Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis

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DISTRIBUTOR TERMINATIONS PURSUANT TO CONSPIRACIES AMONG A SUPPLIER AND COMPLAINING DISTRIBUTORS: A SUGGESTED ANTITRUST ANALYSIS

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Distributor termination cases are among the most actively litigated areas of antitrust today. Antitrust claims have become "an almost reflexive response" of terminated distributors who, faced with certain damages from the loss of a particular product, and in some cases, the complete failure of their businesses, lack valid contract or tort claims against their suppliers. These distributors frequently allege that their termination was illegal under section 1 of the Sherman Act because it was effected pursuant to an agreement among their supplier and one or more other distributors seeking to avoid competition with the terminated distributor. As evidence of an illegal agreement, the terminated distributor may cite other distributors' complaints to the supplier about the terminated distributor's price-cutting, territorial incursions, or other aggressive competition. Courts have had difficulty resolving two issues raised by these allegations: (1) whether a conspiracy may be inferred from the supplier's receipt of the distributors' complaints; and (2) whether such a conspiracy should be characterized as horizontal or vertical conduct.

The issue of conspiracy arises because unilateral refusals to deal are not illegal under section 1. In United States v. Colgate & Co., the Supreme Court held that a supplier may unilaterally refuse to deal with a customer for any reason it deems fit without violating section 1.

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4 See Bohling, supra note 1, at 1181-82; Halverson, supra note 2, at 897; Horton, Legal Remedies of Distributor Terminated Pursuant to Contractual Provision for Termination Upon Notice, 3 Creighton L. Rev. 88 (1970).
5 15 U.S.C. § 1 (1976) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.").
6 250 U.S. 300 (1919).
Courts have had difficulty, however, distinguishing legitimate unilateral conduct from illegal conspiracies among a supplier and its distributors to terminate a competing distributor. This distinction is particularly difficult when the only evidence of the alleged conspiracy is the supplier's receipt of the distributors' complaints about the competitive activity of the terminated distributor. In such cases, many courts have been reluctant to infer an illegal conspiracy because the supplier may have been motivated to effect the termination by business reasons independent of the complaints.

In those cases in which a termination conspiracy between a supplier and one or more of its distributors has been inferred, courts have been uncertain whether to apply the rule of reason or the per se rule. This uncertainty derives from the fact that such conspiracies have both horizontal and vertical elements. The actual termination of the distributor is imposed vertically by the supplier, yet the inducement for the termination may come horizontally from the complaining competitors of the terminated distributor. Thus, although the form of such a "mixed termination"9 conspiracy may be vertical, the competitive purpose and effect of the conspiracy is more similar to horizontal conspiracies that exclude competitors of the conspirators from a market. Concentrating on the vertical form rather than the horizontal competitive substance of mixed termination conspiracies, many courts have mechanically applied the rule of reason when the per se rule would have been more appropriate.10

This Article proposes a new method for analyzing the legality of alleged conspiracies among a supplier and complaining distributors to terminate a competing distributor.11 The proposed analysis, which fo-

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7 See notes 78-87 and accompanying text infra. Some courts and commentators have concluded that in order to come under the Colgate doctrine, the facts of a particular case must be of "such Doric simplicity as to be somewhat rare in this day of complex business enterprise." George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960); see Comment, An Examination of Doric Simplicity: The Criteria of the Decision to Cease Business Relations, 10 VILL. L. REV. 117 (1964).

8 See notes 77-87 and accompanying text infra.

9 The term "mixed termination" describes a supplier's termination of a distributor upon the alleged urging of a competing distributor.

10 See notes 52-68 and accompanying text infra.

11 This Article is confined to a discussion of the legality of such terminations under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Attempts to monopolize under § 2, 15 U.S.C. § 2 (1976), although potentially an issue in termination cases, are analyzed in a completely different manner from agreements under § 1. See note 32 infra. This Article does not discuss other antitrust provisions that are potentially applicable to distributor terminations because they are not likely to apply to terminations effected pursuant to agreements among a supplier and its distributors. Terminations challenged under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), for example, are confined by the statutory language to instances in which a supplier "contract[s] for [the] sale of . . . commodities . . . on the condition . . . that the . . . purchaser thereof shall not . . . deal in the . . . commodities of a competitor . . . of the [supplier]." Id. Such restrictions generally benefit suppliers, not distributors. Therefore, such restrictions
cuses on the supplier's motive in terminating the distributor, should simplif-
ify the task of judging whether a conspiracy in fact exists in a given
case and should ensure that the competitive substance, rather than the
mere form, of such a conspiracy determines whether a vertical or hori-
zontal analysis is applied.

I
Judicial Treatment of Horizontal and Vertical
Conduct

Courts have traditionally distinguished horizontal and vertical con-
spiracies on the basis of their different competitive effects. Generally,
horizontal restraints have been found pernicious enough to be per se
illegal, while non-price vertical restraints have either been analyzed
under the rule of reason to consider their possible procompetitive effects
or upheld as unilateral conduct under Colgate. This distinction indicates
that the antitrust treatment of mixed termination conspiracies should
vary depending upon whether the horizontal or vertical aspects of such
conspiracies predominate. The per se rule should apply if horizontal
aspects predominate and, barring resale price maintenance,1 either the
rule of reason or the Colgate defense should apply if the vertical aspects
of the conspiracy are predominant.13

A. Horizontal Restraints: The Per Se Rule

Courts apply the per se rule to agreements that have been found in
the great majority of instances to have only an anticompetitive purpose
and effect.14 Such agreements are viewed as so plainly pernicious that
their mere existence proves their illegality "without elaborate inquiry as
to the precise harm they have caused or the business excuse for their
use."15 Per se rules are generally adopted only after judicial experience
has indicated that a particular type of restraint will rarely, if ever, sur-

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12 Resale price-fixing agreements are ordinarily analyzed under the per se rule. See Dr. Miles Medical Co. v. John D. Park & Son, Co., 220 U.S. 373 (1911). See generally note 42 and accompanying text infra.
13 See notes 14-48 and accompanying text infra.
14 See, e.g., White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (per se rule applies to "naked restraints of trade with no purpose except stifling of competition").
vive a complete economic analysis. Once established, per se rules reduce the time and expense of antitrust litigation, effectively deter anticompetitive conduct, and promote accuracy and certainty in decisionmaking. These advantages justify the application of the rule in the small minority of cases in which the challenged conduct might otherwise be deemed proper after a full inquiry into its competitive effects.

Courts have determined that agreements that directly restrict actual or potential competition among the parties to the agreement are pernicious enough to justify per se treatment. For example, both horizontal price-fixing and horizontal divisions of customers or territories have been held per se illegal. These horizontal agreements have such serious and obvious anticompetitive effects that no consideration of their possible advantages or justifications is necessary. Indeed, as several courts have noted, such agreements usually have no purpose or effect

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16 Compare White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (noting, in case of first impression, the "need to know more . . . about the actual impact of these [vertical] arrangements" before applying per se analysis) with United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967) (applying per se analysis to vertical arrangements following additional judicial experience).

17 See Note, Concerted Refusals to Deal Under the Federal Antitrust Laws, 71 HARv. L. REV. 1531, 1535 (1958). See also United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972) (per se rule allows courts to avoid rambling "through the wilds of economic theory").


19 See id.

20 See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) ("Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.").


23 See, e.g., United States v. Topco Assocs. Inc., 405 U.S. 596 (1972). Topco involved territorial and customer restrictions among distributors of a single product brand. The Court held that the elimination of intrabrand competition among the distributors was sufficiently pernicious to justify application of the per se rule and that consideration of possible beneficial effects on interbrand competition was unnecessary. Id. at 611-12.
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other than to suppress competition.\textsuperscript{24}

If agreements by which competitors fix prices or divide territories among themselves in order to avoid competition with each other are per se illegal, then conspiracies by such firms to exclude other actual or potential competitors from their market should be no less illegal. Like agreements to fix prices or allocate territories, such horizontal agreements have no purpose other than to restrict competition. The effectiveness of such an agreement often depends upon the conspirators' ability to enlist a firm at a different competitive level to use its market power to enforce the exclusion of a competitor.\textsuperscript{25} Accordingly, courts have held that it is per se illegal for competitors to combine to induce their supplier to participate in a "group boycott" of their actual or potential competitors. In \textit{United States v. General Motors Corp.},\textsuperscript{26} for example, the Supreme Court applied the per se rule when a group of automobile dealers induced General Motors to prohibit contractually its dealers from selling to discounters who competed with the group. Because General Motors initially imposed and later enforced the contractual restriction, the dealers' horizontal conspiracy to exclude discounters from the market was even more effective than it would have been without the supplier's participation.\textsuperscript{27}

The group boycott principle also applies when a single customer induces a group of suppliers to enter into a horizontal agreement not to deal with a competing customer. In \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.},\textsuperscript{28} a retailer induced certain appliance manufacturers and distributors to sell to a competing retailer only at discriminatorily high prices. The Court applied the per se rule because the effective elimination of the competing retailer's sources of supply also eliminated any competition between the two retailers in the appliance market.\textsuperscript{29} Under the


\textsuperscript{25} See Buxbaum, \textit{Boycotts and Restrictive Marketing Arrangements}, 64 MIcH. L. REV. 671, 674-75 (1966):

[An economic boycott requires the cooperation of a party at a different level in the distribution process from that on which the instigators operate. Even though members of an industry wish to punish or eliminate a certain competitor, they can do so only by inducing the competitor's customers or suppliers to stop dealing with him.]


\textsuperscript{26} 384 U.S. 127 (1966).

\textsuperscript{27} Id. at 144.

\textsuperscript{28} 359 U.S. 207 (1959).

\textsuperscript{29} The term "group boycott" describes three basic types of horizontal combinations designed to exclude firms from a market or to coerce them into observing trade practices favored by the members of the combination. Although each type of group boycott takes a
precedent of the group boycott cases, therefore, the per se rule should apply whenever one or more distributors induce a supplier to terminate or refuse to deal with any of their actual or potential competitors.\textsuperscript{30}

B. \textit{Vertical Restraints: The Colgate Defense and the Rule of Reason}

Cases involving vertical conduct indicate that in the absence of resale price-fixing,\textsuperscript{31} the per se rule should not apply to terminations imposed by a supplier independently of his distributors. Such terminations either should be valid as unilateral conduct under \textit{Colgate}\textsuperscript{32} or accorded a full economic analysis under the rule of reason. The \textit{Colgate} defense would apply in those rare situations in which a supplier makes an independent decision not to deal with a distributor and no agreement to

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\item Different form, the Supreme Court has applied the per se rule in each case because of the severe anticompetitive consequences effected by the pooling of the conspirators' market power. \textit{See e.g.}, United States v. General Motors Corp., 384 U.S. 127, 146-47 (1966).
\item The first type of group boycott involves conspiracies among firms at different competitive levels to exclude from a particular market other firms competing with one or more of the conspirators. \textit{See e.g.}, \textit{id.}; Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Six Twenty-Nine Prods. v. Rollins Telecasting, Inc., 365 F.2d 478, 483-85 (5th Cir. 1966).
\item The second type of per se illegal group boycott involves broad horizontal conspiracies of firms at the same competitive level to exclude direct competitors. \textit{See Silver v. New York Stock Exch.}, 373 U.S. 341 (1963) (Stock Exchange members collectively refused to approve telephone connections essential to over-the-counter broker-dealers' business); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (trade association refused to approve gas burners manufactured by a competitor of association's members); Associated Press v. United States, 326 U.S. 1 (1945) (press association prohibited its members from furnishing news to non-members and allowed members to block competitors' membership applications); Eastern States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600 (1914) (retailers conspired to refuse to deal with wholesalers who made direct sales to consumers in competition with retailers).
\item The third type of per se illegal group boycott involves horizontal conspiracies of suppliers designed to induce customers to engage in trade practices favored by the suppliers. \textit{See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.}, 340 U.S. 211 (1951) (liquor manufacturers' collective refusal to sell to price-cutting wholesalers); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (fashion designers' refusal to sell to retailers who purchased and sold copies of original designs).
\item Group boycotts of the first type, in which firms at different competitive levels pool their market power to exclude firms from a particular market, are most similar in competitive purpose and effect to mixed termination conspiracies. Therefore, the references in this Article to "group boycott" cases encompass only this first type of group boycott.
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\textsuperscript{30} \textit{See notes 88-96, 104 and accompanying text infra.}

\textsuperscript{31} \textit{See note 42 and accompanying text infra.}

\textsuperscript{32} United States v. Colgate & Co., 250 U.S. 300 (1919); \textit{see text accompanying note 6 supra.} The \textit{Colgate} Court held that a unilateral refusal to deal does not constitute an illegal contract, combination, or conspiracy within the meaning of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). 250 U.S. at 307. If, however, a supplier has a specific intent to achieve a monopoly in a particular market and there is a dangerous probability that the refusal to deal will allow the supplier to obtain the monopoly, § 2 of the Sherman Act, 15 U.S.C. § 2 (1976), may prohibit a unilateral refusal to deal. \textit{See Otter Tail Power Co. v. United States}, 410 U.S. 366 (1973); Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).
refuse to deal can be inferred. In the more frequent case of a distributor termination pursuant to an express or implied vertical agreement, the termination should be judged by the rule of reason, provided that resale price maintenance is not an objective of the agreement.

The Supreme Court's approach to non-price vertical contract re-

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33 The Colgate defense has been severely limited in cases in which agreements to maintain resale prices have been implied from coercive conduct appearing on its face to be unilateral. The readiness with which courts have implied such agreements has caused one commentator to conclude that the defense is "almost entirely illusory." Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 685 (1962). Indeed, courts have implied an agreement under § 1 when suppliers have engaged in any conduct beyond an expressed disinterest in selling to a discounter. For example, courts have implied resale price-fixing agreements when a supplier has directly threatened a distributor with termination, direct competition, or retaliation from others for failure to observe resale prices. See Albrecht v. Herald Co., 390 U.S. 145 (1968) (newspaper publisher began to compete with independent carrier of its papers to secure carrier's compliance with suggested retail prices); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922) (manufacturer enforced resale price recommendations with special agents, blacklists, and refusals to sell); Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980) (gasoline distributor coerced its dealers into complying with its pricing policy by threats of lease termination). These decisions appear to be based upon an implicit recognition that the seller's coercive conduct would have convinced the distributor to resume reselling "subject to the tacit or implied understanding that [he] will toe the pricing line." See In re Russell Stover Candies, Inc., 1981 Antitrust & Trade Reg. Rep. (BNA) No. 1008, at F-1. Some courts have even found that the business setting itself may create a coercive environment that induces a tacit resale price understanding. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (car muffler franchisee, dependent on supplier for livelihood, made aware of supplier's policy of terminating franchisees who did not observe certain resale prices). Courts have also implied resale price-fixing agreements in cases in which the supplier has enlisted customers at one competitive level to police or coerce adherence to resale prices by customers at another competitive level. See United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (manufacturer threatened to withhold deliveries from wholesalers unless they policed minimum prices of retailers); United State v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944) (optical distributor required assistance of wholesalers in setting prices and approving retailers). The Court justified its findings of conspiracy in Parke, Davis and Bausch & Lomb on the ground that an agreement existed among the supplier and the "policing" customers to engage in a general program of resale price maintenance. See United States v. Parke, Davis & Co., 362 U.S. at 45-46; United States v. Bausch & Lomb Optical Co., 321 U.S. at 723.

Although one commentator recently concluded that "[r]elatively little is left of the [Colgate] defense," Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 23 n.62 (1981), the doctrine remains viable in cases in which the supplier has taken no action beyond a simple unilateral refusal to deal. See, e.g., Garrett's, Inc. v. Farah Mfg. Co., 412 F. Supp. 656 (D.S.C. 1976) (upholding refusal to sell to price-cutter in absence of coercion by supplier or other parties enlisted by supplier); Graham v. Triangle Publications, Inc., 233 F. Supp. 825 (E.D. Pa. 1964), aff'd per curiam, 344 F.2d 775 (3d Cir. 1965). The Third Circuit recently cited Colgate as authority for the "law's traditional tolerance of unilateral decisions on the part of a manufacturer," Cermuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 167 (3d Cir. 1979), and an administrative law judge recently reaffirmed the Colgate doctrine in dismissing a complaint that had been intended to lead to an express outruling of the doctrine. See In re Russell Stover Candies, Inc., 1981 Antitrust & Trade Reg. Rep. (BNA) No. 1008 at F-1 (unilateral refusal to deal with discounter not illegal under § 1). The persistence of the "somewhat hallowed notion" that a company acting unilaterally has the right to choose with whom it will deal also illustrates the continued viability of the Colgate doctrine. See, e.g., Bauer, supra note 18, at 697.
restrictions has come full circle since *White Motor Co. v. United States*, in which the Court held that it had insufficient experience from which to judge such restrictions per se illegal. The Court subsequently held in *United States v. Arnold, Schwinn & Co.* that the per se rule should apply to all territorial or customer restraints imposed on a distributor after the supplier "parted with dominion" over the product. Severe criticism by the commentators and distinguished by the lower courts, *Schwinn* finally was overruled in *Continental T.V., Inc. v. GTE Sylvania, Inc.* in which the Court returned the rule of reason to non-price vertical contract restrictions.

The Court based its holding in *GTE Sylvania* on a belief that non-price resale restrictions attractive to distributors seeking to avoid intrabrand competition might induce "competent and aggressive" firms to invest in a supplier's distributorships, to engage in promotional activities, and to provide service and repair facilities. Such effects presumably would increase the supplier's effectiveness in competing against other brands. The Court concluded that the rule of reason should be

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36 Id. at 382.
39 433 U.S. 36 (1977). *GTE Sylvania* involved a manufacturer's termination of a retailer who had violated its distributor contract by reselling the manufacturer's product from an unauthorized location. The Court, rejecting the retailer's contention that the territorial limitation was a per se violation of §1, held that the rule of reason should apply because the limitation's procompetitive effect on interbrand competition might outweigh its adverse impact on intrabrand competition.
40 433 U.S. at 54-55. Commentators generally have viewed measures designed to protect distributors against intrabrand competition from "cream skimmers" or "free riders" seeking to capitalize on the distributors' promotional efforts as legitimate means of inducing distributors to make adequate investments in personnel and facilities and to engage in aggressive promotional activities. See, e.g., *Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 Law & Contemp. Probs. 506, 511 (1965); Zelek, Stern & Dunfee, *A Rule of Reason Decision Model After Sylvania*, 68 Calif. L. Rev. 13, 16 (1980).
41 433 U.S. at 55-56. The *GTE Sylvania* Court also relied on the theory that the economic interests of suppliers instituting resale restrictions would cause them to retain as much intrabrand competition as possible. *Id.* See generally Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373, 403 (1966); Posner, *supra* note 22, at 283-84. Commentators have noted the *GTE Sylvania* Court's recognition that, when a supplier imposes vertical restrictions on distribution, its interest in retaining adequate competi-
used to balance such positive interbrand effects against the negative effects of non-price vertical restraints on intrabrand competition.\footnote{42}

Courts and commentators have enthusiastically endorsed \textit{GTE Sylvania}'s application of the rule of reason to non-price vertical restraints.\footnote{43} Although only a vertical location clause was directly at issue in \textit{GTE Sylvania}, subsequent decisions have made it clear that the Court's reasoning extends to other non-price restrictions on resale.\footnote{45}

\section*{Distributor Terminations}

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  \item The Court retained the per se rule for resale price-fixing. 433 U.S. at 51 n.18. Subsequent decisions have referred to price restraints as the only vertical resale restriction that is still subject to the per se rule. \textit{See}, e.g., National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953, 960 (2d Cir. 1978). Indeed, courts have consistently applied the per se rule to resale price-fixing since the early case of \textit{Dr. Miles Medical Co. v. John D. Park & Sons, Co.}, 220 U.S. 373 (1911), and the per se illegality of resale price maintenance was recently reaffirmed by the Supreme Court. \textit{See} California Retail Liquor Dealers Ass'n v. Midea Aluminum, Inc., 445 U.S. 97, 102 (1980) (dictum). The application of the per se rule to resale price coercion appearing on its face to be unilateral has severely impinged upon the \textit{Colgate} doctrine. Under current law, it appears that a supplier may announce and observe a policy of refusing to deal with price-cutters. If, however, the supplier attempts to secure customers' adherence to resale prices by terminations, threats of terminations, or otherwise, he has committed a per se violation of §1. \textit{See} Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 719 (S.D.N.Y.), aff'd per curiam, 417 F.2d 621 (2d Cir. 1969); South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650, 653-54 (N.D. Ill. 1965). \textit{See generally} note 33 supra.

Although retaining the per se rule for resale price-fixing, the \textit{GTE Sylvania} Court concluded that the rule of reason should be used to balance the positive interbrand effects against the negative intrabrand effects of all other vertical restrictions on distribution. 433 U.S. at 57. When the supplier is a monopolist, however, there is no interbrand competition that would figure in the balancing test. Some commentators therefore suggest that the \textit{GTE Sylvania} rule of reason approach should not apply when monopolists impose non-price resale restrictions. Instead, they argue, such restrictions should be per se illegal. \textit{See}, e.g., Pitofsky, supra note 22, at 35. \textit{But see} Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977) (upholding territorial restrictions imposed by monopolist newspaper on home sales dealers where plaintiff made no showing that dealers wanted to compete).

\item The commentators have significantly amplified \textit{GTE Sylvania}'s original list of possible procompetitive justifications for non-price vertical restraints. \textit{See}, e.g., Pitofsky, supra note 22, at 25-26 (allowing dealers to achieve economies of scale); Turner, supra note 33, at 699 (pre-\textit{GTE Sylvania} (inducing dealers to develop local markets more aggressively); Zelek, Stern & Dunfee, supra note 40, at 16 n.20 (ensuring that no single distributor becomes overly dominant). Some commentators, however, have argued that the \textit{GTE Sylvania} rule of reason analysis should not apply to certain non-price vertical restraints. \textit{See}, e.g., Pitofsky, supra note 22, at 8-9 (per se rule should apply to "airtight" territorial allocations).\footnote{44}

\item \textit{See} Clairiol, Inc. v. Boston Discount Center, Inc., 608 F.2d 1114, 1123 (6th Cir. 1979) (dictum) (\textit{GTE Sylvania} applies to all non-price vertical restraints); Gough v. Rossmoor Corp., 585 F.2d 381, 387 n.7 (9th Cir. 1978), cert. denied, 440 U.S. 926 (1979); National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953, 960 (2d Cir. 1978) (applying \textit{GTE Sylvania} to allotment system under which each distributor assured of specified minimum number of ears for resale); Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir.) (territorial limitations), cert. denied, 439 U.S. 833 (1978); Davis-Watkins Co. v. Service Merchandise Co., 500 F. Supp. 1244, 1250 (M.D. Tenn. 1980) (territorial, customer, and location limitations); Munters Corp. v. Burgess Indns., Inc., 450 F. Supp. 1195 (S.D.N.Y. 1978) (field-of-use restrictions on patented products).
\end{itemize}
If a supplier independently decides to terminate a distributor for violating a territorial, customer, or other non-price restriction in its distribution agreement, *GTE Sylvania* would require that a court engage in a rather prolonged and complicated economic analysis of the termination under the rule of reason.\(^46\) The termination would be illegal only if the court determined that the anticompetitive effects of the distributor's elimination from the intrabrand market outweighed the procompetitive interbrand effects of a restriction allowing the supplier to attract aggressive distributors.\(^47\) Because it would be easier for the supplier to demonstrate possible procompetitive interbrand effects than for the terminated distributor to prove an adverse impact upon intrabrand competition, the supplier would be much more likely to prevail in such a case.

Thus, the ultimate outcome of cases in which distributor terminations allegedly have been induced by the complaints of other distributors often will depend on whether the court characterizes the challenged conduct as vertical or horizontal.\(^48\) If the court views the termination as having been imposed vertically by the supplier, the termination is likely to be upheld either as unilateral conduct under *Colgate* or as a reasonable method of promoting interbrand competition under *GTE Sylvania*. If, on the other hand, the court views the termination as the product of a horizontal conspiracy among complaining distributors, it will most likely declare the termination illegal under the rationale of the group boycott cases.

II

THE FAILURE OF ANALYSIS IN MIXED TERMINATION CASES

Terminations induced by complaining distributors often do not fit conveniently into a horizontal or vertical mold. Consequently, many courts have had difficulty applying the precedent of the pure horizontal and vertical cases to such terminations. In attempting to apply this precedent, courts have frequently focused on the apparent form of mixed termination conspiracies. For example, courts have applied the rule of reason to termination conspiracies involving only a single supplier and a single competing distributor because such conspiracies appear vertical

\(^{46}\) 433 U.S. at 59.

\(^{47}\) *Id.* at 49. The complicated nature of the analysis usually required under the rule of reason has generated criticism of the rule. See *Louis*, *supra* note 37, at 277-78 (courts' alleged inability to engage effectively and consistently in balancing test required under rule of reason); *McLaren, Territorial and Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal*, 37 ANTITRUST L.J. 137, 144 (1967) (bulky and protracted proceedings required to apply rule of reason); *Pitofsky, supra* note 22, at 2 (vagueness of rule of reason provides little deterrent effect).

\(^{48}\) The *GTE Sylvania* Court specifically recognized the need to distinguish horizontal from vertical restrictions. 433 U.S. at 58 n.28.
in form. On the other hand, when a supplier has retained the right to compete with its distributors in the resale of its product, courts have applied the per se rule, because the conspiracy appeared to take the form of a horizontal agreement among competitors. Although lending a superficial consistency to mixed termination cases, such an analysis has, in fact, resulted in frequent misapplication of the rule of reason and the per se rule. The analysis also has led courts to impose unnecessary restrictions on the fact-finder's consideration of a terminated distributor's prima facie case.

A. Overuse of the Rule of Reason

When mixed termination conspiracies involve only one supplier and a single distributor, thereby lacking the horizontal form of a classic group boycott, courts often mechanically apply the rule of reason on the basis of the apparent vertical form of the conspiracies. Courts have thus overlooked the possible applicability of the per se rule to distributor terminations actually induced by a single competing distributor. This effect has been most evident in the "exclusive distributor" and "horizontal plurality" cases.

1. The Exclusive Distributor Cases

Under the rule of reason, courts traditionally have upheld a supplier's refusal to deal with one distributor motivated by the grant of an exclusive distributorship to an actual or potential competitor. Because the refusal to deal in such cases is not induced by a conspiracy of competitors, courts have concluded that the per se rule could not be applied under the precedent of the group boycott cases. In many of the exclusive distributor cases, application of the rule of reason has been justified by the likelihood that the supplier's refusal to deal was the result of an independent decision about the overall nature of its distribution system. In other cases, however, courts have automatically upheld exclusive distributorships when a further inquiry might have revealed that the exclusive distributor induced the supplier to refuse to deal with an actual or potential competitor. Some courts, for example, have upheld a

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49 See notes 52-62 and accompanying text infra.
50 See notes 69-72 and accompanying text infra.
51 See notes 77-79 and accompanying text infra.
53 The establishment of an exclusive distributor in a particular territory does appear on its face to be a decision that a supplier would make independently in planning its distribution system. See notes 146-48 and accompanying text infra.
distributor termination induced by an existing distributor who was subsequently awarded an exclusive distributorship." Other courts have approved a new distributor's successful solicitation of his replacement of a previous exclusive distributor. A few courts have even upheld an exclusive distributor's outright veto of the appointment of additional distributors. Under the rationale employed in such cases, the per se rule

54 See Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131-34 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1978) (supplier's termination of distributor and appointment of another retailer as exclusive distributor held reasonable in absence of evidence of anticompetitive purpose or effect); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420-21 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957) (supplier's termination of two dealers and appointment of third as exclusive distributor at inducement of third dealer held reasonable in view of continued interbrand competition). See also Harold Friedman Inc. v. Thorofare Mkt., Inc., 587 F.2d 127, 141-42 (3d Cir. 1978) (court applied rule of reason where grocery store lessee at shopping center exercised right under lease to compel landlord to terminate lease of another grocer already in competition with lessee); Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962) (rule of reason applied to contract clause granting gas station exclusive right to operate in shopping center).

55 See Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972) (upholding replacement of existing distributor with subsidiary of parent supplier); Comment, Vertical Agreements to Terminate Competing Distributor: Oreck Corp. v. Whirlpool Corp., 92 Harv. L. Rev. 1160, 1167-69 (1979). See also Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1248-49 (5th Cir. 1975) (agreement between supplier and new distributor to terminate incumbent distributor does not violate antitrust laws). Some courts have upheld the substitution of one exclusive distributor for another on the ground that the substitution caused no net reduction of competition in the relevant market. These cases emphasize that the antitrust laws are concerned primarily with market structure rather than injury to a particular competitor and that substituting one dealer for another has no effect on the market. See Ace Beer Dists. v. Kohn, Inc., 318 F.2d 283, 286-87 (6th Cir.), cert. denied, 375 U.S. 922 (1963) (substitution of one brewer for another not illegal despite adverse effect on terminated brewer's business); Fleischman Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 227 n.11 (S.D.N.Y. 1975) (replacement of existing distributor not a violation where no proof of public injury). These cases, however, overlook the restriction of potential intrabrand competition that may result from the substitution of one exclusive distributor for another in view of the fact that the supplier might otherwise have allowed both distributors to coexist in the intrabrand market. The Supreme Court has found the horizontal restriction of potential intrabrand competition serious enough to justify application of the per se rule. See notes 91-93 and accompanying text infra. Therefore, the per se rule should apply in any case in which a new distributor has induced the supplier to replace an existing exclusive distributor, because of the horizontal restriction of potential intrabrand competition resulting from such replacement. See notes 150-52 and accompanying text infra.

56 See Ron Tonkin Gran Turismo, Inc. v. Fiat Dists., 637 F.2d 1376 (9th Cir. 1981) (no violation where exclusive franchisee convinced supplier not to grant another franchise); Borger v. Yamaha Int'l Corp., 625 F.2d 390, 395 (2d Cir. 1980) (reversing judgment in favor of distributor with whom supplier allegedly refused to deal as result of complaints of incumbent distributor). These decisions relied not only on the absence of the broad horizontal conspiracy required for a classic group boycott, but also on the fact that the refusal to deal adversely affected only potential intrabrand competition. See Ron Tonkin Gran Turismo, Inc. v. Fiat Dists., 637 F.2d at 1385-86; Borger v. Yamaha Int'l Corp., 625 F.2d at 397. Such reliance was misplaced, however, because the Supreme Court has deemed existing distributors' veto of potential intrabrand competition as sufficient in itself to justify application of the per se rule. See United States v. Topeco Asso's., 405 U.S. 596 (1972). See also Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 n.11 (3d Cir. 1979) ("Interbrand competition . . . has been labeled the 'primary concern of antitrust law' [citing GTE Sylvania] . . .

57 See Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131-34 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1978) (supplier's termination of distributor and appointment of another retailer as exclusive distributor held reasonable in absence of evidence of anticompetitive purpose or effect); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420-21 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957) (supplier's termination of two dealers and appointment of third as exclusive distributor at inducement of third dealer held reasonable in view of continued interbrand competition). See also Harold Friedman Inc. v. Thorofare Mkt., Inc., 587 F.2d 127, 141-42 (3d Cir. 1978) (court applied rule of reason where grocery store lessee at shopping center exercised right under lease to compel landlord to terminate lease of another grocer already in competition with lessee); Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962) (rule of reason applied to contract clause granting gas station exclusive right to operate in shopping center).

55 See Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972) (upholding replacement of existing distributor with subsidiary of parent supplier); Comment, Vertical Agreements to Terminate Competing Distributor: Oreck Corp. v. Whirlpool Corp., 92 Harv. L. Rev. 1160, 1167-69 (1979). See also Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1248-49 (5th Cir. 1975) (agreement between supplier and new distributor to terminate incumbent distributor does not violate antitrust laws). Some courts have upheld the substitution of one exclusive distributor for another on the ground that the substitution caused no net reduction of competition in the relevant market. These cases emphasize that the antitrust laws are concerned primarily with market structure rather than injury to a particular competitor and that substituting one dealer for another has no effect on the market. See Ace Beer Dists. v. Kohn, Inc., 318 F.2d 283, 286-87 (6th Cir.), cert. denied, 375 U.S. 922 (1963) (substitution of one brewer for another not illegal despite adverse effect on terminated brewer's business); Fleischman Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 227 n.11 (S.D.N.Y. 1975) (replacement of existing distributor not a violation where no proof of public injury). These cases, however, overlook the restriction of potential intrabrand competition that may result from the substitution of one exclusive distributor for another in view of the fact that the supplier might otherwise have allowed both distributors to coexist in the intrabrand market. The Supreme Court has found the horizontal restriction of potential intrabrand competition serious enough to justify application of the per se rule. See notes 91-93 and accompanying text infra. Therefore, the per se rule should apply in any case in which a new distributor has induced the supplier to replace an existing exclusive distributor, because of the horizontal restriction of potential intrabrand competition resulting from such replacement. See notes 150-52 and accompanying text infra.

56 See Ron Tonkin Gran Turismo, Inc. v. Fiat Dists., 637 F.2d 1376 (9th Cir. 1981) (no violation where exclusive franchisee convinced supplier not to grant another franchise); Borger v. Yamaha Int'l Corp., 625 F.2d 390, 395 (2d Cir. 1980) (reversing judgment in favor of distributor with whom supplier allegedly refused to deal as result of complaints of incumbent distributor). These decisions relied not only on the absence of the broad horizontal conspiracy required for a classic group boycott, but also on the fact that the refusal to deal adversely affected only potential intrabrand competition. See Ron Tonkin Gran Turismo, Inc. v. Fiat Dists., 637 F.2d at 1385-86; Borger v. Yamaha Int'l Corp., 625 F.2d at 397. Such reliance was misplaced, however, because the Supreme Court has deemed existing distributors' veto of potential intrabrand competition as sufficient in itself to justify application of the per se rule. See United States v. Topeco Asso's., 405 U.S. 596 (1972). See also Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 n.11 (3d Cir. 1979) ("Interbrand competition . . . has been labeled the 'primary concern of antitrust law' [citing GTE Sylvania] . . .
would not apply when a distributor's complaints about an actual or potential competitor induce a supplier to refuse to deal with the competitor and to appoint, or continue, the complaining distributor as an exclusive.

The mechanical application of the rule of reason in these cases contradicts the precedent of the group boycott cases. Under the group boycott rationale, the per se rule should apply in any case in which an exclusive distributor successfully uses its market power to induce the supplier to refuse to deal with an actual or potential competitor. In such situations, no less than in the classic group boycott cases, the only purpose of the supplier's refusal to deal is to restrict competition between the terminated distributor and the exclusive distributor inducing the refusal to deal. Nor is the adverse competitive effect of the elimination of the terminated distributor from the intrabrand market any less serious than in the group boycott cases. Thus, by concentrating on the apparent vertical form and overlooking the possible horizontal competitive substance of the exclusive distributor cases, many courts have failed to consider the application of the per se rule in situations in which its use may indeed have been appropriate.

2. The Horizontal Plurality Cases

In the horizontal plurality cases, courts have acknowledged expressly that they will apply the per se rule only to mixed termination conspiracies that are identical in form to a classic group boycott induced by a broad horizontal combination of competitors. Courts have held in these cases that the per se rule does not apply if a refusal to deal is induced by only one distributor, because there is no plurality of actors on the inducing level who can enter into a horizontal conspiracy. The

Nonetheless, intrabrand competition . . . has not been of so little importance as never to merit the protection of a per se rule.

Courts have also frequently used the rule of reason to validate clauses in shopping center leases giving tenants the right to veto leases of space to potential competitors. See, e.g., Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F. Supp. 988 (D.D.C.), aff'd, 429 F.2d 206 (D.C. Cir. 1970). A similar rationale could be used to uphold a distributor's veto of a supplier's appointment of a competing firm as a distributor. But see note 153 infra.

57 See notes 25-30 and accompanying text supra.

58 In Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 421-22 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957), Judge Bazelon noted in dissent that before applying the rule of reason to uphold a distributor termination and the subsequent appointment of a competitor as an exclusive distributor, the majority should first have considered evidence that the competitor had induced the termination. Such conduct, if proven, would have met the classic requirements for the application of the per se rule because it would have no purpose other than the elimination of the terminated distributor's competition. See generally notes 14-30 and accompanying text supra.

59 See note 42 supra.

60 See Gough v. Rossmoor Corp., 585 F.2d 381, 386-87 (9th Cir. 1978) (no violation when single advertiser induced publisher to refuse competitor's advertisements), cert. denied, 440 U.S. 936 (1979); Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440, 446-47 (3d Cir. 1982).
horizontal plurality cases may represent an even greater misuse of the rule of reason than the exclusive distributor cases. In the latter cases, it was at least likely in many instances that the supplier had decided independently to refuse to deal with the terminated distributors. In the horizontal plurality cases, however, a single distributor may have induced the supplier to terminate a competing distributor, yet courts have refused to apply the per se rule merely because the termination lacked the broad horizontal character of a classic group boycott.

This elevation of form over substance stems from a misreading of the group boycott cases. Although each of the group boycott cases involved a horizontal plurality of competing firms at some competitive level, the horizontal plurality did not always exist on the same competitive level as the firm inducing the boycott. For example, in Klor's, Inc. v. Broadway-Hale Stores, Inc., a single retailer induced its suppliers to boycott a competing retailer. The evil perceived by the Supreme Court was not the existence of a broad horizontal conspiracy, but the ability of a firm at one competitive level to use its economic power to induce firms at another competitive level to participate in a conspiracy and thereby make the exclusion of competitors from the market more effective. A-
though such inducement is more likely to be effective when several competitors pool their economic power, a single firm may also possess sufficient economic power to induce the exclusionary conduct. The effect on competition is no less severe, and the exclusionary purpose no less pernicious, when the termination is induced by one rather than several competitors.

Thus, the per se rule should apply regardless of whether a distributor's termination is induced by the complaints of one or several of its competitors. By focusing mechanically on the horizontal plurality prerequisite to the application of the per se rule in mixed termination cases. In *Poller*, CBS had terminated its affiliation with one UHF broadcasting station owned by Poller and had subsequently affiliated with another UHF station it had purchased. Poller alleged that CBS had conspired with the new affiliate to eliminate Poller's station from the market and destroy the entire UHF industry. The Court held these allegations sufficient to withstand a motion for summary judgment against Poller. The facts of the case were similar to the situation in which a supplier terminates an existing distributor pursuant to an agreement with a single aspiring distributor. This comparison must be qualified, however, by the fact that the Court in *Poller* paid special attention to Poller's allegations that CBS had a broader intent to destroy the entire UHF industry by eliminating Poller. 368 U.S. at 466, 472, 474.

In the original three-judge panel decision in *Oreck Corp. v. Whirlpool Corp.*, 563 F.2d 54 (2d Cir. 1977), *aff'd en banc*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978), Judge Mansfield dissented from the majority's conclusion that a distributor termination induced by a single competitor cannot be per se illegal. Noting that traditional group boycott principles would apply if several competitors induced the termination, Judge Mansfield concluded that the same per se rule should apply when the size and purchasing power of a single inducing competitor amounts to "the equivalent of many . . . distributors." *Id.* at 66.

The fact that only a single supplier responds to a distributor's anticompetitive inducement should also not preclude application of the per se rule. Under Supreme Court precedent, horizontal plurality on the suppliers' level is no more a prerequisite to per se illegality than is horizontal plurality on the distributors' level. The Court has deemed the elimination of intrabrand competition by a single supplier sufficient to show a group boycott, see, e.g., *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and to justify application of the per se rule in mixed conspiracy cases, see notes 91-93 and accompanying text infra.

A few lower court decisions have extended the per se concept of the group boycott to situations in which there is no broad horizontal combination. See *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966) (finding no distinction between *Ford* and group boycott cases; court applied per se rule to a series of customer resale restrictions imposed by a supplier at insistence of one distributor); *Walker Distrib. Co. v. Lucky Lager Brewing, Co.*, 323 F.2d 1, 7-8 (9th Cir. 1963) (court referred to group boycott cases in upholding complaint alleging a conspiracy between supplier and non-competing distributors to prevent another distributor from carrying products competitive with those of the supplier), *cert. denied*, 385 U.S. 976 (1966); *United States v. New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79, 83-84 (7th Cir. 1949) (court found § 1 violation based in part upon a single firm's ability to use its significant purchasing power to induce suppliers not to grant beneficial pricing to competing purchasers); *Hub Auto Supply, Inc. v. Automatic Radio Mfg. Co.*, 173 F. Supp. 396, 397 (D. Mass. 1959) (court held that agreement between manufacturer and two competing distributors to eliminate a third distributor fell within group boycott doctrine). The Federal Trade Commission has expressly stated that refusals to deal induced by a single competitor come within the per se rule of the group boycott cases. *See* *Tysons Corner Regional Shopping Center*, 85 F.T.C. 970, 1010-11, *modified*, 86 F.T.C. 921 (1975) (exercise of right granted to store in shopping center lease to veto new tenants per se illegal).
requirement in mixed termination cases, however, many courts have pre-
cluded any consideration of whether a single distributor's exercise of
economic power justifies application of the per se rule.

B. Overuse of the Per Se Rule

While certain courts have unduly favored suppliers in the exclusive
distributor and horizontal plurality cases by an overbroad use of the
rule of reason, other courts have unfairly applied the per se rule to sup-
pliers who retain the right to market their product on the resale level in
competition with their own wholesalers. Some courts have held that
these dual distributors\(^69\) commit per se violations when they impose cus-
tomer or territorial restrictions on their wholesalers.\(^70\) Such restrictions,
courts have concluded, constitute a horizontal allocation of customers
and territories because the supplier is also a competitor of the restricted
wholesalers.\(^71\) Under this rationale, a dual distributor may commit a
per se violation whenever he terminates a distributor with whom he
competes, regardless of the purpose of the termination.\(^72\)

Several courts and commentators have criticized the mechanical
application of the per se rule to all territorial and customer restrictions
imposed by dual distributors.\(^73\) Application of the per se rule may not

\(^{69}\) The term "dual distributor" describes firms that not only supply wholesalers but also
sell their product directly to retail customers in competition with the wholesalers. See Pitof-
sky, supra note 22, at 31.

\(^{70}\) This line of cases derives from United States v. McKesson & Robbins, Inc., 351 U.S.
305 (1956), in which the Court held that a manufacturer that also functions as a wholesaler
cannot enforce fair trade agreements with its wholesale distributors. Although McKesson
did not involve non-price restraints, lower courts have applied its per se rule to territorial and
customer restrictions imposed by dual distributors. See Pitchford Scientific Instruments Corp.
Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), cert. denied, 412 U.S. 923 (1973); Copy-
Data Sys. v. Toshiba America, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,696 (S.D.N.Y. 1979);
Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y.), aff'd per curiam, 417 F.2d 621
(2d Cir. 1969).

\(^{71}\) See, e.g., Hobart Bros. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 898 (5th Cir.), cert.

\(^{72}\) See id.; Copy-Data Sys. v. Toshiba America, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,696
(S.D.N.Y. 1979); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y.), aff'd per
curiam, 417 F.2d 621 (2d Cir. 1969). But see Red Diamond Supply v. Liquid Carbonic Corp.,
627 F.2d 1001 (5th Cir. 1981) (rule of reason applied to dual distributor's termination of
distributor for violating territorial and customer restrictions).

\(^{73}\) One commentator has pointed out that the lower courts' reliance on United States v.
McKesson & Robbins, Inc., 351 U.S. 305 (1956), in the dual distributor cases was misplaced,
because McKesson was limited to a narrow question of statutory construction of the fair trade
immunity for resale price maintenance. See Steuer, Beyond Sylvania: Reason Returns to Vertical
Restrains, 47 ANTITRUST L.J. 1007, 1019-20 (1978). Steuer also maintains that some of the
lower court decisions are "gratuitous" because they were decided while United States v. Ar-
old Schwinn & Co., 388 U.S. 365 (1967), overruled, Continental T.V., Inc. v. GTE Sylvania,
Inc., 433 U.S. 36 (1977), was still good law and territorial restraints were per se illegal even if
vertical. See Steuer, supra, at 1020. A few recent cases have recognized that application of the
per se rule may not always be appropriate in dual distributor cases. See, e.g., Krehl v. Baskin-
always be appropriate when a dual distributor enforces his territorial or customer restrictions by terminating a dealer following complaints from independent distributors. A dual distributor, like any other supplier, may effect such a termination not to meet the distributors' anticompetitive demands but to preserve territorial or customer restrictions that allow the dual distributor to attract aggressive distributors and thereby engage in more effective interbrand competition. In such cases, the termination should be judged by the rule of reason. The fact that the dual distributor happens to operate on two competitive levels should not prejudice his right to use the termination weapon to enforce resale restrictions for the purpose of promoting interbrand competition.\(^7\) In other cases, however, a dual distributor's enforcement of territorial or customer restrictions may be motivated by a desire to meet the demands of independent distributors, or even personnel within the dual distributor's own organization, seeking to avoid competition with the terminated distributor. In that event, the termination should be per se illegal because it has no purpose other than the suppression of intrabrand competition.\(^7\)

Although courts may experience difficulty in making the distinction between horizontal and vertical terminations by dual distributors,\(^7\) they should not avoid their responsibility to distinguish per se from rule of reason conduct simply by deeming all dual distributors liable for terminating distributors to enforce territorial or customer restrictions.

C. Judicial Usurpation of the Fact-Finding Function

Relying on the principle that the form of a mixed termination conspiracy should determine its legality, some courts have concluded that the per se rule must apply to all termination conspiracies among a supplier and its distributors regardless of the supplier's competitive purpose.\(^7\) This approach entails rather severe consequences when the fact-finder infers a conspiracy from the supplier's mere receipt of complaints

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74 Steuer, supra note 73, at 1020; Note, Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System, 56 Texas L. Rev. 1466, 1504 (1978).

75 See notes 14-30 and accompanying text supra; notes 141-44 and accompanying text infra.

76 Steuer, supra note 73, at 1019 n.77 (referring to the difficulty of distinguishing vertical from horizontal restraints in the case of dual distributors). But see notes 141-44 and accompanying text infra (suggesting a method for making that distinction).

about a distributor's price-cutting, territorial incursions, or other competitive activity. A supplier with independent business reasons for a termination may be found to have committed a per se antitrust violation merely because he received complaints from distributors outside of his control. In order to protect suppliers from the perceived severity of the per se rule in such cases, many courts have required the terminated distributor to meet a high initial standard of proof. These courts have held that evidence of a supplier's receipt of complaints about the terminated distributor cannot establish a prima facie case of conspiracy. In granting summary judgment or a directed verdict for the supplier, courts have pointed out that it would be unfair to infer an illegal agreement because it is the "normal working of the marketplace" for distributors to complain about competitors' marketing activities.

Such decisions are inconsistent with the courts' traditional deference to the fact-finder in antitrust actions. In other antitrust areas, the

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79 Carbon Steel Prods. v. Alan Wood Steel Co., 289 F. Supp. at 588. In Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., the district court stated that "to draw an inference of combination between the maker and the recipient of a complaint from the mere receipt of a complaint would be somewhat like holding that the subject of an attempted bribe is guilty of bribery." 478 F. Supp. at 257 n.32. Some commentators have pointed out the inequity of forcing a supplier who has received such complaints to suffer "costly and drawn out" antitrust litigation. See, e.g., Elias, supra note 52, at 445; Posner, supra note 33, at 15.

80 See Poller v. Columbia Broadcast Sys., 368 U.S. 464, 473 (1962): We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. See also Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976). But see Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1110-11 (5th Cir. 1979) (criticizing Poller and arguing that courts should not automatically deny summary judgment motions when antitrust issues are involved).

The fact-finder may play a particularly important role in dealer termination cases, where anticompetitive purposes such as eliminating price-cutters may differ little from such possible procompetitive purposes as eliminating "free riders," and the "evidence will often reflect what counsel advise businessmen their purpose should have been." Pitofsky, supra note 22, at 35. See also Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 123-25 (3d Cir. 1980) (Sloviter, J., dissenting), cert. denied, 451 U.S. 911 (1981). In such cases, the fact-finder should be allowed to weigh the conflicting inferences and the credibility of witnesses to determine the parties' actual intent. As one commentator has stated, "[T]here is one task that judges and juries, informed through the adversary system, may really be good at. It is identifying the pernicious in human affairs." L. SCHWARTZ & J. FLYNN, ANTITRUST AND REGULATORY ALTERNATIVES 125 (5th ed. 1977) (quoting early draft of Sullivan, Economics and More
fact-finder has been allowed to infer the existence of an agreement from ambivalent conduct. Because direct evidence of an illegal agreement is rarely available in today's sophisticated business climate, courts have permitted the inference of a conspiracy from circumstantial evidence. Courts usually defer to the jury, as the reasoned voice of the community, to resolve the conflicting inferences presented by such circumstantial evidence and to determine whether the alleged conspirators reached a true meeting of the minds. In several mixed termination cases, however, the terminated distributor has presented prima facie evidence of conspiracy, yet the courts have refused to allow the jury to decide the question of conspiracy.

The avoidance of the jury in such cases would be unnecessary if courts would recognize that the per se rule need not automatically apply when the existence of a conspiracy is inferred from distributor complaints. Many courts have failed to distinguish between conduct that constitutes conspiracy, on the one hand, and conspiracies that violate the antitrust laws, on the other. Their "mechanistic search for direct evidence of a combination diverts consideration away from the more significant issue, which is the appropriate treatment of such conduct

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81 Courts have frequently upheld jury verdicts based on circumstantial evidence of an anticompetitive conspiracy. Fact-finders have been allowed to infer the existence of a conspiracy from prima facie evidence of apparent common purpose, see American Tobacco Co. v. United States, 328 U.S. 781 (1946) (parties could have mutually benefited from an anticompetitive agreement), communications among the parties providing an opportunity for agreement, see id. at 787; United States v. Masonite Corp., 316 U.S. 265, 269-71 (1942); Interstate Circuit, Inc. v. Paramount Pictures Distrib. Co., 306 U.S. 208, 210 (1939), and subsequent parallel conduct appearing to implement the alleged agreement, see Milgram v. Loew's, Inc., 192 F.2d 579, 584 (3d Cir. 1951), cert. denied, 343 U.S. 929 (1952); Ball v. Paramount Pictures, Inc., 169 F.2d 317, 319 (3d Cir. 1949), cert. denied, 339 U.S. 911 (1950).

82 See Milgram v. Loew's, Inc., 192 F.2d at 583; Pitofsky, supra note 22, at 35.


84 When a supplier receives complaints about a distributor's price-cutting or other competitive activities from a distributor's competitor and soon thereafter terminates the offending distributor, the terminated distributor should have little difficulty making out a prima facie case of conspiracy between the supplier and the complaining distributor. See note 81 supra. The supplier and complaining distributor obviously have a common intention to effect the termination; the supplier's receipt of complaints and his response thereto establish the opportunity for a meeting of the minds, and the subsequent termination supplies the conduct to complete the conspiracy. Nevertheless, several courts have precluded any consideration of the conspiracy question by the fact-finder by ordering summary judgment or a directed verdict in favor of the supplier in such cases. See Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.), cert. denied, 439 U.S. 946 (1978); Roesch, Inc. v. Star Cooler Corp., 514 F. Supp. 890 (E.D. Mo. 1981); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243 (E.D. Pa. 1979); Carbon Steel Prods. v. Sony Corp. of America, 472 F. Supp. 9 (N.D. Cal. 1979).

under the antitrust laws.” As the Supreme Court has recognized in several mixed conspiracy cases, a court must analyze the substantive competitive purpose of a conspiracy before determining its legality. Under this substantive approach, the per se rule need not apply, even after a conspiracy has been inferred, unless the terminated distributor can demonstrate that the supplier had no independent business reasons for the termination and was motivated only by a desire to protect the complaining distributors against intrabrand competition. By providing for a separate determination of the competitive purpose in mixed termination conspiracies, courts can free the fact-finder to consider a terminated distributor’s circumstantial evidence of conspiracy without fear of unfairly applying the per se rule. Under this approach, the fact-finder would no longer be precluded from considering the most important issue in mixed termination cases: the supplier’s competitive motive for effecting the termination.

III

SUPREME COURT PRECEDENT FOR SEPARATELY DETERMINING COMPETITIVE PURPOSE

The lower courts’ failure adequately to analyze mixed termination conspiracies stems from their improper analysis of relevant Supreme Court precedent. In deciding whether to employ a horizontal or vertical approach to mixed termination conspiracies, these courts have focused on the form of the conspiracies. A closer reading of Supreme Court precedent, however, reveals that the competitive purpose—not the form—of a mixed termination conspiracy ought to determine whether a horizontal or vertical analysis is applied.

In *United States v. Sealy, Inc.*, the Court first applied the per se rule to an ostensibly vertical restraint on the basis of the horizontal competitive purpose of the restraint. Sealy, Inc. had imposed territorial restrictions and minimum resale prices on certain firms licensed under the “Sealy” trademark. The licensees owned a majority of Sealy’s stock and dominated its board of directors. The Court stated that the purpose of the territorial restrictions should determine the manner in which they were analyzed under the Sherman Act. The Court concluded that although the territorial restrictions were vertical in form, Sealy, Inc. was in fact “an instrumentality of the licensees for purposes of the horizontal territorial allocation.” Because the territorial allocations as well as the

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86 Id. at 131.
87 See notes 88-97 and accompanying text infra.
89 Id. at 352.
90 Id. at 354. Subsequent lower court decisions found territorial restraints in the mattress industry per se illegal on similar facts. See Ohio-Sealy Mattress Mfg. v. Sealy, Inc., 585
resale price restrictions had a horizontal competitive purpose, both restrictions were held to be per se illegal.

In United States v. Topco Associates, the Court extended the Sealy rationale to territorial limitations without any ancillary price-fixing. Topco, an association composed of and controlled by twenty-five regional supermarket chains, had entered into licenses with each of its members for the use of the "Topco" brand name. The licenses assigned restricted territories to the Topco members and provided that new licensees would have to be approved by a vote of the members. The Court noted that members thus had "a veto power of sorts" over actual or potential competition. The Court determined, as it had in Sealy, that despite the apparent vertical form of the arrangement, the territorial allocation had in fact been instituted by the competing supermarket chains acting through Topco. Because, in substance, the territorial restraints had been horizontally imposed, the per se rule applied.

United States v. General Motors Corp. suggests that the Sealy-Topco principle may extend beyond the case in which a supplier serves as the alter ego of its distributors. In General Motors, a group of automobile dealers seeking to avoid competition with discounters had induced General Motors to prohibit all of its dealers from selling automobiles to the


91 405 U.S. 596 (1972).

92 Id. at 602.

93 The Court refused to consider whether the territorial restraints allowed Topco's private brand to compete more effectively with other brands, concluding that, in light of the anticompetitive purpose of the restraints, the restraints' adverse impact on intrabrand competition justified application of the per se rule without any inquiry into possible beneficial interbrand effects. Id. at 610-12.

One commentator has viewed the Topco Court's failure to balance interbrand competitive benefits against adverse intrabrand effects as an unfortunate consequence of the fact that the case was decided before the adoption of GTE Sylvania's balancing test for non-price vertical restrictions. See Comment, A Proposed Rule of Reason Analysis for Restrictions on Distribution, 47 Fordham L. Rev. 527, 555 (1979). Indeed, several commentators have argued that Topco's per se rule may be inappropriate in mixed horizontal/vertical cases that do not involve price-fixing. See Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977, 77 Colum. L. Rev. 979, 987 (1977); Posner, supra note 22, at 24-25; Note, Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason, 40 Geo. Wash. L. Rev. 123, 149 (1971). In GTE Sylvania, however, the Court specifically re-affirmed Topco's per se rule for restrictions horizontal in substance. This precedent indicates that Topco's per se rule against territorial allocations effected by distributors through a common supplier has survived GTE Sylvania.
discounters. The Court recognized that the apparent vertical form of the resale restrictions should not insulate General Motors from per se liability when, in implementing the restrictions, it had merely acquiesced in the anticompetitive purposes of the dealers.\textsuperscript{95}

In each of these cases, the Supreme Court looked to the competitive substance of apparently vertical restrictions and applied the per se rule because the restrictions actually originated from a horizontal conspiracy designed to restrict intrabrand competition. These decisions indicate that the parties' competitive purpose, rather than the mere form of their agreement, should determine whether a vertical or horizontal analysis is applied to a termination allegedly induced by complaining distributors. If the termination is induced by the distributors, as in \textit{General Motors}, the per se rule should apply regardless of the apparent vertical form of the termination, because the supplier's only purpose for refusing to deal is to restrict competition among the distributors.\textsuperscript{96} If, however, the supplier is motivated by his own business purposes, the termination should be judged as vertical conduct, and the per se rule should apply only if the supplier is attempting to maintain resale prices.\textsuperscript{97}

\textsuperscript{95} \textit{Id.} at 145-47.

\textsuperscript{96} Indeed, at least one Supreme Court Justice recognized prior to \textit{General Motors} that restraints induced by distributors should be per se illegal, despite the fact that a supplier imposed the restraints. \textit{See} \textit{White Motor Co. v. United States}, 372 U.S. 253, 267 (1963) (Brennan, J., concurring) (“If it were clear that the territorial restrictions involved in this case had been induced solely or even primarily by [White Motor's] dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement.”) (footnote omitted). A few lower federal courts have also recognized that a refusal to deal induced by a competing distributor has an anticompetitive purpose justifying use of the per se rule even when the refusal to deal takes a vertical form. \textit{See} \textit{Battle v. Lubrizol Corp.}, 42 \textit{Antitrust & Trade Reg. Rep.} (BNA) 563 (8th Cir. 1982) (per se rule may apply to termination allegedly induced by single distributor who complained about terminated distributor's price competition); \textit{Com-Tel, Inc. v. Du-Kane Corp.}, 42 \textit{Antitrust & Trade Reg. Rep.} (BNA) 317, 319 (6th Cir. 1982) (comparing case to \textit{Cernuto} and emphasizing that "although the restraints were nominally applied vertically . . . [their purpose was to] exclude [a] horizontal competitor."); \textit{Cernuto, Inc. v. United Cabinet Corp.}, 595 F.2d 164, 168 (3rd Cir. 1979) (per se analysis justified because only purpose of termination would be "to eliminate competition at the retail level, and not . . . to promote competition at the manufacturer level"). \textit{See also} \textit{CUSCO v. Certain-teed Prods. Corp.}, 638 F.2d 1061, 1072 n.9 (7th Cir. 1981); \textit{Alloy Int'l Co. v. Hoover-NSK Bearing Co.}, 635 F.2d 1222, 1225 n.5 (7th Cir. 1980).

\textsuperscript{97} \textit{See} notes 31-48 and accompanying text \textit{supra}. In \textit{Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.}, 416 F.2d 71, 80 (9th Cir. 1969), \textit{cert. denied}, 396 U.S. 1062 (1970), the court recognized that if the cause of a termination is vertical in substance, the termination should be judged by the rule of reason even though the termination may have been effected pursuant to a conspiracy horizontal in form. In \textit{Seagram}, two suppliers had agreed that they would terminate their separate distributorship agreements with the plaintiff. The court held that the horizontal conspiracy was not a per se group boycott, because in terminating the plaintiff, the suppliers had each been motivated by their dissatisfaction with the plaintiff's performance.

Despite the Supreme Court precedent indicating that the source of a mixed termination conspiracy should determine its legality, some commentators have viewed the difficulty of distinguishing vertical from horizontal conduct in the mixed termination area as a rationale
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IV

PROPOSED ANALYSIS OF MIXED TERMINATION CONSPIRACIES

The Supreme Court cases involving mixed conspiracies suggest a way out of the lower federal courts' dilemma in analyzing such conspiracies. By looking beyond the form of a conspiracy to its activating source, the Court has formulated a sensible, consistent, and equitable standard for applying the per se rule. A similar approach in mixed termination cases should prevent the inconsistencies, inequities, and unnecessary avoidance of the fact-finder that have characterized many such cases in the lower federal courts. The following is therefore proposed as a method, consistent with this Supreme Court precedent, for analyzing the termination of a distributor by a supplier that has received complaints about the distributor's competitive activities from other distributors.

Because the competitive purpose and effect of a mixed termination conspiracy does not depend upon its form, courts should adopt a uniform approach to all mixed termination conspiracies. In each case, the supplier's motivation for effecting the termination should determine whether the court applies a horizontal or vertical analysis. If the supplier terminates a distributor for independent business purposes, the termination should be treated as vertical conduct and, in the absence of resale price-fixing, either the Colgate defense or the rule of reason should apply. On the other hand, if the supplier terminates the distributor merely to satisfy the anticompetitive purposes of a complaining distributor or distributors, the termination should be treated as horizontal conduct and declared per se illegal.

In order to protect suppliers against undue application of the per se rule, the fact-finder should engage in a two-step analysis in mixed termination cases. First, in order to bring the challenged termination within the language of section 1, the terminated distributor must demonstrate the existence of an agreement between the supplier and the complaining distributor. As in other antitrust areas, however, the fact-finder should be allowed to infer the agreement from circumstantial evidence.

for abandoning such a substantive analysis entirely. As one commentator has stated, "[A]n approach that attempts to determine which party's interest or initiative is more fully served by the agreement encounters difficulties; for the most significant interests of the manufacturer are themselves framed in terms of the interests of the dealer." Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 825 (1962). See also Buxbaum, supra note 25, at 683-84; Comment, supra note 93, at 566. The analysis proposed in this Article, however, provides an effective method for distinguishing the interests of suppliers and distributors in a mixed termination conspiracy consistent with the Supreme Court precedent that the activating source of such conspiracies should determine their legality. See generally notes 98-105 and accompanying text infra.

98 See notes 80-83 and accompanying text supra.
If the fact-finder infers the existence of an agreement, it will then consider the second and most important issue: the supplier's competitive purpose for entering into the agreement. This issue will require a determination of whether the termination was provoked by the supplier's agreement with the competing distributor or by the supplier's independent exercise of business judgment. In some cases, a supplier may have a legitimate motive for effecting the termination that is distinct from the anticompetitive motives of the complaining distributor. The fact that the supplier agrees with the complaining distributor to effect the termination should not prove that he shares the distributor's anticompetitive purpose. The supplier, for example, may agree to terminate the distributor simply because he is dissatisfied with the distributor's poor performance. If the supplier's dissatisfaction is so great that he would have terminated the distributor even in the absence of the agreement with the distributor's competitor, the agreement is not the proximate cause of the terminated distributor's injury and cannot be a basis for the supplier's liability. Indeed, the net effect on competition in such a case would be no different than if the supplier and competing distributor had never entered into an agreement. Therefore, the per se rule should apply only if the supplier would not have terminated the distributor "but for" the supplier's agreement with one or more of the distributor's competitors. Only then could the supplier be said to have participated in a conspiracy, the single purpose of which was to eliminate the competition of the terminated distributor.

A separate analysis of the questions of conspiracy and the activating cause of a termination is necessary because those two questions involve entirely different evidentiary and policy considerations. The question of conspiracy must be resolved in order to meet the technical


100 Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), requires the plaintiff to demonstrate that he has been "injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." Courts have construed this language to require a causal nexus between the plaintiff's injury and the prohibited antitrust conduct. See, e.g., Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), cert. denied, 412 U.S. 923 (1973). Thus, there can be no antitrust liability in the absence of "some causal connection between the alleged conspiracy and the refusal to deal." Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 721 (S.D.N.Y.), aff'd, 417 F.2d 621 (2d Cir. 1969).

101 Cf. Turner, supra note 33, at 705 ("The manufacturer might be able to rebut the prima facie case [of an illegal conspiracy between the manufacturer and a distributor] by showing that the distributor's threat played no part in his decision, i.e., that he would have done the same thing anyway.").

102 See Comment, supra note 99, at 648. But see Posner, supra note 22, at 298 (arguing against determining the appropriateness of per se rule on the basis of whether the activating source of a restraint is horizontal or vertical).

103 Some courts have confused these two questions. For example, in Edward J. Sweeney & Sons Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981), the Third Circuit viewed proof of a causal connection between competitors' complaints and the
In resolving the conspiracy issue, the fact-finder must determine whether the supplier and complaining distributors were mutually committed to another distributor's termination; that determination will turn on such factors as the nature and timing of communications among the parties. The question of the activating cause of the termination, however, must be resolved in order to determine whether the conspiracy constitutes an unreasonable restraint of trade within the substantive meaning of section 1. That determination can be made only by considering the supplier's competitive motive for entering into the conspiracy.

Separating the issue of cause from the issue of conspiracy should ensure that the courts distinguish more fairly and consistently between horizontal and vertical approaches to mixed termination conspiracies. Regardless of the form of the conspiracy, a horizontal analysis would apply whenever the supplier was motivated by the anticompetitive demands of a complaining distributor in effecting a termination. If, however, the supplier had an independent purpose for terminating the distributor, the court would apply the rule of reason and Colgate defenses appropriate for such vertical conduct. This approach should guarantee that truly anticompetitive terminations do not escape per se liability merely because they lack the broad horizontal form of a classic group boycott. On the other hand, a supplier, whether or not it happens to operate at one or more competitive levels, will not be precluded from enforcing legitimate restrictions on intrabrand distribution. Because suppliers will be held per se liable only if they share the anticompetitive purpose of complaining distributors, courts should not feel compelled to avoid the fact-finder in those frequent cases in which only circumstantial evidence of a supplier's participation in a conspiracy is available.

By separately focusing the attention of the fact-finder upon the legitimate supplier's response as "[t]he necessary first step toward ... proof of ... conspiracy." Id. at 111. The per se rule would be appropriate because the complaining distributor's only purpose in inducing the termination would be to restrict competition between itself and the terminated distributor. See notes 14-30 and accompanying text supra. The fact that only intrabrand competition would be affected by the termination should not preclude use of the per se rule. See Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 n.11 (3d Cir. 1979) ("Interbrand competition ... has been labelled the 'primary concern of antitrust law' [citing GTE Sylvania]. Nonetheless, intrabrand competition ... has not been of so little importance as never to merit the protection of a per se rule." (citing United States v. General Motors Corp., 384 U.S. 127 (1966), and United States v. Parke, Davis & Co., 362 U.S. 29 (1959))).

This approach will focus the fact-finder's attention upon the substance of the parties' conduct and away from the formalistic question of the existence of a conspiracy. Several commentators have emphasized that courts should avoid a preoccupation with the question of conspiracy and should concentrate instead on the substantive purpose and effect of the conduct at issue. See, e.g., Turner, supra note 33, at 683-84. Professor Turner has also pointed out that a full consideration of competitive purpose is particularly important in the case of a mixed conspiracy: "[T]he economic consequences of a vertical-horizontal arrangement may well vary substantially depending on where the initiative came from and ... legal conclu-
macy of a supplier's motives for effecting a termination, the two-step approach outlined above should result in a more consistent and equitable application of the per se rule and the rule of reason than that resulting from the lower federal courts' current formalistic approach to mixed terminations.

A. The Conspiracy Issue

Courts' traditional deference to the fact-finder in antitrust actions requires that a terminated distributor be allowed to establish a prima facie case of conspiracy through circumstantial evidence.\(^{106}\) Such a prima facie case may consist of evidence of a distributor's complaints to a supplier about another distributor's price-cutting, territorial incursions, or other competitive activities, and the subsequent termination of the offending distributor. When a distributor complains to a supplier about such competitive activities, the fact-finder may reasonably assume that the distributor is attempting to induce the supplier to do something to prevent such activities in the future.\(^{107}\) The supplier may respond to these complaints in several different ways. If the complaints concern a distributor's price-cutting, for example, the supplier may attempt to coerce the offending distributor into maintaining higher resale prices, convince the offending distributor to refrain from selling at lower prices within the complaining distributor's territory, or simply terminate the offending distributor. Any of these responses presumably would be acceptable to the complaining distributor. Therefore, if the supplier terminates the offending distributor following the receipt of such complaints, the fact-finder should be able to infer that the supplier and complaining distributor were mutually committed to the termination.\(^{108}\)

Several courts have noted the unfairness of concluding, solely from evidence of distributor complaints, that a supplier has engaged in an illegal conspiracy to terminate another distributor. The receipt of such complaints, some courts argue, may be merely fortuitous and should not preclude a supplier from exercising its right to determine independently the form of its distribution system.\(^{109}\) Consequently, many courts have sought to protect suppliers in such situations by refusing to allow the inference of a conspiracy from the terminated distributor's circumstan-

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\(^{106}\) See notes 80-83 and accompanying text supra.

\(^{107}\) See Girardi v. Gates Rubber Co. Sales Div., Inc., 325 F.2d 196, 202 (9th Cir. 1963).

\(^{108}\) See id.; Flintkote Co. v. Lysfjord, 246 F.2d 368, 375-76 (9th Cir. 1957).

Under the proposed analysis, however, allowing the inference of conspiracy from circumstantial evidence should not unduly prejudice suppliers. A supplier would have the opportunity to rebut the prima facie case of conspiracy and, even if the fact-finder were to infer the existence of a conspiracy, the per se rule could not be applied until the fact-finder had concluded that the supplier had no independent business reasons for the termination.

A supplier might rebut a prima facie case of conspiracy by showing that the timing and nature of the complaints negate any inference of a meeting of the minds among the supplier and complaining distributors. If, for example, the supplier did not receive the complaints until after making the decision to terminate the distributor, the fact-finder should not view the termination as a response to the complaints. If the complaints occurred a significant time before the supplier’s decision to terminate a distributor, the supplier might demonstrate that the complaining distributors’ offer to participate in a termination conspiracy had lapsed. A supplier may also demonstrate that, although its lower-level employees received the complaints immediately prior to the termination, the complaints were never communicated to the managers who made the termination decision.

Certain distributor complaints may not support the inference of a termination conspiracy because they neither expressly nor impliedly carry a request for another distributor’s termination. A distributor complaining about a competitor’s low resale prices may, for example, intend not to induce the supplier to terminate the competitor, but to grant the complaining distributor the same lower price or other favorable sales terms available to the competitor. In other cases, a distributor’s com-

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110 See notes 79-84 and accompanying text supra.

111 Courts and commentators have pointed out that prima facie proof of a § 1 conspiracy must at least include evidence that all parties to the alleged conspiracy were mutually aware of the objectives of the conspiracy and of each other’s intention to participate in the conspiracy. See American Tobacco Co. v. United States, 328 U.S. 781 (1946); Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971); United States v. Standard Oil Co., 316 F.2d 884, 890 (7th Cir. 1963); Flintkote Co. v. Lysfjord, 246 F.2d 368, 374 (9th Cir. 1957); An Interview with the Honorable Donald F. Turner, 37 ANTRUST L.J. 290, 300-01 (1968); Kaysen, Collusion Under the Sherman Act, 65 Q.J. ECON. 263, 268-69 (1965). That mutual awareness could not exist if the supplier received no notice of the complaints until after making the decision to terminate the distributor.


113 See Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3d Cir. 1963) (finding no conspiracy when evidence did not indicate the supplier’s sales representative had ever communicated distributors’ complaints to supplier).

114 See Westinghouse Elec. Corp. v. CX Processing Laboratories, Inc., 523 F.2d 668, 674 (9th Cir. 1975). Complaints from distributors about more favorable prices or sales terms granted to their competitors are quite predictable and, indeed, may point out a supplier’s
munications to a supplier about another distributor may not even constitute complaints about the other distributor's competitive activities. A court should not view such communications as an attempt to induce the supplier to terminate the other distributor. The communications may, for example, have pointed out matters such as another distributor's poor service or advertising, or carrying of other brands competitive with the supplier's product. In such cases, the distributor's conduct would concern the supplier but not other distributors, and the fact-finder might conclude that the "complaining" distributor merely intended to inform the supplier of marketing information in which he would presumably be interested.\textsuperscript{115} Indeed, if the competing distributor has not engaged in any activity harmful to the complaining distributor, it would be reasonable to assume that the complaining distributor does not care whether the competing distributor is terminated. The supplier and complaining distributor therefore should not be deemed to have reached a meeting of the minds on the termination.\textsuperscript{116}

A supplier has greater access than a terminated distributor to evidence of whether a mixed termination conspiracy ever existed. The issue of conspiracy will, after all, turn primarily on the supplier's awareness and interpretation of the complaints of other distributors. Therefore, the burden of disproving the existence of a conspiracy should rest with the supplier once the terminated distributor has introduced circumstantial evidence of the conspiracy. Furthermore, because the supplier's employees are most likely to be aware of the facts indicating whether a conspiracy ever existed, the supplier's failure to introduce testimony from these employees may properly result in an adverse inference against the supplier.\textsuperscript{117} Because evidence in modern antitrust cases

\textsuperscript{115} See Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1980) (no illegal conspiracy when competing distributor complained about allegedly false and misleading advertising of terminated distributor). \textit{But see} Walker Distrib. Co. v. Lucky Lager Brewing Co., 325 F.2d 1, 7-8 (9th Cir. 1963) (upholding complaint alleging conspiracy among supplier and distributors to prevent distributors from carrying products competitive with those of supplier), \textit{cert. denied}, 385 U.S. 976 (1966).

\textsuperscript{116} A vertical agreement between the supplier and terminated distributor, however, may be implied. If, for example, the termination followed the supplier's receipt of information concerning the distributor's merchandising of competing products, the fact-finder might find that the supplier attempted to coerce the distributor into observing an exclusive dealing arrangement. If it could be shown under the rule of reason that such an agreement had the requisite anticompetitive effect, the agreement might be illegal under either § 1 of the Sherman Act or § 3 of the Clayton Act. \textit{See} Alles Corp. v. Senco Prods., 329 F.2d 567 (6th Cir. 1964); United States v. Sun Oil Co., 176 F. Supp. 715 (E.D. Pa. 1959).

\textsuperscript{117} Some courts have inferred a conspiracy when a defendant in a position to know
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is often inconclusive and only reflects "what counsel advise businessmen their purpose should have been," the fact-finder should be allowed to weigh the distributor's circumstantial case against the supplier's rebuttal evidence and determine, as the reasoned voice of the community, which view is most credible.

If the fact-finder concludes that the timing or nature of a distributor's complaints do not support an inference of conspiracy between the supplier and complaining distributor, the termination should be analyzed as vertical conduct. Although no mixed horizontal/vertical agreement will be at issue, the fact-finder might still find an express or implied vertical contract that brings the termination within section 1. If the supplier has terminated the distributor for violating territorial or customer restrictions in its distributor contract, the contract restrictions themselves should be examined under the rule of reason to determine whether their procompetitive effect on interbrand competition outweighs their adverse impact on intrabrand competition. If the terminated distributor was a price-cutter, the court might infer the existence of a per se illegal resale price-fixing conspiracy from the termination. Such an inference could be made if the supplier directly threatened the distributor with termination for failing to maintain certain resale prices or if the supplier engaged in a pattern of coercion or actual terminations of other distributors that failed to abide by those prices.

In the absence of an express or implied agreement, the vertical termination would not be subject to section 1. Provided that the termination was not effected to enforce a restriction on resale activities or to coerce a distributor into observing any such restriction, the termination would be deemed unilateral and thus valid under the Colgate defense.

whether an agreement existed has failed to call any witnesses to testify as to the absence of an agreement. See William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738, 743 (3d Cir. 1945). In Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939), the Supreme Court, confronted by the defendants' failure to call witnesses who could directly rebut the inference of a § 1 conspiracy, stated, "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."

Pitofsky, supra note 22, at 35.

See notes 34-47 and accompanying text supra. A per se horizontal territorial allocation should not be inferable merely because the supplier imposed parallel territorial or customer restrictions in each of its distributor contracts. In the absence of some direct interaction among the distributors, their parallel conduct in entering into the separate distribution contracts should be insufficient to demonstrate a horizontal conspiracy. See Anderson v. American Auto. Assoc., 454 F.2d 1240, 1244 (9th Cir. 1972); Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963); Turner, supra note 33, at 700.

See notes 33 & 42 and accompanying text supra.

See Yentsch v. Texaco, Inc., 630 F.2d 46, 52 (2d Cir. 1980); notes 33-42 and accompanying text supra.

See notes 32-33 and accompanying text supra.

See Dart Drug Corp. v. Parke, Davis & Co., 344 F.2d 173 (D.C. Cir. 1965) (upholding unilateral termination in absence of attempt to affect resale activities); House of Materials,
B. The Causation Issue

1. Analyzing the Causation Issue

If the fact-finder concludes that a supplier and complaining distributor agreed to terminate a competing distributor, the fact-finder should next consider whether the termination was actually caused by the agreement. The court should apply the per se rule only if the fact-finder answers this question in the affirmative. Such a separate causal analysis is necessary because the supplier may have been motivated by business reasons independent of the agreement in effecting the termination. The supplier’s business reasons, unlike those of the complaining distributor, may not have been entirely anticompetitive and therefore should not subject the supplier to per se liability.

In attempting to induce a termination, a competing distributor can only be motivated by a desire to eliminate the intrabrand competition of the terminated distributor. The supplier, however, occupies a different level in the distribution chain and, in terminating a distributor, may therefore be motivated by a desire to increase the interbrand effectiveness of its distribution system as well as to restrict intrabrand competition. Distributors’ complaints about a competitor’s incursion into their territories may, for example, apprise the supplier of the offending distributor’s failure to develop his assigned territory adequately. Similarly, complaints about price-cutting may alert the supplier to a distributor’s inferior service or merchandising. In these situations, the complaints may “simply catalyze a decision to terminate or replace a distributor whose performance has been unsatisfactory.” The termination of such a distributor may allow the supplier to concentrate his resale efforts on more effective distributors and thereby compete more effectively against other brands. Courts should employ a vertical analysis to judge such procompetitive effects when a supplier’s only motive in agreeing to a termination is to promote its independent business interests.

The per se rule therefore should apply only to mixed termination conspiracies in which the supplier would not have effected the termination “but for” its agreement with a complaining distributor. The “but for” test provides an effective method of determining whether business reasons independent of a distributor’s complaints motivated a supplier in effecting a termination. The test forces the fact-finder to consider how the supplier would have acted in the absence of the complaints. If
the supplier would have acted in the same manner had it learned of the terminated distributor’s conduct independently of the complaints, the complaints should be deemed irrelevant, and the fact-finder should consider the legitimacy of the supplier’s independent purposes for the termination under a vertical analysis.

If the “but for” test is satisfied, the supplier’s competitive purpose need not be considered. In such a case, the supplier would have been motivated solely by a desire to satisfy the anticompetitive demands of the complaining distributors, and the distributors’ complaints would be the proximate cause of the termination. The per se rule would be appropriate because the supplier would have been enlisted to participate in a group boycott designed solely to restrict intrabrand competition. If the “but for” test is satisfied, the supplier’s competitive purpose need not be considered. In such a case, the supplier would have been motivated solely by a desire to satisfy the anticompetitive demands of the complaining distributors, and the distributors’ complaints would be the proximate cause of the termination. The per se rule would be appropriate because the supplier would have been enlisted to participate in a group boycott designed solely to restrict intrabrand competition.

127 See notes 14-30 and accompanying text supra.

128 In such a situation, the supplier, like the suppliers in Topco and General Motors, is acting for the horizontal conspirators in effecting the termination. See notes 91-95 and accompanying text supra. GTE Sylvania expressly retained the per se rule for such situations. 433 U.S. at 58 n.28.

129 The Supreme Court has held that the per se rule should apply to apparent vertical restraints whenever competitors are the activating source of the restraints. See notes 88-95 and accompanying text supra.

A few courts have recognized that the per se rule may apply when a single distributor induces or otherwise causes a competitor’s termination. See Battle v. Lubrizol Corp., 42 ANTITRUST & TRADE REG. REP. (BNA) 563 (8th Cir. 1982); Com-Tel, Inc. v. Du-Kane Corp., 42 ANTITRUST & TRADE REG. REP. (BNA) 317 (6th Cir. 1982); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979); Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466 (8th Cir. 1976); Girardi v. Gates Rubber Co. Sales Div., Inc., 325 F.2d 196 (9th Cir. 1963). See also CUSCO v. Certain-teed Prods. Corp., 638 F.2d 1061, 1072 n.9 (7th Cir. 1981); Alloy Int’l Co. v. Hoover-NSK Bearing Co., 635 F.2d 1222, 1225 n.5 (7th Cir. 1980); Mannington...
pernicious in purpose and effect as a termination induced by several distributors. Indeed, the single distributor in such a case would have successfully exercised a market power equivalent to that exercised by the broad horizontal conspiracies of distributors in group boycott cases such as General Motors.

2. Allocating the Burden of Proof

Once the terminated distributor has proven the existence of a mixed termination conspiracy, a rebuttable presumption generally should arise that the conspiracy caused the termination. The supplier would therefore have the burden of rebutting this presumption by proving independent business reasons for the termination. This allocation of the burden of proof is equitable because the supplier is the party most likely to have access to evidence that would prove the actual cause of termination. Only employees of the supplier, after all, can explain

Mills, Inc. v. Congoleum Indus., Inc., 610 F.2d 1059, 1069-70 (3d Cir. 1979); Tysons Corner Regional Shopping Center, 85 F.T.C. 970, 1010-11 (1975). But see notes 59-62 and accompanying text supra (cases barring application of the per se rule in absence of "horizontal plurality").

In any of these cases, the courts relied on a price-fixing theory in concluding that the per se rule could be applied when a single distributor induces a competitor’s termination. The courts emphasized that the per se rule was appropriate in such cases because the termination was motivated by a desire to reduce or eliminate price competition. See Battle v. Lubrizol Corp., 42 ANTITRUST & TRADE REG. REP. 565 (8th Cir. 1982); CUSCO v. Certaineed Pros., Corp., 638 F.2d at 1073-74; Alloy Int'l Co. v. Hoover-NSK Bearing Co., 635 F.2d at 1225 n.5; Mannington Mills, Inc. v. Congoleum Indus., Inc., 610 F.2d at 1069-70; Ceruuto, Inc. v. United Cabinet Corp., 595 F.2d at 170; Girardi v. Gates Rubber Co. Sales Div., Inc., 325 F.2d at 199-200. The Third Circuit recently reaffirmed its limitation of the Cernuto per se rule to terminations designed to affect resale prices. Tose v. First Pa. Bank N.A., 648 F.2d 879, 890 (3d Cir. 1981). See also Battle v. The Lubrizol Corp., 513 F. Supp. 995 (E.D. Mo. 1981) (per se rule may not apply to termination induced by single competing distributor in absence of price-fixing motivation) (rev'd on other grounds, 42 ANTITRUST & TRADE REG. REP. 563 (8th Cir. 1982)). This Article argues, however, that the per se rule should apply whenever one distributor induces the termination of a competing distributor, regardless of whether the elimination of price competition is a specific objective of the termination. This result is required by the Supreme Court’s holding that the per se rule should apply whenever firms are excluded from a market by their actual or potential competitors, even when price-fixing is not a motive for the exclusion. See notes 91-93 and accompanying text supra. Therefore, despite the precedent of the lower court decisions, a price-related motive should not be deemed a prerequisite to the application of the per se rule when a supplier terminates a distributor as a result of the complaints of one of the distributor’s competitors.

See notes 65-67 and accompanying text supra.


Under other antitrust provisions, courts have held that the party seeking to take advantage of a defense should bear the burden of proving the defense. See, e.g., Alterman Foods, Inc. v. FTC, 497 F.2d 993, 1001 (5th Cir. 1974); R.H. Macy & Co. v. FTC, 326 F.2d 445, 450 (2d Cir. 1964); Mueller Co. v. FTC, 323 F.2d 44, 47 (7th Cir. 1963) (burden of proving "availability" defense under § 2(d) of Robinson-Patman Act lies with defendant).

In other antitrust cases, a party's access to probative information has justified placing
whether business concerns independent of the distributor’s complaints motivated a termination.

In mixed termination cases involving the appointment of exclusive distributors or the enforcement of non-price resale restrictions, however, the supplier is likely to have been motivated by independent business reasons in effecting the termination. It would be unfair in such cases to expose the supplier to the expenses and risks of a full trial when the terminated distributor merely introduces proof of the supplier’s receipt of complaints from competing distributors. To alleviate this unfairness, the fact-finder should not be allowed to consider the supplier’s per se liability in such special cases unless the distributor has introduced prima facie proof not only of a mixed termination agreement, but also of the fact that the supplier would not have terminated the distributor but for the agreement.

a. The Effect of Vertical Contract Restrictions. A supplier responding to a termination conspiracy charge under section 1 may claim that the real cause of the termination was the distributor’s breach of a non-price restriction on resale in its distribution contract with the supplier. If the distributor has committed such a breach, there should be a presumption that the contract violation, not the complaints of a competing distributor, caused the termination, and the burden should be shifted to the distributor to prove that the termination was actually a response to the complaints.

Such a presumption of vertical cause is required by the rationale of GTE Sylvania. Under GTE Sylvania, a supplier may consider the anticompetitive interests of its distributors at the time of their initial appointment. Providing intrabrand territorial protection to individual distributors, for example, is viewed as a legitimate method of inducing the distributors to make the type of investment in facilities and personnel that will allow the supplier to compete more effectively against other brands. Because of these possible procompetitive interbrand effects, vertical territorial restrictions are accorded the benefit of a full economic

135 Several courts and commentators have concluded that in order to save suppliers from such expenses and risks, a terminated distributor should always be required to introduce more than circumstantial evidence of the existence of a conspiracy. See, e.g., P. AREEDA, ANTITRUST ANALYSIS 560 (2d ed. 1974); notes 77-84 and accompanying text supra. Placing the additional burden of proof on the terminated distributor, however, is only necessary in those cases in which it appears likely that the supplier had an independent business reason for a termination. See notes 136-53 and accompanying text infra. In all other cases, the supplier should have the burden of proving his independent motive for the termination. See notes 133-34 and accompanying text supra. The supplier’s ability to rebut the presumption of horizontal cause should provide adequate protection against an unfair application of the per se rule in such cases. See notes 109-18 and accompanying text supra.

136 433 U.S. at 54.

137 See notes 40-41 and accompanying text supra.
A supplier should not be held to have waived that benefit when it enforces territorial restrictions by terminating a distributor following the receipt of complaints concerning the distributor's incursions into other distributors' territories. Such complaints do not make it less likely that the termination was effected for procompetitive inter-brand purposes. Because the supplier initially devised the restrictions to meet the distributors' desires to avoid intrabrand competition, the supplier would have known, even in the absence of complaints, of the distributors' concern about violations of the restrictions. With or without the complaints, the supplier probably would have terminated the distributor for violating the resale contract restriction to prove to its distributors that it would continue to maintain the integrity of its distribution system. Such a termination generally should be accorded a vertical rule of reason analysis to allow consideration of the procompetitive effects of inducing the remaining distributors to compete more aggressively against other brands.

In some cases the terminated distributor will be able to rebut the presumption of vertical cause by showing that its violation of a contract restriction was not the real reason for its termination. A supplier may, for example, terminate a distributor ostensibly for a single technical violation of a contractual provision requiring the distributor to resell products from a specified location. If the distributor demonstrates a willingness to abide by the location clause in the future, the fact-finder may conclude that complaints from other competitors about the distributor's price-cutting or other aggressive competition, not the technical contract violations, actually provoked the termination. If the terminated distributor can prove that, but for the complaints, the supplier would not have enforced the contract restriction by termination, the per se rule should apply.

The inference of vertical cause for terminations pursuant to con-

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138 See notes 40-47 and accompanying text supra.

139 When a supplier terminates a distributor to enforce the supplier's contractual rights, it may appear more likely that the supplier acted independently of any complaining distributors. Although a supplier's contractual right to terminate a distributor is no defense to a distributor's antitrust action, see United States v. General Motors Corp., 384 U.S. 140 (1966), one court has specifically noted that a termination pursuant to a contract in a mixed termination case may give rise to an inference of vertical conduct. In Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979), the court held a supplier per se liable for breaching a distributor contract and terminating a distributor pursuant to a conspiracy with the distributor's competitor. Distinguishing Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc) (applying the rule of reason to a similar termination), cert. denied, 439 U.S. 946 (1978), the court pointed out that the supplier in Oreck had been within its contractual rights in refusing to renew the plaintiff's distributorship and that such a circumstance might have raised a greater inference of vertical conduct. 595 F.2d at 170.

140 Cf. Uniroyal, Inc. v. Jetco Auto Serv., Inc., 461 F. Supp. 350, 355 (S.D.N.Y. 1978) (finding of an illegal termination based in part upon the supplier's failure to discuss the possibility of remedying the contractually prohibited conduct with the distributor).
tractual resale restrictions may apply in certain instances to suppliers who have retained the right to market their product on the resale level in competition with their own distributors. A presumption of vertical cause is appropriate whenever such a "dual distributor" terminates a firm for violating restrictions that do not benefit the dual distributor in its capacity as a reseller.\footnote{141} A dual distributor, for example, may terminate a firm after receiving complaints from another distributor that the firm was violating its distribution contract by selling in that distributor's territory. In such a case, it would be unlikely that the firm was terminated on account of its competition with the dual distributor. Furthermore, the dual distributor, like any other supplier, would be more likely to enforce the territorial restrictions to preserve the integrity of its distribution system rather than to meet the anticompetitive concerns of the complaining distributor. Therefore, the terminated firm should have the burden of proving that the termination would not have occurred "but for" the complaints of the other distributor.

A presumption of horizontal cause should apply, however, when a dual distributor terminates a firm following complaints from an entity within the dual distributor's own organization concerning the terminated firm's competitive activities. In such cases it is more likely that the termination was effected to prevent the terminated firm from competing with the dual distributor.

Under the "intra-enterprise conspiracy" doctrine, a parent and its subsidiary may be viewed as two separate entities capable of entering into an agreement in violation of section 1.\footnote{142} Therefore, if a dual dis-

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\footnote{141} Cf. Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir. 1981) (applying rule of reason to dual distributor's termination of distributor who violated vertical territorial and customer restrictions). \textit{But see} notes 70-72 supra (cases automatically applying per se rule to contractual resale restrictions imposed by a dual distributor without regard to whether the dual distributor benefited from such restrictions in its resale capacity).

\footnote{142} The Supreme Court has held that affiliated corporations are capable of conspiring because they are legally distinct. \textit{See} Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (involving parent and subsidiary); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (conspiracy among U.S. company and two of its foreign affiliates); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951) (corporations under "common ownership and control" may conspire to violate Sherman Act); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948) (involving parent and five wholly-owned subsidiaries). The circuit courts, however, have disagreed over the precise limits of the intra-enterprise conspiracy doctrine. The Third and Fifth Circuits have held as a matter of law that a parent and its wholly-owned subsidiaries provide the requisite plurality of actors because they are separately incorporated. \textit{See} Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 (3d Cir.), \textit{cert. denied}, 439 U.S. 876 (1978); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978). The Seventh, Eighth, and Ninth Circuits have held, however, that the capacity of related corporations to conspire is a question of fact that depends upon the extent to which such corporations actually carry on their operations separately. \textit{See} Ogilvie v. Fotomat Corp., 641 F.2d 581, 582 (8th Cir. 1981) ("photo processing franchisor and wholly owned subsidiary constituted single economic entity of business enterprise incapable of conspiracy"); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979) (six hotel-casinos owned or controlled by one individual did not act...
tributor carries on resale activities through a subsidiary, the parent supplier may be deemed to have entered into an agreement with its subsidiary to terminate a distributor competing with the subsidiary. The close natural ties between the parent and subsidiary would make it easy to infer such an agreement when personnel of the subsidiary have communicated their concern about the terminated distributor's competitive activities to the management of the parent. In this situation, it is equally likely that the parent terminated the distributor in order to restrict intrabrand competition with its own subsidiary rather than to preserve the procompetitive interbrand effects of its vertical resale restrictions. There is no justification, therefore, for according a presumption of vertical cause to the termination simply because of the presence of the resale restrictions. Because proof of the actual purpose of the termination is more accessible to the dual distributor than the terminated distributor, the burden of proving an independent business reason for the termination should be on the dual distributor.

When a termination follows complaints from a dual distributor's own subsidiary, the fact-finder should resolve the causal issue by considering the parent and subsidiary as unrelated entities and applying the causal analysis previously discussed. The termination will be held per se illegal if the fact-finder concludes that the parent had no business reasons independent of the anticompetitive concerns of the subsidiary for terminating the distributor. In such a case, the anticompetitive purpose and effect of the termination would be no different than if the distributor had been terminated because of the complaints of an independent distributor. If, however, the fact-finder concludes that the parent would have terminated the distributor even in the absence of the subsidiary's expressions of anticompetitive concern in order to enforce its contractual resale restrictions, a vertical analysis would apply to the termination. The dual distributor would not be denied the right to prove the reasonableness of the restrictions under GTE Sylvania merely because it had retained the right to market at wholesale through a subsidiary.

143 Courts have applied the intra-enterprise doctrine to find a conspiracy when a parent and subsidiary have been involved jointly in a termination decision. See Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Minnesota Bearing Co. v. White Motor Co., 470 F.2d 1323, 1328-29 (8th Cir. 1973).

144 See notes 117 & 134 and accompanying text supra.
b. **The Effect of Exclusive Distributorships.** An inference of vertical cause should also arise when the purpose of a mixed termination conspiracy is to establish or maintain an exclusive distributorship. The inference of vertical cause is justified by the likelihood that the supplier was motivated by its own business purposes rather than by the anticompetitive concerns of the exclusive distributor.

    Courts almost uniformly have upheld refusals to deal motivated by grants of exclusive distributorships.\(^{145}\) They rarely have articulated the rationale underlying these decisions, and the cases are generally decided on the basis of the traditional validity of exclusive distributorships rather than on their substantive competitive effect. Nevertheless, the decisions appear to recognize implicitly that the establishment of an exclusive distributorship usually results from a supplier's independent decision concerning the general nature of its distribution system.\(^{146}\) Indeed, the promise of exclusive distribution rights constitutes a significant concession to a distributor, and a supplier is not likely to grant such an advantage without legitimate marketing reasons. The supplier may, for example, believe that the grant of an exclusive distributorship, much like the territorial limitations at issue in *GTE Sylvania*, is necessary to induce the favored distributor to promote the supplier's product aggressively.\(^{147}\) A supplier presumably would be willing to grant exclusive rights only to a distributor who has demonstrated the marketing capability and willingness to represent the supplier effectively in the exclusive territory.\(^{148}\) Thus, it is unlikely that a complaining distributor could induce a supplier to terminate other distributors and appoint the complaining distributor as an exclusive unless the supplier has independent business reasons for making the appointment. Because the grant of an exclusive distributorship so often involves these independent business considerations, the terminated distributor should bear the burden of proving that the supplier was actually motivated by the anticompetitive concerns of the favored distributor in effecting the termination.

    In some cases the terminated distributor may be able to prove that the supplier's refusal to deal would not have occurred without the inducement of the exclusive distributor. The distributor receiving an exclusive distributorship, for example, may have complained to the supplier about the competitive activities of other distributors and threatened to reduce its purchases unless the distributors were terminated. If the fact-finder concludes that the supplier was compelled by the exclusive distributor's purchasing power to accede to its demands,

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145 See notes 52-56 and accompanying text supra.
147 See Del Rio Distrib., Inc. v. Adolph Coors Co., 589 F.2d 176, 179 (5th Cir. 1979); Posner, supra note 22, at 293.
148 See Note, supra note 97, at 806-08.
the per se rule should apply. The terminated distributors would have been excluded from the market by one of their competitors, and the supplier and complaining distributor should not escape per se liability merely because their conspiracy happened to result in the establishment of an exclusive distributorship.149

Although this Article has focused primarily upon the application of the causal analysis to situations involving the restriction of actual intrabrand competition, the analysis also applies when potential intrabrand competition is affected. Exclusive distributor cases may frequently involve restrictions that affect potential intrabrand competition. For example, the supplier may replace one exclusive distributor with a new exclusive distributor.150 Potential intrabrand competition is restricted by the replacement because the supplier otherwise might have allowed both distributors to coexist in the market as non-exclusives. The horizontal restriction of potential intrabrand competition justifies application of the per se rule.151 Therefore, if the former exclusive distributor can demonstrate under the causal analysis that the newly appointed exclusive distributor induced its termination, the per se rule should apply.152

Once an exclusive distributor has been validly appointed, firms subsequently excluded from the intrabrand market by virtue of the appointment should not be able to assert an antitrust claim against the supplier or exclusive distributor. The exclusion of such potential competition is the natural consequence of the exclusive distribution agreement, and the legitimacy of the exclusion derives from the validity of the agreement itself. If, however, the supplier has granted a distributor a lesser right than an exclusive, potential competitors excluded by reason of the grant may have a valid antitrust claim. The supplier may, for example, grant a distributor the right to veto the appointment of new competitors in its territory. Whenever a distributor exercises such a veto right to exclude a potential new distributor from the intrabrand market, the per se rule should apply. Any supplier who presents a potential new distributor for an existing distributor's approval would have an in-

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149 See Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 421-22 (D.C. Cir.) (Bazelon, J., dissenting), cert. denied, 355 U.S. 822 (1957). But see note 54 supra (citing cases in which courts failed to consider that an exclusive distributor's inducement of another distributor's termination might justify use of the per se rule).

150 See note 55 supra.

151 In United States v. Topco Assoc., Inc., 405 U.S. 596 (1972), for example, the Court based its application of the per se rule upon the fact that supermarket chains distributing Topco brand products had the right to determine whether additional chains would be licensed to distribute such products.

152 The terminated distributor would have more difficulty proving improper inducement than in the case of a refusal to deal induced by an incumbent distributor, because the newly appointed distributor would not have possessed any purchasing power by which to induce the termination prior to its appointment as an exclusive.
dependent desire to appoint the new distributor. If the existing distributor subsequently vetoed the appointment of the new distributor, it would be clear that “but for” such action the supplier would have appointed the new distributor. Such an elimination of potential competition by the incumbent distributor would thus meet the requirements of the causal test necessary for application of the per se rule.\(^\text{153}\)

3. Proving the Causation Issue

a. The Supplier’s Case. The supplier will have the burden of proving the vertical cause of a mixed termination unless the termination involves a non-price contractual resale restriction or an exclusive distributorship.\(^\text{154}\) This section outlines evidence that the supplier may use to support its burden of proving that it would have terminated the distributor even in the absence of other distributors’ complaints.

Several business reasons independent of the distributors’ complaints may have motivated a supplier to terminate a distributor. The complaints, for example, may have merely confirmed a prior decision made by the supplier to simplify its distribution system by reducing the number of distributors.\(^\text{155}\) In order to prove that it intended to rationalize its overall distribution system, the supplier may have to demonstrate that it terminated other distributors at approximately the same time.

The supplier also may argue that it decided to terminate the distributor for poor performance. Courts have frequently sustained terminations of distributors for inadequate performance, stating that suppliers have a “legitimate interest in the quality, competence, and stability” of their distributors.\(^\text{156}\) Lack of diligence,\(^\text{157}\) inadequate serv-

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\(^{153}\) Some courts have found the per se rule inapplicable in veto cases on the ground that the exercise of the veto restricted only potential intrabrand competition. See note 56 supra. These cases, however, appear to conflict with the Supreme Court’s decision in Topco, in which the Court found the horizontal restriction of potential intrabrand competition sufficient to justify application of the per se rule. A few lower courts have also held the exercise of a veto right per se illegal even though only potential intrabrand competition is affected. In American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975), the court found that the right of Holiday Inn franchisees to veto the appointment of new franchisees in their territory was per se illegal. The court emphasized that Holiday Inn treated the incumbent franchisees’ objections to such appointments as “dispositive” and that the franchisees, like the grocery chains in Topco, had the ability to determine whether potential competitors would be appointed. 521 F.2d at 1242-43. See also Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466 (8th Cir. 1976) (upholding complaint based on allegation that automobile distributor had contract right to veto appointment of competing distributors); Tysons Corner Regional Shopping Center, 85 F.T.C. 970, 1011 (1975) (per se illegality of right of department store under shopping center lease to veto new department store tenants).

\(^{154}\) See notes 133-35 and accompanying text supra.

\(^{155}\) See Naifch v. Ronson Art Metal Works, 218 F.2d 202 (10th Cir. 1954); Montoux v. Gulling Auto Elec., Inc., 1963 Trade Cas. (CCH) ¶ 70,639 (S.D. Ind. 1963).


\(^{157}\) Gateway Bottling, Inc. v. Dad’s Rootbeer Co., 53 F.R.D. 585 (W.D. Pa. 1971) (de-
ice, dishonesty, poor financial condition, and low standards of cleanliness and appearance have all been considered legitimate grounds for distributor terminations. The supplier may strengthen its case by establishing that the distributor's poor performance constituted a breach of specific promotional or other similar provisions in its distributor contract.

Evidence of the supplier's past conduct in terminating distributors may aid it in meeting its burden of proof on the causation issue. For example, the supplier's argument that it terminated a distributor for poor performance might carry greater weight if it could demonstrate a history of terminating other distributors who failed to promote the supplier's product effectively. The timing of the competing distributors' complaints may also indicate that the complaints did not cause the termination. The competing distributors may have complained regularly for several years prior to the termination. In such a case, the supplier may successfully argue that it disregarded the complaining distributors' anticompetitive concerns for years and finally decided to terminate the distributor for its own business reasons.

To establish the vertical cause of a termination, the supplier may produce evidence of the complaining distributors' inability to induce the termination. The purchasing power of the complaining distributors, for example, may be so small in relation to the supplier's market power as to make it unlikely that the complaints could have induced the supplier to terminate another distributor. Indeed, the distributors' complaints may not even have included an express or implied threat to condition future purchases upon another distributor's termination. In such cases it is less likely that the supplier would have felt compelled to effect a termination that did not coincide with its own legitimate business interests.

fault of provisions in distributor contract requiring distributor to maintain facilities and aggressively promote sales.


162 Some courts have indicated that terminations pursuant to distributor contracts may give rise to a greater inference of vertical cause in mixed termination cases. See note 139 supra.

163 In Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), the court upheld a termination in which the competitors' complaints had been continuing for approximately five years before the termination. See also Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1049 (2d Cir.), cert. denied, 429 U.S. 885 (1976).
DISTRIBUTOR TERMINATIONS

If the supplier rebuts the inference of horizontal cause by introducing the type of evidence discussed in this section, the termination should be viewed as vertical conduct without regard to the agreement between the supplier and the complaining distributors. In such a case the agreement would be irrelevant because the supplier would have terminated the distributor even in the absence of the agreement. The per se rule could then apply only if the supplier had attempted to coerce the distributor into observing certain resale prices or had terminated the distributor pursuant to a general program of resale price maintenance. Provided the supplier had not effected the termination to enforce resale price-fixing or a non-price restriction on resale in a distributor contract, the termination would be deemed valid under the Colgate defense as a unilateral decision made by the supplier for its own business reasons.

b. The Terminated Distributor's Case. A supplier should have the benefit of a presumption that it acted independently of distributor complaints when it terminates a distributor pursuant to a non-price resale restriction or to the grant of an exclusive distributorship. This presumption is appropriate because the supplier may legitimately consider certain anticompetitive interests of its distributors in making these decisions about the general nature of its distribution system. The terminated distributor, however, may still prevail by proving that its competitors induced the supplier to effect a termination that the supplier would not otherwise have considered. In such a case, the per se rule should apply because the supplier would be motivated not by the overall objectives of its distribution system, but merely by a desire to restrict intrabrand competition with the inducing distributors. The following are examples of the type of evidence that would help the terminated distributor meet its burden of proving that the per se rule should apply.

A terminated distributor may rebut the presumption of vertical cause by demonstrating that the termination ran contrary to the supplier's self-interest. Such a termination is more likely to have resulted from competitors' complaints than from the supplier's independent exercise of business judgment. For example, suppliers have an eco-

\[164\] See notes 33, 42 and accompanying text supra.
\[165\] See notes 34-47 and accompanying text supra.
\[166\] See note 33 and accompanying text supra.
\[167\] See notes 136-53 and accompanying text supra.
\[168\] See notes 140, 149-53 and accompanying text supra.
\[169\] See id.
nomic interest in stimulating a high-volume, low mark-up distribution policy.\textsuperscript{171} If a supplier acts against that interest by terminating a distributor who has successfully maintained a high resale volume, the inference may arise that other distributors coerced the supplier into effecting the termination.\textsuperscript{172}

The terminated distributor also may demonstrate the horizontal cause of a termination by proving that the complaining distributors could have provided the supplier with an important marketing benefit as consideration for the termination. For example, a supplier entering a new market may feel compelled to placate the complaining distributors to convince them to assume the risk of investing in a new product. When one large distributor or a combination of several smaller distributors demands that the supplier terminate another distributor, even a well established supplier may accede to the demands in order to retain the distributors' business and goodwill. Any special concessions by a complaining distributor to a supplier may also indicate horizontal causation. For example, if the complaining distributor increases its purchases or agrees to other contract conditions favorable to the supplier immediately following the termination, the fact-finder may view this conduct as a "quid pro quo" for the termination.\textsuperscript{173}

The timing and nature of the competing distributors' complaints may indicate that the complaints caused a distributor's termination. The complaints may concern competitive conduct such as price-cutting, for example, which is more likely to be of concern to the complaining distributors than to the supplier.\textsuperscript{174} A termination following receipt of such complaints gives rise to a greater inference of horizontal cause. A similar inference may arise when a termination occurs immediately following a supplier's receipt of complaints about a distributor who, by all outward appearances, had been performing satisfactorily.\textsuperscript{175} If the sup-

\textsuperscript{171} The GTE-Sylvania Court cited this interest in support of its conclusion that, in attempting to promote interbrand competition, suppliers would also attempt to retain as much intrabrand competition as possible. 433 U.S. at 55-56. \textit{See} Pitofsky, supra note 22, at 10; Posner, supra note 22, at 283. \textit{But see} Comanor, \textit{Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath}, 81 \textit{Harv. L. Rev.} 1419, 1425-27 (1968) (manufacturer and retailer benefit from restricted intrabrand competition through higher markups).


\textsuperscript{174} It is in the supplier's economic interest to retain low-price, high-volume distributors. \textit{See} notes 171-72 and accompanying text supra.

\textsuperscript{175} \textit{See} Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 170 (3d Cir. 1979) ("sudden repudiation of a recently made" distributor agreement indicates that pressure from another customer may have caused the termination); \textit{cf.} Venture Technology, Inc. v. National Fuel Gas Co., 1980-81 Trade Cas. (CCH) ¶ 63,780 (W.D.N.Y. 1981) (finding indication of illegal conspiracy from fact that buyer refused, within three days of contact by natural gas producer, to purchase gas from competing producer).
DISTRIBUTOR TERMINATIONS

plier never expressed dissatisfaction with the distributor before the termination, it is more likely that the termination was directly related to the complaints. 176

The supplier's treatment of other distributors may reveal that the supplier would not have considered a distributor's contract violation serious enough to justify termination in the absence of complaints from the distributor's competitors. For example, the supplier may not have terminated other distributors who had previously engaged in similar conduct. 177 The supplier may even have singled out the distributor for termination while retaining distributors whose conduct was indistinguishable from that of the terminated distributor. 178

The supplier's treatment of the distributor during their contractual relationship may also indicate that the contract violation allegedly motivating the refusal to deal was not in fact of great concern to the supplier. If the supplier had failed to provide a contractual right of termination for the violation in question, a court might conclude that the supplier did not consider the contract provision critical to the distribution arrangement. The supplier also may not have informed the distributor that such a violation could lead to termination 179 and may not have allowed the distributor an opportunity to remedy the violation. 180 In such cases, the fact-finder may conclude that the breach of a vertical contract provision was not considered to be serious by the supplier and was only an excuse for terminating the distributor to satisfy the complaints of competitors.

Internal memoranda or other documents indicating that the parties bargained for a termination provide the best evidence of horizontal cause. Written reports of calls on competing distributors by the supplier's salesmen may reveal that a distributor threatened to condition


177 See Mendel Schwimmer d/b/a/ Supersonic Elecs. Co. v. Sony Corp. of America, 1980-81 Trade Cas. (CCH) ¶ 63,766 (E.D.N.Y. 1981) (jury could infer that competitors' complaints caused termination when supplier had not previously terminated a distributor for failure to repay advertising credits), rev'd, 1982 TRADE REG. REP. (CCH) ¶ 64,724 (2d Cir. 1982).

178 See Bartlit, supra note 3, at 320-21.

179 In United States v. General Motors Corp., 384 U.S. 127 (1966), GM argued that it should not be liable for terminating dealers who dealt with discounters, because such conduct violated the location clauses in the dealers' franchise agreements. Rejecting the argument, the Court pointed out that GM had never informed its dealers that such conduct violated the franchise agreements and had never announced that the dealers might be terminated for such conduct. 384 U.S. at 139, 143.

180 In Uniroyal, Inc. v. Jetco Auto Serv., Inc., 461 F. Supp. 350 (S.D.N.Y. 1978), the court based its finding of an illegal termination in part upon the supplier's failure to give the terminated distributor an opportunity to explain the customer complaints that were the alleged reason for the termination.
future purchases upon another distributor's termination. Internal mem-
oranda of the supplier may indicate that distributors' complaints about
a competitor were forwarded to senior management and seriously con-
sidered at that level.\textsuperscript{181} Given the present sophistication of antitrust
compliance programs, however, it is unlikely that any such documents
will be completely dispositive of the causation issue.\textsuperscript{182}

If the terminated distributor proves by use of the type of evidence
discussed in this section that the supplier would not have terminated the
distributor but for the complaints of competing distributors, the per se
rule should apply even if an exclusive distributorship or non-price resale
restriction is involved. Such a result is appropriate because any termi-
nation induced by competing distributors can have no purpose other
than the restriction of intrabrand competition.\textsuperscript{183}

V

A HYPOTHETICAL CASE

The advantages of the analysis proposed in this Article are best il-
lustrated by application to the following hypothetical case. Assume that
Supplier has appointed Distributor \textit{A} and Distributor \textit{B} as competing
distributors in a particular territory. Distributor \textit{A} is a large, long-term
customer of Supplier who has made a substantial investment in facilities
and personnel to promote Supplier's product. Distributor \textit{B} carries on a
small, low overhead operation, has only recently begun to carry Sup-
plier's product, and is not yet a significant factor in the market for Sup-
plier's product. Distributor \textit{A} complains to Supplier that Distributor \textit{B}
has been cutting the price for Supplier's product and has thereby di-
verted potential customers from Distributor \textit{A}. Three months later,
Supplier terminates Distributor \textit{B} and appoints Distributor \textit{A} as an ex-
clusive distributor in the territory. Given its insignificant market share,
Distributor \textit{B} cannot allege that its termination unreasonably restricted
competition in the relevant market for Supplier's product. Distributor
\textit{B} does, however, bring an action against Supplier and Distributor \textit{A},
alleging a conspiracy to exclude it from the market that constituted a
per se violation of the Sherman Act. In its complaint Distributor \textit{B} al-
leges that an illegal conspiracy can be inferred from Supplier's receipt of
Distributor \textit{A}'s complaints and subsequent termination of Distributor \textit{B}.

Under the approach currently employed by several lower federal
courts, Distributor \textit{B}'s claim could be dismissed in a summary judgment
action on any of the following grounds: (1) the allegation of Supplier's
receipt of Distributor \textit{A}'s complaints is insufficient prima facie proof of a

\textsuperscript{181} \textit{See} Girardi \textit{v.} Gates Rubber Co., 325 F.2d 196, 200-01 (9th Cir. 1963).
\textsuperscript{182} Pitofsky, \textit{supra} note 22, at 35.
\textsuperscript{183} \textit{See} notes 14-30 and accompanying text \textit{supra}. 
conspiracy;\textsuperscript{184} (2) the per se rule cannot apply to the termination because the alleged conspiracy lacks horizontal plurality;\textsuperscript{185} or (3) the per se rule is inapplicable because Supplier established an exclusive distributorship.\textsuperscript{186}

Under the proposed analysis, the fact-finder would have a greater opportunity to review the competitive substance of the alleged conspiracy. Distributor \( B \) could establish a prima facie case of conspiracy by showing that Distributor \( A \) complained to Supplier about Distributor \( B \)'s price-cutting, that Supplier's top management received the complaints immediately prior to the termination, and that the complaints carried the implied request that Distributor \( B \) be terminated.\textsuperscript{187} The fact-finder could then consider whether Supplier and Distributor \( A \) had reached a meeting of the minds on Distributor \( B \)'s termination. If the fact-finder concludes that such a conspiracy existed, it would then consider the causation issue and determine whether the per se rule might apply because Supplier had undertaken the termination not for its own business reasons but to satisfy the anticompetitive concerns of Distributor \( A \).

The per se rule would not be deemed automatically inapplicable merely because the conspiracy lacks horizontal plurality or happens to involve the appointment of an exclusive distributor. In order to protect Supplier against undue litigation costs and delays, however, Supplier would have the benefit of a presumption that in terminating Distributor \( B \) and appointing Distributor \( A \) as an exclusive, it was motivated by independent concerns about the overall nature of its distribution system.\textsuperscript{188} To avoid summary judgment or a directed verdict, Distributor \( B \) would therefore have to rebut the presumption by introducing evidence that Supplier would not have terminated Distributor \( B \) "but for" the complaints of Distributor \( A \). Distributor \( B \) might meet this burden by producing evidence that it had been purchasing increasing volumes of product from Supplier and that Supplier consequently had acted against its own economic interests in effecting the termination,\textsuperscript{189} that internal memoranda of Supplier or Distributor \( A \) indicated that Supplier had seriously considered a threat by Distributor \( A \) to reduce its purchases significantly if Supplier did not terminate Distributor \( B \),\textsuperscript{190} or

\textsuperscript{184} See notes 77-87 and accompanying text supra.
\textsuperscript{185} See notes 59-68 and accompanying text supra.
\textsuperscript{186} See notes 52-58 and accompanying text supra.
\textsuperscript{187} See notes 106-08 and accompanying text supra.
\textsuperscript{188} See notes 145-49 and accompanying text supra. If, however, Supplier had not established an exclusive, Supplier would have the burden of rebutting the inference that the termination was caused by Supplier's agreement with Distributor \( A \). See notes 133-34 and accompanying text supra.
\textsuperscript{189} See notes 170-72 and accompanying text supra.
\textsuperscript{190} See notes 181-82 and accompanying text supra.
that prior to the receipt of Distributor A's complaints Supplier had given no indication that it was considering terminating Distributor B and appointing Distributor A as an exclusive.\footnote{191} If Distributor B introduces any such evidence rebutting the presumption of vertical cause, the fact-finder would weigh the conflicting evidence and determine whether Supplier was motivated by Distributor A's price-cutting complaints or by its own independent business judgment in effecting the termination.

If the fact-finder holds in favor of Distributor B on both the conspiracy issue and the causation issue, the termination will be deemed per se illegal. In such a case, Distributor B would have been excluded from the market by virtue of the actions of Distributor A, a direct competitor. Because a termination induced by Distributor A would not promote interbrand competition and would have as its only purpose the elimination of intrabrand competition, the per se rule would be appropriate.\footnote{192}

If the fact-finder concludes either that no conspiracy existed between Supplier and Distributor A or that, although the parties were both committed to the termination, Supplier terminated Distributor B for business reasons independent of Distributor A's price-cutting concerns, the termination will be analyzed as vertical conduct. The termination would be valid under \textit{Colgate} as a unilateral action by Supplier unless Distributor B could demonstrate that the termination constituted an attempt by Supplier to coerce Distributor B into adhering to certain resale prices.\footnote{193}

**CONCLUSION**

The analysis proposed in this Article provides a practical method for courts to determine whether a horizontal or vertical approach is appropriate when a distributor has allegedly been terminated pursuant to a conspiracy between its supplier and one or more of its competitors.\footnote{194}

\footnote{191}{See notes 175-76 and accompanying text \textit{supra}.}
\footnote{192}{See notes 127-29 and accompanying text \textit{supra}.}
\footnote{193}{See note 33 and accompanying text \textit{supra}. Distributor B would probably not prevail in a claim alleging that Supplier effected the termination to enforce a resale price restriction because the fact-finder would previously have concluded that Supplier was not motivated by Distributor A's price-cutting complaints. If Supplier had terminated Distributor B to enforce territorial or other non-price vertical restrictions in a distribution contract between Supplier and Distributor B, Distributor B would have to demonstrate that the contract restrictions were invalid under the rule of reason. See notes 34-47 and accompanying text \textit{supra}.}
\footnote{194}{This Article has analyzed mixed conspiracies which result in the termination of a distributor. The proposed analysis may also apply, however, when a complaining distributor induces a supplier to impose restraints other than a termination upon a competing distributor. If, for example, the "but for" test indicates that certain distributors induced a supplier only to sell to a competing distributor at a discriminatorily high price, to require the distributor to observe certain territorial or customer restrictions, or to impose other disadvantageous resale restrictions on the distributor, the conditions imposed by the supplier should be ana-}
By separating the issue of conspiracy from the issue of cause, the analysis ensures that the fact-finder will consider the questions of competitive purpose and intent necessary for a fair and consistent application of the per se rule, the rule of reason, and the *Colgate* defense. The analysis thus avoids the inconsistencies and inequities of the formalistic approach adopted by the lower federal courts in many mixed termination cases.¹⁹⁵

The proposed analysis may also apply when only potential competition is affected. As pointed out in the case of exclusive distributorships, the analysis may apply either when a potential distributor induces a supplier to terminate an incumbent distributor, see notes 150-52 and accompanying text *supra*, or when an incumbent distributor induces a supplier not to deal with a potential distributor, see note 153 and accompanying text *supra*. In each case, potential intrabrand competition is eliminated, and *Topco* requires that the per se rule be applied if the "but for" test is met.

¹⁹⁵ *See* notes 49-87 and accompanying text *supra*.