Building a Stronger Foundation: Recent Trends in Vertical Restraint Enforcement

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At the beginning of the Clinton Administration there may have been great expectations for a revival of aggressive vertical restraint enforcement. After all, Congress had been strongly critical of the lack of vertical restraint enforcement during the Reagan Administration and the efforts to create more permissive standards in vertical restraint law.[1] As just one example, for several years legislation was proposed in Congress to repeal the Supreme Court decisions in *Monsanto* and *Sharp*.[2] Distribution cases were basically the domain of State Attorneys General. The arrival of Clinton Administration antitrust officials created expectations of a much stronger federal role in distribution cases, if not landmark changes in the law.

After eight years, however, the change seems far less dramatic. The number of vertical restraint cases brought by the Federal Trade Commission ("FTC") was not substantial, about one price-fixing case a year. Moreover, the enforcement actions undertaken by the agency tried to clarify the law in a reserved fashion, rather than seek significant changes in the law. This article attempts to give some perspective on vertical restraint enforcement at the FTC by reviewing several enforcement actions during the last year of the Clinton Administration: the *Compact Disk* cases, *Toys "R" Us*, and *McCormick & Company*. The article elaborates how by taking a moderate course in these enforcement actions, and eschewing per se rules, the FTC built a stronger foundation for future vertical restraint enforcement.[3] The article closes with a discussion of several initiatives the Bush Administration should consider to build on this foundation and clarify the law in this area.

VERTICAL PRICE RESTRAINTS

At the dawn of the Clinton Administration, one area in which the antitrust community could have expected a significant increase in antitrust enforcement was vertical price restraints. Soon to be FTC Chairman Robert Pitofsky made several predictions in 1993 about changes in antitrust enforcement. The first and most prominent prediction was increased enforcement in the area of vertical price restraints and efforts to reverse the decisions of the courts that narrowed the per se rule against vertical price fixing. Pitofsky predicted:

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> The rule that outlawed vertical price-fixing, established in 1911 in *Dr. Miles*[4] would be enforced and the opportunity for discounters to offer low prices to consumers protected. The Supreme Court's *Sharp*[5] decision would be overruled and *Monsanto*[6] clarified legislatively. It has always struck me that the nullification of enforcement against resale price maintenance, despite support for the *per se* rule in the Supreme Court and in Congress, was the most indefensible prosecutorial decision in the last twelve years.[7]

After eight years of Clinton Administration antitrust, the record on resale price maintenance and, indeed, the application of per se rules, is more centrist than one might have expected. First, there were no efforts in Congress from 1993 to 2001 to repeal *Monsanto* or *Sharp*. Second, the number of enforcement actions brought by the agencies in the area of vertical price restraints were relatively modest. There were only nine enforcement actions by both the Department of Justice ("DOJ") and the FTC combined during the eight-year period.

Third, the agencies' approach to the use of per se rules was not doctrinaire. In fact, when the question arose whether maximum resale price maintenance should be treated as per se illegal in *Khan v. State Oil*,[8] the antitrust enforcement agencies filed an amicus brief before the Supreme Court, arguing that the rule of reason was the appropriate standard and suggested reversal of the Supreme Court's decision in *Albrecht*.[9] The agencies' position was notable since the State Attorneys General filed an amicus brief opposing reversal. The DOJ/FTC brief, quoting the Supreme Court's decision in *ARCO*, observed: "the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist."[10] Thus, it was their view that in the vertical maximum price-fixing context, the per se rule could be anticonsumer and ought to be changed. Moreover, the per se rule had little effect on government enforcement, since the antitrust agencies had not found any vertical maximum resale price maintenance arrangements worth challenging in recent memory. The Supreme Court adopted the agencies' position in reversing *Albrecht.*

THE *COMPACT DISK* CASES

One of the traditional concerns about vertical restraints, in particular resale price maintenance, is that it can facilitate horizontal agreements (either tacit or explicit) among horizontal rivals. Vertical restraints can also facilitate coordination of conduct among rivals. This facilitating practice theory was an important aspect of the FTC's enforcement action against the five major recording companies for their use of similar minimum advertised price programs ("MAP").

Given the historic concern of antitrust to vertical resale price agreements, it is not surprising that agreements between suppliers and retailers for participation in MAP programs have been viewed with suspicion by enforcement authorities over the years.

Under a MAP program, cooperative advertising funds are given to dealers on the condition that they not advertise below a manufacturer-set price. The FTC has grappled for many years about how to analyze MAP programs. The critical issue has been when a program should be analyzed under the rule of reason as a potentially procompetitive nonprice vertical restriction, designed to manage the spending of a manufacturer's advertising budget, and when it becomes a method of vertically controlling the actual prices at the retail level, demanding per se condemnation.

Given the historic concern of antitrust to vertical resale price agreements, it is not surprising that agreements between suppliers and retailers for participation in MAP programs have been viewed with suspicion by enforcement authorities over the years. In a 1980 policy statement in connection with the acceptance of two consent orders,[11] the FTC announced its intention to challenge certain price-restrictive cooperative advertising programs as per se violations.[12]

In 1987, however, the FTC rescinded the 1980 policy statement, proclaiming that, instead, it would analyze MAP restraint agreements under the rule of reason.[13] Simultaneously, it reopened and set aside a particular consent order against the Advertising Checking Bureau, as a reflection of the policy change.[14] The FTC noted that such programs could often be procompetitive or competitively neutral, stimulating dealer investment in promotion and benefitting interbrand competition. According to the FTC, the programs at issue in the Advertising Checking Bureau matter would not prevent the dealer from "selling at discount prices or even from advertising discount prices at the dealer's own expense."[15] However, it did not say it would treat cooperative MAP restraints meeting these criteria as per se *legal*. The FTC acknowledged that they remained potentially troublesome, and that this potential would be realized whenever such programs amounted to, or played a role in, actual resale price maintenance.

Under the new policy, the FTC approved the use of various MAP programs where firms' institution of the policy was unlikely to lead to an RPM agreement, the firms lacked significant market share or there were no impediments to entry, and there was little likelihood of competitive harm.[16] In other cases, the FTC declined to approve these policies where they appeared to have the potential to lead to RPM agreements.[17]

It is important to note why MAP programs receive such careful analysis. Advertising plays a critical role in price competition, and restrictions on price advertising can have a substantial impact on prices. According to Judge Easterbrook, "the proposition that to forbid the advertising of discounts is to set price (at least to influence it) [is] a proposition with substantial support in both law and economics."[18] Justice Breyer in his minority opinion in *California Dental Association*, made this essential point in the context of the FTC's attack on an agreement restraining dentists' advertising of discounts:

> An agreement not to advertise ... that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices ... . To restrain truthful advertising about lower prices is likely to restrict competition in respect to price—"the central nervous system of the economy."[19]

Last year, the FTC entered into settlements with all five major pre-recorded music distributors—Sony, Universal, BMG, Warner-Elektra-Atlantic, and

EMI—over their MAP policies, settling charges that they entered into illegal price-fixing arrangements.[20] These companies control over 85 percent of the prerecorded music market. At issue were the actions taken by all five companies in recent years to strengthen their existing cooperative advertising programs by inducing retailers to charge consumers higher prices for CDs, and coincidentally prohibiting distributors from raising their own prices.

Advertising plays a critical role in all retailing, especially music and electronics retailing, where consumers are very familiar with advertising inserts in their weekly newspaper. Often those advertised products will be sold as loss leaders to attract customers into the store. Like many areas of retailing, the prerecorded music industry faced a revolution in the early 1990s with the emergence of category-killer stores, such as Best Buy and Circuit City. The category-killer retailers sell at low margins, engage in regular advertising typically in weekend newspaper circulars, and often sell products, such as CDs, as loss leaders in order to bring customers into their stores. Traditional retailers did not welcome the emergence of the new competitors or their aggressive pricing policies. The conflict came to a head in the early 1990s when several large consumer electronics and mass merchandiser chains, including Best Buy, Wal-Mart, Circuit City, K-Mart, and Target, began selling CDs and other recordings. Through aggressive discounting, the entrance of the mass merchandiser chains precipitated a price war and the average price of CD's dropped an estimated 50 percent in a short period.

Some traditional retailers not only had to cut prices but reportedly lost market share in spite of their own cuts. These firms then sought "margin protection" from the distributors. In 1992-93, the major distributors responded, each adopting a "traditional" MAP policy, which limited the price solely in the advertisements that received MAP support. From the perspective of the traditional retailers, the "traditional" programs were ineffective, since the mass merchandisers could still engage in aggressive pricing through other means of advertising not included under the MAP policies, as well as lax enforcement by the distributors.

In response to concerns from traditional retailers and distributors' own concerns about their margins, the distributors significantly tightened their MAP policies in 1995-96. The revised MAP programs, characterized as "MAP with teeth," broadly restricted in-store "advertising and promotion,"i ncluding virtually every means of communicating the price of the product to the consumer other than the small price sticker on the product. The tightened policies also extended to any advertisements, whether or not wholly paid for by the retailer. By broadly restricting advertising, including all in-store displays and signs, the MAP policies effectively precluded most retailers from communicating prices below the suggested prices to their customers. And without the ability to advertise lower prices, prices increased.

Further, the new policies established significant financial penalties for failure to adhere. All the distributors (except BMG) provided that any retailer who advertised the distributors' product below the established MAP would be subject to a suspension of all cooperative advertising and promotional funds for either sixty or ninety days.[21] Under the revised policies, a single violation of the new MAP policies resulted in a total loss of all cooperative advertising and promotional funds for the specified period. The funds were substantial and the severity of the new penalties virtually ensured that even the most aggressive retail competitors would stop advertising prices below MAP. The distributors carefully policed their programs and imposed significant penalties upon violation by a retailer. As alleged in the FTC complaints, the new policy worked, with retail prices increasing in 1995-96, and wholesale prices in 1997.

The features that distinguished the music distributors' troublesome MAP programs included their application to all advertising beyond that funded by the distributors. It applied to television, radio, newspaper, even signs and banners within the retailers' own stores, as well as to advertising funded entirely by the retailer. Large music retailers stood to lose millions of dollars in cooperative payments each year if they were caught violating the revised MAP programs. If retailers could not induce customer response to the discount by advertising it, they seemingly had very little incentive to price at a discount.

Mode of analysis: per se or rule of reason

In analyzing the CD MAP programs, the FTC began with its 1987 policy declaration that the rule of reason treatment should be given to MAP programs that fell short of actual resale price maintenance agreements. According to the logic of the FTC's policy, it seemed that if the reasons it cited for the rule of reason treatment were not met in a particular case, treatment of the MAP program under scrutiny would revert to the per se treatment accorded under the previous policy. The FTC's position was set forth in *American Cyanamid*: "both the courts and the FTC have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement."[22]

There were two significant obstacles to application of a per se approach to the policies in these cases. As a policy matter, application of a per se approach would prevent smaller distributors from implementing these policies. If a distributor with a very small market share (e.g., 10 percent) implemented these policies, it is unlikely that they would have much of a competitive impact. Again, a small distributor might have a strong efficiency rationale, such as the need to distinguish its products. So a per se approach would be overbroad.

Moreover, less than a year after the FTC revised its MAP policy, the Supreme Court decided *Sharp*, in which the Court imposed the requirement that there be an agreement on "price or price levels" for per se condemnation.[23] As the FTC observed: "Restrictions on advertisements that include discounted prices in advertisements funded in whole or in part by the manufacturer are not per se illegal, notwithstanding the fact that they are likely to have an influence on resale prices."[24] In other words, to support per se analysis, the FTC has to be able to find "agreement on price or price levels" to satisfy the *Sharp* criterion.[25] Indeed, there was evidence in this case that some retailers had "on rare occasions ... [sold] a product at a discount without advertising the discounted price, [and] instead advertis[ed] simply that the product was available at a 'guaranteed low price.'"[26] Although the FTC did not find a per se violation, it is obvious that they believed that the respondents had skated as close to the line of illegality as possible.

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Rule of reason analysis

The lack of a per se approach does not mean that MAP cases will result in "lengthy trials of the century." In this case, the FTC set out a rule of reason analysis that may instruct how a rule of reason approach could be structured. Most important, the five major distributors controlled 85 percent of the market. Aggregation was appropriate because they acted in parallel and left would-be discounters no realistic alternatives. Each of the distributors had market power in the sense relevant to the case, because no music retailer could realistically choose not to carry product from even one of the five major distributors. Further, in the adoption and tightening of their MAP policies, the distributors had a common purpose of stabilizing and then increasing retail prices in order to relax the pressure on their own profit margins.[27]

As noted earlier, the aimed result was ultimately achieved by their policies, as both wholesale and retail prices increased significantly. This is not surprising since the significant financial incentives to adhere to the MAP policies effectively prevented the retailers from communicating discounts to consumers and this severely diminished the incentives of retailers to discount. As in many other cases, where actual evidence of anticompetitive effects is present, a full rule of reason analysis may not be necessary.[28]

The FTC went on to consider whether the conduct was efficient since vertical restraints often benefit consumers by enhancing interbrand competition and expanding market output. Resale price maintenance and similar restrictions may be efficient particularly to the extent they enable firms to provide services that may enhance output. The FTC, however, found no plausible efficiency justifications in this case. While the restraints may have offered some potential efficiencies, such as the protection of firms which offered greater services or a broader range of products, this justification was unsupported by contemporaneous evidence. The policies appeared to have been adopted to protect both the traditional retailer and distributors' margins. Although instituting policies to protect margins individually can be procompetitive, especially when it results in better services of a broader range of products, the results in this case were to the contrary. The traditional retailers did not offer some service or breadth of product that would have been lost if they were not protected by the MAP policies. The mass merchandisers that charged lower prices offered a product selection (in terms of number of recordings) that was more than twice as large as that of traditional retailers. The mass merchandisers also provided services that were as good as, and in some cases, superior, to those provided by higher-priced traditional retailers.[29] Thus, the finding of a rule of reason violation seems to have a strong foundation.

Currently, there is a lively debate on whether vertical price restrictions should be per se illegal under the antitrust laws. Those who suggest that resale price maintenance is typically benign or procompetitive assume that the interests of manufacturers and consumers are almost invariable coincident. Economic theory teaches that it is in a manufacturer's interest to sell as much product as possible where the manufacturer lacks market power and is not in collusion with its competitors.[30] The manufacturer facing a competitive market will choose the most efficient means of marketing its product to consumers.

Even though this may often be evident, there was an important distinction in this case that undermined the assumption that the interests of the manufacturers were aligned with consumers. The five major music distributors implemented the new tougher MAP policy at a point when the distributors themselves were concerned that retail price cutting was putting pressure on their own wholesale prices. Thus, the interests of the manufacturers were no longer aligned with the interests of consumers for lower prices. The impact of price competition at the distributor level having an impact on manufacturers' margins seems consistent with the analysis by Professor Pitofsky in his article about resale price maintenance.[31] As Pitofsky observed: "if aggressive price competition drives down retail prices the manufacturers' profits will suffer eventually."[32]

Notwithstanding the decision not to apply a per se rule, the FTC declared that in the future it would " view with great skepticism cooperative advertising programs that effectively eliminate the ability of dealers to sell product at a discount."[33] The FTC reminded the business community that it will consider per se unlawful any arrangement between a manufacturer and its dealers that includes an explicit or implied agreement on minimum price or price levels. Additionally, the FTC noted: "it will henceforth consider unlawful arrangements that have the same practical effect ... without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power."[34]

MAP policies as facilitating practices

As noted earlier, a critical aspect of the case was the horizontal nature of the conduct at issue. The FTC concluded that MAP arrangements of these dominant distributors facilitated horizontal collusion among the distributors, and therefore violated Section 5 of the FTC Act.[35] Section 5 plays a critical role in preventing certain types of practices that can facilitate collusion and cannot be reached under Sherman Act standards. Facilitating practices are practices adopted by participants in a market, either unilaterally in parallel or by agreement among them, that make it easier to achieve the results of collusion on some element of competition without overt agreement. A tangible example of such a practice is the adoption, in a market with relatively few sellers, of a regular custom of publicly announcing price increases in advance, where actual customers were separately notified privately and the public notice served only to make competitors' parallel moves easier and more timely.[36]

Vertical restraints may be a particularly effective mechanism to facilitate collusion, especially in an oligopolistic industry such as pre-recorded music. As

Professor Areeda has observed: "[d]istribution restraints can aid express or tacit coordination among manufacturers," among other reasons, because "a manufacturer has less reason to cut his price, or to fear the cuts of rival manufacturers, when dealers cannot pass the discount to customers." He noted that vertical price restraints can be particularly problematic and "might be presumed dangerous when it covers a substantial portion of a concentrated market."[37]

In the *Compact Disk* cases, the FTC found that these agreements facilitated successful horizontal price fixing through the success of vertical price fixing. Several factors make this industry oligopolistic and conducive to coordinated interaction. The distributors control approximately 85 percent of the market and there are very high entry barriers. As important, the adoption of MAP policies by one or more distributors was easily observable and in this instance all of them changed their policies in lock-step fashion. Detection of cheating was simple; as Judge Easterbrook has observed: "a no advertising rule … is easily enforceable because advertising of discounts is observable."[38] In the music industry, practices that facilitate coordination are of particular concern due to the high concentration of competitors, significant entry barriers, and the regular lock-step increase of prices. Moreover, other factors, such as parallel adoption of closely similar MAP programs, evidence of an intent to stabilize and increase industry prices, and evidence of the success of the undertaking, suggested a threat of coordination. The analysis of facilitating practices also requires the consideration of efficiencies. Once again, the FTC found a lack of plausible legitimate business justification for the MAP programs.[39]

One of the most difficult economic, and legal, battles was, and still is, being fought by full service retailers against upstart discount retailers.

Lessons for e-commerce

The *Compact Disk* cases have some interesting implications for retailing and electronic commerce. There were clear lines in the *Compact Disk* cases between advertising that received manufacturer cooperative support and advertising that did not. The extension of minimum pricing to the latter was clearly illegal. It is not certain that such clear lines can be easily discerned in an Internet context, where all the pages of a Web site, or even many Web sites, may be hyperlinked to each other. If a manufacturer provides cooperative funds for some pages of a Web site but not others, can it still claim that the funds support the entire Web site, and therefore it can demand minimum prices throughout the site? What if the manufacturer only provides a banner ad on the first page? The analogy to the *Compact Disk* cases would suggest that there would be credible arguments that a restriction throughout the Web site may be overbroad. Yet, this is an area in which the law is inchoate, and continued vigilance by the antitrust authorities is necessary in order to protect new avenues of competition.

TOYS "R" US

A distribution revolution, like the current one caused by the growth of various forms of electronic commerce, is not a new phenomenon in American economic history.[40] As the economy has grown and matured, local commerce has given way to national competition, supermarkets have displaced small grocery stores, and department stores have grown at the expense of specialty retailers. Of course, the companies on the losing end of this creative destruction did not simply accept the inevitable and close their doors, contrary to the attestment of a significant body of antitrust jurisprudence.[41] One of the most difficult economic, and legal, battles was, and still is, being fought by full service retailers against upstart discount retailers. These battles may have implications for the future as bricks-and-mortar retailers attempt to stave off Internet competitors. The FTC's *Toys "R" Us* ("TRU") case has real resonance for an era in which bricks-and-mortar merchants are increasingly facing new modes of competition from online merchants. At bottom, *TRU* is a case about the reaction of an incumbent retailer to the entrance of new and different competition. In *TRU*, after the incumbent retailer lost market share to the new entrants, it reacted by abusing its market power to stifle these new competitive initiatives.

TRU is one of the great innovation stories in American retailing. It is credited with inventing the "category-killer" retailer concept, and by the mid-1980s had become the nation's largest retailer of toys. However, by the early 1990s, TRU was facing a new competitive threat. Warehouse clubs had begun selling toys at prices that were lower than TRU prices. Both the TRU low-price image and market position were put in issue. In response, the FTC found that TRU orchestrated agreements with and among toy manufacturers to withhold from the clubs toys they were selling to TRU. Under this "no identical products" policy, the manufacturers instead were limited to selling the clubs more expensive, less desirable packages of two or more toys in "club specials," or other differentiated products. After a lengthy trial, in October 1998, the FTC upheld an Administrative Law Judge's finding that TRU had violated Section 5 of the FTC Act by inducing major toy manufacturers to agree—both with TRU and among themselves—to deal with warehouse clubs, like Costco and Sam's Club, on less favorable terms.[42]

The FTC held that the manufacturers did not see TRU's restrictions to be in their own interests, but were pressured into them by TRU's threats that it would not carry toy items that the suppliers sold to the clubs. Critically, the FTC concluded that TRU responded to manufacturer concerns that their competitors would take business away by obtaining and conveying to competitor manufacturers reassurances of mutual forbearance.

The FTC noted that their agreements could be per se illegal under *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[43] which had very similar facts, but, instead, chose to apply the detailed market analysis called for in the Supreme Court's more recent *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* case.[44] The FTC found that per se treatment was appropriate under the *Stationers* criteria because the boycott agreement's purpose was "to disadvantage competitors of one of the participants," and the parties to the agreement "were dominant in their markets." Moreover, it held that the agreement deprived the boycotted firms of "products and relationships" essential to effective competition, and there were no plausible efficiency justifications.[45]

The FTC also found TRU's conduct in orchestrating the boycott unlawful under a rule of reason standard. The FTC concluded that not only did TRU prevent the decrease in consumer toy prices but it also determined that TRU's business justification of free riding was purely pretextual. The FTC further held that "each agreement in the series of vertical agreements, standing alone, even without the evidence of horizontal agreement among many of the toy manufacturers violates § 1 of the Sherman Act upon a full rule of reason review."[46]

Last year, the Seventh Circuit affirmed the FTC decision.[47] On appeal, TRU argued that:

(1) the finding of a horizontal conspiracy was contrary to the facts and impermissibly confuses the law of vertical restraints with the law of horizontal restraints;
(2) the restrictions were not unlawful because TRU lacked market power;
(3) the TRU policy was a legitimate response to free riding; and
(4) the relief ordered by the FTC went too far.[48]

Horizontal agreement

In upholding the FTC's finding of a horizontal agreement in which TRU served as "ringmaster," the court of appeals first noted that such agreement can be proven circumstantially as well as directly. In *Interstate Circuit*, the Supreme Court held that a combination is tacit where "knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."[49] Under this standard, a meeting of the minds is implied where the alleged violators participated or acquiesced in a pattern of uniform business conduct. The Supreme Court further noted in *Monsanto*[50] that where circumstantial evidence is relied upon, "there must be some evidence that tends to exclude the possibility" that the alleged conspirators acted independently.[51]

The court rejected TRU's contention that *Monsanto* required evidence that "exclude[d] all possibility that the manufacturers acted independently," because this would "amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred."[52] Applying a "substantial evidence" standard of review, the court found the FTC's conclusions even more compelling than those reached in the old *Interstate Circuit* Supreme Court case[53] because, *inter alia*, "the record here included the direct evidence of communications that was missing [there]."[54] In this case, the evidence showed that the manufacturers "wanted to diversify from TRU, not to become more dependent upon it; it showed that each manufacturer was afraid to curb its sales to the warehouse clubs alone, because it was afraid its rivals would cheat and gain a special advantage in that popular niche market."[55] Moreover, it was clear to the court that each competitor would not agree to TRU's demands unless it was sure that its competitors were doing the same. The court found a horizontal agreement through the collusive efforts of TRU and held that TRU's actions were a per se violation.[56]

Market power

The court's treatment of market power was particularly interesting, since TRU had a modest market share of about 25 percent, which is not usually associated with antitrust violations. Due to the per se finding of a horizontal agreement, the court found consideration of market power unnecessary and only addressed the issue "in the alternative."[57] In its treatment of the issue, the court suggested that effective market power might be found at lower market shares in vertical contexts than in horizontal ones. The court began by noting that TRU "has things backwards" in supposing that anticompetitive effects of a restraint cannot be shown unless it is first proved that the actor "has a large market share." Rather, the court observed, "there are two ways of proving market power. One is through direct evidence of anticompetitive effects," the other by proving relevant market and "showing that the defendant's share exceeds whatever threshold is important for the practice in the case."[58] The court cited both kinds of evidence in upholding the FTC's findings that "it was clear that [TRU's] boycott was having an effect in the market," and that "affected manufacturers accounted for some 40% of the traditional toy market, and that TRU had 20% of the [buying side of the] national wholesale market and up to 49% of some local wholesale markets."[59]

The court's association of buying power with these market shares was notably more sophisticated than the usual mechanical application of the market power concept. The court recognized that such shares, when they are the largest shares in the market, confer enormous coercive power over the firm's trading partners. The FTC, in finding "dominance as a buyer and seller"[60] on TRU's part, cited not only its extraordinarily large share for a retailer, but also the fact that no other retailer could replace it as a purchaser of a manufacturer's product. TRU was substantially larger than any other retailer in terms of market share and geographic scope. Its unusually broad inventory made it virtually the only buyer for some older or low-volume toys that disproportionately affected a manufacturer's profitability. Further, many manufacturers believed a promotional campaign would not be cost-effective without TRU's participation, and that TRU could amplify its market power by "playing favorites" or threatening to cut off purchases.[61]

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Efficiency

Prominent among TRU's defenses was the contention that its policy was a legitimate business response to combat free riding by the warehouse clubs. Specifically, TRU contended that it provided the manufacturers important promotional and informational services that helped the clubs to sell the same products at a discount, even though the clubs did not have to make a similar investment. In considering TRU's free riding defense, the court concluded that

TRU fundamentally misunderstood the theory of free riding and that "the evidence shows the free-riding story is inverted."[62] In other words, the court noted that the manufacturers did not want to keep their products away from the clubs to preserve an incentive to TRU to provide valuable distribution services. Such a distinction is crucial, the court asserted:

> because the most important insight behind the free-rider concept is the fact that, with respect to the cost of distribution services, the interests of the manufacturer and the consumer are aligned, and are basically adverse to the interests of the retailer (who would presumably like to charge as much as possible for its part in the process).[63]

Further, the court found that this defense was unsupported since TRU's economic interest was in maximizing its own profits, not in keeping down its suppliers' cost of doing business and thus delivering goods to consumers at the lowest price. In any event, TRU was being compensated directly for the distribution services it was furnishing.[64]

Lessons for e-commerce

One important element of the TRU decision may help inform the analysis of business to business ("B2B") arrangements. A controversial issue in B2B arrangements is whether exclusion poses competitive problems. The FTC's examination in TRU suggests that the analysis of exclusion need not rely entirely on the amount of market share of the venture. In its competitive effects analysis of TRU's "no identical products" policy, the FTC focused on three important factors. First, the FTC concluded that the policy reversed a pattern of rapid growth of toy sales at the clubs. Second, the FTC found that in the past TRU had responded to the lower clubstore prices by lowering its own prices. Finally, and most significantly, the FTC found that competition from the clubs would have driven TRU to lower its prices if TRU had not taken action to stifle the competitive threat posed by the clubs. The lesson is that market share is only one element of the analysis. Competitive concerns may be raised where there is actual evidence that a market participant had a constraining influence on the market and that constraining influence has been diminished by exclusionary practices. Such a conclusion raises the possibility that B2Bs that do not have a large market share but possess strong buying power may be subject to antitrust liability if they are seen as an essential form of distribution.

MCCORMICK & COMPANY

It is also important to look at Robinson-Patman enforcement. In 2000, the FTC brought the first Robinson-Patman enforcement action in a decade—a consent order with McCormick & Company settling allegations of secondary-line violations of the Robinson-Patman Act.[65] The Robinson-Patman Act has it own line of enforcement and case law that differ from that found under the FTC Act. Passage of the Robinson-Patman Act followed from a FTC report in 1934 and from demands of independent retailers for protection from chain stores.[66] Although the law on its face seems to mandate equal prices to all buyers in many situations, powerful defenses of "meeting competition" and "cost justification" that are built into the statute make successful application difficult and infrequent. Economic theory informs us that in many instances, prices that look discriminatory are actually efficient, thus the resulting strong efficiency defenses built into the law itself. Nonetheless, sometimes economically harmful discrimination is present. In *McCormick*, the meeting competition defense was inapposite, and the facts pointed to price discrimination that harmed competition at both the wholesale and retail level of food distribution.

Antitrust enforcement agencies must distinguish between economically efficient price discrimination and discrimination that is harmful to the competitive process and consumers.

Many ponder whether there is any role for government enforcement of the Robinson-Patman Act. Government enforcers face a difficult quandary since price discrimination is typically efficient, and application of the Act in an overly rigid fashion will stifle many procompetitive activities. Enforcement efforts could lead to uniform charges tending to stabilize prices and ultimately lead to higher prices for consumers. Thus, antitrust enforcement agencies, in the exercise of their prosecutorial discretion, must distinguish between economically efficient price discrimination and discrimination that is harmful to the competitive process and consumers. What types of matters should receive scrutiny? As former FTC Competition Bureau Director Thomas J. Campbell noted almost two decades ago, the cases in which there is the greatest likelihood of competitive harm include:

(1) cases where price discrimination has been used as a tool for attempted monopolization or predatory conduct;
(2) cases where dealer or dealers with market power force the seller to give it a price break; and
(3) cases where manufacturers try to confer market power on a favored dealer in exchange for preferential treatment at a later time.[67]

McCormick is the world's largest spice company and by far the leading supplier in the United States. In the early 1990s, McCormick faced a new competitive threat through the emergence of a full-line spice rival, Burns Philp Food Inc. In response to this threat, McCormick engaged in unlawful price discrimination, through allowances given to retailers for shelf space. The consent decree settled charges that McCormick had engaged in unlawful price discrimination in the sale of spice and seasoning products, and that this had injured competitors of the favored retailers. Discounts to favored chains allegedly were conditioned on an agreement to devote all or a substantial portion of shelf space to McCormick products. The unlawful agreement contributed to the paucity of alternative sources from which disfavored retailers could purchase comparable goods at prices and terms equivalent to those which McCormick provided to the favored purchasers, leading to the competitive injury of disfavored retailers.[68]

The complaint alleged that McCormick had a single national price list, but relatively few McCormick customers paid the list price. McCormick commonly made deals with customers that provided substantial discounts, including cash payments up-front, free goods, off-invoice discounts, cash rebates, performance funds, and other financial benefits, all of which effectively reduced the net price. Typically, McCormick negotiated with particular customers over the total percentage of such discounts and benefits, commonly known as the "allowance offer" or the "deal rate." The complaint alleged that McCormick discriminated in its "deals" among competing retailers. Additionally, as the FTC majority observed, part of the injury at the secondary level occurred because McCormick's behavior injured its only full-line competitor, Burns Philp. The majority added that in reaching their conclusions they had "examined other factors, including the market power of McCormick and the fact that discounts to favored chains were conditioned on an agreement to devote all or a substantial portion of shelf space to the McCormick line of products."[69]

A central issue in *McCormick* was the analysis of competitive injury and whether the FTC would presume injury based on the *Morton Salt* inference. The

Supreme Court's 1948 decision in *FTC v. Morton Salt* held that the FTC can infer that there was injury to competition, an essential element of the offense, from the fact of persistent, non-trivial discrimination itself, especially where the market in which the buyers compete operates with narrow margins.[70] The use of this inference has been especially controversial since it appears to permit the disadvantaged retailer to establish a critical element of the offense without any evidence that the discrimination had any market impact. This, in turn, probably has led many inauspicious Robinson-Patman claims to survive summary dismissal at trial, forcing defendants to settle cases that were not meritorious.

The spice case seemed to fit the textbook model for the application of the *Morton Salt* inference. As noted earlier, the particular market setting in which the discrimination occurred was of central importance to the FTC majority. In the early 1990s, McCormick had found itself in a price war with Burns Philp, its only major full-line competitor. The majority said that they weren't simply applying the *Morton Salt* presumption in finding injury to competition, but had examined such other factors as the market dominance of McCormick and the evidence that discounts to favored chains were conditioned on an agreement to devote all or a substantial portion of shelf space to the McCormick line. The majority added:

> [T]here will be circumstances in which the *Morton Salt* presumption is appropriate and dispositive. There may be other market settings in which it makes sense for the Commission, as a matter of prosecutorial discretion, or the Commission and Courts, in the process of considering whether there has been a violation, to look past the *Morton Salt* factors to a broader range of market conditions to determine whether there has been real injury to competition. Taking those additional factors into account, the majority concluded that there was injury not just to the disfavored buyers, but to secondary-line competition generally.[71]

The majority's statement suggests that both the FTC and the courts should look beyond the simple application of the inference and examine market factors to determine if there is some likelihood of competitive harm from the practice at issue.

FOUR SUGGESTIONS FOR THE BUSH ADMINISTRATION

Although the Clinton Administration antitrust enforcers established a stronger foundation for vertical restraint enforcement, there are many tasks left undone. Here are four modest suggestions for the Bush Administration on how to strengthen vertical restraint enforcement.

Structuring the analysis of resale price maintenance claims

Current law on vertical resale price maintenance claims focuses almost entirely on the question of whether the manufacturer and the retailer enter into an agreement on resale prices. Once that element is established, such an arrangement is presumptively illegal. The question of whether a RPM agreement has any effect or potential for anticompetitive effects does not enter into the analysis. The Bush Administration should look for opportunities, such as the *Compact Disk* cases, to bring RPM enforcement actions under the rule of reason to explain how that analytical approach should be structured. The truncated analysis used by the FTC is suggestive of an appropriate fashion to truncate the rule of reason analysis. However, the analysis in that case did not describe what the threshold inquiries are or what the burden of proof is. The Bush Administration should find an opportunity to explain how a truncated rule of reason can be applied to these cases.

Clarifying the bounds of the Robinson-Patman Act through guidelines and amicus filings in private litigation

The Robinson-Patman Act is regularly criticized, but continues to play an important role in antitrust litigation and counseling. Yet much of the antitrust jurisprudence is from FTC cases decided in the 1960s. As private counselors attempt to apply decades old precedent to new economy situations, they recognize the dissonance between law and new economy realities. On the litigation front, the agencies should consider participating as amici in private litigation to bring greater economic focus to the law. One place to start with would be cases involving the *Morton Salt* inference. The FTC's decision in *McCormick* suggests that the inference should be scaled back and there should be a greater consideration of competitive effects in these cases. The FTC should look for opportunities to identify a sensible approach to the issue of injury in secondary line cases and advocate that approach as an amicus in appellate litigation.

The FTC also plays an important, and often overlooked, role in providing guidance on Robinson-Patman issues. The FTC's *Fred Meyer Guides* are a vital resource for counseling on promotions and allowances, but these Guides have not been revised since 1989. The FTC should revise the *Fred Meyer Guides* to take into account the new challenges created by the distribution revolution. Guides generally can provide useful information for private counselors, especially in areas where there is relatively little law or the law is outdated. The FTC should also consider issuing guides on other frequent counseling issues, such as the cost justification or meeting competition defenses.

Providing greater guidance on retailing shelf space practices

Perhaps one of the most controversial and complex issues in distribution are the practices surrounding the acquisition and management of shelf space at retailers, primarily supermarkets. These practices include payments for shelf space, known as slotting allowances, and category management, where a manufacturer assists a retailer in managing shelf space in a specific category. Last year, the FTC held a two-day workshop on these practices and issued a report earlier this year.[72] The report formulated several questions that need to be addressed and set forth an analytical model for reviewing these practices. The FTC should follow up on the report with additional workshops and guidance on these practices.

Consistently coordinating with state antitrust officials

Generally, since the Bush I Administration, antitrust enforcers have done a commendable job of coordinating both federal and state antitrust enforcers. Coordination has numerous benefits for both the government and private parties, since a global settlement is typically a quicker and more efficient solution. Moreover, coordinated enforcement generally leads to more consistency between enforcement officials. Unfortunately, the *Compact Disk* cases did not lead to coordinated litigation. Cases with such a substantial consumer impact should always be effectively coordinated.

CONCLUSION

The importance of distribution cases sometimes belies their low profile. Distribution is the central nervous system of a modern economy—if it does not work efficiently, the results may include manufactured goods with no place to go and a lack of products at the other end of the pipeline. As distribution has undergone a revolution due to the emergence of electronic commerce, we have greater appreciation for the vital role of antitrust enforcement. The process of distribution is not seamless; nor is it static. Distribution changes over time as new technology and new thinking on various topics, such as inventory control, streamlining management, and the relative efficiency of vertical integration or disintegration change the way products move through the pipeline. The antitrust laws protect innovation of the distribution process by making sure that new ideas and new competitors are not illegally stifled by entrenched incumbents. Maintaining a competitive distribution sector is particularly vital to innovation and the new high-tech economy.

The efforts of the Clinton Administration have set a stronger foundation to vertical restraint enforcement. Rather than engaging in an ideological crusade or taking the divisive path of trying to reverse the trend in the law to treat distribution restraints with more sensitivity, they took a centrist course. The recent vertical restraint cases brought by the FTC show that antitrust policymakers are cognizant of the harm that can be done by a policy of barren formalism, leading to excessively regulatory enforcement. These cases show an overriding concern for efficiency in distribution and an acknowledgment that vertical restrictions can be procompetitive in many instances. The agencies follow the economic teaching that per se analysis should be limited to issues where anticompetitive effects are certain and efficiencies are almost invariably lacking. The FTC's approach in the *Compact Disk* cases eschewed a per se analysis that may have unnecessarily imposed liability on MAP restrictions where there was little likelihood of competitive harm. The agencies successfully sought reversal of the per se rule against maximum resale price maintenance in *Khan v. State Oil*, which enables firms to engage in new vertical price restraints that are almost invariably beneficial to consumers.[73] The treatment of the *Morton Salt* inference in *McCormick* shows an awareness of the need to limit presumptions of liability that can often lead to inefficient results. Finally, the *TRU* case demonstrated how the exercise of buyer power can raise competitive concerns. Taken together, these cases show the agencies' efforts to infuse distribution cases with modern economic analysis that attempts to keep the distribution process open, free, and innovative.

These cases show the agencies' efforts to infuse distribution cases with modern economic analysis that attempts to keep the distribution process open, free, and innovative.

NOTES

1. *See generally* David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 Cornell J.L. & Pub. Pol'y 62 (1999).

2. Business Elecs. v. Sharp Elecs., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

3. The article does not address tying or exclusive dealing cases brought by the agencies.

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

5. 485 U.S. 717 (1988).

6. 465 U.S. 752 (1984).

7. Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 Antitrust L.J. 217, 219 (1993). Chairman Pitofsky is one of the leading advocates for the per se approach to resale price maintenance. *See* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487 (1983).

> This commentary contends that the Supreme Court's long-standing rule of per se illegality with respect to minimum price-fixing agreements is justified. The one point that emerges clearly in any debate concerning the per se rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices. Such agreements completely eliminate price flexibility at the dealer level and may stabilize higher prices at the manufacturer level. Critics of a per se rule rely on theoretical arguments that complicate a relatively straightforward policy choice.

Id. at 1488-89.

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

9. Albrecht v. Herald Co., 390 U.S. 145 (1968); *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, State Oil Co. v. Khan, 522 U.S. 3 (1997) (No. 96-871) (supporting reversal).

10. Atlantic Richfield Co. v. USA Petroleum, Co., 495 U.S. 328, 343 n.13 (1990).

11. Totes Inc., 96 F.T.C. 335 (1980); Tingley Rubber Corp., 96 F.T.C. 340 (1980).

12. Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (June 27, 1980). The FTC acknowledged that this policy "departs from that announced by the United States Court of Appeals for the Fifth Circuit, in *In re Nissan Antitrust Litigation*, 577 F. 2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), which held that such programs should be judged under the rule of reason."

13. Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs-Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

14. The Advertising Checking Bureau, Inc., 109 F.T.C. 146, 147 (reopening and setting aside 93 F.T.C. 4 (1979)).

15. *Id.*

16. Onkyo U.S.A. Corp., 122 F.T.C. 325 (1996); Clinique Laboratories, Inc., 116 F.T.C. 126 (1993); Magnovox Co., 113 F.T.C. 255 (1990).

17. U.S. Pioneer Elecs. Corp., 115 F.T.C. 446 (1992).

18. Illinois Corporate Travel Inc. v. American Airlines, Inc., 889 F.2d 751, 754 (7th Cir. 1989).

19. California Dental Ass'n v. Federal Trade Comm'n, 526 U.S. 756, 784-85 (1999) (citations omitted).

20. Sony Music Entertainment, Inc., Dkt. No. C-3971; Time Warner, Inc., Dkt. No. C-3972; BMG Music, Dkt. No. C-3973; Universal Music & Video Distrib. Corp., Dkt. No. C-3974; Capital Records, Inc., Dkt. No. C-3975 (all made final Sept. 6, 2000). A coalition of over 30 states filed an antitrust suit against the major CD manufacturers, alleging that they engaged in illegal price fixing. *See Music Distributors, Retailers Charged With Price-Fixing*, Press Release of the Attorney General

of Vermont (Aug. 9, 2000). The European Union conducted a similar price-fixing investigation, but closed it when the companies abandoned these practices. *See EU Quits Inquiry on Music Pricing by Five Companies,* Wall St. J. Europe 3 (Aug. 20, 2001).

21. BMG's policy varied slightly and provided that any retailer who violated the policy three times within a 12-month period would be subject to a suspension of all cooperative advertising and promotional fiends for up to 12 months.

22. Analysis to Aid Public Comment in the *Compact Disk* cases (*quoting* American Cyanamid Co., 123 F.T.C. 1257, 1265 (1997)) [hereinafter *Analysis to Aid Public Comment*].

23. *See supra* note 5, at 736.

24. *See supra* note 22.

25. In footnote 1 to the Competitive Impact Statement in the *Compact Disk* cases, the FTC observed:

> In American Cyanamid, the manufacturer conditioned financial payments on its dealers' charging a specified minimum price, which the Commission found to be per se unlawful minimum resale price maintenance. By contrast, financial payments under the distributors' MAP policies here were conditioned on the price advertised, not on the price charged.

26. *See supra* note 22.

27. This case has been criticized for having no regard for "the distributor's legitimate interest in providing its full-line retailers with sufficient margin" to enable them to stock a broad selection of merchandise. *See* Michael L. Denger & Jon G. Shepherd, *Minimum Advertised Price Restrictions in Cooperative Advertising Programs: Have the Ground Rules Changed?,* Antitrust Rep., July 2000, at 8. This is the same criticism that some economists make about the per se rule against minimum RPM. Higher margins may indeed induce retailers to provide more services, but consumers are entitled to competitively set prices and agreements that lead to higher prices are illegal.

28. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 462 (1986).

29. *Analysis to Aid Public Comment, supra* note 22.

30. *Id.*

31. Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for Per Se Rule Against Vertical Price-Fixing,* 71 Georgetown L.J. 1485, 1492 (1983).

32. *Id.*

33. *Analysis to Aid Public Comment,supra* note 22.

34. *Id.*

35. 15 U.S.C. § 45.

36. *See* Petroleum Prods. Antitrust Litig., 906 F.2d 432, 446-47 (9th Cir. 1990), *cert denied,* 500 U.S. 959 (1991). *See also* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (reversing FTC finding of facilitating practices violation but indicating grounds on which such a finding could be upheld).

37. Phillip E. Areeda, VIII Antitrust Law ¶ 1601(16), at 20-21 (1989).

38. Illinois CorporateTravel, Inc. v. American Airlines, Inc., 806 F.2d 722, 727 (7th Cir. 1986).

39. *See also Distribution Law Developments at the Federal Trade Commission,* Prepared Remarks of Commissioner Leary before the 21st Anniversary Law Journal Seminar, New York, N.Y. (June 26, 2000), *available at* www.ftc.g ov/speeches.

40. For a description of the E Commerce revolution and the antitrust issues posed, *see* David A. Balto, Assistant Director, Office of Policy and Evaluation, Federal Trade Comm'n, *Emerging Antitrust Issues in Electronic Commerce* (Nov. 12, 1999).

41. *See, e.g.,* Golf City, Inc. v. Wilson Sporting Goods Co., 555 F.2d 426, 430-31 (5th Cir. 1977); Wal-Mart Stores, Inc. v. American Drugs, Inc., 319 Ark. 214 (S.E.2d Ark. 1995); Dalmo Sales Co. v. Tysons Corner Regional Shopping Ctr., 429 F.2d 206 (D.C. Cir. 1970).

42. Toys "R" Us, Inc., Dkt. No. 9278 (Opinion

and Final Order, Oct. 13, 1998), 1998 FTC Lexis 119 (Commissioner Swindle concurring in part and dissenting in part).

43. 359 U.S. 207 (1959).

44. 472 U.S. 284 (1985).

45. Toys "R" Us, FTC Dkt. No. 9278, 1998 FTC Lexis 119, at 58.

46. *Id.* at 58-59.

47. Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

48. 221 F.3d at 934.

49. 306 U.S. 208, 226 (1939).

50. Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752 (1984) (inference of vertical agreement). The opinion also cites Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (horizontal agreement at issue), and Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (similar horizontal/vertical "ringmaster" situation).

51. 465 U.S. at 764.

52. 221 F.3d at 934-35, *citing In re* Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 787 (7th Cir. 1999), *cert. denied sub nom.* HJB, Inc. v. AmeriSOURCE Corp., 528 U.S. 1181 (Feb. 22, 2000).

53. 306 U.S. at 223-24. The record in that case showed that Interstate had separately written eight competing distributors identical letters, showing all as addressees on each letter, asking each to impose two restrictions on certain of their contracts with theaters. Unlike in *TRU*, there was no evidence of direct communication among the distributors—simply that each met separately with representatives of Interstate Circuit to discuss its demands, that each eventually agreed in identical detail, and that they offered no explanation to refute unlawful agreement. But the Supreme Court upheld the finding of an unlawful agreement among the distributors on that evidence.

54. 221 F.3d at 935.

55. *Id.* at 936.

56. It is interesting to observe that current FTC Chairman Timothy J. Muris was a testifying expert against the FTC in *Toys "R" Us.* Muris testified that vertical price restraints, which are typically considered per se illegal, should be judged with some evaluation of efficiencies, as with horizontal price restraints. He criticized the FTC's per se approach based on a horizontal conspiracy of the toy manufacturers as "vitiat[ing] much of current distinction between horizontal and vertical restraints and would be a major expansion of per se categorization." Affidavit of Timothy J. Muris, FTC Dkt. No. 9278.

57. *Id.*

58. The Supreme Court made this point in FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 462 (1986):

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

quoting VII Phillip E. Areeda, Antitrust Law ¶ 1511, at 429 (1986).

59. 221 F.3d at 937.

60. Toys "R" Us, FTC Dkt. No. 9278, 1998 FTC LEXIS 119, at 116.

61. *Id.* at 117-119.

62. 221 F.3d at 938.

63. *Id.*

64. 221 F.3d at 938.

65. McCormick & Co., Dkt. No. C-3939 (May 2, 2000) (Commissioners Swindle and Leary, dissenting).

66. Federal Trade Comm'n, *Final Report on the Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

67. *See* Thomas J. Campbell, Director, Bureau of Competition, Federal Trade Comm'n, Statement before the Subcommittee on Anti-

trust and Restraint of Trade Activities Affecting Small Business of the Committee of Small Business, U.S. House of Reps. (Sept. 9, 1982).

68. These shelf-space agreements were important to the majority's assessment of the competitive impact.

69. Statement of Chairman Robert Pitofsky & Commissioners Sheila F. Anthony & Mozelle W. Thompson.

70. The *Morton Salt* inference has been upheld in numerous appellate court decisions. David A. Balto, *Recent Decision Rightly Confirms Robinson-Patman Focus on Shielding the Small Retailer*, Legal Times 23 (Oct. 13, 1997).

71. *See supra* note 69. Commissioners Swindle and Leary dissented, arguing that, rather than clarifying and circumscribing the application of the *Morton Salt* inference of competitive injury from a price differential, the facts of this case might have the opposite effect.

72. *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry* (Feb. 2001).

73. *Id.*