Developments in Resale Price Maintenance Cases: A Trend Toward Overturning The Per Se Rule

Dr. Andrew L. Urich, Business Law, Oklahoma State University

Abstract

Recent court decisions have radically departed from a seventy year old line of cases that defined the per se rule's application to resale price maintenance. This paper reviews the background of the per se rule, and looks at the present trend of the Supreme Court which appears to be headed toward overturning the per se rule. In addition, the Congressional responses to the emerging trend is also examined.

Introduction

Throughout the eighties, the Reagan administration led the charge to reconsider and revise many longstanding Antitrust policies.(1) The courts have been sympathetic to the administration's views to an increasing degree as the Reagan appointees filled the court.(2) Reagan and many of his appointees to the judiciary are proponents of the "Chicago School" of Antitrust who believe the determinative factor in Antitrust cases should be the economic impact of the alleged anti-competitive behavior. The subscribers to the "Chicago School" have argued that several traditional notions of Antitrust are incorrect or outdated.(3) One such view is the claim that Resale Price Maintenance (RPM) is benign and pro-competitive.(4) This idea flies in the face of the traditional view that RPM is a per se violation of Section 1 of the Sherman Act. The administration's involvement in the area of RPM has put them, along with the Department of Justice, at odds with Congress.(5) The intent of this article is not to add to the ongoing argument between the two schools of thought, but rather, to focus on the recent developments in RPM cases.

Following a background study on the development of the per se rule, this article focuses on Monsanto Co. v. Spray-Rite Service Corp.(6)

Monsanto was the case which sparked Congress' belief that the Supreme Court was beginning to stray from the Congressional views on RPM cases. The Congressional reaction to Monsanto and the cases which followed clearly defined the divergent views regarding the per se rule. The only question that remained was which view the high court was going to adopt. Four years after Monsanto, in 1988, the question was answered when the Supreme Court departed from the view Congress had considered to be the traditional view and restricted the application of the per se rule in Business Electronics Corp. v. Sharp Electronics Corp.(7)

Background of Resale Price Maintenance (RPM)

The term, resale price maintenance (RPM), or vertical price-fixing, refers to agreements between firms at different levels of the distribution chain that set the price at which the goods can be resold. Resale price maintenance agreements can lead to artificially inflated prices because they limit the amount that the buyer may discount the goods.(8) RPM is one type of vertical restraint. Vertical restraints encompass all agreements between parties at different levels of the distribution chain including non-price re-

straints such as service agreements and exclusive territory agreements. Horizontal restraints refer to agreements between parties at the same level in the distribution chain, such as agreements between retailers or agreements between wholesalers that restrain trade. While horizontal price-fixing agreements are inherently anti-competitive, there is much dispute as to whether RPM agreements promote unfair competition.

Often manufacturers want to control the retail price at which dealers sell their products. RPM agreements would be the best way to accomplish price controls, but the illegality of such agreements lead manufacturers to other methods of controlling the retailer. A manufacturer may unilaterally decide to deal only with dealers who will abide by the manufacturers suggested retail prices. Historically however, courts were protective of dealers who were terminated for selling below the suggested prices once their relationship was established with the manufacturer. RPM may also be accomplished legally through vertical integration. However, controlling several levels of the distribution chain is often impractical or cost prohibitive for many manufacturers. Consequently, most manufacturers are left with non-price vertical restraints such as exclusive territories, service and promotion requirements and cooperative advertising. Although these practices are not as effective as RPM agreements, they are subject to the rule of reason and thus generally legal.

Although a thorough examination of the advantages and disadvantages of RPM is beyond the scope of this paper, a brief look at the pros and cons may illuminate the rationales for the differing opinions. Arguments that favor RPM agreements fall into the following categories. First, proponents of RPM assert that it is not necessary to have intrabrand competition because the interbrand competition will be sufficient to protect consumers from excessive prices.(9) Secondly, they argue that retailers need minimum prices to support necessary service and promotion.(10) Their concern is that discounters will take a "free ride" on the service and promotion of full service distributors.(11) Finally, they

argue that suppliers should be free to deal with whom they choose even if it means terminating a distributor in response to competitor's complaints of price cutting.(12)

The opponents of RPM argue that eliminating intrabrand competition will allow manufacturers to act in concert and set prices for all of their retailers which would facilitate horizontal price-fixing.(13) Furthermore, they argue that price-fixing does not assure that all retailers will spend sufficient amounts of money on promotion and service.(14) They claim that a separate agreement regarding promotion and service will accomplish the same goal without price-fixing. Finally, opponents argue that all levels of the distribution chain should be free to set their own prices. This includes being free from undue pressure to raise their prices in response to complaints by a competitor to a mutual supplier.(15) Accordingly, fixed service levels limit the free market from reflecting the levels of service for which consumers are willing to pay. Opponents argue such freedom will allow for maximum competition and thus, the lowest prices to the ultimate consumer.(16)

Whether an antitrust violation is a per se violation or subject to the rule of reason is an important distinction, not only in terms of applying the evidentiary standard, but also in terms of making policy judgments regarding the case. The following excerpt from a House Judiciary Committee Report illustrates the distinction:

"Per se offenses subsume a limited number of economic practices that are deemed so harmful to competition that proof of their existence establishes an antitrust violation without further analysis. Rule of reason offenses, on the other hand, reflect a policy judgment that other types of economic practices may be either pro-competitive or anti-competitive, depending on the factual circumstances surrounding them. Resale price maintenance has always been characterized by the supreme court as a per se offense."(17)

The general language in the Sherman Act intentionally leaves the door open for significant

judicial interpretation. Section 1 prohibits "every contract, combination..., or conspiracy in restraint of trade or commerce.(18) However, Congress has indicated a clear intent to set policy for the courts in the area of RPM since 1911, when the Supreme Court first ruled on the issue in Dr. Miles Medical Co. v. John D. Park & Sons, Co.(19) Dr. Miles, condemns RPM agreements as a matter of policy and states that all RPM agreements violate the Sherman Act.(20) The reasoning of the court was that all participants in the distribution chain have the right to make their own business decisions.(21) Although the manufacturer initiates the chain of distribution, it is not entitled to control the other links of the chain.(22) The rule in Dr. Miles was limited by U.S. v. Colgate & Co., which allowed a manufacturer to announce resale prices and refuse to deal with anyone who sells below the announced price.(23) Although this rule is still in effect, it has not been viewed as relevant in cases where a dealer is terminated in response to competitor's complaints of price cutting.

In 1958, the court explained the per se rule in Northern Pac. R. Co. v. U.S., "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.(24) Nine years later, with the U.S. arguing in favor of expanding the use of the per se rule, the court issued a controversial decision in U.S. v. Arnold Schwinn & Co.(25) Schwinn, prohibited all attempts by manufacturers to restrain "retailers freedom as to where and to whom it will resell the product.(26) The decision held the practices of granting exclusive territories and customer restrictions to be per se illegal.

In 1977, the court reconsidered and overruled the Schwinn decision in Continental T.V., Inc. v. GTE Sylvania, Inc.(27) This case marked the court's recognition of the distinction between vertical non-price restraints and vertical price restraints. GTE Sylvania, the manufacturer, attempted to limit the locations in which distribu-

tors could sell their product.(28) The court held that the non-price restraint was properly judged under the rule of reason, and that it was not per se illegal.(29) The court noted that such a restriction reduces but does not eliminate competition among retailers.(30) Furthermore, the court found that there would be an increase in interbrand competition due to efficiencies in the distribution system.(31) The efficiencies would be facilitated by the non-price restrictions. The court acknowledged that such restrictions are beneficial for the purposes of requiring retailers to engage in promotional activities and to provide service and repair facilities.(32) In addition, these agreements allow the manufacturers to control their image at the retail level.

At no point in GTE Sylvania does the court suggest that price restrictions, or restrictions having a direct effect on price, should be judged under the rule of reason. The decision is also limited to restrictions imposed upon the retailers by other links in the vertical chain as opposed to those initiated by other retailers. Up to this point in time, there was no cause to believe that the per se rule was in jeopardy. The Supreme Court gave unanimous support for the use of the per se rule in RPM cases as recently as 1980, in California Retail Liquor Dealers v. Midcal Aluminum Co.(33) Congress has intervened in the RPM area from time to time,(34) but only recently, in the case of Monsanto Co. v. Spray-Rite Corp.,(35) have they perceived a threat to the per se rule.

Monsanto Co. v. Spray-Rite Service Corp.

Spray-Rite, a distributor of agricultural herbicides, alleged that Monsanto, a supplier, terminated them for failing to follow pricing policies that were set in a conspiracy between the supplier and other distributors. Following the termination, Spray-Rite unsuccessfully attempted to fill its needs from other distributorships. Spray-Rite introduced evidence that several competing distributors had made complaints to Monsanto regarding Spray-Rite's prices and that they were terminated in response to those complaints. Monsanto alleged that insufficient service was

the reason for the termination. The jury found that the termination was a result of the distributor's complaints and awarded Spray-Rite 3.5 million dollars which was trebled to 10.5 million.(36) The Court of Appeals for the Seventh Circuit affirmed.(37) The Supreme Court granted certiorari to resolve apparent ambiguities in the standard of proof required to find a vertical price-fixing conspiracy in violation of Section 1 of the Sherman Act.(38)

Although the Supreme Court affirmed the result, members of Congress interpreted the decision as a radical departure from Congressional intent in the area of RPM. In response to Monsanto, the House of Representatives introduced House Bill 100-585, which proposed the "Freedom From Vertical Price Fixing Act of 1987." The Senate introduced similar legislation, Senate Bill 100-430 which was entitled "The Retail Competition Enforcement Act of 1987." Both of the bills were amended by their respective Judiciary Committee to substantially the same form which would have eliminated controversy at a joint committee meeting. The House bill was approved,(39) but the session ended before the Senate could vote on their bill which had come out of committee with a recommendation of passage.(40) I have incorporated the views of the Congressional Judiciary Committees for the purpose of identifying the controversial issues contained in the decision.

The first problem noted by the Judiciary Committees was that Monsanto resulted in an increased burden on plaintiff's evidentiary burden necessary to establish an RPM case.(41) Secondly, the Committees interpreted Monsanto as applying the Sherman Act to concerted actions only, and as categorically excluding unilateral actions from the per se rule.(42) In addition, the burden of proof required to establish a concerted action was viewed as being increased to an unreasonable burden.(43) Thirdly, the Monsanto decision has led to confusion in its application by the lower courts.(44) Finally, Congress has indicated serious concern that the per se rule may be eviscerated by the courts in response to Justice Department efforts to accomplish that

goal.(45)

The first question concerns the standard of proof necessary to establish a prima facie case of vertical price-fixing. A prima facie case will overcome a summary judgment challenge and, if not rebutted or contradicted, is sufficient for the party establishing the case to succeed in the suit. The Senate Judiciary Committee takes exception with the Court's stated requirement for a prima facie case which requires the antitrust plaintiff to introduce evidence that "tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." (46) The House Judiciary Committee asserts that the pre-Monsanto standard merely required the plaintiff to provide evidence which is sufficient to permit a reasonable inference of liability.(47) The Court went on to say that a conspiracy should not be inferred "from the fact that the termination came about in response to complaints." (48) House committee members interpret the Court's ruling as increasing the plaintiffs burden of proof necessary to avoid dismissal by summary judgment and to have the issue heard by a jury.(49) The confusion regarding which standard of proof to apply in summary judgment proceedings is illustrated in the cases which followed Monsanto.

The second problem with the Monsanto decision is that it restricts the types of cases that fall under the per se rule. The Court stated that "independent action by the manufacturer, and concerted action on non-price restrictions, should be distinguished from price-fixing agreements, since the latter are subject to the per se treatment." (50) This means that a termination of a distributor in response to a competitor's complaint is not a per se violation unless the plaintiff can prove a specific conspiracy between the supplier and at least one of the other distributors to fix prices. The court goes on to define conspiracy as a "conscious commitment to a common scheme designed to achieve an unlawful objective." (51) The House Judiciary Committee responded by saying that the court's analysis is not in accordance with the Sherman Act. They indicated that the Court should have found "that

a manufacturer's refusal to deal with a distributor, or its threat of such action resulting in a distributor's compliance with announced policy, constituted concerted action."(52) If a supplier unilaterally terminates one distributor at the request of the only other distributor in the area, the remaining distributor will be able to set prices regardless of whether there was a specific agreement with the supplier to do so. The assertion of the Judiciary Committees is that per se violations may be unilateral actions and do not literally require a contract, combination or conspiracy to fix prices.(53)

The third problem created by Monsanto is the inconsistent and alarming application of the rules by the lower courts.(54) By the first quarter of 1986 over 60 antitrust decisions had cited Monsanto; over half of these cases involved rulings on motions for summary judgment or directed verdicts in the favor of the defendant.(55) These statistics affirm the concern of the committees that Monsanto has led to an increased burden on plaintiffs and has led to confusion among the lower courts.(56) The lower courts wrestled with the requirements for proof of a conspiracy and the distinction between a termination "following" competitors' complaints and termination "in response to" competitor's complaints.(57) The Fifth Circuit found that a supplier and distributor's behavior was parallel, but found in favor of the defendant because they could not find the "plus" factor required in Monsanto.(58) Several of the Circuits took the already narrow definition of price fixing in Monsanto one step further. They found that if a conspiracy had elements of price and non-price restraints, the entire action should be examined by applying the rule of reason.(59) It was these decisions as much as Monsanto that led to the Congressional response.(60)

Finally, Congress was not only concerned with the narrowing of the per se rule application, but in the possibility of an all out attack on the per se rule. Although Monsanto did not address the possibility of overruling the per se rule, the Court did not take the opportunity to reaffirm the rule.(61)

Concerns for the welfare of the per se rule stem from the persistent attacks by the Justice Department. The Department presented an amicus curiae brief in the Monsanto case which advocated the overturn of the per se rule.(62) As indicated earlier, the Department of Justice has been a champion of the "Chicago School" of antitrust which argues that resale price maintenance is generally benign and pro-competitive in its impact.(63) Congress has even gone as far as restricting the Justice Department from spending any funds on its effort to overturn the per se rule.(64) The fact that the Justice Department has not brought a single RPM action since 1981 indicates that it is steadfast in its position.(65)

Cases that followed Monsanto

The divergent interpretations by the lower courts illustrate that the decision in Monsanto was ambiguous. As previously noted, the principal question in Monsanto was which evidentiary standard to use to establish a prima facie case of vertical price-fixing. The Court's message in Monsanto was that the plaintiff needed to introduce evidence that "tended to exclude the possibility that the manufacturer and non-terminated distributor were acting independently."(66)

The Congressional Judiciary Committees response was that the correct burden on the plaintiff should be a demonstration of evidence that raises an inference that the termination was "in response to" the complaints of the non-terminated competitor.(67) The position of Congress is as follows:

"The thinking of Congress, now reaffirmed in H.R. 585, is to condemn agreements intended to stabilize, exclude or minimize price competition, even if they do not include a commitment to a particular price or some level of pricing.... The Third Circuit in Cernuto v. United Cabinet Corp., 595 F 2d 164, 169 (3rd Cir. 1979) may have stated the issue even more succinctly: 'If the purpose is to restrain price movement and the free play of market forces, it is then per se illegal.'"(68)

In the wake of the Monsanto decision, the Fifth Circuit appears to have gone even further than the Court in Monsanto. The Fifth Circuit held that the termination of one dealer, in response to another dealer's complaints, is not a per se violation of Section 1 of the Sherman Act unless the non-terminated dealer expressly or impliedly agreed to set its prices at some level.-(69) The "confusing welter of lower court semantics"(70) which followed Monsanto was set clearly before the Supreme Court when they granted certiorari in Business Electronics Corp. v. Sharp Electronics, Inc.(71) The issue was not the burden of proof, but whether termination in response to price complaints was any longer considered to be a per se violation of the Sherman Act.

Business Electronics Corp v. Sharp Electronics Corp.(72)

Business Electronics and Hartwell were the only two distributors of Sharp's products in the Houston area. Business Electronics usually sold Sharp's products below the manufacturer's suggested retail price, while Hartwell generally adhered to suggested retail prices. There was no express agreement between any of the parties as to the retail price to charge. Hartwell had made a number of complaints to Sharp that Business Electronics was "free riding" on Hartwell's provision of educational and promotional services. Eventually, Hartwell gave Sharp the ultimatum that he would terminate his dealership unless Sharp terminated its relationship with Business Electronics. Sharp terminated the dealership with Business Electronics within the designated period, and Business Electronics filed suit in Southern District of Texas. The suit alleged that Sharp and Hartwell had conspired to terminate the dealership and that such a conspiracy was a per se violation under Section 1 of the Sherman Act.(73)

In the jury trial that followed, the District Court submitted a liability interrogatory to the jury that asked whether "there was an agreement or understanding between Sharp Electronics Corporation and Hartwell to terminate Business

Electronics as a Sharp dealer because of Business Electronics' price cutting," and instructed the jury that such an agreement or understanding would be a per se violation of antitrust law.(74) The jury found that an agreement did in fact exist and awarded Business Electronics \$600,000 which was trebled to \$1.8 million.(75) The Fifth Circuit found the jury instruction to be erroneous and reversed the holding of the lower court. The Appellate Court held that a per se illegal vertical restraint agreement "must expressly or impliedly agree to set its prices at some level, though not a specific one [and] the distributor cannot retain complete freedom to set whatever price it chooses."(76) The court determined the case to be one of a non-price restraint which should be analyzed under the rule of reason.(77)

The ruling of the Fifth Circuit was upheld by the Supreme Court.(78) The court cited GTE Sylvania and Monsanto for the proposition that there is a presumption in favor of the rule of reason.(79) The court went on to say that the per se rule only applies to cases involving severe anti-competitive behavior when there is an obviously anti-competitive effect that does not involve an "elaborate study" of the industry to establish the illegality.(80) The court was not persuaded by the argument that a price agreement generally follows a termination. Nor was the court persuaded that an agreement was unnecessary at the dealer level, because the competition was eliminated at the dealer level.(81)

The decision indicates a distrust of juries through the assertion that manufacturers will have a difficult time convincing juries that the terminations were in response to a failure to provide adequate services because "price cutting and some measure of service cutting usually go hand in hand."(82) Inversely, under the rule in Business Electronics, it would be extremely difficult to establish that the primary motivation for a termination was price cutting, because it is easy to make an accusation of inadequate service. Although the rules of reason standard should leave the door open to establish a particular activity as anti-competitive, it is doubtful that

this will be the case. The court has reversed the presumption in favor of the manufacturer, and acknowledges that it is a difficult presumption to overcome.(83)

The court, through its decision in Business Electronics, no longer recognizes that a real distinction exists between vertical non-price restraints and vertical price restraints. The court dismissed the argument contained in the dissenting opinion that such an action has a horizontal effect because the price competition is not eliminated by the distributor, as in the case of traditional vertical non-price restraints, but rather by pressure at the dealer level.(84) Furthermore, the court now acknowledges that vertical non-price restraints cause an increase in prices through a decrease in intrabrand competition.(85) The court condones such a result stating that it protects profit margins so that retailers can provide desired services and promotion.(86) Such logic is identical to that used by proponents of legalized RPM.(87)

Conclusion

The preceding analysis indicates a trend toward the repeal of the per se rule in RPM cases. Monsanto raised the issue of which standard of proof to apply in a case in which a dealer is terminated in response to complaints of price cutting. In the four years that followed, the

lower courts wrestled with the ambiguous language in Monsanto. Finally, four years later, the issue became moot because of the decision in Business Electronics. That case ruled that the practice of terminating a dealer for price cutting at the request of a competitor is no longer a per se violation unless there is a specific agreement to set prices.

Shifting the presumption in favor of the manufacturer sends a message that the courts are sympathetic to the position that RPM is not a serious threat to competition. The Court's decision in Business Electronics condones price fixing to guarantee profits to facilitate service. This line of reasoning fully supports the assertion that there is no case in which RPM should be per se illegal and possibly that it should be legal. This position is bolstered by the abandonment of the traditional distinctions between price and vertical non-price restraints. The reason the court has not yet gone that far may be due to the potential for controversy as indicated by the congressional response to Monsanto and the spending restrictions placed upon the Department of Justice. Thus, a judicial legalization of RPM seems to be a very real possibility as the court may rely on the rationale already developed in Business Electronics. In light of the Congressional response to Monsanto, one should watch for future legislative developments as well.

FOOTNOTES

- 1 See Gellhorn & Fenton, *Vertical Restraints During the Reagan Administration: A Program in Search of a Policy*, 33 Antitrust Bill. 543 (1988).
- 2 See Flynn, *The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 Corn. L. Rev. 1095 (1986).
- 3 Posner, *The Chicago School of Antitrust Analysis*, 127 U.Pa. L. Rev. 925, (1979). See generally, R. Bork, *The Antitrust Paradox* (1978). See also, Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984).
- 4 See R. Posner, *Economic Analysis of Law*, 275-77, 3rd Ed. (1986).
- 5 The DOJ released "Vertical Restraints Guidelines" on January 23, 1985. The House passed H. Res. 303, 99th Cong., 1st Sess. (1985), which stated that the "Guidelines" were "not an accurate expression of the federal antitrust laws..., should not be treated by the courts as binding or persuasive, and should be recalled."
- 6 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed. 2d 775, reh. den. (U.S.), 104 S. Ct. 2378, 80 L. Ed. 850 (1984).
- 7 -- U.S. --, 108 S. Ct. 1515, 99 L.Ed. 2d 808 (1988).
- 8 S. Rep. No. 466, 94th Cong. 1st Sess. 3 (1975), cited a study in the 1969 Economic Report of the President which indicated that consumers were paying 2.1 billion dollars in excess prices as a result of "fair trade" agreements. The report included a study by the Justice Department that indicated that "fair trade" raises the prices or goods by 18-27 percent. Ironically, the report also cited a letter by Ronald Reagan calling for the repeal of "free trade" laws. 121 Cong. Rec. 1268 (1975).

- 9 See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II]*, 75 Yale L.J. 373 (19-66).
- 10 Posner, *Economic Analysis of the Law*, 276.
- 11 Id.
- 12 See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981).
- 13 See Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?* 67 Va. L. Rev. 1457 (1981). See Statement of Robert Pitofsky, Antitrust Division, Department of Justice, Oversight Hearing, Subcomm. on Monopolies and Commercial Law, House Comm. on the Judiciary, at 12 (98th Cong., 1st & 2d Sess., 1986). Comanor, *Vertical Arrangements and Antitrust Analysis*. 62 N.Y.U. L. Rev. 1153 (1987). Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*. 62 N.Y.U. L. Rev. 1125 (1987).
- 14 See P. Areeda. *Antitrust Analysis* (1974).
- 15 See Comanor, *Vertical Price-Fixing, Vertical Market Restriction, and the New Antitrust Policy*, 98 Harv. L. Rev. 983 (1985).
- 16 See footnote 6.
- 17 H. Rep. No. 421, 100th Cong., 1st Sess. 5, n. 3 (1987).
- 18 15 U.S.C. Sec. 1 (1982).
- 19 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502, (1911).
- 20 Id. p. 408-9.
- 21 Id. p. 408.
- 22 Id.
- 23 250 U.S. 300, 39 S. Ct. 465, 63 L.Ed. 992 (1919).
- 24 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).
- 25 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967).
- 26 Id. 378.
- 27 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977).
- 28 Id. 39.
- 29 Id. 59.
- 30 Id. 46.
- 31 Id. 54.
- 32 Id. 55.
- 33 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980).
- 34 In 1975, Congress passed the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, Sec. 3, 89 Stat. 801 (1975), which overturned the Miller-Tydings Act and the McGuire Act which had allowed states to enact "fair trade" laws and "nonsigner" provisions which allowed competing retailers to have identical prices and thereby eliminate price competition.
- 35 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed. 2d 775, reh. den. (U.S.), 104 S. Ct. 2378, 80 L. Ed. 850 (1984).
- 36 Id. p. 758.
- 37 684 F.2d 1226 (CA 7 1982).
- 38 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed. 2d 775, reh. den. (U.S.), 104 S. Ct. 2378, 80 L. Ed. 850 (1984).
- 39 H.R. 585, 100th Cong., 1st Sess. (1987), was passed by the House of Representatives on November 23, 1988.
- 40 S. 430, 100th Cong., 1st Sess. (1987), was reported out of the Judiciary Committee with a recommendation of passage on February 1, 1988.
- 41 H. Rep. No. 421, 13, and S. Rep. No. 280, 100th Cong., 1st Sess. 5 (1987).
- 42 H. Rep. No. 421, 16.
- 43 Id. 17, see also, S. Rep. No. 280, 4.
- 44 Id. 21.
- 45 Id. 6, see also, S. Rep. No. 280, 7.
- 46 S. Rep. No. 280, 5, citing Monsanto Co. v. Spray-Rite Service Corp. 465 U.S. 752, 764, see also, H. Rep. No. 421, 17.
- 47 H. Rep. No. 421, 17.
- 48 465 U.S. 752, 763.
- 49 H. Rep. No. 421, 18.
- 50 465 U.S. 752, 763.
- 51 Id. 764.
- 52 H. Rep. No. 421, 17.
- 53 Id.

- 54 Flynn, 1102.
55 Id.
56 S. Rep. No. 280, 7.
57 H. Rep. No. 421, 22.
58 Royal Drug Co. v. Group Life and Health Insurance Co., 737 F.2d 1433 (CA 5 1984).
59 McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323, (CA8 1986), Morrison v. Murray Biscuit Co., 797
60 F.2d 1430, (CA7 1986), and Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216 (CA10 1986).
H. Rep. No. 421, 25. In summarizing the circumstances for the Congressional response the report states, "It is clear
that if certiorari was granted in Monsanto to settle the diversity of expression on the sufficiency of evidence standard
in dealer termination cases, the opinion has clearly failed to do so. The only discernable trend in the confusing welter
of lower court semantic formulations is the disturbing end result: that antitrust plaintiffs now have a burden to sustain
that appears disparately unfair in surviving motions for summary judgment or directed verdict. In these circumstances,
the Committee believes that the time has come for a legislative response."
61 465 U.S. 752, 761, n. 7.
62 The DOJ filed an amicus curiae brief with the Supreme Court in the Monsanto case urging the abandonment of the
per se rule for vertical price fixing. The Supreme Court declined to address the issue because neither party argued
the point at the District Court level or raised it on appeal, 465 U.S. 752, 761 n.7. In addition, William F. Baxter,
of the Justice Department's Antitrust Division, was granted special leave of Court to argue for the repeal of the per
se rule but was unable to do so due to a funding restriction imposed upon the DOJ by Congress. This treatment of
the per se rule can hardly be viewed as a strong endorsement by the Court.
63 Posner, *Economic Analysis of the Law*, 276.
64 Public Law 99-1005, sec. 605, and Public Law 100-202, sec. 605.
65 S. Rep. No. 280, 23.
66 465 U.S. 752, 764.
67 H. Rep. No. 421, 37.
68 Id.
69 Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212 (1986).
70 See footnote 57.
71 107 S. Ct. 3182 (1987).
72 -- U.S. --, 108 S. Ct. 1515, 99 L.Ed. 2d 808 (1988).
73 99 L. Ed. 2d 808, 815.
74 Id.
75 Id.
76 780 F.2d 1212, 1218.
77 Id.
78 99 L. Ed. 2d 808, 824.
79 Id. 818.
80 Id. 816, citing National Soc. of Professional Engineers v. U.S. 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355
(1978).
81 Id. 821.
82 Id. 819.
83 Id.
84 Id. 817-18.
85 Id. 819.
86 Id.
87 See footnotes 3 and 4.