *supra* n.56 at 309–11.

85. *Compare* 485 U.S. at 731 n.4 ("a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement") *with Id.* at 745–47 ("the fact that the agreement is between only one complaining dealer and the manufacturer does not prevent it from imposing a 'horizontal' restraint...the economic consequences of Hartwell's ultimatum to respondent are identical to those that would result from a comparable ultimatum by two or three dealers in a market...").

86. *See Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1231 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 751 (1988) ("When competing distributors conspire with their supplier to impose restrictions that redound primarily to the benefit of the distributors, the agreement should be considered horizontal even though it is vertical in form.").

in a market.[87] When this independence is eliminated by an agreement between even a single dealer and its supplier, the resulting "anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly."[88]

Of course, proof of coercion will not be simple in the ordinary case; the manufacturer will deny such coercion and proffer alternative explanations for the termination. Difficulty of proof, however, is not a sufficient reason for denying plaintiffs the opportunity to try.[89] Evidence that the proffered alternative explanations are pretextual or sham may itself be probative of conspiracy.[90]

More importantly, *Business Electronics'* reluctance to find per se illegality without proof of a specific agreement on price or price levels ignores inferences to be drawn from economic analysis, inferences which are readily drawn in slightly different settings. The Court states: "There has been no *showing* [emphasis added] 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."[91] This is not something on which a showing should be required in each individual case when the proposition is established in general by economic analysis.

Economic theory suggests that competition and output might not be adversely affected if free ridership is eliminated by the agreement to terminate the price cutter.[92] It does not suggest any other set of facts which would save the agreement from being restrictive of output, and indeed suggests that in the absence of free ridership the price cutter is serving to increase competition and increase output.[93] Logically, if evidence is adduced that elimination of free ridership or other efficiency enhancing rationale was not the actual concern, but rather that dealer coercion explains the behavior of the manufacturer, the inference of anticompetitiveness from the agreement to terminate should be drawable, even without any additional evidence that the manufacturer and remaining dealer further agreed on prices or price levels. *Business*

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87. "The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984).

88. *Id.* at 769.

89. Floyd, *Vertical Antitrust Conspiracies after Monsanto and Russell Stover*, 33 KAN. L. REV. 269, 274 (1985) ("The only consequence of permitting the plaintiff to get to the jury on the basis of evidence susceptible of more than one reasonable inference would be to subject the defendant to the risk of an adverse jury verdict if it failed to produce evidence that persuaded the jury that its conduct was the result of a unilateral decision. Is it not appropriate to subject the defendant to that risk?").

90. *See Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 822–23 (11th Cir. 1990); *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985).

91. *Business Electronics*, 485 U.S. at 726–27.

92. *See* authorities cited *supra* note 25.

93. Gerhart, *supra* note 25 at 433 n.5 ("If a free rider problem does not exist, the value of services to consumers can be appropriated only by sellers who offer the services. In this circumstance, to allow a manufacturer to induce dealer services would misallocate resources by requiring consumers to pay more for services than they desire").

Electronics, however, fearful that juries are unable to decide the real motive, refused to let them try.[94]

The Court's insistence on that additional agreement in order to get to the jury turns the per se ban on vertical price fixing on its head. Resale price maintenance agreements have long been condemned because they "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."[95] Such restraints on dealers' selling in accordance with their own judgment are tolerated when the restraint does not specify the resale price but merely arranges things so that dealers have the same incentive as the manufacturer to adhere to a particular price or price level. The fiction is that the dealers then reach their pricing decision independently even if threatened with termination. Yet the courts have never indulged in this fiction in the absence of any free ridership problem. To require proof of the explicit price agreement stretches this fiction beyond any justifiable bounds.

V. CONCLUSION

If resale price maintenance agreements are to continue to be illegal, they must be inferable from circumstantial evidence. When a jury finds an agreement to terminate a discounter, and there is further evidence that elimination of free ridership or other efficiency enhancing reason[96] was not the motivation, the inference of coercion by a competing dealer, and therefore of an illegal conspiracy, must be allowed. It should then be incumbent on the manufacturer to proffer an alternative explanation for its conduct which rebuts the inference that the manufacturer intended to keep resale prices above competitive levels. If it cannot do so persuasively, permitting the inference is well within the mainstream of economic theory.

Admittedly, the supplier-coercion method of proving that termination of a discounter amounts to resale price maintenance would fly in the face of some post-*Monsanto* cases.[97] If antitrust legality is to turn on demonstrable eco-

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94. *Business Electronics*, 485 U.S. at 727–28.

95. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951).

96. Aside from elimination of free riders, the manufacturer's concern for its product's image may explain its desire for higher resale prices. *See, e.g. McCabe's Furniture, Inc. v. La-Z-Boy Chair Company*, 798 F.2d 323, 329 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 1728 (1988); *Winn v. Edna Hibel Corporation*, 858 F.2d 1517, 1520 (11th Cir. 1988). *See generally*, Monroe and Krishman, *The Effect of Price On Subjective Product Evaluations*, *in* Jacoby and Olson, *Perceived Quality: How Consumers View Stores and Merchandise* 209–32 (1985). This is not a rationale, however, sanctioned by the Supreme Court, which remains fixated on the free rider rationale.

97. The Report of the Senate Judiciary Committee accompanying the Retail Competition Enforcement Act of 1987 (S. 430), noted:

> Some decisions have suggested, for example, that even if the termination was directly caused by the price-related complaints of a competing dealer, accompanied by economic duress, coercion and threats, the plaintiff could not get to the trier of fact unless it also offered independent proof of a resale-price arrangement between the supplier and the complaining dealer. These requirements are too severe, and S. 430 is intended to remedy

nomic effects,[98] however, suppliers who are coerced into terminating a price cutter must be liable, for the simple reason that the effect of their conduct is the same as resale price maintenance, but without any redeeming virtues in terms of efficiency enhancement. The absence of such redeeming virtues should be the touchstone of illegality in any vertical restraint case.[99]

There is ongoing debate on the proper goals of antitrust law, roughly divisible into two camps: those favoring economic efficiency as the sole determinant of antitrust legality, and those seeking atomistic dispersion of economic power as a goal.[100] Permitting a terminated dealer to get to the jury on the question of the manufacturer's motive without specifically proving an agreement on price or price levels with other dealers serves the interests of both camps, at least when there is evidence that the supplier succumbed to dealer coercion and would not otherwise have desired the termination. If the per se rule against resale price maintenance is to be preserved, it must not be emasculated by erecting too high on evidentiary barrier. *Business Electronics* has unfortunately done both.

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these problems.

S. Rep. No. 100-280, 100th Cong., 2nd Sess. (Feb. 1, 1988) at 5.

98. Monsanto, 465 U.S. at 762 ("The legality of arguably anticompetitive conduct should be judged primarily by its market impact").

99. Sylvania, 433 U.S. at 54 ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason").

100. Hovenkamp, *After Chicago: A Reply,* 1986 DUKE L.J. 1014, 1024-25 (1986); Ponsoldt, *The Unreasonableness of Coerced Cooperation: A Comment Upon the NCAA Decision,* 31 ANTITRUST BULL. 1003, 1006-16 (1986).