RESALE PRICE MAINTENANCE

Economic Evidence From Litigation

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EXECUTIVE SUMMARY

Resale price maintenance (RPM) is a practice by which a manufacturer limits the retail or wholesale price for its product. RPM is per se illegal under the antitrust laws, but many commentators have suggested that this legal prohibition is inappropriate.

Minimum RPM occurs when the manufacturer sets a lower limit on resale prices. If manufacturers use minimum RPM to facilitate horizontal price-fixing with other manufacturers (by making it easier to detect cheating on the collusion, for instance), or if manufacturers are induced by dealers to use RPM to fix retail margins above competitive levels, then RPM is likely to injure consumers and the legal prohibition of minimum RPM may be beneficial. However, if individual manufacturers use RPM in order to provide the incentives for dealers to generate a variety of services or selling efforts, RPM is likely to benefit consumers under most circumstances. In this case, the legal rules against the use of minimum RPM may reduce the efficiency of retail and wholesale distribution systems and thus injure consumers. The extent to which minimum RPM would be of the collusive type, as opposed to the service-enhancing type, is thus a central question in determining the most appropriate legal rules on the use of RPM.

Since the repeal of state Fair Trade laws in 1975, all RPM has been per se illegal. Thus, the only available evidence for the U.S. in recent years comes from cases in which firms were alleged to be using RPM. This study examines a large sample of private and government cases that alleged RPM between 1976 and 1982. The analysis of various subsets of these cases suggests that the collusion theories of minimum RPM explain few instances of its use; the collusion theories are possible explanations for no more than 15 percent of all the cases and for a smaller portion of the private cases. Moreover, most of these potential collusion-type cases were pursued effectively under existing horizontal price-fixing doctrines, suggesting that the per se rule against RPM may not be important in deterring this type of conduct.

In contrast, virtually all of the cases appear to be consistent with at least one of the service-enhancing theories of minimum RPM. The most prominent of these theories, the "special

services" theory, in which minimum RPM is used to prevent discounting dealers from "free-riding" on pre-sale services provided by other dealers, is found to be a potentially important explanation for the practice. However, this theory does not appear to be the explanation for all uses of RPM. At least 30 percent of the cases involve types of products for which the "special services" theory is an implausible explanation for the use of RPM. The evidence suggests that a quality-control theory, in which the manufacturer uses RPM (and other controls) to protect its quality reputation by inducing dealers to provide higher quality pre- and post-sale services to consumers, may be an equally important explanation for the use of RPM. RPM's ability to enhance dealer sales efforts, especially at the wholesale level, is also found to be a potentially important explanation for RPM. The use of RPM to insure dealers against demand risk by limiting price reductions in bad markets does not appear to explain many of the cases. Thus, while no individual service-enhancing theory appears able to explain all uses of RPM, these theories, taken together, do provide potential explanations for virtually all of the cases.

The study also shows that approximately 30 percent of private RPM litigation involves maximum rather than minimum RPM. This litigation generally raises consumer prices without offsetting benefits, and thus, the per se rule against maximum RPM almost surely injures consumers. Moreover, the prevalence of this type of RPM litigation indicates that these losses are larger than many have supposed.

Finally, several characteristics of the private case sample suggest that many allegations of RPM may, in fact, have little to do with the actual practice of RPM. Many of the cases appear to be contract disputes or other business disagreements recast as antitrust allegations. If accurate, these findings imply that the per se illegal standard for RPM, together with the triple damage awards of private antitrust litigation, may deter a variety of manufacturer-dealer business practices besides RPM itself. In doing so, this per se illegal standard may have undesirable effects on the efficiency of distribution systems beyond those usually recognized in the policy debate.

CONTENTS

TABLES

I. INTRODUCTION AND SUMMARY

There is probably no area of antitrust activity that has generated more controversy than that dealing with vertical restraints. Generally, a manufacturer's actions are considered "vertical" if they affect the activities of distributors or retailers rather than those of other manufacturers at the same level of productive activity. Typical examples of vertical restraints are franchise arrangements, territorial or customer restrictions, tying arrangements, exclusive dealing requirements, and resale price maintenance (RPM).[1]

The economic view of vertical restraints has generally progressed from exclusive concern about their potential anti-competitive use to the current view that recognizes their potential efficiency motivations as well. The legal treatment of vertical restraints has been even more unsettled, moving from general legality, to per se illegality, to legality under state sanction (often with broad enforcement rules), back to per se illegality, and finally to the current standard: vertical non-price restraints are judged under a rule of reason standard, and vertical price restraints under a per se illegal standard, with an

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[1] For example, a manufacturer might require that an ice cream franchise use particular storage and preparation methods as a condition of receiving a franchise (a franchise requirement); that a beer distributor limit sales to a specified geographic area (a territorial restraint); that an auto dealer purchase all replacement parts from the manufacturer (a tying arrangement); or that a tire dealer sell only the manufacturer's brand (an exclusive dealing requirement).

Unlike these nonprice restrictions, RPM is a manufacturer-imposed limit on the retail price. Typically, RPM is used to specify a minimum price, though it can also be used to specify a maximum price or an exact price. For instance, a manufacturer of women's clothing who refuses to deal with discounting retailers because of their low pricing has a minimum RPM policy, while a newspaper publisher who terminates dealers who sell the paper for more than the posted price has a maximum RPM policy.

exception for some types of unilateral manufacturer RPM policies.[2]

Virtually all economists who have addressed the issue have been troubled by the current disparate legal treatment of price and nonprice vertical restraints. Yet there is considerable disagreement about the most appropriate change in policy in the area. Much of the recent literature has focused on the issue of RPM, since the current per se illegality standard is most at odds with economic analysis. However, the appropriateness of a rule of reason standard for all vertical restraints, and what such an analysis should entail if it is appropriate, are also important, contested policy questions.

The focus of this paper is RPM. In recent years there has been active development of the economic theory of RPM. However, there is virtually-no systematic empirical evidence against which to assess the strength of the various theories that have been developed. This is a significant deficiency, since appropriate policy decisions in the area depend fundamentally on the relative importance of the potential anti-competitive and efficiency-enhancing uses of RPM.

Market studies of the effects of RPM are difficult, because they require retail price, quality and service data over a broad sample of markets, and different or changing legal environments.[3] Because of these difficulties, this study will adopt an indirect approach to gathering evidence on the RPM questions, specifically by studying a sample of recent antitrust cases alleging vertical price restraints by manufacturers or distributors.

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[2] See, for instance, Calvani and Berg (1984), Hay (1985), and Overstreet (1983) for historical reviews of the legal treatment of vertical restraints under U.S. law.

[3] See Overstreet (1983) for a thorough review of past empirical work in the area. Also Caves (1986) presents an interesting assessment of many important RPM cases and Marvel and McCafferty (1986) discuss empirical problems that color many of the earlier cross-state studies of RPM's effects during the Fair Trade era. Finally, see Gilligan (1986) for an alternative effort to get empirical evidence on the RPM question by using stock market reactions to announced litigation.

This study has four primary goals:

1. To provide as much basic factual information as possible (without costly field research) about the cases alleging RPM conduct that were brought from 1976 through 1982;

2. To develop evidence on the relative merits of the various theories of RPM and related policy issues;

3. To provide some information from the RPM area to assess the growing concern that private antitrust activity may be used more to stifle competition and efficiency than to promote it; and finally,

4. To illustrate the potential usefulness of samples of litigated cases as the basis for empirical evaluation of economic and policy issues.

For this study, all private and public antitrust cases that contained a vertical price-fixing allegation and were reported in **CCH Trade Cases** between 1976 and 1982 were collected. This sample of cases includes virtually all private cases that were litigated to judgment, all litigated or settled federal cases, and most litigated or settled state cases that had vertical price-fixing allegations. These cases are listed in the appendix tables with a variety of information about them. Basic summary statistics on the cases are provided in Section III.B of the report.

The central analysis of the study examines key subsamples of cases in an effort the judge the likely importance of the major service-enhancing and anti-competitive theories of minimum RPM. The intuitive basis for this analysis is that if a particular theory is an important explanation for the use of RPM, many of the cases should be consistent with the theory in question. For instance, if the collusion theories of RPM were the dominant explanation for the practice, most RPM cases should be collusion-type cases.

Unfortunately, from a research perspective, this intuitive idea cannot be applied directly, because litigated cases are a selected sample of all uses of a practice. A variety of factors determine which cases go to litigation, such as, the strength of the cases relative to the liability standard, the costs of litigation, expected damage awards, and the relative stakes of litigation. However, because of the per se nature of the RPM standard, an analysis of these factors suggests that, with the possible exception of supplier collusion cases, private litigated RPM cases may, in fact, be representative of the most profitable uses of RPM. The sample of all private litigated cases is thus a key sample analyzed

in the study. Cases brought by the government may compensate for any weaknesses in private incentives to pursue collusion cases. For this reason, the joint sample of private litigated cases and government litigated and settled cases is also analyzed.

If either of these samples is, in fact, representative of the most profitable uses of RPM, a number of conclusions are indicated. In particular, an examination of the cases suggests that the collusion theories are not a major explanation for the use of RPM. A test based on the presence of any allegation, consent provision, parallel cases, or other evidence of collusion indicates that the collusion theories are a possible explanation for no more than 15 percent of the entire sample and a somewhat smaller proportion of the private cases. Most of the cases where collusion is a possibility were pursued primarily as horizontal price-fixing cases rather than as RPM cases. As a result, the per se rule against RPM would appear to have limited incremental value in deterring RPM used for collusive reasons.

The most prominent service-enhancing theory of RPM, the "special services" theory in which RPM is used to prevent free-riding by low-priced dealers on the information services of other dealers, is found to have more potential as a major explanation of RPM. An analysis of the products in the cases in terms of the value of pre-purchase information to consumers suggests that this theory is a possible explanation for approximately 50 percent of the cases under a narrow definition, or up to 70 percent of the sample under a broad definition, of the types of products for which the theory might apply. The theory seems an implausible explanation for at least 30 percent of the cases. Thus, even taken together, the collusion and "special services" theories appear incapable of providing a complete explanation for the use of RPM.

A more general view of RPM as a device to correct a variety of principal-agent problems in the relationships between manufacturers and dealers is found to have the potential to explain virtually the entire sample of cases. The "special services" theory is one example of a principal-agent theory, but there are others. In particular, on the basis of the types of products in the cases, a quality-control theory, in which RPM is used to alter incentives for dealers who can influence the quality of the good, is found to be a potentially important explanation for RPM. However, the portion of the sample consistent with the quality-control theory overlaps to a large extent with that

potentially explained by the "special services" theory. A sales-effort theory, in which there are vertical externalities that limit the sales efforts of dealers, is also found to be a possible explanation for a significant subsample of cases, and especially, for cases that were unexplained by the other theories. The final principal-agent theory considered, one in which RPM is used to insure dealers against demand risk, was found to have little potential in explaining the sample.

Overall, if either the sample of private litigated cases or the entire sample of cases is representative of the most profitable uses of RPM, this study thus suggests that the collusion theories of RPM are a relatively minor explanation for the use of RPM, while the service-enhancing theories, taken together, may provide an explanation for virtually all observed uses of the practice. This evidence is broadly consistent with theoretical economic analyses that suggest that RPM is used for a variety of reasons and that many of these uses are likely to enhance welfare.

Finally, several characteristics of the private case sample suggest that many allegations of RPM may, in fact, have little to do with the actual practice of RPM. Many of the cases appear to be contract disputes or other business disagreements recast as antitrust allegations. If accurate, these findings imply that the per se illegal standard for RPM, together with the triple damage awards of private antitrust litigation, may deter a variety of manufacturer-dealer business practices besides RPM itself. In doing so, this per se illegal standard may have undesirable effects on the efficiency of distribution systems beyond those usually recognized in the policy debate.

Section II of the report outlines the basic issues in the RPM debate and reviews the most important RPM theories. Section III outlines theories of litigation and examines potential biases in various subsamples of litigated and settled cases. A variety of summary statistics for the overall sample of RPM cases is also provided. The central analysis of the report is presented in Section IV, where the evidence on the theories of minimum RPM is developed. The subsample of maximum RPM cases is described in Section V and conclusions are presented in Section VI. Detailed listings of the cases are provided in the Appendix.

II. ECONOMIC THEORIES OF RPM

A. Basic Issues in the Debate

The current policy debate about the appropriate legal treatment of RPM almost universally focuses on **minimum** RPM that is adopted and enforced by manufacturers. There is little economic debate about the inappropriateness of the current per se illegality of **maximum** RPM (Blair and Fesmire (1986) and Scherer (1983)). Similarly, regulations or laws that give enforcement ability to parties other than the manufacturer raise different questions about the likelihood that RPM might be used to support non-competitive pricing, especially by dealers.[4] For these reasons, this section of the report will focus exclusively on minimum RPM that is not part of any regulatory apparatus and that can be legally enforced only by manufacturers.

RPM is currently illegal per se under the antitrust laws and has been so for all RPM-type practices since the 1975 repeal of the Miller-Tydings and McGuire Acts, which had created an exemption from the federal antitrust laws for RPM adopted under state-sanctioned Fair Trade contracts. Although today RPM is illegal per se, "unilateral action" by a manufacturer under the *Colgate* doctrine is not actionable.[5] The discretion actually given

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[4] It is important to note that this enforcement issue is a potentially important distinction between the RPM practices that are the subject of current economic analyses and the RPM practices that were legal under the Fair Trade laws that governed this issue from the mid-1930s until their repeal in 1975. All of the Fair Trade laws gave dealers, and in some cases their trade associations, legal standing to enforce Fair Trade contracts against discounting dealers. In some cases, the state itself enforced the contracts (FTC (1945)).

[5] In *U. S. v. Colgate & Co.*, 350 U.S. 300 (1919), the Court held that a manufacturer could unilaterally determine its retail price and refuse to sell to discounters. See Calvani and Berg (1984) or Overstreet (1983) for discussions of the *Colgate* doctrine generally. In legal terms, "unilateral" retail price decisions by a manufacturer that fall under the *Colgate* doctrine are not considered to be RPM. However, for purposes of

to manufacturers under this doctrine has been the subject of much legal debate, but until the *Monsanto* decision in 1984, it was generally assumed to be very narrow and virtually unusable.[6]

The per se illegal standard for RPM would be economically efficient if most uses of RPM are inefficient and if the cost of more finely discriminating between the inefficient and the efficient uses of RPM exceeds the social benefit of doing so. Conversely, a per se legal standard for RPM would be efficient if most uses of RPM are efficient and, again, discriminating more finely costs more than the benefits of doing so. Between these two extremes are a host of alternatives, including full rule of reason analysis and per se standards with particular exceptions.

Generally, litigation using a rule of reason analysis is more complex and therefore more costly per case and subject to more uncertainty than that using a per se illegal rule. The effects of a rule of reason standard on the total costs of litigation are, therefore, difficult to predict. The added cost of litigation per case should reduce the likelihood of legal challenge to a given practice and of a case going to trial once challenged. However, the increased uncertainty about the outcome could increase the use of RPM as well as the proportion of cases litigated compared with the per se illegal standard.[7] Overall then, the total volume and costs of litigation could either increase or decrease under a rule of reason standard. If the analysis used to effect the rule of reason standard is well-founded, however, even if subject to substantial error, fewer efficient uses of RPM should be deterred by the law, though anti-competitive uses of RPM could increase somewhat as well, compared with the per se illegal standard.

The balancing of these factors -- the changes in total litigation costs and in the deterrence effects on both efficient and inefficient uses of RPM under different legal standards -- is

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economic analysis, it is appropriate to view the *Colgate* doctrine as an exception to the per se illegal rule against RPM.

[6] *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984).

[7] See Priest and Klein (1984), Priest (1986), Nalebuff (1987), Salop and White (1986) and the papers cited there on the relation between these factors and the decision to settle or to litigate.

the fundamental issue that underlies the economic policy debate on the legal treatment of RPM. Differing judgments about the likely magnitudes of these factors have led to a variety of recommendations for the most efficient changes to the current per se illegal standard for RPM.[8] A primary purpose of this study is to develop additional evidence on which to base these judgments.

The remainder of Section II of the report reviews the principal economic theories of RPM and their efficiency consequences. Later sections will describe the sample of litigated cases and analyze the implications of the available evidence for the theories. Maximum RPM cases are reviewed in Section V.

B. RPM as an Aid to Collusion

The primary anti-competitive theories of RPM are the collusion theories. In the supplier collusion theory, RPM is viewed as a means of reducing cheating by colluding manufacturers (Telser (1960)). By imposing minimum RPM the colluders can fix the retail price of the good to reflect the collusive wholesale price. This reduces manufacturers' incentives to cheat, since the fixed retail price makes it more difficult to increase sales by lowering the wholesale price.

The potential role of RPM in facilitating supplier collusion is, however, subject to a number of theoretical limitations. If a manufacturer is attempting to cheat on the collusion, it has little incentive to enforce the RPM price. Since other colluding manufacturers cannot enforce that price directly, RPM's strength as a pure enforcement device appears limited. Similarly, even if the retail price is enforced, a manufacturer can increase dealer margins by lowering the wholesale price. If the dealer can take actions to increase sales, these higher margins would partially undermine any effect of RPM on the incentive to cheat (Telser (1960) and Ornstein (1985)).

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[8] See, for instance, Comanor and Kirkwood (1985), Easterbrook (1984), Lafferty, Lande and Kirkwood (1986), Meehan and Larner (1981), Ornstein (1985), Overstreet (1983), Overstreet and Fisher (1985), Posner (1981), Schwartz and Eisenstadt (1983), and Steiner (1985).

If RPM could aid in the detection of cheating, however, RPM's potential as a device that facilitates collusion might be greater. By eliminating other reasons for variations in retail prices, RPM might make cheating easier to detect. Effective collusion would still require some other disciplining mechanism to prevent the cheating that the RPM would reveal.

The second RPM collusion theory relates to dealer efforts to limit competition. In the primary version of this theory, dealers are unable to discipline price-cutting among themselves. Thus, in an effort to raise dealer margins above competitive levels, they induce manufacturers to impose and enforce minimum RPM at the desired noncompetitive price.

There are several problems with this theory that limit its applicability. For most retail markets, entry is relatively easy and thus a significant problem for any collusion effort. Moreover, a manufacturer would not want to participate in such a collusion scheme, since dealer collusion will tend to reduce manufacturer profits. Thus, it seems necessary for the dealers to have some credible economic threat (such as a group boycott of a sufficiently large portion of the retail market) to induce the manufacturer to impose and enforce the RPM. Finally, if there are competing non-RPM manufacturers, dealers have an incentive to cheat on the collusion by offering the competing manufacturers' goods. Disciplining this type of cheating may be as much a problem as the original price-cutting. These theoretical problems limit the potential applicability of this dealer collusion theory. In particular, this type of dealer collusion becomes more plausible if there is (near) industry-wide RPM.

A variant of this dealer collusion theory is also potentially important. In this version of the theory, previously competitive retailers suddenly face competition from a new, more efficient form of distribution. The projected lower prices will reduce the value of existing dealers' human and other capital investments. To prevent this capital loss, the traditional dealers use RPM to slow the evolution to the new retailing equilibrium.

The entry problem for colluders in this situation is somewhat less than in the first dealer collusion theory. The RPM price is set at the previously competitive level (or possibly even lower). Thus, there is no incentive for new traditional dealers to enter the market. Entry by the new type of retailer would still be a problem, but these dealers would be forced to compete in nonprice dimensions. Manufacturer incentives to impose and

enforce the RPM would still be a problem for the colluders, as would the presence of competing non-RPM manufacturers.

This version of the dealer collusion theory is the more prominent one in recent discussions of the RPM issue (Overstreet (1983) and Mathewson and Winter (1985), for instance). Historically, there is evidence to support this focus. Political support for the Fair Trade laws seems to have come primarily from traditional dealers who were facing significant competition from new types of retailers (FTC (1945) and Overstreet (1983)). Similarly, sales-below-cost laws (which essentially define minimum legal prices) were strongly supported by wholesalers who were facing competition from new types of vertically integrated retailers. In both of these cases, it is important to note that the state laws allowing minimum retail prices also provided enforcement mechanisms that did not rely on the manufacturer. This is not true of the current per se illegal RPM rule or of any of the alternative rules considered in the recent economic literature.

C. RPM and the "Special Services" Theory

The most prominent service-enhancing theory of RPM is the "free-rider" or "special services" theory. In this theory a manufacturer uses RPM to prevent lower-priced dealers from "free-riding" on the special selling services of other dealers. In its traditional version (Telser (1960)), the special selling services at issue are typified by large display areas, knowledgeable salesmen, customer demonstrations, or other explicit pre-purchase selling services. The important feature of these services is that consumers can benefit from the services, but then purchase the good from a lower-priced dealer who does not provide the services. If allowed to persist, dealers would be unwilling to provide these "special services," even when such services lead to more efficient markets.

More recent work in the area suggests that this theory would also apply to other more nebulous, but equally free-ridable, selling services (Marvel and McCafferty (1984)). Quality or fashion certification are primary examples here. If the fact that a particular retailer carries a product certifies to the market that the good is of high quality or is fashionable, consumers can learn this without purchasing the product at the particular retailer.

This again makes it possible for some retailers to free ride on the reputations of other retailers.

In any of these cases, if the manufacturer could directly pay retailers for the "special services," the manufacturer would have no incentive to use RPM for this purpose.[9] However, there are several serious problems with direct payment. The Robinson-Patman Act raises the possibility of legal liability for selling goods to different retailers at different prices. As currently interpreted, it would be extremely difficult to escape liability on the ground that compensation was provided for "quality or fashion certification," for instance. Moreover, even without the legal problems created by the Robinson-Patman law, if the manufacturer cannot monitor the services perfectly, it would want to tie the compensation to the quantity of the good sold. However, unless sales can be monitored, bootlegging (in which dealers who get the good for a lower price sell it to other dealers) can undermine the manufacturer's ability to compensate dealers only for effective selling services.[10]

For these reasons, a manufacturer might turn to minimum RPM to induce dealers to provide free-ridable services. The minimum price would be set high enough to induce the desired level of retail services from the most efficient providers of these services. It is important to note that inducing this type of service competition is not always possible simply by limiting price competition with minimum RPM. Service competition can occur along many dimensions. If there are non-free-ridable service dimensions that are valued by consumers, dealer competition

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[9] Compared to two-part pricing (where a fixed fee is charged in addition to a unit price for the good), RPM raises the retail price of the good. Abstracting from the effects of the desired special services, this reduces the quantity sold and the manufacturer's profits. If the service is verifiable, the manufacturer would prefer to pay directly and avoid this distortion in the retail price.

[10] For some categories of goods, bootlegging is relatively easy to monitor and prevent. In these cases, repeal of the Robinson-Patman law would probably eliminate most manufacturer efforts to control retail prices in order to get the desired selling services.

would occur along these dimensions first, unless this is also controlled through the use of other vertical restraints or with an active policy of manufacturer monitoring and termination of dealers who do not provide the *desired* services.

For instance, one non-free-ridable "service" is locational convenience. In markets where location is important to consumers, minimum RPM alone would tend to generate excess entry of dealers, that is, competition in this non-free-ridable dimension. In these cases, manufacturers would have to use other restraints to limit the number of dealers, together with RPM, to get the desired "special service" competition.[11]

According to the "special services" theory, RPM is more likely to be used for new products, for technologically complex products, and for other products for which there are many choices to be made at purchase. Similarly, RPM is more likely to be used for goods that are purchased infrequently or that change often. In each of these cases, retailer services designed to direct information to consumers are potentially important in expanding demand for the product. RPM is also more likely to be used when quality is not directly observable and for fashion goods, because of the information implicit in stores with strong reputations carrying those types of goods. Moreover, because other dimensions of competition often exist, RPM will tend to occur with other restrictions on dealers.

D. RPM and Agency Problems Between Manufacturers and Dealers

The RPM debate has primarily focused on the relative importance of the collusion and "special services" theories of RPM. Yet, in recent years there has been considerable

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[11] See Bittlingmayer (1983) or Perry and Porter (1986) for models of this type of competition. Note that this argument illustrates that entry restrictions (such as territorial limits, franchising, etc.) can be complementary to RPM, contrary to the conventional wisdom that they are substitutes.

development of other economic theories of vertical restraints.[12] A wide variety of situations have been analyzed in varying degrees of generality. This has led to a host of potential explanations for the use of RPM beyond the collusion and "special services" theories, explanations that at this point have not been adequately integrated or distilled.

Fundamentally, the basic insight of much of this literature is quite simple, however: retailers and distributors function as agents of manufacturers, and as such, their relationships are prone to all of the problems inherent in principal-agent arrangements. The dealer does not necessarily have the incentive to do what the manufacturer would like it to do. These incentives depend on the information available to both the dealer and the manufacturer, the ease with which the manufacturer can control various actions of the dealer, and other market factors, such as the relative risk aversion and the comparative efficiencies of the parties in providing particular services related to selling the product and determining its quality.

The manufacturer's lack of control over the dealer's actions can cause undesirable horizontal and vertical externalities. The classic free-rider externality in the provision of special selling services discussed above is one example of a horizontal externality. The addition of supra-competitive margins by dealers with market power is a well-known example of a vertical externality (Spengler (1950)).[13] But there are many others. Vertical restraints, and RPM in particular, can sometimes reduce

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[12] For instance, see Bittlingmayer (1983), Bolton and Bonnano (1986), Caves (1984 and 1986), Dixit (1983), Gallini and Winter (1983), Gal-Or (1987), Grieson and Singh (1986), Klein and Murphy (1987), Leffler (1986), Mathewson and Winter (1983a, b, c and 1984), Ordover, Saloner and Salop (1987), Perry and Groff (1985), Perry and Porter (1986), and Rey and Tirole (1986a and b), and Stiglitz (1987).

[13] Because supra-competitive retail margins reduce the demand for the product, they potentially reduce the manufacturer's profits. Such margins are generally inefficient. This problem is usually called the "successive marginalization" problem, because the dealer's excess margin is added to that of the manufacturer.

these externalities enough to produce the desired dealer actions. In most cases, these vertical restraints are likely to improve efficiency, though there are situations in which manufacturers have incentives to provide too much service. (See Section III.E.2 for an example of such a situation.)

To illustrate the diverse nature of potential agency problems for the manufacturer, three particular types of agency problems will be examined in more detail.

1. RPM When the Dealer Can Influence the Product's Quality

For many products, the final quality of the good received by the consumer depends in a significant way on inputs provided by the dealer. Moreover, in many of these cases, if the product's quality is not good, the consumer will be unable to judge whether the product itself is bad or the dealer's contribution is to blame. A variety of pre-sale services may fit these criteria: the assembly of bicycles or furniture, advice on coordinating stereo components or sports equipment, advice on type or grade of building material for a consumer's job, and the handling of food products are typical examples. However, many post-sale services may also fit these criteria: the post-sale servicing of automobiles or other equipment, advice on upgrading stereo or computer components, or courteous and timely warranty service all influence the consumer's ultimate satisfaction with the product.

In these types of situations, the retailer may not have the incentive to provide the level of service that the manufacturer (or the consumer) would like. The retailer would incur a cost to provide the service, yet part of the return from that investment would go to the manufacturer. The vertical externality implicit in maintaining the manufacturer's reputation is the direct cause of the underprovision of service.

As in most externality situations, contracting for the desired service is one potential solution. However, if the service in question is not easy to monitor and to verify legally, minimum RPM, together with control over the number of dealers and the right to terminate dealers at will, may be a more efficient

solution than service contracts.[14] By giving dealers a performance-related profit stream that they risk losing if the manufacturer is not satisfied, dealer incentives are changed dramatically.

2. RPM Where Sales Effort by the Dealer is the Most Efficient Way to Increase Sales

A manufacturer's concern with sales effort by dealers is the crux of the "special services" theory that has long been recognized as an efficiency explanation for the use of RPM. However, the use of RPM to induce sales effort goes beyond the direct horizontal externality highlighted by this special services argument.

New sales can sometimes generate profits for both the manufacturer and the dealer. In cases where the dealer's sales efforts are the most efficient way to increase sales, this creates a potential vertical externality. The dealer will expend sales effort only to the point where the dealer's marginal cost equals its marginal revenue; the additional profit to the manufacturer plays no role in the decision. This can result in too little sales effort on the product's behalf.[15]

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[14] See Bolton and Bonanno (1986), Leffler (1986) and Klein and Murphy (1987) for models of this type. This quality-related price premium acts to assure quality just as it would in a consumer market with asymmetric information at purchase (Klein and Leffler (1981)). However, it differs from the consumer case if the manufacturer can control the entry of new dealers: without entry that will erode the profit stream, there is no need to require the quality-specific sunk costs necessary to separate high quality sellers from cheaters (Ippolito (1986) and Klein and Murphy (1987)).

[15] See Rey and Tirole (1986a). Note that this argument leads to too little sales effort contrary to the usual argument that too much sales effort (or entry in the usual analysis) will result with differentiated retailers (see Section C, Bittlingmayer (1983) or Perry and Porter (1986) for this argument). The difference between the two outcomes depends on whether two-part pricing is economically feasible. In the case here, the

There are a number of potential solutions to this type of vertical externality. Two-part pricing (as with a franchise fee and a unit price for the good) is often the simplest way to align dealer incentives with the manufacturer's interests. However, two-part pricing is not always desirable, for instance, because it shifts risk to the dealers.[16] Direct subsidization of the sales activity, such as with advertising allowances or below-cost signs and displays, is another alternative, but this is appropriate only when the sales effort can be easily monitored and legally verified.

Minimum RPM, together with the ability to limit the entry of new dealers and the right to terminate dealers at will, can also generate the desired sales effort. By making the product profitable for dealers but reserving the right to terminate the dealer if it does not perform as desired, the manufacturer can directly increase dealers' incentives to promote the product.

It is important to note that this argument does not rely on any horizontal free-ridable promotional activity. The externality at issue is strictly vertical. For instance, manufacturers' efforts to ensure that dealers carry a wide breadth of their lines, hold deep inventories, or have well organized displays do not necessarily involve issues that are free-ridable by other dealers, but even so they may increase sales of the product. Similarly, a restaurant franchisee's upkeep of its property, hours, or monitoring of staff are not generally free-ridable. But these

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inability to use two-part pricing to set the dealer's marginal revenues to reflect the marginal value of its activities is the source of the vertical externality.

[16] See Blair and Kaserman (1983) for a discussion of these issues. Basically, two-part pricing allows the manufacturer to set the unit wholesale price at its marginal cost, which gives dealers the full profit (and hence the correct incentives) in making marginal sales-effort decisions. Any "excess profits" to dealers that this unit price generates can be eliminated through an adequate franchise fee. Without the opportunity to charge the franchise fee, the manufacturer's incentive is to set a higher unit price despite its distortionary effects. Note, however, that when the franchise fee is determined before any demand uncertainty is resolved, that uncertainty is shifted to the dealer.

issues can affect overall sales and the franchiser's profits if it does not have full two-part pricing. At the wholesale level, some aspects of market cultivation through the development of a dense and well-supplied distribution network are also examples of dealer activities that are not subject to free-riding by other distributors but that can affect overall sales of the product.[17] Minimum RPM could be used to generate more of these sales-increasing activities.

3. RPM When Demand Is Uncertain

Most business enterprises involve some types of risk. Concerns about these risks can sometimes influence the actions of firms. In particular, dealers who are facing demand uncertainty may limit the amount of a good they purchase or insist on a wider spacing of dealers to reduce the risk that they will be left holding large inventories. In these circumstances, manufacturers may find it profitable to provide insurance against this risk in order to induce a more dense dealer network[18] or higher dealer inventories.

If the source of the risk can be directly monitored, explicit insurance is often feasible and the most efficient solution. For instance, if sales of US manufacturers' goods depend on the relative prices of competing foreign goods, and this in turn depends on fluctuating exchange rates, then it is possible to write a contract to insure against the exchange rate risk. However, for many sources of demand risk, such a simple insurance contract is difficult to write. In apparel sales, for instance, consumer acceptance of a new fashion may be the major source of risk. This is difficult to monitor directly; that is, if a retailer does not sell its inventory of an item, it is difficult to

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[17] For instance, the placement and servicing of vending machines does not suffer from the typical free-riding problem.

[18] Note that this differential risk aversion theory provides one basis for the "outlets theory" of Gould and Preston (1965) that has been put forward as an explanation for the manufacturer's interest in retail prices. In this outlets theory, manufacturers were presumed to use minimum RPM to increase the number of retailers who would carry their products.

separate the effect of possibly inadequate sales effort from poor acceptance by consumers. More importantly perhaps, it is difficult to write a contract to separate these two sources of poor sales performance.[19]

In cases where direct insurance is not efficient (that is, where monitoring is too costly), minimum RPM can be employed to insure the retailer against demand risk (Rey and Tirole (1986)).[20] By limiting price reductions in the cases when demand is lower than expected, the manufacturer limits retailer losses in this case. Such insurance can be efficient if retailers are sufficiently risk averse. When RPM is used for this purpose, it is important to note that market behavior will be quite different than with the typical externality uses of RPM. In particular, the minimum price will be binding on the market only in cases of a "bad market," that is, when the demand is particularly low.

4. Summary of RPM's Use to Diminish Agency Problems

As these three examples illustrate, there are a wide variety of reasons why a dealer may not have the incentive to do what a manufacturer would like it to do. The economic basis for this behavior is sometimes quite similar to that in the horizontal Telser-type special services externality, but often it is qualitatively different. In particular, vertical externalities, which

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[19] Throughout the literature on vertical control, there is often the presumption that if information is not asymmetric between the parties, it is a simple matter to write a meaningful contract based on that information. Often though, the cost of establishing the information for a third party can be a prohibitive determinant of the options available. In the case of a rule of reason analysis of RPM, for instance, proving that a discounter would not provide the desired quality certification or that its post-sale service was not consistent with the manufacturer's standards might be quite costly in the face of allegations that the refusal to deal was related to price--regardless of the parties' knowledge of the information at issue.

[20] Rey and Tirole establish this result for a fixed price RPM rather than minimum RPM. However, when sales effort is also at issue, their result generalizes directly to minimum RPM.

involve the relationship between the manufacturer and the dealer alone, can result in dealer actions that conflict with the manufacturer's wishes.

As with all principal-agent problems, contracts that specify the desired actions are the preferred solution if they can be written and enforced at a low cost. However, in many market situations such contracts can be quite costly: specifying the requirements under all contingencies is difficult, monitoring and (especially) proving contract violations is costly, and allowing for market evolution is difficult. In these cases, vertical restraints-- and RPM in particular -- can often improve dealer performance. Moreover, while it is sometimes possible for vertical restraints to be used to resolve agency problems in ways that are not welfare improving, these seem to be the exceptions in the theoretical literature to date.[21]

E. Other RPM Theories and Issues

1. When Dealers Have Market Power

The agency theories of RPM generally presume that the impetus for the practice comes from the manufacturer.[22]

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[21] Mathewson and Winter (1983a,b,c) show that if there is no uncertainty, vertical restraints generally increase welfare under a wide variety of circumstances. Most of the vertical restraints literature also analyzes this no uncertainty case, and thus comes to the same conclusion. When there is demand uncertainty, Rey and Tirole (1986b) find no inefficiency in all the cases they consider. When there is retail cost uncertainty that dealers resolve before manufacturers, Rey and Tirole do find that exclusive territories can be adopted inefficiently in some circumstances. RPM will not be adopted inefficiently even in this case. When consumers differ in particular ways, there are cases when manufacturers will have incentives to provide too much service. See Section III.E.2 for a description of such a case.

[22] It is important to note that this initiation is not inconsistent with complaints from dealers about discounters once the practice is established. Any horizontal or vertical free-riding would affect the competitive position of non-discounting dealers,

However, considerable historical evidence indicates that dealers actively supported the use of RPM in some cases. The dealer collusion theory has been outlined above. This section will consider the use of RPM in response to individual dealer market power.

Theoretical analyses of RPM have generally assumed that noncolluding retailers behave competitively. This assumption may reflect the strong conditions necessary for individual dealers to have market power. Certainly, narrow line dealers, and especially dealers who are dedicated to a single manufacturer, do not satisfy these conditions in most geographic markets. A manufacturer's franchisee, for instance, can usually be replaced relatively quickly from a pool of potential dealers if the franchisee attempts to deviate from competitive terms.[23] Similarly, small scale retailers in markets with several such retailers are in no position to exercise individual control over the manufacturer. They can be replaced easily and face competition from other dealers.

Multiproduct dealers present more theoretical potential for market power because of possible scale and scope economies. However, again, the conditions necessary for any significant control suggest that dealer market power is not a likely occurrence in most markets. Most goods are sold by many dealers in a given geographic market and these dealers often operate at a relatively small scale. Entry in these markets is typically quite easy, and is, in fact, a frequent occurrence. Individual efforts to induce a reluctant manufacturer to impose and enforce RPM to limit retail competition are unlikely to be successful in these cases.

Thus, on the basis of the underlying structural conditions of most markets, there seems limited potential for dealers acting individually to exert significant market power. Nevertheless, if there are situations where the conditions allow it, individual market power would be a possibility. There has been little formal analysis of the welfare implications of different legal rules

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and thus is likely to generate complaints regardless of the initial impetus of the RPM.

[23] This analysis assumes that legal rules do not restrict contracting freedoms in this regard.

governing vertical restraints in these circumstances. However, based on what we know generally about bilateral bargaining situations, such analyses are likely to lead to difficult welfare evaluations.

For a dealer to induce the manufacturer to use and enforce RPM against the latter's wishes, the dealer must have a credible threat against the manufacturer, that is, some other market action that is more profitable for it if the manufacturer does not comply. For instance, it might threaten to drop the manufacturer's line and substitute its own house brand (or some lesser known brand) if the manufacturer does not adopt RPM.[24] But in this case, if RPM is prohibited by law, this house brand option (or any other credible threat) is still more profitable for the dealer.[25]

The welfare effects of an RPM prohibition under these conditions thus depend on the comparison of a market equilibrium in which the dominant dealers carry house brands (or exercise some other credible threat) and other retailers carry the existing brands, with an equilibrium in which both carry the known brands at a price subject to RPM.[26] Thus, the welfare judgment requires weighing the costs of the reduced price competition

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[24] Throughout this discussion I am assuming that there is no "duty to buy" that legally restricts an individual dealer's ability to drop or limit its sales of a particular manufacturer's goods. No such duty exists in current law.

[25] In fact, since the prohibition of RPM became law, there are indicators that the proportion of house brands sold by some major retailers appears to have increased substantially in certain lines (*The New York Times*, March 8, 1987, p. 4). Approximately 25 percent of the sales at retailers like Macy's are now private label goods. Of course, in other circumstances, other actions by the retailer might be more profitable.

[26] The one exception to this characterization of the two possible equilibria occurs in the case where the **only** credible threat the retailer has is to shift to another producer willing to enforce RPM. In that case, the prohibition of RPM eliminates the dealer's threat and is welfare improving. See also Steiner (1985) for a related discussion.

caused by the RPM with the losses inherent in reducing brand name property rights[27] -- a very difficult assessment under most circumstances.

2. When Consumers Differ

For manufacturers with downward sloping demand curves, the decision to adopt a vertical restraint is dependent primarily on the reactions of marginal consumers. If RPM is used to increase selling effort by retailers, the effect of RPM on the manufacturer's profits (given the wholesale price) is determined by balancing the loss of current customers due to the price increase against the addition of new customers due to the increased selling effort. The effects of the RPM on inframarginal customers (those who would buy the good in the same quantity under either circumstance) do not influence the manufacturer's decision. As a result, the manufacturer's actions do not necessarily maximize consumer surplus and lead to an efficient allocation of resources when consumers differ.

This theoretical argument has been known for some time (Spence (1975)). Recently, it has been put forward as an economic basis for a restrictive policy on RPM and other vertical restraints.[28] However, upon closer examination, this argument seems a tenuous basis for any policy recommendations.[29]

First, the argument is not particular to RPM or other vertical restraints. In fact, it applies to every decision that a manufacturer facing a downward sloping demand curve makes; for instance, decisions about how much information to provide customers, what to produce, how much to advertise, how to organize the distribution network, which quality choices to make,

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[27] That is, the prohibition of RPM in such cases limits the options available to existing brands. For instance, if selling the product through the dealer with market power is the least costly way to achieve and maintain a reputation for quality, the prohibition of RPM limits the brand to more costly alternatives.

[28] See especially Comanor (1985), Comanor and Kirkwood (1985), and Scherer (1983).

[29] See White (1985) for a similar assessment.

what features to bundle in the good, how to package it, and so on. There is nothing in the argument to suggest that vertical restraint decisions are even qualitatively more subject to this particular type of inefficiency.

The root of this problem is that consumers differ (in the amount of information they have, for instance) and that firms cannot economically tailor the product to each consumer. Fixed costs of offering different goods and services limit the number of options that can be offered, so that in some cases excess service is chosen.

The fact that such an inefficiency can exist does not imply that there are effective policy responses. Even if we could devise legal rules that would isolate situations where this inefficiency is significant,[30] the universal applicability of the phenomenon to all of the manufacturer's decisions acts to limit its relevance to particular policy questions. Barring the use of particular vertical restraints in such circumstances would shift all of the other marginal decisions that are affected by the same problem. The likelihood that such a shift would generate nontrivial consumer benefits seems quite remote. When coupled with the difficulty inherent in identifying these circumstances in the first place, our current understanding of this issue suggests that welfare concerns based on differences between marginal and inframarginal consumers are not likely to provide a good basis for broad policy decisions concerning RPM or other vertical restraints.

F. Summary

There are a number of different theories predicting the use of RPM. The leading anti-competitive theories of RPM are the supplier and dealer collusion theories. The primary theories in which RPM can enhance efficiency can all be viewed as

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[30] Such a rule would have to isolate situations where the consumer surplus loss to inframarginal consumers from the use of RPM would be greater than the gain to marginal consumers. Given our limited ability to estimate demand curves away from equilibrium and under different information conditions, this prospect seems fraught with difficulty and opportunities for manipulation in a legal setting.

principal-agent theories in which RPM is used to align dealer interests with those of the manufacturer. The classic Telser "free-rider" theory dealing with the provision of pre-sale "special services" is one example of such a theory, but there are several others, including theories based on the dealer's role in determining product quality, vertical externalities arising from dealers' selling efforts, and differences in risk aversion between manufacturers and dealers. These service-enhancing theories reflect competitive responses by manufacturers to encourage the provision of services or other actions by their dealers. While there can be circumstances where manufacturers may induce too much service from their dealers, for most cases these service-enhancing uses of RPM are likely to improve market performance. Certainly these theories do not raise traditional antitrust concerns.

From an economic perspective, the most appropriate policy towards RPM depends on the relative importance of these various theories in explaining the use of RPM. That is the issue discussed in the next chapter.

III. STUDY DESIGN AND DATA

A. Litigated Cases As a Sample For Study

1. Why Examine Litigation?

The frequency with which RPM would be used for efficient as opposed to inefficient reasons and the magnitude of the gains or losses in these cases are fundamental issues underlying the RPM debate. Yet, little empirical evidence has been collected that might provide a basis for making reasoned assessments of these issues.

Moreover, in the current environment where RPM is per se illegal, there would appear to be little opportunity for collecting such evidence. Surveys or other traditional data collection methods would be futile, since firms' open acknowledgement of RPM would invite successful challenge under the law. Virtually the only current evidence available on the use of RPM occurs in the context of litigation. Thus, from a research perspective, it is important to consider whether we could use a sample of litigated cases as a basis for analysis and what its limitations would be. Economic theories of litigation and settlement are discussed in the next two sections. Summary statistics on the sample of RPM cases follow.

2. Deterrence and the Decision to Challenge RPM.

Since RPM is currently per se illegal under the antitrust laws, it carries the potential for triple damage awards to private litigants as well as the other costs inherent in private and government challenges. Manufacturers would be expected to use RPM only if the expected gains are large enough to justify these risks. If the probability that RPM will be legally challenged and successfully litigated, as well as the method of computing the damage award, do not depend on the reason for using RPM, the set of disputed uses of RPM under a per se illegal rule should indicate where practices likely to be judged to be RPM are most valuable to firms. Thus, under these assumptions, such a sample should indicate the relative frequencies of the most profitable

efficient and inefficient uses of RPM.[31] These assumptions are, therefore, fundamentally important in assessing the usefulness of a sample of disputed uses of RPM. I will consider them in turn.

Probability that RPM will be challenged if used. The likelihood of legal challenge to any illegal activity depends on (among other things) the potential damage awards to plaintiffs as well as other effects of the practice. These could be subject to variation depending on the reason for RPM's use.

The most obvious issue in this regard is the distribution of harm in horizontal price-fixing cases in which RPM is used as a collusive device by suppliers. Consumers are the primary injured parties in such cases. Unless buyers are very large, their incentives to bring a suit are relatively weak.[32] Further, except for dealers who have lower retailing costs, dealers also have little incentive to challenge the practice since the retail margin is presumably set at the competitive level. Thus, private incentives to bring cases where RPM supports supplier collusion may be weaker than for other uses of RPM.

Public agencies do not face this bias. In fact, one of the significant factors that ought to affect public prosecution decisions is the adequacy of private remedies. If public prosecution simply compensates for the lack of private incentives, the probability of challenge by someone will not vary systematically across uses of RPM. If it does not compensate (or overcompensates), the probability of challenge might be lower (or higher) for supplier collusion cases.[33]

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[31] The sample will not indicate the relative frequencies of the less profitable RPM uses that might be observed under different legal standards.

[32] In addition, legal restrictions under the *Illinois Brick* standard limit consumers' ability to bring suit.

[33] The distribution of damages does not seem to involve similar disincentives for private dealer collusion cases, however. Potential discounters who are limited by the collusive RPM price would seem to have as great an incentive to bring suit as they would if the RPM price was adopted for efficiency reasons.

More generally, the determinants of public prosecution of antitrust cases are not as well understood as the private incentives. In particular, it is quite possible that public prosecution of RPM practices is either more or less vigorous than private activity for particular types of RPM depending on prosecutorial discretion and on political forces. It is also quite possible that these forces are different at the state and local level than at the federal level.[34] The probability of challenge would be higher or lower in those areas where these forces are significant.

Thus, in assessing the probability that RPM will be challenged, the most problematic issues are the potential bias in private incentives against bringing cases where RPM supports supplier collusion, the complementarity of public and private enforcement, and more basically, the determinants of public enforcement.

The probability of success once challenged. The probability of plaintiff success once RPM is challenged is simpler. Since RPM is a per se offense, legal liability ostensibly does not depend on the reason RPM was used. Once challenged, the probability of legal success would appear to be independent of the economic reason for using RPM.

One factor that might confound this independence is judicial flexibility. That is, the judiciary might act to balance inefficiencies in the law by adopting more stringent evidentiary standards, etc., in cases in which a practice is efficient though illegal. If so, the economic rationale for using RPM would be expected to play a role in determining success at trial.

It is impossible to test this speculation directly for RPM cases. My subjective assessment of the RPM case evidence in this sample is that this phenomenon, if it exists, was not a major factor during the period of this sample. As the evidence below will demonstrate, the per se standard appears to have been applied uniformly. Moreover, there are many maximum RPM cases in the sample, a fact which is inconsistent with the hypothesis that judicial flexibility is used to promote efficiency.

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[34] See Marvel and McCafferty (1986) for an argument of this type in the Fair Trade context.

Another potentially confounding factor is the ease of establishing evidence of RPM. If for some reason the cost of collecting evidence to establish the use of RPM varied with its economic rationale, the probability of success would vary with it. I see no obvious evidentiary issues of this type, but its potential should be noted.

Finally, the *Colgate* doctrine in theory allows manufacturers to set retail prices unilaterally. To the extent that this doctrine had significance, it would have reduced the probability of successful prosecution of some efficient uses of RPM where the manufacturer acted alone.

A direct test of the strength of the *Colgate* doctrine is not possible. However, it seems reasonable to assume that this doctrine was very limited during the period of interest for this study (1976-1982). Until the *Monsanto* decision in 1984, the overall tenor of legal opinion-dealing with the *Colgate* doctrine made it all but impossible to apply in practice. Moreover, by 1975, the doctrine was widely regarded by legal scholars as a theoretical irrelevancy in the legal treatment of RPM.[35]

Thus, if the judiciary enforced the stated per se standard, if the cost of collecting evidence on RPM did not vary with its rationale, and if the *Colgate* doctrine had no real significance during the period of study, then the plaintiff's probability of success at trial would have been independent of the economic rationale for the RPM. If these factors varied with the rationale, the probability of success also varied with it.

Damage awards. The method of computing damage awards in RPM cases may also bias case samples. In particular, biases are introduced if the ratio of damage awards to manufacturer profits varies with the rationale for the RPM.

As shown below, dealers bring most private RPM cases. In these cases, damages are generally computed as "lost profits" due

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[35] See **Antitrust Advisor** 2.31, at 132 (C. Hills ed., 2d ed. 1978), for instance. In fact, most legal scholars regard the recent *Monsanto* decision by the Supreme Court to be significant primarily because it revitalized the possibility of using the *Colgate* defense. See Calvani and Berg (1984), Hay (1985) and Steiner (1985) and the many cites in these pieces for discussion of the *Colgate* doctrine.

to the inability to get the desired product or to charge the desired price. In these cases dealer injury and manufacturer profits are both based on the difference between the RPM-imposed price and the proposed discount price. There does not appear to be any relationship between the ratio of dealer injury to manufacturer profit and the reason for the RPM in this computation.

The possibility that some types of RPM cases are more likely to be prosecuted by public authorities rather than by private parties, however, does raise potential bias issues. If the damage awards implicit in public prosecution are lower than those in private cases (because public authorities cannot collect triple damages, for instance), this reduces deterrence of and creates a bias in favor of the types of cases pursued disproportionately by public authorities rather than private parties. In particular, this might create a bias in favor of observations supporting the collusion theories of RPM if public authorities rather than private parties tend to pursue these cases. However, if instead public prosecution increases expected damage awards (because greater publicity about government suits might generate more follow-on private suits, for instance), this potential selection bias would be reversed.

Incentives to allege RPM. The discussion above deals with the legal incentives to challenge the use of RPM. However, it is also possible that some allegations of RPM do not represent actual use of RPM. There are two important issues to consider in this regard.

The first issue concerns practices that are "like" RPM. As shown in Figure 1, this issue can be conceptualized by considering a range of practices arrayed according to their similarity to RPM, with practices most like RPM on the right (the strongest cases) and practices least like RPM on the left (the weakest cases). The standard of evidence that determines legal liability under the RPM law can be assumed to lie somewhere on this line. If all participants in the legal proceeding had perfect information about the practice at issue and were concerned only with the RPM-related practice, only cases to the right of the standard would be challenged legally. If information is imperfect, practices that do not meet the legal standard might be challenged (or practices that meet the standard might not be challenged) depending on a variety of factors that

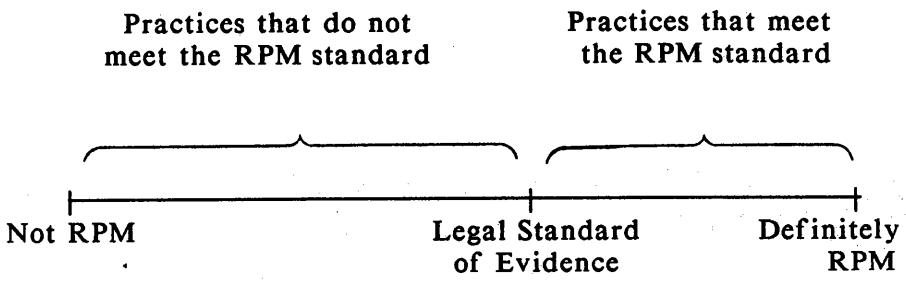

FIGURE 1. RPM-type practices, arrayed according to their "similarity" to RPM.

affect the expected gains to litigation.[36] In terms of the selection issues under consideration here, however, the potential for RPM-like practices to be challenged under the law does not introduce new bias issues as long as the underlying distribution of practices is independent of the rationale for the practice. If the underlying distribution does depend on the rationale for the RPM-type practice, the possibility for bias exists when RPM use is analyzed using case samples.

The second issue concerns the potential for "sham" RPM allegations, that is, allegations of RPM where there is little likelihood that the RPM allegation would succeed on its merits, but where the allegation is being used to enhance the likelihood of success in some other matter. If there are "sham" RPM allegations, such cases could again bias any analysis of the uses of RPM. Since I had no strong prior beliefs about the importance of either of these issues, I tested the sensitivity of the key results on these bases, namely, by attempting to identify the weakest cases and conducting the test with and without those cases in the sample.

Overall deterrence and the likelihood of challenge. In summary then, if the probability of challenging RPM, the probability of success once challenged, and the computation of legal damages relative to manufacturer profits do not depend on the economic basis for using RPM, firms should use RPM where it is most valuable to them, even though RPM is per se illegal. In this case, unless "sham" or otherwise weak cases distort the sample, a random sample of challenged uses of RPM should give an unbiased picture of the RPM uses most valuable to firms. As a result, a study of this type of sample would yield some important information with which to assess the economic and policy debates.

If the factors discussed above vary systematically with the economic rationale for RPM's use, however, these differences will create potential biases in inferences based on a sample of legally challenged RPM practices. These potential biases occur for two basic reasons: differences in deterrence and in the likelihood of legal challenge. If the factors are such that the expected loss from litigation relative to manufacturer profits is higher for some

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[36] Some of these factors are discussed in the next section.

types of RPM than for others, the deterrence of these types of RPM will be greater. This might lead to their underrepresentation in a sample of challenged cases. Similarly, if some uses of RPM are less likely to be challenged when used, these uses will be underrepresented in a sample of challenged cases.[37]

My own assessment is that the relationship between public and private enforcement is the most important potential source of differential deterrence and challenge rates for the different uses of RPM.[38] The relative strength of government enforcement across the different uses of RPM and how well any differential government enforcement compensates for differential private enforcement are potential sources of bias in case samples. I will generally report private case evidence separately from government evidence to allow for some evaluation of the likely importance of this issue. Relatively weak private incentives to bring supplier collusion cases also stand out as a potential source of selection bias. With this exception, private incentives to challenge RPM seem to me relatively independent of the economic rationale for the RPM.

3. Settlement Versus Litigation

This discussion so far has focused on potential selection issues in samples of **challenged** uses of RPM. Unfortunately for

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[37] The importance of this second type of selection bias depends on the question under consideration. In assessing the relative importance of the various economic theories of RPM's use, this selection bias, if large, is critical. In assessing the effects of a particular legal standard for RPM, it is not. A legal standard that does not change targeted behavior is not an effective policy. Whether this is because the practice does not exist, or because there is no incentive to challenge it under the standard when it does exist, does not change this conclusion.

[38] I have no clear predictions about the direction of any biases, however. The incentives in state government cases (with local dealers challenging the vertical control by outside manufacturers) seem quite different than the incentives faced by federal authorities, for instance.

research purposes, most parties who challenge practices on antitrust grounds settle their disputes before going to trial. For instance, Salop and White (1986) estimate the settlement rate for RPM charges to be at least 72 percent for private cases that are formally filed. There are no easily accessible data on these private settled cases.[39] Government cases are also typically settled, though for most of these the charges and settlement terms are published.

More information is generally available about litigated cases. If these litigated cases are an unbiased sample of all challenged cases in the dimensions of interest for this study, they would still form a good basis for analysis. Thus, it is important to consider the selection process that generates litigation as opposed to settlement.

There are two selection theories of litigation that are potentially important in this setting. The first theory suggests that even with symmetric information, uncertainty about legal outcomes can lead to a large enough difference in opinions about the plaintiff's probability of success at trial to make both parties to the litigation think it is worthwhile to litigate.[40] In this theory, if both the plaintiff and the defendant make equally good independent estimates of the strength of the case relative to the legal standard, and if litigation costs and stakes are equal for the parties, cases near the legal standard are more likely to generate the difference of opinion necessary for litigation.[41] In

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[39] A recent survey conducted under the auspices of Georgetown University Law School was designed in part to gather information on these settled cases. Unfortunately, the survey did not focus on the types of questions at issue in the RPM debate. See Salop and White (1986) for a description of the data and sample.

[40] See Klein and Priest (1984), Priest (1986) and Salop and White (1986). If both parties knew what the court would decide, they would have an incentive to settle their dispute in order to save the litigation costs.

[41] This result simply reflects the fact that, with liability/no liability decisions, cases that are further away from the liability threshold require larger errors by the participants in order to generate the beliefs necessary for litigation. Thus, if

fact, if the errors for both parties are symmetric, the success rate of litigated cases should approach 50 percent as the ability to estimate the legal outcome improves (that is, as errors get small).

If the stakes or legal costs are asymmetric between the parties, the range of cases likely to go to litigation reflects this asymmetry. For instance, if the stakes of the litigation are greater for the defendant than for the plaintiff, then the settlement rate should increase, cases below the legal standard should go to trial more frequently, and the success rate of litigated cases should be lower than 50 percent (Klein and Priest (1984) and Salop and White (1986)).

The second theory deals with situations where one of the parties knows more about the strength of the case. In this case, to be credible, settlement demands must be high enough so that plaintiffs have the incentive to litigate rejected settlement demands (Nalebuff (1987)). For example, suppose a dealer-plaintiff does not know what type of evidence a manufacturer-defendant will be able to present. For any credible settlement request, manufacturers with the weakest defenses will settle and the others will find it best to litigate. Thus, for the settlement demand to be credible, the expected gain from litigation with the remaining (stronger) defendants must be greater than the cost of litigation. For plaintiffs with relatively weak cases, this phenomenon can induce larger settlement demands than in the absence of this asymmetry, and hence, a greater likelihood of litigation for the weaker cases. Overall, therefore, litigated cases will tend to be weaker than average cases from the plaintiff's point of view.

For both theories, the selection of cases for litigation occurs according to the strength of the case relative to the legal standard of guilt. As discussed above, for a per se rule that is applied uniformly, this should reflect only the uncertainty that a court will agree that the practice actually took place. In particular, if the economic rationale for RPM does not influence the cost of collecting evidence, the rationale itself should play no role in the court's assessment. Under these assumptions, then, for each particular level of expected damage award,

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the parties make unbiased errors, the probability of litigation is greatest for cases near the liability standard.

litigated cases should be an unbiased sample of all contested RPM uses.

If the method of assessing damage awards does not vary systematically with the economic rationale for RPM, the aggregation of cases with different expected damage awards introduces no new bias issues. However, as discussed above, there are differences in the damage rules for private and government cases, and these do raise the possibility of differential settlement rates. In particular, if the penalties in government cases are smaller than those in comparable private cases, other things equal, government cases should have a higher settlement rate. In this case, a sample of litigated cases would tend to underestimate the prevalence of the uses of RPM disproportionately pursued by government rather than private parties. If the penalties are higher (because of expected follow-on suits), the settlement rate might be lower and the bias reversed.

Thus, as in the analysis of the decisions to use RPM and to challenge it legally, the dominant selection issue in the litigation versus settlement decision is the potential difference between government and private enforcement. Also, litigated cases will not be the strongest cases relative to the legal standard of guilt, though precisely where they fall on the legal spectrum will depend on any asymmetries in the stakes or legal costs between the parties.

4. Summary

Though there is no question that litigated RPM cases are a selected sample of all disputed RPM cases, and disputed RPM uses are a selected sample of all RPM uses, most of this selection, in fact, appears to be independent of the economic rationale for RPM's use. In particular, if the probability of challenging RPM, the probability of success once challenged, and the computation of any legal damages do not vary systematically with the economic rationale for RPM, litigated cases can be used as an unbiased sample of the most valuable uses of RPM for firms. In my view, the most problematic issues in satisfying these assumptions are the differences between public and private enforcement and the possible weakness of private incentives to bring supplier collusion cases, though I have no clear prediction on the overall bias that these issues might introduce.

Because of these potentially important selection issues, I will generally analyze two key samples of cases: (1) the sample of all private litigated cases reported between 1976 and 1982;[42] and (2) the sample of all private and government litigated cases together with all government settled cases during the same period. Under the assumptions above, the litigated case sample would be an unbiased sample. If there are no important differences between government and private behavior towards RPM litigation, this is the most appropriate sample for analysis. The addition of the settled government cases acts to bias the sample in favor of the types of cases that the government disproportionately pursues. If the differences between government and private prosecution are important, the addition of the government settled cases tends to remove some of the biases these differences introduce into the settlement/litigation decision, though it does this by adding an overall bias in favor of the types of cases the government tends to pursue disproportionately. In particular, if government pursues collusive uses of RPM disproportionately, this broader sample would tend to overstate the frequency of the collusive uses of RPM.

B. Description and Summary of the Data: RPM Cases, 1976 - 1982

1. Sample of Cases

The sample of cases examined in this study is taken from the Commerce Clearing House's **Trade Cases**, which is a systematic compilation of reported antitrust and trade litigation in federal and state courts in the U. S. Reported private litigation includes most cases where judicial opinions are delivered. Cases that are settled out of court are not typically reported unless they are settled after some preliminary legal ruling. Cases that are considered routine from a legal perspective may also be underrepresented. All federal and most state government cases and settlements are generally reported.

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[42] Since there are very few government litigated cases during this period, this sample is essentially the sample of all litigated cases.

In constructing the sample, a systematic search was conducted of the **CCH Trade Cases** volumes for the years 1976 through 1982.[43] Any reported case that involved an allegation of "vertical price-fixing" by a manufacturer or distributor or otherwise involved "vertical price issues" was included in the sample.[44] The primary data used in this study was taken from published opinions in these cases, including relevant subsequent and prior opinions for the cases.

For this seven year period, 203 reported cases alleged illegal vertical price restraints. A listing of the cases with a variety of information about them is provided in the two tables in the Appendix.

From a careful reading of the available opinions for each of these cases, data was collected on the nature of the vertical price-fixing charge, whether the charge involved maximum or minimum RPM or both, whether state regulations were involved, other vertical restraint allegations, other antitrust charges, whether contract violations were alleged, the initial judgments and any appeal decisions, whether consents or summary judgments were issued, the legal standard used, whether the case was brought in state or federal court and the circuit, the year of the initial opinion, who brought the case, the type of distribution system used by the manufacturer, and the type of product. In addition, any allegations of horizontal collusion at the dealer or manufacturer level were recorded, as were any parallel cases. This information constitutes the primary data for this study.

Before proceeding with an analysis of the sample, I will present some overall statistics on the vertical price-fixing cases. Besides providing basic information about this class of cases,

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[43] A search indicated that **CCH Trade Cases** was a slightly more comprehensive source of RPM cases than the LEXIS and WESTLAW systems. Michael Knoll and Thomas Overstreet compiled this initial list of cases with funding from the Small Business Administration.

[44] Sample cases were not limited to those indexed under RPM by CCH. Cases listed under the CCH headings of price-fixing, refusal to deal, vertical restraints of various types, and dealers, distributors and agreements were also examined and included if they involved a charge of vertical price-fixing.

these statistics will be a useful baseline against which to judge the subsamples considered below.

2. Nature of the Vertical Price-Fixing Allegations

One of the important features of this sample is the fact that 40 of the 203 cases, or 19.7 percent, involve allegations of **maximum** (but not minimum) RPM, that is, allegations that the manufacturer was attempting to put an upper limit on the retail price charged by its dealers. This is a significant finding, since economic theories do not support this use of the antitrust laws. This subsample of cases and the issues involved are described in Section V below.

Another subsample consists of 10 cases, or 4.9 percent of the sample, involving challenges to state laws or regulations that control minimum prices. Most of these cases deal with state regulations of retail liquor prices, but one opinion involves state Fair Trade laws generally. The analysis of these cases is somewhat different from that of cases involving privately initiated and enforced RPM. RPM theories based on dealer or supplier collusion are much more plausible explanations for cases involving state enforcement of RPM or laws that allow other parties besides the manufacturer to enforce RPM.[45]

In addition to the cases involving maximum RPM and state regulations, 153 cases, or 75.4 percent of the sample, allege "unregulated" manufacturer or distributor efforts to control the minimum resale price of a product or service. The analysis in Section IV is based on this core subsample of cases, since it is most clearly relevant to the economic and legal debate on RPM.

3. Origin of Cases

This sample of 203 cases includes 11 cases brought by the Department of Justice (DOJ), 30 cases brought by the Federal Trade Commission (FTC), 32 cases brought by state and local governments, and 130 cases brought by private parties.

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[45] See Ornstein and Hanssens (1987) for evidence that supports retailer collusion in the case of state-enforced RPM in retail liquor markets.

As shown in Table 1, most of the private cases are brought by distributors. In this sample, 64 of the 130 private cases were brought by terminated distributors, 46 cases were brought by ongoing distributors, and 3 cases were initiated by potential distributors. In total, distributors initiated 113 of the 130 private cases (86.9 percent).

There are also 5 private class action suits, 4 cases initiated by customers, 2 suits brought by competitors,[46] 1 general interpretation of the Fair Trade laws, and 6 insurance cases that do not fit into any of these other categories.[47]

4. Case Outcomes

Table 2 presents information on the outcomes for the RPM charges in the 203 cases in this sample. A judicial decision or consent agreement is available for 172 cases, or 84.7 percent of the sample. Of these, 109 cases involved judicial decisions and 63 resulted in consent agreements on the RPM charge. All 63 consented cases were brought by government agencies.[48]

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[46] The two competitor cases involved RPM charges brought in cases with a multitude of charges. In the first, a soft drink concentrate manufacturer claimed that a competitor made efforts to limit its bottlers' prices (maximum RPM). No final decision was reported in the case. In the second case, a funeral home charged that a competitor's participation in a funeral insurance policy that "fixed" the price of the funeral service (maximum RPM) to be paid by the insurance was vertical price-fixing. Summary judgment was issued for the defendant in this case.

[47] Five of these insurance cases were brought as maximum RPM cases by health care providers in attempts to overturn insurance company limits on the compensation they would give for particular services. Initially two of these cases resulted in guilty verdicts, but after appeals all five cases led to not-guilty decisions. The sixth case was a maximum RPM case against an auto insurance company initiated by an auto body repair facility.

[48] There are only 6 other government-initiated cases for which decisions are available in the full sample. One of these (*NJ v. Lawn King*) resulted in a guilty verdict that was ultimately

TABLE 1

Distribution of Vertical Price-Fixing Cases by Origin

Suit Initiated By	Number of Cases	% of Total	% of Private Cases
Terminated Distributor	64	31.5	49.2
Distributor	46	22.7	35.4
Potential Distributor	3	1.5	2.3
Department of Justice	11	5.4	NA
Federal Trade Commission	30	14.8	NA
State and Local Governments	32	15.7	NA
Class Action	5	2.5	3.8
Customers	4	2.0	3.1
Other	8	3.9	6.2
Totals	203	100.0	100.0

SOURCE: **CCH Trade Cases**, 1976-1982.

TABLE 2

Decisions for Vertical Price-Fixing Charges, 1976-1982

	Number of Cases			
	At Initial Decision	Appealed/ Overturned	Appealed/ Overturned at Supreme Court	Decision at Highest Level Available
Guilty	31	23/12	3/0	29[1]
Summary Judgment/ Plaintiff	1	0/0	0/0	1
Not Guilty	43	30/6	0/0	49[2]
Summary Judgment/ Defendant	34	20/4	1/0	30
Consent	63	NA[3]	NA	63
None[4]	31	NA	NA	31
TOTALS	203	73/22	4/0	203

SOURCE: **CCH Trade Cases**, 1976-1982.

NOTES: [1] Includes 5 not-guilty decisions that were reversed and remanded but for which there is no subsequent decision reported.

[2] Includes 4 guilty decisions that were reversed and remanded but for which no subsequent decision is reported.

[3] NA indicates that the category is not applicable.

[4] Decisions were not available for these cases.

A summary judgment against the defendant was reported in 1 case, and guilty verdicts were issued in 31 cases. Together, these two classes of initial guilty decisions constitute 29.4 percent of the 109 cases for which judicial decisions are available for the RPM charge. Summary judgments for the defendant were entered in 34 cases, and not-guilty decisions were delivered in another 43 cases.[49] Together these two classes of not-guilty verdicts for the RPM charges constitute 70.6 percent of the 109 cases.

Of the 109 cases where a judicial decision is available for the RPM charge, 73 cases (67 percent) were appealed. Twenty-three of the 31 guilty decisions were appealed, and 12 of these (52.2 percent) were overturned.[50] Fifty of the 77 not-guilty decisions were also appealed, and 10 of these (20 percent) were overturned.[51] Overall, appeals on the RPM judgments were successful in 22 of the 73 appealed cases, 30.1 percent. Four

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overturned. The second case (*Arizona v. Arizona License Beverage Assn.*) involved state liquor regulation, and the third was a maximum RPM case. Finally, three FTC cases were litigated (*FTC v. Rubbermaid, FTC v. Amway*, and *FTC v. Russell Stover*). The first two cases resulted in guilty verdicts, and the third, which challenged the *Colgate* doctrine, resulted in a guilty verdict that was overturned on appeal. Four other government cases do not have reported final decisions, suggesting that these cases were settled during litigation.

[49] In 35 of the 43 cases, the evidence on the use of RPM was judged insufficient to support a guilty verdict. In the remaining 8 cases, 3 of the decisions involved Fair Trade or state regulation issues; two decisions were based on *Colgate* rulings (one was overturned on appeal); and 3 cases involved practices that were judged to be reasonable business decisions.

[50] This count includes 8 decisions that were overturned outright, and 4 decisions that were reversed and remanded to the lower courts.

[51] This count includes 5 decisions that were overturned outright, and 5 decisions that were reversed and remanded to the lower courts.

cases were appealed to the Supreme Court, but none of these were overturned.

Based on the final decisions available in the cases, only 30 of the 109 cases for which decisions were issued resulted in a guilty verdict on the RPM charge (27.5 percent). Seventy-nine of the 109 cases resulted in not-guilty verdicts (72.5 percent).

This strong imbalance towards not-guilty and away from guilty outcomes is one of the striking features of this area of antitrust litigation.[52] The imbalance is consistent with the selection theories of litigation. In particular, the low guilty rate, together with the high settlement rate,[53] suggests that most defendants charged with an RPM violation settle out of court unless they are likely to succeed in litigation. One possible explanation for this behavior is that the penalties faced by defendants who receive a guilty-verdict are substantially larger than the damages received by the plaintiff (Priest and Klein (1984) and Priest (1986)). This is possible, for instance, if defendants fear a rash of follow-on litigation if found guilty of RPM, if a profitable practice that applies to their entire dealership network will have to be terminated, or if reputation damage would be significant.

Another possible explanation is that the high cost of antitrust litigation and asymmetries in information about evidence in the case make it difficult for plaintiffs to make credible settlement demands (Nalebuff (1987)). This difficulty might make it necessary for plaintiffs with small claims to inflate their settlement demands, with the result that they will not be accepted in a larger proportion of the weaker cases.

Under either of these selection theories of litigation, this low plaintiff success rate and high settlement rate suggest that

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[52] Salop and White (1986) also find relatively low plaintiff success rates for vertical price-fixing as well as for many other areas of private antitrust litigation. Similarly, Priest and Klein (1984) found an imbalance in private RPM actions during the Fair Trade era. Plaintiff/manufacturers won injunctions for 60 percent of their requests between 1934 and 1975.

[53] Salop and White (1986) estimate that the settlement rate for vertical price-fixing allegations in private antitrust cases is at least 72.5 percent.

many defendants who would have a better than 50/50 chance of success at trial are settling cases rather than accepting the costs of litigation to get an expected favorable judgment. If the judiciary is relatively accurate in judging the facts at trial, this evidence suggests that in addition to deterring RPM, the current legal environment is probably deterring other practices that are more tenuously related to vertical price-fixing, that is, practices that have less than a 50 percent chance of resulting in a guilty decision. This result adds to the importance of resolving the current policy debate about the economic effects of RPM.

The distinction in the sample between government-initiated cases and private litigation should also be noted. In this sample, 63 of the 73 government cases resulted in consents. All 11 Department of Justice cases and 27 of the 30 FTC cases were settled by consent. Of the 10 government cases that went to litigation, 3 were FTC cases and 7 were state or municipal cases (4 of these appear to have settled after some litigation). Thus, the settlement rate for government-initiated cases is higher than it is for private cases. This is especially true for federal government cases.

5. Number of Cases

As shown in Table 3, the number of cases per year with a vertical price-fixing charge is quite stable over the sample period, showing only a slight tendency to increase. This is true for both government cases and private cases, though there is more variability in Federal cases. The number of cases concerned with maximum RPM is somewhat more variable, but again has no significant trends.

6. Other Antitrust Allegations

One of the most prominent features of the overall sample is the small proportion of cases that are "pure" RPM cases. Only 35 of the 203 cases (17.2 percent) did not also include other antitrust or contract charges, and 6 of these involved state liquor regulation. In particular, as shown in Table 4, 122 cases (60.1 percent) contained other vertical restraint charges and 105 cases (51.7 percent) contained other non-vertical antitrust charges.

This feature is even more pronounced if the sample is restricted to private cases. Only 15 of the 130 private cases

TABLE 3

Number of Cases With a Vertical Price-Fixing Charge, By Year

Year[1]	Number of Cases				
	Total	Federal[2]	State/ Local	Private	Maximum RPM
1976	26	6	4	16	8
1977	20	3	4	13	5
1978	27	4	4	19	6
1979	28	8	4	16	2
1980	25	9	5	11	5
1981	27	3	5	19	6
1982	25	2	5	18	4
Totals	178	35	31	112	36

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES: [1] Because the date of the initial complaint is not available for most private cases, the date of the first reported decision in the case is used to date cases for this table. These counts do not reflect the entire sample, because some of the opinions reported during 1976-1982 were appeals or other actions in cases that had preliminary decisions prior to 1976.

[2] Department of Justice and Federal Trade Commission cases are included in this count.

TABLE 4

Other Antitrust Charges in Vertical Price-Fixing Cases

Other Antitrust Charges	Whole Sample (203 Cases)		Private Cases (130 Cases)	
	Number of Cases	Percent	Number of Cases	Percent
None	45	22.2	24	18.5
Vertical Charges	122	60.1	79	60.8
Territorial Restraints	49	24.1	39	30.0
Tying	31	15.3	26	20.0
Customer Restrictions	32	15.8	11	8.5
Exclusive Dealing	14	6.9	10	7.7
Advertising Restrictions[1]	32	15.8	3	2.3
Group Boycott	5	2.5	5	3.8
Locational Restriction	6	3.0	2	1.5
Other Non-Vertical Charges	105	51.8	84	64.6
Horizontal Price-Fixing	30	14.8	18	13.8
Refusal to Deal	40	19.7	36	27.7
Price Discrimination	25	12.3	23	17.7
Monopolization	17	8.4	17	13.1
Boycott	9	4.4	8	6.2
Market Division	3	1.5	3	2.3
Restraints on Alienation	2	1.0	1	0.8

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES: [1] FTC consents routinely included prohibitions on advertising restrictions for much of this period. There are only 6 non-FTC cases with such charges.

(11.5 percent) were "pure" RPM cases, and 4 of these were challenges to state liquor regulation.[54] Other vertical restraint charges were raised in 79 cases (60.8 percent), and other non-vertical antitrust charges were included in 84 cases (64.6 percent). In contrast, 48 of the 73 government cases (65.8 percent) were primarily RPM cases, that is, cases where RPM was the only charge or appeared to be the primary charge.[55] The particular antitrust charges are listed in Table 4 for the whole sample and for the subsample of private cases.[56]

The multiplicity of antitrust charges in vertical price-fixing cases is potentially an important issue for both economic and legal research in the area. If these multiple charges are symptomatic of the misuse of antitrust litigation for competitive

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[54] Nine of the 24 cases with no other antitrust charges (see Table 4) did have contract charges.

[55] This is sometimes an admittedly subjective determination, since in multiple allegation cases the consent decree may contain the only public information available. If a consent decree included a provision prohibiting fixing of retail prices but was primarily concerned with horizontal price-fixing or other antitrust issues, RPM was recorded as a secondary charge. In fact, in some of these cases, there may have been no RPM charge in the complaint; the RPM prohibition in the consent decree may have been included only to reduce the potential for future horizontal price-fixing activity. Similarly, during most of the period of my sample, FTC consent agreements dealing with RPM routinely included a clause prohibiting manufacturer restrictions of advertising. These cases were considered to be pure RPM cases for purposes of this statistic.

[56] Note that many cases are included in several categories because of multiple antitrust allegations in the case. Contract charges or other nonantitrust charges are not reflected in Table 4, but it should be noted that such charges are prevalent in the private case sample.

or other business reasons,[57] this evidence would support those concerned that private antitrust litigation is significantly at odds with the goals of the antitrust laws. Alternatively, if these multiple charges reflect business practice of using vertical restraints in combinations, this evidence raises questions about much of the economic analysis of RPM that examines the effects of the practice in isolation, that is, in the absence of other vertical restraints.[58] These issues will be explored further in the analysis of the major subsamples of cases.

7. Legal Standard

There appears to be very tight adherence to the per se illegal rule in judging vertical price restraint charges. Of the 111 cases that resulted in judicial opinions, 105 cases (94.6 percent) appeared to be judged against a per se standard, and most of the remaining 6 cases involved unusual vertical price-fixing charges.

8. Damage Awards

Damages were awarded in 18 of the 30 private cases where the defendant was found guilty. The distribution of damage awards is quite skewed. Three damage awards exceeded one

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[57] Although difficult to quantify, a reading of litigated private cases suggests that many of the cases (especially the dealer-instigated cases) are fundamentally contract disputes. For instance, despite explicit termination clauses in the contract or particular contract durations, many of the cases were initiated when the manufacturer chose to exercise the contract's termination clause or not to renew the contract when it expired.

[58] Some of the more recent economic literature has begun to investigate the joint use of various vertical restraints. Generally the literature finds that the effects of RPM can change significantly depending on the other vertical restraints in place in particular circumstances. Moreover, other vertical restraints can sometimes substitute for RPM, though this is not always the case. See Rey and Tirole (1986a,b) and Mathewson and Winter (1983a,b,c), for instance.

million dollars (before trebling); all other damage awards were under $170,000. The average damage amount is approximately $570,000, but the median award is only $125,000.

IV. EVIDENCE ON THE USE OF MINIMUM RPM

The amount and type of economic information available in case opinions is generally limited. This is especially true in cases involving per se offenses, since the reasons for the practice and its effects have no legal relevance to the proceeding. Yet, information can be gleaned through careful scrutiny of the opinions to help assess underlying economic issues.

To evaluate the economic debate on RPM policy, ideally we would like evidence on the magnitude of the welfare losses from the inefficient uses of RPM as well as the magnitude of the welfare gains from the efficient uses of RPM. Unfortunately, the available data is insufficient to allow this type of analysis. Data is available, however, for a number of more limited tests of the potential strength of the various RPM theories. Throughout this section of the report, the analysis will be based on the subsample of cases alleging minimum RPM that is not supported by regulation. There are 153 such cases.

A. RPM As an Aid to Collusion

The collusion theories of RPM hypothesize that RPM is an important device in supporting collusion by suppliers or dealers. In judging the importance of these theories it is instructive to recall that collusion itself (whether supported by RPM or not) is a per se violation of the antitrust laws. Thus, if RPM is serving as a device to support collusion, and if the plaintiff has any evidence at all to suggest collusion, we would expect to see a horizontal price-fixing charge in addition to the RPM allegation.[59]

An allegation of collusion is not proof that collusion actually took place. In this sense, a collusion test based on the presence of an accompanying horizontal charge is only a one-sided test

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[59] The absence of a horizontal price-fixing allegation in an RPM case does not prove that there is no collusion, but given the strong incentive to add the charge if it is applicable and given the presence of so many other charges in the cases, there is a strong presumption that RPM used to support horizontal collusion would generate such a horizontal charge.

capable of delineating the proportion of cases where the collusion theory is a *potential* explanation for the use of RPM. If either the sample of private litigated cases or the entire sample of private and government litigated cases together with the sample of government settled cases is representative of the uses of RPM, this test would indicate the proportion of the most profitable uses of RPM potentially consistent with the collusion theory.

To explore this issue, every vertical price-fixing case was examined to determine whether there was any allegation of a horizontal agreement at either the dealer or the manufacturer level. Cases where only a consent agreement is available were judged to have an "allegation" of a horizontal agreement if provisions in the decree prohibited such activity. Cases were also examined to determine if there were any parallel cases that might indicate collusion despite the absence of a legal allegation. None were found in the sample. This is clearly a broad index of the presence of collusive allegations.

Table 5 provides the results of this analysis for the entire minimum RPM sample of 153 cases and for the subsample of 82 private cases. There is little support in either sample of cases for the collusion theories of RPM. Only 20 of the 153 cases alleged any horizontal collusion, even under my broad definition of such allegations. Further, RPM could be considered a primary issue in only 6 of these cases.[60] The other cases were first and

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[60] Consent agreements were entered in two of these cases, the first prohibiting a motorcycle distributor and six dealers from using RPM (*Colorado v. Torbuc Corp.*) and the second prohibiting an appliance buying cooperative from requiring its members to use RPM (*FTC v. Appliance Dealers Cooperative*). In the third case, a preliminary injunction was denied because of little likelihood of success on the merits (*Blake Associates, Inc. v. Omni Spectra, Inc.*). In this case an electronic parts wholesaler was terminated after a series of business disputes with the manufacturer. The only conspiracy evidence in the case -- two general complaints about dealers' selling outside of allocated territories -- occurred two years before the disputes and termination. The case was apparently dropped after the ruling.

A not-guilty verdict (affirmed on appeal) was issued in the fourth case in which a paper manufacturer reduced the credit available to a discounting wholesaler who was unable to make

TABLE 5

Minimum RPM Cases Alleging Horizontal Collusion

	Minimum RPM Cases (153 Cases)		Private Cases (82 Cases)	
	Number of Cases	Percent	Number of Cases	Percent
Allegation[1] of Dealer Collusion	11	7.2	4	4.9
Allegation of Supplier Collusion	9	5.9	4	4.9
Allegation of Any Horizontal Collusion	20[2]	13.1	8[3]	9.8

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTE: [1] A broad definition was used to classify cases with an "allegation" of horizontal price-fixing. In addition to cases with explicit horizontal price-fixing charges, cases in which the consent decree had provisions dealing with both horizontal and vertical price-fixing were also included. Three cases that had allegations of "horizontal price-fixing" were excluded because the "conspirators" were either different parts of a firm or a firm and its customers, neither of which constitutes collusion in the economic sense. The horizontal price-fixing charge was summarily dismissed in two of these cases and the defendant was found not guilty in the third.

[2] These 20 cases resulted in 9 consent agreements, 4 guilty decisions, 3 not-guilty decisions, and 4 cases with no decision reported. RPM was the primary issue in only 6 of the cases.

[3] These 8 cases resulted in 3 guilty decisions, 3 not-guilty decisions and 2 cases with no decision reported. RPM was the primary issue in only 3 of the 7 cases.

foremost horizontal price-fixing cases, with RPM as a subsidiary allegation or with RPM prohibited in the consent agreement. All of these 14 cases were tried or settled primarily as horizontal price-fixing cases.

For the private cases, collusion allegations are still more infrequent. Horizontal collusion is alleged in only 8 of 82 private cases, and RPM can be considered the primary issue in only 3 of these cases. Moreover, only 1 of these 3 cases resulted in a guilty verdict (see footnote 60).

For the government cases, allegations of horizontal price-fixing in cases with an RPM allegation are more prevalent, but even here they occur in only 12 of 71 cases (16.9 percent). For the Department of Justice cases, the percentage is higher at 45 percent (5 out of 11 cases).[61]

If either the sample of private cases or the entire sample is an unbiased indicator of RPM practice, this evidence suggests that the collusion theory is not a principal explanation for the use of RPM. Moreover, all but 6 of the cases with allegations of collusion were pursued primarily as horizontal price-fixing cases. As a result the per se rule against RPM would appear to have very limited incremental value in successfully prosecuting RPM used for collusive purposes.

In probing the strength of this collusion evidence, it is instructive to consider some of the litigation selection issues

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timely payments on its past debts (*Reno-West Coast Distribution Co., Inc. v. Mead Corp.*). A guilty verdict was issued in the fifth case which challenged a marketer of electronic dictating equipment's warranty program designed to punish bootlegging outside franchisees' assigned territories (*Eiberger v. Sony, Inc.*). Finally, a guilty decision was issued against a manufacturer who sold at both wholesale and retail (*FTC v. Rubbermaid*).

[61] Ornstein (1985) also studied the importance of RPM as an aid to collusion by computing the percentage of all horizontal price-fixing cases that had an RPM charge. He finds, for instance, that RPM was alleged in only 6.8 percent of the DOJ cartel cases from 1890 to 1983 and in only 10 percent of the FTC cases from 1942 to 1983. Consistent with the results here, Ornstein also finds that 47 percent of the DOJ RPM cases from 1890 to 1983 included charges of collusion.

discussed in Section III. In particular, the evidence does suggest that public authorities are somewhat more likely to pursue collusive uses of RPM compared to private parties (16.9 percent of the government sample compared to 9.8 percent of the private sample). The private case sample may thus underestimate the importance of the collusion theories of RPM, while the government sample may overstate their importance. However, the differences between the two are relatively small and are thus incapable of changing the fundamental finding that the collusion theories have limited potential as explanations for the use of RPM.

The fact that litigated cases tend to be weaker than settled ones (from the plaintiff's point of view) also raises the possibility for selection bias if underlying distributions differ with the rationale for the practice. To consider this issue, an effort was made to identify the weakest cases, that is, the cases in which there is little likelihood that there actually was any vertical price-fixing, despite the allegation. For this purpose, all cases were identified in which a summary judgment or a not-guilty verdict was issued for the defendant on the RPM charge, and in which there was evidence that RPM was never practiced. There were 36 such cases, all of which were private cases.[62] As shown in Table 6, when these cases are deleted from the sample, there is a small increase (to 15.4 percent) in the percentage of the sample in which the collusive use of RPM is alleged. However, again this potential bias is quite small and thus would not change

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[62] Note that this set of "frivolous" cases does not include all cases with summary judgments or not-guilty verdicts, only those for which it seemed clear that the RPM charge was unfounded, usually because there was direct evidence introduced at trial that other dealers discounted freely or that the dealer in question had discounted in the past with no objection from the manufacturer. With one exception, these cases were all multiple allegation cases where RPM was one of several antitrust or contract charges.

TABLE 6

Minimum RPM Cases Alleging Horizontal Collusion, Subsample Excluding Cases Where RPM Allegation Appeared to be Without Foundation[1]

	Minimum RPM Cases (117 Cases)		Private Cases (46 Cases)	
	Number of Cases	Percent	Number of Cases	Percent
Allegation[2] of Dealer Collusion	9	-7.7	2	4.3
Allegation of Supplier Collusion	9	7.7	4	8.7
Allegation of Any Horizontal Collusion	18	15.4	6	13.0

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES: [1] All cases where the RPM charge was summarily dismissed or where the defendant was found not guilty and where there was positive evidence that RPM was not practiced are excluded. Some cases where the defendant was found not guilty but where the evidence on RPM was not as clear were retained.

[2] See Footnote 1 in Table 5 for a definition.

the basic finding that the collusion theories are not the likely explanation for most uses of RPM.[63]

The type of dealer in the suit can sometimes provide additional evidence on the potential importance of the dealer collusion theory, though this approach is limited by the data available in the opinions. In particular, the dealer collusion theory requires that the group of colluding dealers has significant market power so that their threat against the manufacturer is credible. This is quite implausible for some types of distribution outlets. In particular, exclusive dealers, franchisees, small firms with territorial allocations given by the manufacturer, and vertically integrated retailers do not generally meet these conditions. Typically, the manufacturer can directly control these outlets or can easily replace them, factors that generally eliminate their ability to exercise any significant market power.[64]

As shown in Table 7, approximately 37 of the 140 cases (26.4 percent) for which I have data fall into one of these categories, making dealer collusion highly implausible for this portion of the sample. Further, 13 of the remaining 103 cases involved dual distribution systems, where the manufacturer distributed the product directly in addition to using independent distributors. Again, dealer collusion is less plausible under these conditions, because the existence of direct distribution suggests that it is economic for the manufacturer to integrate vertically if faced

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[63] A second check on this potential bias was made by restricting the sample further to include only cases in which the defendant was found guilty at the initial decision or where he signed a consent agreement. In this sample, 17.1 percent of the cases alleged collusion. Most of these were government cases, and most resulted in consent agreements; initial guilty decisions were issued in only 19 cases and 5 of these included collusion allegations. Thus, this type of potential bias is not large enough to alter the basic finding.

[64] Exclusive dealers or franchisees in markets where reputation is important or where the required skill is scarce might be an exception to this argument, since they could not be so easily replaced. The cases at issue here, however, are typified by gasoline, ice cream, and office equipment distributors where this qualification seems minimal.

TABLE 7

Types of Distributors in Minimum RPM Cases

Type of Distribution	Minimum RPM Cases[1] (140 Cases)		Private Cases (77 Cases)	
	Number of Cases	Percent	Number of Cases	Percent
Exclusive Dealers	11	7.9	10	13.0
Franchises	19	13.6	15	19.4
Territorial Allocations	3	2.1	3	3.9
Vertical Integration	4	2.9	4	5.2
Dual Distribution	16	11.4	11	14.3
Independent Dealers	87	62.1	34	44.2

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES: [1] Only the 140 cases for which the information is available are included. There are 153 minimum RPM cases in the entire sample, 82 of which are private cases.

with significant dealer collusion. Together the cases involving the types of dealers who on structural grounds are unlikely to have the market power required by the dealer collusion theory constitute 36 percent of the overall minimum RPM sample.

There is a striking difference between government and private cases in this regard. None of the Department of Justice cases involved any of these exclusive dealing, vertically integrated, exclusive territory, franchise, or dual distribution types of dealers. Further, only 3 of the FTC cases and 7 of the state government cases involved them. Thus, only 15.9 percent of the 63 government cases for which I have data involved these types of dealers for which dealer collusion is a structurally implausible explanation for the use of RPM.

In contrast, as shown in Table 7, 32 of the 77 private cases (41.6 percent) involved the first 4 types of dealers. Moreover, an additional 11 private cases involve dual distribution networks. Together these cases constitute 55.8 percent of the private sample.

Unfortunately, the opinions typically contain little market share data or concentration information with which to judge the independent dealer cases. Though in many of the independent dealer cases it is clear from external knowledge of the markets that there are neither the structural characteristics nor the organizing mechanisms necessary to support a dealer collusion theory, there is no objective basis on which to estimate the extent of these limitations on the potential relevance of the dealer collusion theory.

Thus, on structural grounds, the evidence on the type of dealer involved suggests that the dealer collusion theory is implausible for at least 36 percent of the entire sample, and for at least 55 percent of the private case sample. The remaining portions of the samples involve independent dealers for which there is no systematic structural information to assess the dealer collusion theory.

Overall, then, if either the entire sample or the private case sample is reasonably representative of the economic uses of RPM, the primary evidence does not support the view that RPM is used primarily as an aid to collusion. Using the presence of horizontal allegations, consent provisions, parallel cases, or other case evidence to indicate potential collusion, collusion by either dealers or suppliers seems a modest explanation for the use of RPM. Moreover, most of these cases were pursued effectively

under the horizontal prohibitions. The limited structural information available also suggests that dealer collusion is an unlikely explanation for a substantial portion of the RPM use, though the lack of structural information for cases involving independent dealers does not allow us to rule it out on this basis in a majority of cases. Finally, the collusion evidence suggests that whether the sample is representative of the most profitable uses of RPM does depend somewhat on whether public and private enforcement are complementary; the government sample (especially the Department of Justice sample) includes a greater proportion of cases that might involve horizontal collusion. These differences are relatively minor, however.

B. RPM and the "Special-Services" Theory

Developing evidence to assess the potential importance of the "free-rider," or "special services," theory is difficult. The theory is fundamentally grounded in the value of information to consumers, but objective measurements of consumer information requirements are nonexistent in economics. The fact that a product or firm is new to the market can usually be determined from the case opinions, but the more basic information characteristics of the product cannot.

In order to get some information on this issue, I first categorized products as new or existing, and second, I made an admittedly subjective judgment of the "complexity" of the product in each case in terms of the likely value of pre-purchase information for the consumer. Within the "simple" products group, goods for which quality is not obvious at purchase, or for which a fashion component is potentially important, were noted since these characteristics may be the basis for retailer "certification" which is subject to "free-riding." Similarly, products that are infrequently purchased or change often were also noted. Of course, the fact that a product is "complex" does not prove that RPM was used to overcome "free-riding" by dealers, but it does constitute a necessary condition for the theory to apply. In this sense, this test is again a one-sided test capable of indicating only the potential relevance of the theory.

In Table 8, the products for the 153 cases are shown. All goods classified as "complex" are listed in the first column. All others are listed in the second. Seventy-two of the 153 cases (47.1 percent) involve complex goods. In addition, 2 of the 63

TABLE 8

Products In Minimum RPM Cases, Classified According To Consumer's Pre-purchase Information Needs

"Complex" Products	"Simple" Products
snowmobiles	gasoline
. ski equipment	gasoline
ski equipment*	gasoline
ski equipment*	gasoline
ski clothing*	gasoline*
sailboats*	. gasoline
pianos	. gasoline
+ air conditioner coils*	. gasoline
. air conditioner systems	+ gasoline
diving equipment*	oil products
jewelry*	. oil products
musical instruments*	oil products*
+ musical instruments	. + paper goods
motor bearings	+ fine paper
scientific instruments	. pipe
scientific instruments	. auto financing
scientific instruments	truck rental
ceiling products	. prescription drugs
. ice machines	paint
furniture	paint*
kitchen cabinets	dimethyl sulfoxide*
. pneumatic equipment	beer
word processing equipment	beer
. rustproofing products	. beer
. fluorescent lamp ballasts	. beer
. floor coverings	+ beer*
printing	. wine
+ floor machines*	liquor
+ plumbing supplies*	liquor
swine confinement systems*	liquor*
lawn care*	bread
trucks/agricultural equipment	+ refined sugar*

Table continued on next page.

TABLE 8 -- *Continued*

"Complex" Products	"Simple" Products
vacuum cleaners*	bakery products
+ motorcycles*	milk*
. orthopedic products	milk*
breathing devices*	milk*
marine electrical equipment*	+ milk*
audio equipment*	+ milk*
audio equipment*	ice cream
audio equipment*	ice cream
audio equipment*	candy*
audio equipment*	candy*
agricultural chemicals	. snack foods
. electronic equipment	+ newspapers*
+ hearing aids	+ rubber household goods*
+ houses & building lots	household/personal goods*
limited edition plates*	household/personal goods*
. appliances	rubber footware*
+ appliances*	rubber footware*
sewing machines*	rubber footware*
. autos	candy*
autos	**Infrequently Purchased/**
. autos	**Changing Products**
. autos	surfboards*
auto repair	mattresses*
. autos/fleet sales	watches*
handmade carpets*	auto tires
. golf equipment	auto tires
. funeral insurance	auto tires*
. agricultural chemicals	**Fashion Goods/**
. + electronic parts	**Unobservable Quality**[1]
medical goods	leather clothing*
motion picture distribution	men's pants
televisions	men's clothing*
. televisions	men's clothing*
gourmet cookware*	clothing*
pet supplies*	perfume*
silverware*	cosmetics*

Table continued on next page.

TABLE 8 -- *Continued*

"Complex" Products	"Simple" Products
New Entrant	cosmetics*
lawn care*	. cosmetics
food processors*	women's clothing
. agricultural equipment	. women's clothing
+ dictating equipment	+ women's clothing*
	women's clothing*
	women's clothing*
	casual clothing*
	casual clothing*
	casual clothing
	casual clothing
	casual clothing*
	casual clothing*
	maternity clothing*
	accessories*
	New Entrant
	. ice cream
	. cosmetics
Totals 72 cases	81 cases

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES: * indicates a government-initiated case.

. indicates a "frivolous" case as defined in Table 6.

+ indicates one of the 20 "collusion" cases.

[1] Only goods sold through independent retailers are included in this category, because the certification theory applies only in this case.

"simple" product cases were brought against new entrants, 22 involved clothing and cosmetics where a fashion/quality certification issue is plausible, and 6 more were infrequently purchased items. If these are included with the complex good cases, there are 102 cases of 153 (66.7 percent) where the "special services" theory could be a plausible explanation for the use of RPM.

The government sample involves a somewhat lower proportion of "complex" product cases than the private cases, but the differences between the two samples are small and are reversed under the broader definition of "special service" goods. Thirty of the 71 government-initiated cases (42.2 percent) involved "complex" goods; when infrequently purchased, fashion, and new entrant goods are added, the "special services" theory is plausible for 50 of the 71 cases (70.4 percent). Forty-two of the 82 private cases (51.2 percent) involve "complex" goods; when the other special categories are added, 52 of the 82 cases (63.4 percent) are potentially consistent with the "special services" theory.

As with the collusion theory, one potentially serious bias in interpreting these statistics as evidence on the empirical importance of the "special services" theory involves "frivolous" litigation that does not represent actual use of RPM. In order to consider this potential bias, the products in Table 8 are marked if they represent one of the 36 "frivolous" cases (.). When these cases are eliminated from the sample, however, the results are approximately the same. Fifty-two of the 117 remaining cases (44.4 percent) involve "complex" goods, and with the 6 infrequently purchased items and the 20 "fashion" goods, 78 of the 117 cases (66.7 percent) could be explained by the "special services" theory. Removing the "frivolous" cases from the sample reduces the difference between the subsets of government and private cases under the simple categorization of "complex" goods, but increases it under the expanded definition. These differences are small, however.[65]

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[65] As with the collusion test, the result was also checked for the more restrictive samples of cases where the defendant was found guilty or signed a consent agreement. If only the cases with a guilty verdict are considered, complex goods were involved in 52.6 percent of the sample. If cases resulting in

Overall, if either the entire sample of RPM cases or the private subsample is representative of the most important uses of RPM, these results suggest that the "special services" theory is potentially a more significant explanation than the collusion theory for manufacturers' efforts to set minimum retail prices. Approximately 47 percent of the minimum RPM cases involve "complex" goods. An additional 20 percent involve goods where infrequent purchase or reputation issues also suggest a free-riding potential. Cases involving new entrants are relatively infrequent; there are only 6 cases in this sample of 153 cases (3.9 percent). But like the collusion theory, the theories of RPM as a solution to "free-riding" on pre-sale services seem incapable of explaining the entire sample of RPM cases.

C. RPM and Principal-Agent Problems

Evaluating the potential importance of the principal-agent theories of RPM is also a problem, since they are inherently based on the inability of manufacturers to contract for a wide variety of particular services and behaviors at a low cost. Given the limited information available in the opinions, the only evaluation we can typically make is an assessment of the plausibility of the theories based on the nature of the product and the situation in the cases.

1. When Dealers Can Influence the Product's Quality

There are many products in the RPM case sample for which the dealer can significantly affect the consumer's ultimate satisfaction. Certainly the theory is quite plausible for the cases involving services or for goods where fit or appropriateness for a particular use is important (as with custom-designed component systems). Similarly, complex or technical goods where the initial choice of the best product or where post-sale diagnostic and

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guilty verdicts and consent agreements are considered together, the proportion of cases involving complex goods is 47.6 percent of the sample. Thus, the results are essentially unchanged when based on the more restrictive samples. These results support the presumption that the courts were in fact using a per se rule in judging RPM allegations.

maintenance services are significant meet the necessary conditions. Finally, the theory is a plausible explanation for cases involving food or drink products for which handling is important.

Table 9 lists the products in the RPM cases classified on these grounds. The dealer's ability to influence consumer satisfaction seems potentially important in 71 of the 153 cases (46.4 percent). In particular, there are 7 cases involving services, 34 cases where fit or suitability for the purpose is potentially important, 26 cases where the goods are complex or costly enough to make post-sale servicing important for the consumer, and 4 cases where the handling of food could substantially affect quality.[66] Some of the cases classified as "dealer unimportant" also might involve this type of quality issue, but probably to a lesser extent.[67] The gasoline cases in particular should be noted in this respect, since there is clear evidence in some of the cases that the oil companies took an active interest in the operation of the individual stations (e.g., by specifying minimum hours of operation, rest room condition, etc.). On the basis of this classification of the entire sample of cases then, the theory that RPM is used to control dealers' influence on product quality seems a potentially important rationale for its use.

Again in exploring bias issues, differences between government and private behavior should be noted. In particular, government cases fall more heavily into the "dealer unimportant" category. Forty-five of the 71 cases (63.4 percent) were classified in this way compared with 45.1 percent for the private cases. Thus, evidence supporting the potential importance of the dealer quality control theory is somewhat stronger if based on the private case sample than if based on the overall sample.

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[66] Three of the cases involve Coors beer, which is unpasteurized and needs special refrigeration during shipping and storage compared to most other beers (McLaughlin (1979) or Caves (1984)). The fourth case was brought against Friendly Ice Cream Company, which runs ice cream and sandwich restaurants.

[67] For instance, it is not difficult to make a quality-control argument for the dealer in cases involving cosmetics, paint, furniture, televisions, surfboards, mattresses, and wine.

TABLE 9

Products In Minimum RPM Cases, Classified According To Dealer's Ability to Influence Consumer Satisfaction

Dealer Important	Dealer Unimportant
Services	jewelry*
auto repair	silverware*
printing	limited edition plates*
lawn care*	. televisions
. funeral insurance	televisions
lawn care*	motion picture distrib.
. auto financing	- oil products*
truck rental	furniture
Fit/Suitability Important	gasoline
diving equipment*	gasoline
sailboats*	gasoline
+ air conditioner coils*	gasoline
. air conditioner systems	gasoline*
+ hearing aids	. gasoline
kitchen cabinets	. gasoline
swine confinement systems*	. gasoline
. orthopedic products	+ gasoline
audio equipment*	oil products
audio equipment*	. oil products
audio equipment*	+ rubber household goods*
audio equipment*	household/personal goods*
audio equipment*	household/personal goods*
ski clothing*	rubber footware*
ski equipment*	rubber footware*
ski equipment*	rubber footware*
. ski equipment	. + paper goods
motor bearings	+ fine paper
. rustproofing products	. prescription drugs
. fluorescent lamp ballasts	paint
ceiling products	paint*
. floor coverings	dimethyl sulfoxide*
+ plumbing supplies*	beer

Table continued on next page.

TABLE 9 -- *Continued*

Dealer Important	Dealer Unimportant
agricultural chemicals	+ beer*
. agricultural chemicals	. wine
. golf equipment	liquor
. + electronic parts	liquor
medical goods	liquor*
musical instruments*	bread
+ musical instruments	+ refined sugar*
pianos	bakery products
. pipe	milk*
handmade carpets*	milk*
gourmet cookware*	milk*
Post-Sale Services Important	+ milk*
+ houses & building lots	+ milk*
snowmobiles	ice cream
. appliances	. ice cream
+ appliances*	candy*
scientific instruments	candy*
scientific instruments	candy*
scientific instruments	pet supplies*
. ice machines	. snack foods
. pneumatic equipment	+ newspapers*
word processing equipment	surfboards*
+ floor machines*	mattresses*
trucks/agricultural equipment	watches*
vacuum cleaners*	auto tires
+ motorcycles*	auto tires
breathing devices*	auto tires*
marine electrical equipment*	leather clothing*
sewing machines*	men's pants
. electronic equipment	perfume
+ dictating equipment	cosmetics*
. agricultural equipment	cosmetics*
autos	. cosmetics
. autos	. cosmetics
. autos	. women's clothing
. autos	+ women's clothing*

Table continued on next page.

TABLE 9 -- *Continued*

Dealer Important	Dealer Unimportant
. autos/fleet sales	women's clothing
food processors*	women's clothing*
Food - Quality Affected	women's clothing*
. beer (Coors)	casual clothing*
beer (Coors)	casual clothing*
. beer (Coors)	casual clothing*
ice cream (restaurant)	casual clothing*
	casual clothing
	casual clothing
	men's clothing*
	men's clothing*
	maternity clothing*
	accessories*
	pet supplies*
Totals 71 cases	82 cases

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES: * indicates a government-initiated case.

. indicates a "frivolous" case as defined in Table 6.

+ indicates one of the 20 "collusion" cases.

However, if the "frivolous" cases are deleted from the samples, this difference is substantially reduced; 23 of the 36 "frivolous" cases were in the "dealer important" category.[68]

These potential biases, thus, do not seem large enough to alter the basic finding. Namely, if either the entire sample or the private case sample is reasonably representative of the uses of RPM, the theory that RPM is adopted to control dealer influence on product quality is a potential explanation for approximately half the uses of RPM. Based on the types of products involved, the theory does not appear capable of explaining the entire sample. Moreover, 63 of the 71 cases where the quality control theory is potentially relevant belong to the "complex" product category used to analyze the Telser "special services" theory. Thus, while potentially an important explanation for the use of RPM, the quality-control theory does not provide a complete complement to the collusion and "special services" theories, so that the three theories combined still do not provide potential explanations for the entire sample of RPM uses.

2. Where Sales Effort by the Dealer Is the Most Efficient Way to Increase Sales

The vertical sales effort theory hypothesizes that in situations where it is costly for manufacturers to use two-part pricing effectively, RPM might be used to induce additional sales effort from dealers. It is difficult to evaluate the empirical importance of this theory of RPM based on the information typically available in the legal opinions. However, examination of the products at issue and the nature of the disputes suggests that the vertical sales effort theory is a plausible explanation for a non-trivial subset of the cases, especially for many of the

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[68] If the analysis is restricted to the sample of cases in which the defendant was found guilty, the results are unchanged; 47.4 percent of this sample involved products where the dealer was likely to be important in determining product quality. If cases with a guilty outcome are combined with those resulting in a consent agreement, the result is weakened slightly; 41.5 percent of this sample involved situations where the dealer was likely to be important to product quality.

cases that are unexplainable under the RPM theories analyzed so far.

In particular, with the notable exception of the gasoline and clothing cases, 21 of the 26 other private "simple" good cases listed in Table 8 involve wholesale distribution of the product.[69] The manufacturer appeared to have considerable control over the number of wholesalers in all of these cases through direct contracts. Territorial limits were part of nearly all of these arrangements.[70]

In these circumstances, the vertical sales effort theory seems to be a plausible explanation for the use of RPM. Territorial limits will often control the major horizontal externalities that might affect performance in these types of situations, but they do not eliminate vertical externalities in the relationship with the manufacturer. Indeed, the facts in some of the cases are telling. For instance, one of the ice cream cases involved a new ice cream product (the "Chipwich") attempting to get broader distribution in New York City; another involved a French perfume company and its attempt to expand its U.S. distribution. Several of the cases involved general restructuring of the distribution networks by manufacturers apparently attempting to improve sales performance.[71] Adequacy of distributors' sales effort or "development of the territory" was explicitly raised in several of the other cases.[72] In these types of cases, sales efforts by individual dealers to find, educate and service retail accounts can

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[69] It is impossible to assess the government cases in this regard because there is so little information in the published consent agreements.

[70] See, for instance, *Krutsinger v. Mead Foods*, *Alladin Oil v. Texaco*, *Continental Distributing v. Somerset Importers*, or *General Beverage Sales v. East-Side Winery*.

[71] See, for instance, *Continental Distributing v. Somerset Importers*, *Blatt v. Lorenz-Schneider Co.*, *CUSCO v. Certain-teed Products*, and *Valley Liquors v. Renfield Importers*.

[72] See, for instance, *General Beverage Sales v. East-Side Winery*, *Blatt v. Lorenz-Schneider Co.*, or *Valley Liquors v. Renfield Importers*.

provide benefits to the manufacturer -- a vertical externality that is the foundation of this theory.

A number of the "complex" good cases listed in Table 8 may also be explained by this sales effort theory, though it is more difficult to isolate the vertical externality from the potential horizontal free-riding problems in these cases.[73]

Thus, the vertical sales effort theory of RPM appears to be a plausible explanation for a significant subset of the private cases, especially for the cases involving wholesalers. These cases are the dominant portion of the private case sample that was unexplainable under the collusion, "special services," or dealer quality-control theories. Reports of government cases typically contain too little information to assess even the plausibility of this theory for the "simple" goods cases.

3. RPM When Demand Is Uncertain

Unfortunately, there is very little information in the opinions that would allow an empirical assessment of the insurance use of RPM. There are hints in a few of the cases that suggest that this theory might explain some of the unusual efforts at vertical price control. For instance, in a few of the gasoline cases, the manufacturer's efforts to limit price reductions seemed to occur only in a "price war" that was apparently triggered by shocks to the market. In other cases, pricing formulas seemed designed to buffer directly the effects of swings in demand. This type of

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[73] In the *Monsanto* case, for instance, the manufacturer seemed clearly concerned with the sales effort of its dealers. The extent to which this concern was driven by the horizontal externality of dealer free-riding on the information provision of others or by a vertical externality that Monsanto was unable to solve with two-part pricing is difficult to judge from available information. See Calvani and Berg (1984) or Liebeler (1983) for a brief discussion of the case.

In the *Battle v. Lubrizol* case involving rustproofing materials, the manufacturer claimed explicitly that the terminated dealer was not adequately pursuing sales to the marine market as his rationale for the termination that left a single dealer in the territory. In this case, the sales effort issue seems more clearly vertical than horizontal.

behavior is quite consistent with the insurance theory of vertical price control. However, because most of the cases seemed to involve continuing efforts to limit prices, it seems very unlikely that this theory would explain a large portion of these samples of cases.

4. Summary of Evidence on Agency Theories of RPM

Based on the limited information available in the published opinions, this sample of RPM cases suggests that the use of RPM (and other vertical restraints) to solve agency problems between manufacturers and dealers is potentially an important explanation for observed uses of RPM. Virtually every case in this sample is consistent with one of the agency problems outlined here. Moreover, a number of cases that seemed inconsistent with both the collusion and the "special services" theories appear to be explainable with one of the other agency theories.

D. RPM and Individual Dealer Market Power

There is very little information in the cases with which to assess the individual dealer market power theory. As in the dealer collusion theory, the type of dealer can give us some information about the likelihood that individual dealer market power might be the cause for the use of RPM. In particular, individual dealer market power is unlikely in cases involving exclusive dealers, franchises, small firms with territorial allocations, and vertically integrated dealers.[74] Moreover, dealers who compete with company-owned outlets are less likely to have significant market power, since the use of dual distribution illustrates that company-owned outlets could be added if an individual dealer attempted to exercise significant market power.

As shown in Table 7, 53 of the 140 minimum RPM cases for which I have data involve these types of dealers, making individual market power an unlikely explanation in these cases.

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[74] An exception to this characterization might be where dealer reputation is important in giving the dealer market power. Dealer reputation is not typically important in this sense for the types of dealers in this sample, who are typified by candy, ice cream and gasoline retailers.

The products in the remaining 87 cases are shown in Table 10. Though there is no market share data in most of the opinions, it is reasonably clear from external knowledge of the markets that most of the cases involve small retailers or wholesalers, or distributors who were under significant control by the manufacturer.

The most important potential exceptions in the sample are some of the liquor and beer wholesaler cases involving multi-product dealers in sometimes heavily regulated markets (including some with explicit licensing requirements),[75] a few of the soft goods cases involving major department stores or chains, and possibly some of the milk cases (though there is virtually no information on these settled government cases). In these cases, the dealer market power theory cannot be ruled out without further information, though there is no evidence in the case opinions to establish this theory either.

In summary, the individual dealer market power theory seems an unlikely explanation for all but a relatively small part of these samples of RPM cases. Thus, if either of these samples of cases is reasonably representative of the use of RPM, it would be a relatively minor explanation for the phenomenon as a whole.

E. Summary

Overall, the evidence developed here indicates that no single theory has the potential to explain all uses of RPM. The service-enhancing theories, taken together, have the potential to explain virtually the entire sample of cases. The collusion theories are a potential explanation for a relatively small portion of the sample. The individual dealer market power theory appears able to explain few cases in the sample.

In particular, if either the private case sample or the overall sample of cases is reasonably representative of the uses of RPM, the available evidence suggests that collusion by dealers or manufacturers is a relatively minor explanation for RPM. Only 13 percent of the overall sample of cases and 10 percent of the private case sample contained allegations of any horizontal

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[75] This is not obviously the case, however, since the trend in these markets seems to be towards a manufacturer/importer-led consolidation of the distribution system.

TABLE 10

Products in Independent Wholesaler/Dealer Cases[1]

Private Cases	Government Cases
Motor Bearings	Watches
Bread	Swine Confinement Systems
Furniture	Stereo Equipment
Ceiling Products	Stereo Equipment
. Floor Covering	Marine Electrical Equipment
Kitchen Cabinets	Sewing Machines
+ Musical Instruments	Food Processors
Scientific Instruments	Breathing Devices
Word Processing Equipment	Vacuum Cleaners
. Ski Equipment	Limited Edition Plates
. Televisions	+ Motorcycles
Televisions	+ Refined Sugar
. Rustproofing Materials	+ Floor Machines
. Ice Machines	+ Newspapers
. Fluorescent Lamp Ballasts	+ Plumbing Supplies
. Orthopedic Products	Surfboards
Medical Goods	Paint
. Pneumatic Equipment	+ Women's Clothing
Perfume	Leather Clothing
. Oil	Milk
. Prescription Drugs	Milk
Motion Picture Distrib.	Milk
. Agricultural Chemicals	+ Milk
Clothing	+ Milk
Clothing	+ Beer
Women's Clothing	Liquor
Women's Clothing	Ski Equipment
Men's Slacks	Ski Equipment
Liquor	Ski Clothing
Liquor	Sailboats
. Beer	+ Appliances
. Beer	Audio Equipment
. Beer	Audio Equipment

Table continued on next page.

TABLE 10 -- *Continued*

Private Cases	Government Cases
Beer	Audio Equipment
	Handmade Carpets
	Gourmet Cookware
	Pet Supplies
	Silverware
	Cosmetics
	Cosmetics
	Women's Clothing
	Women's Clothing
	Casual Clothing
	Casual Clothing
	Men's Clothing
	Men's Clothing
	Accessories
	Household/Personal Goods
	Household/Personal Goods
	Rubber Footware
	Rubber Footware
	Rubber Footware
	Candy

NOTES [1] This table includes only independent wholesaler or dealer cases from the 140 cases for which there is information about the distribution system.

. indicates a "frivolous" case as defined in Table 6.

+ indicates a case in which collusion was alleged.

collusive activity. There were no parallel cases or similar indications of potential collusion in the other cases. Further, the limited structural information in the cases indicates that only about 65 percent of the sample involves independent dealers for whom dealer collusion is most plausible, and in most of these cases the dealers seem too small and too easily replaced to permit the exercise of joint market power without an explicit collusion mechanism. Overall, this evidence suggests a limited role for the collusion theories as an explanation for RPM in this setting where dealers and manufacturers have no enforcement mechanism.[76]

An analysis of the products involved in the cases suggests that the "special services" theory of RPM is a potential explanation for approximately 65 percent of the private case sample and of the entire sample. If either of these samples is reasonably representative of the uses of RPM, this theory is then a potentially important explanation for the use of RPM, but it is unlikely to explain all uses of the practice. For a significant subsample of the cases, the "special services" theory seems quite implausible.

Based on an analysis of the types of products and dealers in the cases, the more general principal-agent theories of RPM that view the practice as a mechanism to discipline a variety of dealer actions are potentially important in explaining the use of RPM overall. Three particular principal-agent theories (besides the "special services" theory) were examined here: the use of RPM to discipline dealer actions that affect product quality; its use to increase sales effort by dealers; and its use to shift demand risk from dealers to manufacturers. Based on the limited information

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[76] RPM that is incorporated into regulations that are enforced by public authorities or that allow for enforcement actions by horizontal competitors is fundamentally different from RPM enforced by the manufacturer alone. This sample of RPM cases does not have a large enough number of regulation cases to allow any systematic analysis of RPM used with these alternative enforcement mechanisms. However, it is important to note that the results described here occur in an environment where enforcement of RPM is left to the manufacturer. On theoretical grounds, the collusive use of RPM is a stronger possibility if enforcement power is given to other parties.

available, virtually every case in the sample is consistent with one of these theories. The product quality-control theory and the sales-effort theory seem particularly important as potential explanations for the practice of RPM.

Finally, the available information on the types of dealers and their relationship to the manufacturer suggests that the individual dealer market power theory has limited potential as an explanation for most uses of RPM. Approximately 40 percent of the sample involves exclusive dealers, franchises, small firms with territorial allocations, dual distributors, or vertically integrated dealers. Typically, the manufacturer can replace such dealers easily, eliminating their ability to exercise market power. Moreover, most of the remaining independent dealer cases involved narrow-line retailers or dealers whose market shares appeared to be too small for them to have any potential for significant market power.

V. MAXIMUM RESALE PRICE MAINTENANCE CASES

One of the striking features of RPM litigation during this period is the significant proportion of the cases that involve maximum RPM. Approximately 20 percent of the entire sample and 30 percent of the private case sample are maximum RPM cases. The economic theories of vertical restraints do not support the current per se prohibition against maximum RPM. In fact, maximum RPM is clearly efficient in most of the current theories of its use.

For instance, a manufacturer can couple maximum RPM with exclusive territories to eliminate free-riding problems without giving dealers the opportunity to price monopolistically. This can easily be shown to be efficient in certain circumstances (Mathewson and Winter (1983b)). Similarly, maximum RPM can be used to prevent supra-competitive pricing by dealers with some local market power (Spengler (1950)) or to reduce inefficient entry or other inefficient selling activities (Bittlingmayer (1983) and Perry and Porter (1986)). In addition, market shocks that induce temporary shortages can create rent opportunities for dealers. If the reputational damage done to the manufacturer by dealers who increase prices is substantial, manufacturers might limit retail prices to prevent it. Maximum RPM would again be efficient in this case.[77]

The most significant theory of the use of maximum RPM that is an exception to efficiency involves opportunistic behavior on the part of manufacturers when dealers have firm-specific sunk costs (see generally, Klein, Crawford and Alchian (1978)). In this case, maximum RPM can be inefficient if instituted unexpectedly after these sunk costs have been expended. However, this theory does not provide a justification for antitrust prohibitions against maximum RPM. The inefficiency here is not a competitive

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[77] This is simply a variation on the usual theory of minimum RPM used to reduce dealer incentives to inflict reputational damage on manufacturers by reducing quality. See Klein and Murphy (1987) and Leffler (1986).

problem but a contracting issue, and adequate mechanisms to protect against such occurrences already exist in contract law.[78]

Table 11 lists the types of cases in the maximum RPM sample and the rate of guilty decisions in these cases. All but two are private non-regulatory cases.[79] Overall, the success rate for plaintiffs in the maximum RPM cases is approximately the same as for the sample as a whole: 25 percent versus 27 percent. This suggests that the legal system is not treating maximum RPM differently than it treats minimum RPM. Moreover, if the judiciary is accurately assessing the per se rule and both parties face equal litigation costs and can equally assess the strength of the cases with only a small error, this low plaintiff success rate, together with a high settlement rate, suggests that there is again an imbalance in the stakes of the litigation, with manufacturers having more to lose than the dealer has to gain. Thus, as with minimum RPM, if these conditions apply, the low plaintiff success rate suggests that manufacturers agree to settlements in most cases unless the cases are relatively weak, and thus that the law has substantial deterrent effect against maximum RPM and the practices that might be construed as RPM.

There are three significant clusters of cases in the maximum RPM sample: newspaper distribution, gasoline retailing, and insurance cases. The newspaper cases all deal with situations in which a manufacturer had granted exclusive territories to its distributors and was attempting to limit monopoly pricing within the territories. Five of the eight cases actually involved charges

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[78] For instance, if RPM were legal, contracts dealing with high sunk cost situations could specify that the dealer has freedom to choose the retail price, or to choose it within limits that depend on observable cost conditions.

[79] The aberrant cases dealt with consumer protection regulations. The first questioned the legality of a New York City ordinance requiring the disclosure of the manufacturer's suggested list price if the retail price was higher than this list price. The regulation was attacked as providing a vehicle for maximum retail price-fixing by manufacturers. No conspiracy was found. The second case challenged a New Jersey law restricting the retail price of hearing aids to be less than 3 times the manufacturer's price. The regulation was again upheld.

TABLE 11

Maximum RPM Cases

Product	Number of Cases	Number of Guilty Decisions/ Decisions[1]	Case Origin	Other Vertical Restraint Allegations
Newspaper Distribution	8	3/5	Dealers (4)[2] Terminated Dealers (4)	Territories (5) Exclusive Dealing (2) Customer Tying (5)
Gasoline Retailing	9	3/5	Dealers (3) Terminated Dealers (6)	None
Insurance (Health)	5	0/5	Service Providers	None
Insurance (Auto)	1	0/1	Auto Body Shop	Tying (3) Territories (2) Exclusive Dealing
Food Franchises & Distributors	4	0/3	Dealers	

Table continued on next page.

TABLE 11 -- *Continued*

Product	Number of Cases	Number of Guilty Decisions/ Decisions[1]	Case Origin	Other Vertical Restraint Allegations
Alcoholic Beverage Distributors	3	1/1	Dealers	Territories (2) Tying (2) Exclusive Dealing (2) Advertising
Weight Control Franchise	1	0/1	Franchisee	None
Appliances	1	0/1	Terminated Dealer	Territories Exclusive Dealing
Electronic Equipment	1	0/1	NYC Regulation	None
Water Filtration Devices	1	0/1	Dealer	None
Machine Tool Lathes	1	0/1	Terminated Dealer	Boycott Territories

Table continued on next page.

TABLE 11 -- *Continued*

Product	Number of Cases	Number of Guilty Decisions/ Decisions[1]	Case Origin	Other Vertical Restraint Allegations
Hearing Aids	1	0/1	NJ Regulation	None
Cigarettes	1	0/0	Dealer	None
Construction Products	1	0/1	Terminated Dealer	None
Auto Crash Parts	1	0/1	Dealer	Territories
Soft Drinks	1	0/0	Competitor	Territories Exclusive Dealing
TOTALS	40	7/28		

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES. [1] Decisions are taken at the highest level available.
[2] Numbers in parentheses indicate the number of cases that have the particular charge.

of illegal exclusive territorial restrictions. All of the cases were brought by dealers, half of them by terminated dealers. Decisions are available for 5 cases, and the newspaper companies were found guilty of maximum RPM in three of them. The other two cases involved vertical integration, and the newspaper companies were found not-guilty.

The newspaper cases seem to fit quite clearly with the efficiency theories of maximum RPM, where maximum RPM is used to limit price increases in cases where dealers have been given exclusive territories.[80] The dominant effect of the RPM policy in the case of newspaper distribution appears to have been the vertical integration of distribution into the manufacturing companies (McChesney (1986)). In fact, some of the terminated distributor cases here were triggered by integration following the earlier legal decisions; this integration is consistently held to be legal under the antitrust laws.

The gasoline retailing cases are not as uniform as the newspaper cases, but they contain common elements. All of the cases were initiated by dealers; 6 of the 9 were initiated by terminated dealers. Five of the cases involve significant contract issues that are plausible explanations for the terminations, quite aside from anything that might raise antitrust concerns.[81] The other four cases appear to have been generated by changes in the oil companies' policies towards vertical integration into gasoline retailing.

Across all the cases, there is evidence of the oil companies' direct control of their retail outlets. Contracts often had quantity-forcing provisions as well as direct operating requirements (hours, restroom condition, etc.). Also, they were generally of short duration (typically 1 year with 30 day

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[80] See Phillips and Mahoney (1985) or McChesney (1986) for a vertical externality theory based on the interaction between the retail price and the price of advertising in the newspaper.

[81] For instance, one terminated dealer had a hidden financial interest in a competing gas station in violation of its contract; another repeatedly violated the "Price Stabilization Act" of the mid-1970s; one refused to honor a 24-hour clause in its contract; and another refused to follow company policy during the OPEC "gasoline shortages."

nonrenewal clauses). Beyond the contracts, many of the cases also showed evidence of frequent monitoring by company personnel and considerable effort put into directing retail operations. While data is incomplete, most of the cases had evidence of company "pressure" on dealers to keep prices low, either through sales targets, wholesale pricing policies that were dependent on retail prices, or explicit pressure to lower retail prices.

The gasoline cases do not suggest any anticompetitive injury consistent with a per se prohibition against RPM. The company efforts to limit retail prices seem most consistent with the theories predicting maximum RPM as an effort to limit local market power or excess sales effort (Bittlingmayer (1983) and Perry and Porter (1986)), and with theories dealing with long-term reputational damage to firms that exploited the opportunities created by the OPEC-related shocks of the 1970s.[82] The terminated dealer cases generated by the transition to more specialized, high volume retail outlets are similarly consistent with efficiency explanations; for instance, as repair work fell as a portion of stations' business, the advantages of owner-operators to control work quality also fell, so that at some point it became more efficient to vertically integrate.

The final cluster of six cases involves insurance companies' efforts to limit the prices they would pay for particular services. Five of these cases were brought by health care providers (either as individuals or as a class) and one was brought by an auto body shop. In each of these cases, the insurance company was accused of maximum price-fixing when it placed compensation limits on insured services. Guilty verdicts were initially issued in two of the health insurance cases, but they were later overturned. Summary judgments for the defendant were issued in the other four cases.

These insurance cases do not deal with the standard RPM issue. Since they involve third-party payment for services, they are essentially buyer limits on prices. While under some circumstances monopsony power can lead to an inefficient

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[82] One case does raise post-contractual reneging issues (*Arnott v. American Oil Co).* The contract issues were the primary focus of the suit and appear to have been dealt with quite effectively from an economic point of view.

outcome, the host of problems in third-party payment arrangements makes a per se rule against maximum RPM a particularly inappropriate vehicle to address the narrow monopsony issue when it does exist. The legal interpretations that such limits are not maximum RPM are consistent with this view.

For the most part, the remaining 17 cases represent a miscellany of disputes between manufacturers and distributors. Fourteen of the cases were brought by dealers, 3 of whom had recently been terminated.[83] The plaintiff's success rate in these cases is particularly low. A guilty verdict was issued in only 1 of the 12 cases for which decisions are available. Moreover, most of these cases involved situations in which dealers had exclusive territories: allegations of illegal exclusive territories were made in 9 of the 14 dealer cases. Illegal tying was also alleged in 3 of the 4 food-related cases and in 2 of the 3 alcoholic beverage distribution cases.

There are common themes in some of the cases. Three of the dealer cases involve promotional schemes: a franchiser's advertisement of a special price at participating dealers, a manufacturer's discount to liquor wholesalers that was conditional on their passing it along to retail dealers, and a gasoline company's "traffic-building" policy of having low-priced cigarettes at all of its dealerships were all challenged as maximum RPM. Four of the other cases appeared to be fundamentally contract disputes that were embellished with a variety of antitrust charges. The cases involved questions of unpaid bills, product quality degradation, and similar issues. All four cases also included other antitrust charges (tying, exclusive dealing, and territorial restrictions). Two other cases were brought by dealers terminated in a broad restructuring of the dealership network. Another case involved a manufacturer's pressure on a dealer not to go along with a local dealers' cartel. Two cases dealt with the freedom to structure the fee: a Weight Watcher's franchisee challenged the corporate policy against front-loaded fees, and an

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[83] Two of the other cases are the challenges to regulations in New York City and New Jersey (see footnote 76). The third case was brought by a competitor who alleged that a soft drink producer was attempting to limit the prices charged by its distributors in violation of the maximum RPM prohibition.

auto manufacturer's policy of providing discounts on crash parts sold to independent body shops was questioned. Finally, the remaining dealer case questioned the manufacturer's right to require "reasonable prices" for out-of-warranty work in the contracts with its authorized repair services.

These miscellaneous cases also seem most consistent with the efficiency theories of maximum RPM. In particular, the theory dealing with supra-competitive pricing by dealers with limited local competition and the theories suggesting vertical restraints as solutions to the manufacturer's problems in generating particular types of sales efforts seem quite plausible explanations for those actions here that resemble maximum RPM.

Overall, the sample of cases alleging maximum RPM do not suggest anticompetitive injury that would support antitrust prohibitions against the practice. The cases in which the manufacturer's pressure on retail prices seems real fit very closely with the efficiency theories predicting its use. The few cases that raise inefficiency issues were essentially contracting or monopsony questions that would be better dealt with on those grounds. Thus, this evidence supports the replacement of the current per se prohibition against maximum RPM with a presumption of legality. Since 30 percent of the private RPM cases involved maximum RPM, this issue is not as innocuous as many have supposed.

VI. CONCLUSIONS

The economic reasons for vertical restraints, and for RPM in particular, have been the subject of much debate in recent years. This study has examined a 1976-1982 sample of all 203 reported public and private antitrust cases that alleged RPM. A primary goal of the study was to extract as much factual information as possible from the sample to help assess the relative importance of the various economic theories of RPM. While detailed public information on the facts of the cases is generally limited, the available evidence does suggest limits on the potential importance of the various theories.

Litigated RPM cases clearly represent a selected sample of all uses of RPM. However, the per se nature of the RPM legal standard, together with economic theories of litigation and settlement, suggest that, with the possible exception of supplier collusion cases, most of this selection in private litigation should be independent of the reasons for the RPM. If so, the sample of all private litigated RPM cases may be a reasonably representative sample of the most profitable uses of RPM. Government behavior is not as well understood, but under a public interest theory of government, government litigation may correct for any deficiencies in private incentives. If so, a sample including government cases might be a more representative sample for study. For these reasons, this study typically analyzed two samples of RPM cases: first, the sample of all private litigated cases, and second, the sample of all private litigated cases together with all government litigated or settled cases. If either of these samples is reasonably representative of the economic uses of RPM, a number of conclusions are suggested by the available evidence.

1. The samples of RPM cases provide little empirical support for the theory that RPM is an important device to facilitate either dealer or manufacturer collusion; the collusion theories seem possible explanations for less than 15 percent of the cases. This is especially true in private antitrust activity, where allegations or other evidence of horizontal agreements supported by RPM are especially limited. With few exceptions, these potential collusion cases were pursued effectively under existing horizontal statutes.

2. The most prominently offered service-enhancing theory of RPM's use -- that RPM prevents free-riding on the special selling

services of some dealers -- is a plausible explanation for a more significant portion of the observed uses of RPM. However, this theory does not appear capable of explaining the entire sample of cases examined here. Based on the products at issue and the nature of the practices observed in the cases, this "special services" theory seems implausible for at least 30 percent of the cases examined.

3. A more general view of vertical restraints as a response to a variety of principal-agent problems between manufacturers and dealers is found to contain potentially important explanations for the use of RPM. The "special services" theory reflects one type of agency problem, but there are many others. In this study, three additional agency problems were examined in more detail: 1) when the dealer can influence the consumer's satisfaction with the good; 2) when selling effort by the dealer is the most efficient way to increase sales; and 3) when demand risk is important in a market. Based on the products and types of dealers at issue in the cases, service-enhancing theories, taken together, provide possible explanations for virtually the entire sample of minimum RPM cases studied. While there are cases when the manufacturer would generate too many services, economic theory suggests that RPM, together with manufacturer determination of the number of dealers and the conditions under which they continue as dealers, is usually efficient in these cases. RPM that is used to enhance dealer services does not raise standard anticompetitive concerns.

4. The debate on RPM almost universally focuses on the question of **minimum** RPM. There is little economic debate about the effects of a manufacturer's efforts to put a **maximum** limit on resale prices. Maximum RPM is generally in the consumer's interest; yet, it is also per se illegal under current legal standards. The case samples examined here suggest that such charges are not rare; 20 percent of the entire sample and 30 percent of the private case sample involve charges of maximum rather than minimum RPM.

5. Most private RPM cases are initiated by dealers (87 percent of the litigated cases here), and most of these by terminated dealers. Available evidence also indicates that the settlement rate for RPM cases is high (approximately 70 percent of the cases filed). Moreover, plaintiffs have a low success rate in the cases that actually do go to litigation (plaintiffs win only 28 percent of the judgments in this sample).

If the judiciary and the parties are relatively accurate in assessing the evidence of RPM against the per se standard, and if legal costs are approximately equal for the parties, economic theories of litigation and settlement suggest that these findings indicate that cases tend to be settled unless they are relatively weak, with defendants acceding at least partially to plaintiffs' demands. According to the theories of settlement behavior, this strong plaintiffs' position suggests asymmetric stakes in the litigation, with manufacturers having more to lose than dealers have to gain. Regardless of the cause, however, if the judiciary is applying a per se rule, this high settlement rate and low plaintiff success rate may indicate that the law is deterring not only RPM, but other activities that have some modest chance of being judged to be RPM. In fact, based on a reading of the substance of the disputes, many private RPM cases appear to be essentially contract disputes recast as antitrust cases and embellished with a variety of antitrust charges.

6. RPM does not occur in a vacuum. In fact, the litigation evidence is quite strong in confirming that RPM is often used with a variety of other vertical restraints. This finding is consistent with recent economic theory on vertical restraints that suggests that RPM can often be complementary with or substitutable for other vertical restraints, depending on the nature of the situation. Thus, it is very difficult to predict the effect of the current more stringent treatment of RPM on the use of other nonprice vertical restraints. In situations where they are substitutes, the per se RPM rule should generate more use of nonprice restraints; in situations where they are complements, it should generate fewer nonprice restraints than would be efficient.

7. In many situations, RPM and other vertical restraints are second-best solutions to a manufacturer's problems in influencing the actions of his dealers. For instance, for goods where the consumer cannot judge quality or where there is a strong fashion component, it might be efficient for a manufacturer simply to pay "high reputation" dealers to carry a product line and thus certify its quality or fashion. Such payments could take the form of a lower wholesale price or a lump-sum cash payment or discount. However, such a payment would probably be subject to challenge under the Robinson-Patman Act against price discrimination.

If the Robinson-Patman Act were relaxed to allow manufacturers to deal differentially with dealers on the basis of

different tangible or intangible services, some uses of vertical restraints including RPM would probably be reduced. If changes in the laws governing manufacturer dealings with their distributors were contemplated, it would thus be important to recognize the interactions between these laws. In particular, the combination of the Robinson-Patman Act and the current per se illegal RPM standard is apt to limit some efficient distribution arrangements.

Overall, the litigation evidence on RPM indicates that no single theory is capable of explaining the use of RPM. In particular, the collusion theories do not seem capable of explaining at least 85 percent of the cases; the "special services" theory seems inapplicable for at least 30 percent of the sample. Taken as a group, the service-enhancing theories may provide explanations for virtually the entire sample of cases, but no individual agency theory provides a possible explanation for more than 70 percent of the sample. Moreover, given the limited information available in the cases, many of the cases are consistent with several of the theories.

These findings are broadly consistent with theoretical economic analyses of RPM that indicate that there are a variety of potential procompetitive and anticompetitive reasons that could explain the use of RPM. The evidence from the case samples suggests that in practice many, and quite possibly most, uses of RPM are likely to be efficient. Moreover, for most of the cases in which collusion seems to be a possible explanation, the anticompetitive behavior was pursued effectively under the existing horizontal statutes, suggesting that the per se rule against RPM may not be important in deterring this type of conduct.

It is very important to understand that this analysis does not imply that it would be desirable to return to the legal rules that governed the Fair Trade era. The Fair Trade statutes gave individual dealers and wholesalers, and sometimes even dealer trade associations, the right to enforce Fair Trade contracts against other discounting dealers. In some states, the state itself enforced the contracts.

These types of enforcement mechanisms are quite different from the enforcement mechanism inherent in a rule of reason standard, or even a per se legal rule, that allows a manufacturer (but not dealers) to enforce RPM. Our understanding of vertical restraints suggests that the manufacturer is more likely to

enforce RPM for efficiency purposes, and to abandon RPM or enforce it selectively when those reasons diminish. The same is not true for dealer enforcement, especially when dealers are faced with competition from new, more efficient retailing forms or with innovations in distribution technology that reduce the retailer's role. Historically, the most suspect uses of RPM have occurred in just such circumstances when dealers had the legal right to enforce the price restraints independently of the manufacturer or when they induced government bodies to enforce them directly.

Further empirical research on vertical restraints is sorely needed. This study is based on admittedly limited plausibility tests of the various theories of RPM. However, I hope that it illustrates that even such weak tests can yield systematic assessments of vertical restraints-that are both reasonable and instructive. Moreover, they may suggest additional tests to refine the analysis.

The current dearth of empirical evidence on the use of vertical restraints, and of RPM in particular, seriously limits the development of economic understanding of these practices. The host of competing theories are left untested and unchallenged as to their relative importance. This empirical vacuum is especially pressing in the policy setting, where the relative importance of the efficiency and inefficiency theories is fundamental.

More generally, many areas of law and economics suffer from a lack of empirical testing. Often, the difficulty of collecting an analytically useful sample of a practice across industries is an insurmountable obstacle to serious study. This study exploited the fact that litigation generates an opportunity to observe a practice in a wide variety of uses. Of course, litigated cases are a selected sample of all cases. However, by investigating the factors that affect this selection, such a sample may nevertheless present an important basis for analysis. At a minimum, careful analysis of litigated samples can often establish bounds on the likely importance of the issues under investigation.

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APPENDIX TABLES

TABLE A1

Cases With a Vertical Price-Fixing Charge, 1976 - 1982

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
US v. Scott Aviation Division (1961)	Min	Breathing devices	Government
US v. Quaker State Oil Refining (1969)	Min	Oil products	Government
Mailand v. Powerine Oil Co. (1972)	Min	Gasoline	Dealer
Merit Motors Inc. v. Chrysler (1972)	Min	Autos	Dealer
US v. R&G Sloane Mfg. Co. (1972)	Min	Plumbing supply	Government
FTC v. Rubbermaid, Inc. (1973)	Min	Rubber household products	Government
Perry v. Amerada Hess Corp. (1973)	Min	Gasoline	Terminated dealer
Phillips v. Crown Central Petroleum Corp. (1973)	Both	Gasoline	Terminated dealer
Sargent-Welch Scientific Co. v. Ventron Corp. (1973)	Min	Scientific instruments	Terminated dealer
Kane v. Martin Paint Stores Inc. (1974)	Both	Paint	Dealer
Knutson v. Daily Review Inc. (1974)	Max	Newspapers	Dealer
Matarazzo v. Friendly Ice Cream (1974)	Min	Ice cream franchise	Terminated dealer
Milonas v. Amerada Hess Corp. (1974)	Max	Gasoline	Terminated dealer
World-Wide Volkwagon Corp. v. Autobahn Motors Co. (1974)	Min	Autos	Terminated dealer
Call Carl Inc. v. BP Oil Corp. (1975)	Max	Gasoline	Terminated dealer

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Consent		Customer restriction, territories	None	
Yes	Consent		Customer restriction, territories	Refusal to deal	
Yes	Guilty		Exclusive dealing, tying	Price discrimination	Franchise distribution
No/ Other AT	Summary Judgment/ Defendant		None	Horizontal price fixing, monopoly, price discrimination	Dual distribution
No/ Other AT	Consent	+s	N/A	Horizontal price fixing	
Yes	Guilty	+w	Customer	Horizontal price fixing, boycott	Dual distribution
Yes	Continued[4]		Tying	Refusal to deal, price discrimination	Franchise distribution
No/ Other AT	Guilty	+s	Tying	Horizontal price fixing	Exclusive dealers
No/ Other AT	Not Guilty		Tying	Refusal to deal, monopoly	
Yes	Summary Judgment/ Plaintiff		Tying	Price discrimination	Franchise distribution
Yes	Guilty		Territories	Refusal to deal, monopoly	Territorial allocations
Yes	Continued		Exclusive dealing, tying	None	Franchise distribution
No/ Other AT	Continued		Tying	Restraints on alienation	Franchise distribution
No/ Contract	Not Guilty		Tying	Price discrimination	Exclusive dealers
No/ Contract	Not Guilty		None	Horizontal price fixing, refusal to deal	Franchise distribution

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
FLM Collision Parts v. Ford Motor (1975)	Max	Auto crash parts	Dealer
FTC v. Amway Corp. (1975)	Min	Household & personal goods	Government
General Beverage Sales Co. v. East-Side Winery (1975)	Min	Wine	Terminated dealer
Minnesota v. Sloneker Milk Co. (1975)	Min	Milk	Government
Mt. Vernon Sundat Inc. v. Nissan Motor Corp. in USA (1975)	Min	Autos	Dealer
Pitchford v. PEPI, Inc. (1975)	Min	Scientific instruments	Terminated dealer
US v. Saks & Co. (1975)	Min	Women's clothing	Government
Alaska v. Simmons Co. (1976)	Min	Mattresses	Government
Allen v. Oil Shale Corp. (1976)	Min	Oil	Terminated dealer
BP Oil v. Park Stations Inc. (1976)	Min	Gasoline	Dealer
Clairol Inc. v. Boston Disc. Center Of Berkeley Inc. (1976)	Min	Cosmetics	Dealer
Colorado v. James B. Beam Distilling Co. (1976)	Min	Liquor	Government
Continental Distributing v. Somerset Importers, Ltd. (1976)	Min	Liquor	Terminated dealer
Davison v. Crown Central Petroleum Corp. (1976)	Max	Gasoline	Dealer
Denton v. Fairfield Publishing (1976)	Max	Newspapers	Dealer
Freed Oil Co. v. Quaker State Oil Refining Corp. (1976)	Min	Motor oil	Terminated dealer

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
No/ Other AT	Not Guilty		Territories	Refusal to deal, price discrimination, monopoly	
Yes	Guilty		Customer restrictions, location, advertising, exc. dealing	None	Franchise case
No/ Other AT	Guilty	.	Territories	Price discrimination	Exclusive dealers
Yes	Consent		None	None	
Yes	Guilty		Advertising restriction	None	Franchise distribution
No/ Other AT	Guilty		Exc. dealing, territories, tying	None	Exclusive dealers
No/ Other AT	Consent	+d	None	Horizontal price fixing	
Yes	Consent		None	Refusal to deal	
No/ Contract	Not Guilty	.	Boycott, tying	Boycott	
No/ Contract	Summary Judgment/ Defendant	.	None	Price discrimination	Exclusive dealers
Yes	Not Guilty	.	Customer restrictions	Price discrimination	Dual distribution
Yes	Consent		None	Refusal to deal	
Yes	Continued		Territories	Refusal to deal	
Yes	Continued		Tying	Horizontal price fixing	
Yes	Continued		None	None	
No/ Other AT	Guilty		Customer restriction, territories	Refusal to deal	Dual distribution

Continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
FTC v. Shaklee Corp. (1976)	Min	Household & personal goods	Government
FTC v. Levi Strauss and Co. (1976)	Min	Casual clothing	Government
FTC v. United Audio Products, Inc. (1976)	Min	Audio equipment	Government
FTC v. Nikko Electric Corp. of America (1976)	Min	Audio equipment	Government
FTC v. Pande, Cameron & Co. (1976)	Min	Handmade rugs	Government
FTC v. Medalist Industries, Inc. (1976)	Min	Ski clothing	Government
Garrett's v. Farah Manufacturing (1976)	Min	Men's slacks	Dealer
Gelardi Corp. v. Miller Brewing (1976)	Min	Beer	Terminated dealer
Krutsinger v. Mead Foods, Inc. (1976)	Min	Bread	Terminated dealer
Mass. v. Datamarine Int'l Inc. (1976)	Min	Marine elec. equipment	Government
Minnesota v. Schott Brothers (1976)	Min	Leather clothing	Government
Newberry v. Washington Post (1976)	Max	Newspapers	Dealer
Roberts v. Exxon Corp. (1976)	Max	Gasoline	Dealer
Sulmeyer v. Seven-Up Co. (1976)	Max	Soft drink franchise	Competitor
Vane v. Amerada Hess (1976)	Max	Gasoline	Terminated dealer
Weight Watchers of Rocky Mountains v. WW International (1976)	Max	Weight control classes	Dealer
Workman v. State Farm Mutual Auto Insurance (1976)	Max	Auto shops/ insurance	Other

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Consent		Customer restriction, location	None	
Yes	Consent		Advertising, customer restriction, tying	None	
Yes	Consent		Advertising	None	
Yes	Consent		Customer, advertising restrictions	None	
Yes	Consent		Advertising	None	
Yes	Consent		Customer, advertising restriction	None	
Yes	Not Guilty		None	Refusal to deal	
No/ Contract	Summary Judgment/ Defendant		Territories	Refusal to deal, price discrimination	
Yes	Not Guilty		Product restriction	None	
Yes	Consent		None	None	
Yes	Consent		None	Refusal to deal	
No/ Contract	Guilty		Customer restriction, territories	Price discrimination	Territorial allocations
Yes	Continued		None	None	Dual distribution, exclusive distribution
No/ Other AT	Continued		Exc. dealing, territories	Monopoly	Franchise distribution
No/ Contract	Continued		Tying	Horizontal price fixing	Dual distribution
Yes	Summary Judgment/ Defendant		None	None	Franchise system
Yes	Summary Judgment/ Defendant		N/A	Boycott, horizontal price fixing	

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Alaska v. Zale Corp. (1977)	Min	Jewelry	Government
Blackwelder Furniture Co. v. Seilig Manufacturing Co. (1977)	Min	Furniture retailer	Terminated dealer
Burch v. A. S. Abell Co. (1977)	Min	Newspapers	Government
California v. CBS Inc. (1977)	Min	Musical instruments	Government
Companie Nouvelle des Parfumes D'Arsay v. D'Arsay Perfumes (1977)	Min	Perfume	Dealer
Crown Central Petroleum v. Brice (1977)	Max	Gasoline	Terminated dealer
FTC v. Salomon/North America, Inc. (1977)	Min	Ski equipment	Government
FTC v. Olin Ski Co. (1977)	Min	Ski equipment	Government
FTC v. Copco, Inc. (1977)	Min	Gourmet cookware	Government
Golf City Inc. v. Wilson Sporting Goods Co. (1977)	Min	Golf equipment	Dealer
H.L. Moore Drug Exchange v. Eli Lilly & Co. (1977)	Min	Prescription drugs	Terminated dealer
Hardin v. Houston Chronicle (1977)	Max	Newspapers	Terminated dealer
Jacobson & Co. v. Armstrong Cork Co. (1977)	Min	Ceiling products	Terminated dealer
Keener v. Sizzler Family Steak Houses (1977)	Max	Restaurant	Dealer
Kramer Motors Inc. v. British Leland Motors Inc. (1977)	Min	Autos	Terminated dealer
La. Attorney General Opinion (1977)	Min	All products	Other
NJ v. Lawn King, Inc. (1977)	Min	Lawn care	Government

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Consent		None	None	
Yes	Continued		Territories	None	
No/ Other AT	Consent	+s	None	Horizontal price fixing	
Yes	Consent		Customer restriction	None	
Yes	Continued		Customer restriction	None	
No/ Contract	Guilty		None	None	Vertically integrated
Yes	Consent		Customer, advertising restriction	None	
Yes	Consent		Customer, advertising restriction	None	
Yes	Consent		Customer, advertising restriction	None	
No/ Other AT	Guilty		Locational restriction	Refusal to deal	Dual distribution
Yes	Guilty		Customer restriction, territories	Refusal to deal	
Yes	Continued		Territories	Refusal to deal	Territorial allocations
No/ Other AT	Not Guilty		Customer restriction, territories	Refusal to deal	
No/ Contract	Not Guilty		Tying	None	Franchise distribution
Yes	Summary Judgment/ Defendant		Exclusive dealing	Refusal to deal	Franchise distribution
Yes	N/A		None	None	Interpretation of La. statute
Yes	Guilty		Territories, exc. dealing, tying, adv. restriction	Restraints on alienation	New entrant in 1970; case filed in 1973; franchises

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Naify v. McClatchy Newspapers (1977)	Max	Newspapers	Terminated dealer
Reiter v. Sonotone Corp. (1977)	Min	Hearing aids	Customer
Santa Clara Valley Dist. Co. v. Pabst Brewing Co. (1977)	Max	Beer distributor	Dealer
Alaska v. Bulova Watch Co. (1978)	Min	Watches	Government
Alaska v. Texaco, Inc. (1978)	Min	Gasoline	Government
Beckers v. Int'l Snowmobile Industry Assoc. (1978)	Min	Snowmobiles	Class action
Belk-Avery Inc. v. Henry I. Siegel Co. (1978)	Min	Women's clothing	Terminated dealer
Blatt v. Lorenz-Schneider Inc. (& Borden) (1978)	Min	Snack foods	Terminated dealer
California v. Armstrong Enterprises, Inc. (1978)	Min	Limited edition plates	Government
California v. Tom Morey & Co. (1978)	Min	Surfboards	Government
Canadian American Oil Co. v. Union Oil Co. of CA (1978)	Min	Gasoline	Terminated dealer
Cernuto, Inc. v. United Cabinet (1978)	Min	Kitchen cabinets	Terminated dealer
Eastern Scientific Co. v. Wild Heerbrugg Instruments (1978)	Min	Scientific instruments	Terminated dealer
Eiberger v. Sony Corp. of America (1978)	Min	Dictating equipment	Terminated dealer
FTC v. Performance Sailcraft, Inc. (1978)	Min	Sailboats	Government
FTC v. Interco, Inc. (1978)	Min	Clothing	Government

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
No/ Other AT	Summary Judgment/ Defendant		Territories	Refusal to deal, monopoly	Dual distribution
No/ Other AT	Continued	+s	Customer restriction, territories	Horizontal price fixing	
Yes	Not Guilty		Customer, territories, tying	Refusal to deal	
Yes	Consent		None	None	
Yes	Consent		None	None	Exclusive dealers
Yes	Summary Judgment/ Defendant		None	None	
No/ Contract	Not Guilty		None	None	
No/ Other AT	Not Guilty		Tying	Refusal to deal, price discrimination	Vertically integrated
Yes	Consent		None	None	
Yes	Consent		None	None	
Yes	Not Guilty		None	None	Exclusive dealers
No/ Contract	Summary Judgment/ Defendant		Territories	Refusal to deal	
No/ Other AT	Guilty		Territories	None	Territorial allocations
No/ Other AT	Guilty	+d	Territories	Horizontal price fixing	Began US distribution in 1971; case in 1976; franchises.
Yes	Consent		Territories, advertising restriction	Price discrimination	
Yes	Consent		Advertising restriction, exc. dealing	None	Dual distribution

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Haden Co. v. Johns-Manville Sales Corp. (1978)	Max	Construction products	Terminated dealer
Hardwick v. Nu-Way Oil Co. (1978)	Min	Gasoline	Terminated dealer
Kahn Music Co. v. Baldwin Piano & Organ Co. (1978)	Min	Pianos	Terminated dealer
Karkell v. Blue Shield of Mass. (1978)	Max	Health insurance	Other
Kestenbaum v. Falstaff Brewing (1978)	Max	Beer distributor	Dealer
Krehl v. Baskin-Robbins Ice Cream Co. (1978)	Max	Ice cream franchise	Class action
NJ Guild of Hearing Aid Dispersers v. Long (1978)	Max	Hearing aids	Dealer
Quality Discount Tires v. Firestone Tire & Rubber (1978)	Min	Auto tires	Terminated dealer
Rice v. ABC Appeals Board (1978)	Min	Liquor	Dealer
US v. B.F. Goodrich Co. (1978)	Min	Tires	Government
US v. Great Western Sugar Co. (1978)	Min	Refined sugar	Government
Uniroyal v. Jetco Auto Services (1978)	Min	Auto tires	Terminated dealer
Universal Lite Distributors v. Northwest IndustriesInc. (1978)	Min	Fluorescent lamp ballasts	Terminated dealer
Whims Appliance Service Inc. v. General Motors Corp. (1978)	Max	Appliances	Terminated dealer
Aladdin Oil Co. v. Texaco Inc. (1979)	Min	Oil distribution	Potential dealer
Arnott v. American Oil Co. (1979)	Max	Gasoline	Terminated dealer

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
No/ Contract	Not Guilty		None	Price discrimination	New product line
No/ Other AT	Summary Judgment/ Defendant	.	None	Price discrimination	Vertically integrated
No/ Other AT	Continued		Locational restriction	None	Franchise distribution
Yes	Guilty		None	Refusal to deal	
Yes	Guilty		Territories, tying, adv. restriction	None	
No/ Other AT	Not Guilty		Territories, tying	None	Franchise distribution
Yes	Not Guilty		None	None	Challenge to regulation
Yes	Not Guilty		Advertising restriction	None	Franchise distribution
Yes	Guilty		None	None	Challenge to regulation
Yes	Consent		None	None	Dual distribution
No/ Other AT	Consent	+d	None	Horizontal price fixing	
No/ Contract	Guilty		None	None	Franchise distribution
No/ Contract	Summary Judgment/ Defendant	.	None	Horizontal price fixing, monopoly, price discrimination	
No/ Contract	Summary Judgment/ Defendant		Exc. dealing, territories	Refusal to deal	
Yes	Summary Judgment/ Defendant	.	None	Refusal to deal	Exclusive distribution, dual distribution
No/ Contract	Guilty		None	None	

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Cal. Retail Liquor Dealers v. Midcal Aluminum Inc. (1979)	Min	Liquor	Dealer
Carr Electronics Corp. v. Sony Corp of America (1979)	Min	Televisions	Terminated dealer
Colorado v. Torbuc Corp. (1979)	Min	Motorcycles	Government
Comfort Trane Air Cond. v. Trane Co. (1979)	Min	Air conditioning systems	Terminated dealer
Connecticut v. Viking Sewing Machines Co. (1979)	Min	Sewing machines	Government
Del Rio Dist. Inc. v. Adolph Coors Co. (1979)	Min	Beer	Terminated dealer
Fine Paper Cases (1979)	Min	Fine paper	Class action
FTC v. Huk-a-Poo Sportsware, Inc. (1979)	Min	Women's clothing	Government
FTC v. Appliance Dealers Cooperative (1979)	Min	Appliances	Government
FTC v. Motherhood Maternity Shops (1979)	Min	Maternity clothing	Government
FTC v. Jonathan Logan, Inc. (1979)	Min	Women's clothing	Government
FTC v. Pendelton Woolen Mills, Inc. (1979)	Min	Clothing	Government
FTC v. Gant, Inc. (1979)	Min	Clothing	Government
FTC v. Jaymar-Ruby, Inc. (1979)	Min	Men's clothing	Government
Highspire v. UKF America (1979)	Min	Agricultural chemicals	Potential dealer
Iowa v. CESH Corp. (1979)	Min	Swine confinement systems	Government
Levi Strauss & Co. v. Federal Pants Co. (1979)	Min	Clothing	Terminated dealer
Marty's Floor Covering Co. v. GAF Corp. (1979)	Min	Floor covering	Dealer

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Guilty		None	None	Challenge to regulation
No/ Contract	Summary Judgment/ Defendant	.	None	None	
Yes	Consent	+d	None	Horizontal price fixing	
No/ Contract	Not Guilty	.	Territories	Monopoly, market division	Dual distribution
Yes	Consent		None	None	
No/ Other AT	Not Guilty		Territories	None	
No/ Other AT	Not Guilty	+s	None	Horizontal price fixing	Dual distribution
Yes	Consent		Advertising	None	
No/ Other AT	Consent	+d	Customer restriction, territories	Horizontal price fixing	
Yes	Consent		Advertising	None	Dual distribution
Yes	Consent		Advertising	None	
Yes	Consent		Advertising	None	
Yes	Consent		Advertising	None	
Yes	Consent		Advertising	None	
No/ Other AT	Not Guilty	.	None	Refusal to deal, price discrimination, monopoly	
Yes	Consent		None	None	
Yes	Continued		None	Refusal to deal	
Yes	Not Guilty	.	None	Price discrimination	

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Morrison v. Nissan Motor Co. (1979)	Min	Auto repair	Customer
NY v. Lawn-A-Mat Chemical & Equipment Corp. (1979)	Min	Lawn care franchise	Government
Pure Water Resources v. Consolidated Foods Corp. (1979)	Max	Water filtration devices	Dealer
Reno-West Coast Dist. Co. v. Mead Corp. (1979)	Min	Paper goods	Terminated dealer
Schwimmer v. Sony Corp. of America (1979)	Min	Electronic equipment	Terminated dealer
Sweeney & Sons Inc. v. Texaco Inc. (1979)	Min	Gasoline	Terminated dealer
US v. Areofin Corp. (1979)	Min	Air conditioner coils	Government
Wedgewood Investment Corp. v. Int'l Harvester Co. (1979)	Min	Trucks/agr. equipment	Dealer
Alloy International Co. v. Hoover-NSK Bearing Co. (1980)	Min	Motor bearings	Terminated dealer
Auburn News Co. v. Providence Journal Co. (1980)	Max	Newspapers	Dealer
California v. Levi Strauss (1980)	Min	Clothing	Government
FTC v. The Hartz Mountain Corp. (1980)	Min	Pet supplies	Government
FTC v. Russell Stover Candies, Inc. (1980)	Min	Candy	Government
FTC v. Clinique Laboratories, Inc. (1980)	Min	Cosmetics	Government
FTC v. Towle Manufacturing Co. (1980)	Min	Silverware	Government

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Summary Judgment/ Defendant		None	None	Franchise distribution
Yes	Consent		Customer & locational restrictions, tying, territories	None	Franchise distribution
No/ Other AT	Not Guilty		None	Monopoly	New product
Yes	Not Guilty	.+d	Territories	Horizontal price fixing	Dual distribution
No/ Other AT	Guilty	.	Territories	Price discrimination	Dual distribution
No/ Other AT	Not Guilty	.	None	Refusal to deal, price discrimination, monopoly	Exclusive dealers
No/ Other AT	Consent	+s	Customer restriction, territories, tying	Horizontal price fixing	
No/ Contract	Summary Judgment/ Defendant		Territories	None	Franchise distribution
Yes	Not Guilty		None	Refusal to deal	
Yes	Continued		Exclusive dealing	Monopoly	Territorial allocations
Yes	Continued		None	None	
Yes	Consent		Exc. dealing, customer, territories, location, tying	Price discrimination	
Yes	Guilty		None	None	Test of *Colgate*
Yes	Consent		Advertising	None	
Yes	Consent		Customer restriction, advertising	None	

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
FTC v. Darvel, Inc. (1980)	Min	Casual clothing	Government
FTC v. Totes, Inc. (1980)	Min	Accessories	Government
FTC v. Tingley Rubber Corp. (1980)	Min	Rubber footware	Government
Heir v. Degnan (1980)	Min	Liquor	Class action
Koerner & Assoc. Inc. v. Aspen Labs Inc. (1980)	Min	Orthopedic products	Terminated dealer
Mich. Assn. of Psychotherapy Clinics v. Blue Cross (1980)	Max	Health services/ BC-BS	Other
New Jersey v. Breuer Electric Mfg. Co. (1980)	Min	Floor machines	Government
Sausalito Pharmacy v. Blue Shield of California (1980)	Max	Prescription drugs/ BC-BS	Other
Sharon Sez, Inc. v. Interco (1980)	Min	Women's clothing	Dealer
Sprayrite Service Corp. v. Monsanto Co. (1980)	Min	Agricultural chemicals	Terminated dealer
Tennessee v. Levi Strauss (1980)	Min	Clothing	Government
Texas v. Scott & Fetzer Co. (1980)	Min	Vacuum cleaner	Government
US v. E. I. Dupont de Nemours (1980)	Min	Paint	Government
US v. Jos. Schlitz Brewing Co. (1980)	Min	Beer	Government
Wagner & Sons v. Appendagez (1980)	Min	Clothing	Terminated dealer
Wisconsin v. Marigold Foods (1980)	Min	Milk	Government
Yentsch v. Texaco, Inc. (1980)	Max	Gasoline	Terminated dealer
Young v. Jo-Ann's Nut House (1980)	Max	Candy & nut franchises	Dealer

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Consent		Advertising	None	
Yes	Consent		Advertising	None	
Yes	Consent		Advertising	None	
Yes	Not Guilty		N/A	None	Challenge to regulation
No/ Other AT	Summary Judgment/ Defendant		Tying	Refusal to deal, price discrimination, monopoly	
Yes	Guilty		None	Refusal to deal, price discrimination	
No/ Other AT	Consent	+d	Customer restriction, territories	Horizontal price fixing	
Yes	Summary Judgment/ Defendant		N/A	Horizontal price fixing	
Yes	Continued		None	Boycott	
Yes	Guilty		Boycott, territories	Boycott	Territorial allocations
Yes	Consent		N/A	None	
No/ Other AT	Consent		Territories, customer & advertising restriction	None	
Yes	Consent		Advertising restriction	None	
No/ Other AT	Consent	+d	None	Horizontal price fixing	
Yes	Guilty		None	Refusal to deal	
Yes	Consent		None	None	
Yes	Guilty		Tying	None	
Yes	Continued		Tying	None	Franchise distribution

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Arizona v. Arizona License Beverage Assn. (1981)	Min	Liquor	Government
Ballo v. James S. Black Co. (1981)	Min	House & building lots	Customer
Battle v. Lubrizol Corp. (1981)	Min	Rustproofing materials	Terminated dealer
CUSCO v. Certain-teed Products (1981)	Min	Pipe	Terminated dealer
California v. Morris-Tait Assoc. (1981)	Min	Stereo equipment	Government
Carlson Machine Tools Inc. v. American Tool, Inc. (1981)	Max	Machine tool lathes	Terminated dealer
City of NY v. Toby's Electronics (1981)	Max	Electronic equipment	Government
FTC v. Palm Beach Co. (1981)	Min	Men's clothing	Government
Hawes Office Systems v. Wang Laboratories, Inc. (1981)	Min	Wordprocessing equipment	Dealer
JBL Enterprises Inc. v. Jhirmack Enterprises Inc. (1981)	Min	Cosmetics	Dealer
Janush v. U-Haul Co. of Detroit (1981)	Min	Truck rental	Dealer
Medical Arts Pharmacy v. Blue Cross & Blue Shield (1981)	Max	Prescription drugs/ BC-BS	Class action
Mesirow v. Pepperidge Farms (1981)	Min	Bakery products	Dealer
Metts v. Clark Oil & Refining (1981)	Max	Gasoline	Dealer
Mezzetti Associates v. State Liquor Authority (1981)	Min	Liquor	Dealer
Minnesota v. Marigold Foods (1981)	Min	Milk	Government

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Not Guilty	+d	None	Horizontal price fixing	Regulation issue
No/ Other AT	Guilty	+s	Exc. dealing, territories	Boycott, horizontal price fixing	
No/ Contract	Summary Judgment/ Defendant	.	None	None	
No/ Other AT	Not Guilty	.	Sales agency agreement	Refusal to deal	Vertically integrated
Yes	Consent		None	None	
No/ Contract	Summary Judgment/ Defendant		Boycott, territories	Boycott	Territorial allocations
Yes	Summary Judgment/ Defendent		None	None	
Yes	Consent		Advertising	None	
No/ Contract	Continued		Customer restriction, territories	None	
No/ Other AT	Summary Judgment/ Defendant	.	Customer, territories, tying	None	New entrant 1972;case triggered by reorg. 1979; territorial allocations
Yes	Summary Judgment/ Defendant		None	None	Vertically integrated
Yes	Summary Judgment/ Defendant		N/A	Horizontal price fixing	
Yes	Summary Judgment/ Defendant		Territories	Monopoly	Dual distribution
No/ Other AT	Not Guilty		Tying	Monopoly	Dual distribution
Yes	Guilty		N/A	None	Challenge to regulation
Yes	Consent		None	None	

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Mulhearn v. Rose-Neath Funeral Home Inc. (1981)	Min	Funeral insurance	Competitor
Murphy v. White Hen Pantry (1981)	Max	Food franchise	Dealer
New Mexico v. Naus (1981)	Min	Dimethyl sulfoxide	Government
Olsen v. Progressive Music Supply Inc. (1981)	Min	Musical instruments	Dealer
Roesch v. Star Cooler Corp. (1981)	Min	Ice machines	Terminated dealer
Rogers v. Consolidated Distributors Inc. (1981)	Min	Television sets	Potential dealer
Serlin Wine & Spirit Merchants v. Healy (1981)	Min	Liquor	Dealer
US v. Cuisinarts, Inc. (1981)	Min	Food processors	Government
US v. Under Sea Industries (1981)	Min	Diving equipment	Government
Wardell v. Certified Oil Co. (1981)	Max	Cigarettes	Dealer
Westgo Industries v. W.J. King (1981)	Min	Agricultural equipment	Dealer
AAA Liquors Inc. v. Jos. E. Seagrams & Sons Inc. (1982)	Max	Liquor	Dealer
ABC Board of KY. v. Taylor Drug Stores Inc. (1982)	Min	Liquor	Dealer
Battipaglia v. NY State Liquor Authority (1982)	Min	Liquor	Dealer
Blake Associates, Inc. v. Omni Spectra, Inc. (1982)	Min	Electronic parts	Terminated dealer
Bruce Drug v. Hollister Inc. (1982)	Min	Medical goods	Terminated dealer
California v. Sanyo Electric Inc. (1982)	Min	Stereo equipment	Government

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
No/ Other AT	Summary Judgment/ Defendant	.	Territories, tying	None	
No/ Contract	Summary Judgment/ Defendant		None	Price discrimination	Franchise distribution
Yes	Consent		None	None	
No/ Other AT	Guilty	+d	Boycott	Boycott, horizontal price fixing	
Yes	Not Guilty	.	None	None	
No/ Other AT	Summary Judgment/ Defendant		None	Refusal to deal	
Yes	Guilty		N/A	None	Challenge to regulation
Yes	Consent		Customer restriction	None	New product in 1974; case filed in 1979.
Yes	Consent		None	None	
Yes	Continued		None	None	
No/ Contract	Not Guilty	.	None	Horizontal agree. not to compete	New product in 1974; case in 1975; exclusive dealers
Yes	Not Guilty		None	None	
Yes	Guilty		N/A	Horizontal price fixing	Challenge to regulation
Yes	Not Guilty		None	None	Challenge to regulation
Yes	Continued	.+d	Territories	Horizontal price fixing, market division	Dual distribution
Yes	Continued		Boycott	Boycott	
Yes	Consent		None	None	

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Conway v. Bulk Petroleum Corp. (1982)	Min	Gasoline	Terminated dealer
Delaware v. Russell Stover (1982)	Min	Candy	Government
Enrico's Inc. v. Rice (1982)	Min	Liquor	Customer
Feldman v. Health Care Service Corp. (1982)	Max	Prescription drugs/ insurance	Other
FTC v. Onkyo USA Corp. (1982)	Min	Audio equipment	Government
FTC v. Germaine Monteil Cosmetiques (1982)	Min	Cosmetics	Government
General Cinema Corp. v. Buena Vista Distribution (1982)	Min	Motion picture distribution	Dealer
Kolling v. Dow Jones & Co. (1982)	Max	Newspapers	Terminated dealer
Levicoff v. General Motors (1982)	Min	Auto financing	Dealer
Mass. v. Russell Stover Candies (1982)	Min	Candy	Government
Maykuth v. Adolph Coors Co. (1982)	Min	Beer	Terminated dealer
Mendelovitz v. Adolph Coors (1982)	Min	Beer	Terminated dealer
NY v. Queensboro Farm Products (1982)	Min	Milk	Government
New York v. Elmhurst Milk & Cream Co. (1982)	Min	Milk	Government
Olympic Distributors Inc. v. Perkins Co. (1982)	Min	Ski equipment	Terminated dealer
Parsons v. Ford Motor Corp. (1982)	Min	Autos/fleet sales	Dealer
Valley Liquors Inc. v. Renfield Importers Ltd. (1982)	Min	Liquor	Terminated dealer
White v. Hearst Corp. (1982)	Max	Newspapers	Terminated dealer

Notes at end of table.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
No/ Other AT	Summary Judgment/ Defendant		Tying	None	Exclusive dealers
Yes	Consent		None	None	Franchise distribution
Yes	Guilty		None	None	Challenge to regulation
Yes	Summary Judgment/ Defendant		None	Horizontal price fixing	
Yes	Consent		Advertising	None	
Yes	Consent		Advertising	None	
No/ Other AT	Guilty		None	None	
Yes	Guilty		Exc. dealing, territories	Refusal to deal	Territorial allocations
Yes	Not Guilty	.	Tying	Horizontal price fixing	Franchise distribution
Yes	Continued		None	None	Franchise distribution
No/ Contract	Not Guilty	.	Territories	None	
No/ Other AT	Not Guilty	.	Territories	Refusal to deal	
No/ Other AT	Continued	+s	Customer restriction	Horizontal price fixing	
No/ Other AT	Continued	+s	Customer restriction	Horizontal price fixing, market division	
Yes	Not Guilty	.	None	Refusal to deal	
No/ Other AT	Summary Judgment/ Defendant	.	Customer restriction	Refusal to deal, monopoly	Franchise distribution
No/ Other AT	Continued		Territories	Market division	
No/ Other AT	Summary Judgment/ Defendant		None	Refusal to deal	Triggered by vertical integration

Table continued on next page.

TABLE A1 -- *Continued*

Case Name (Year)[1]	RPM Type	Product	Initiated Suit
Zell-Aire of New England v. Zell-Aire Corp. (1982)	Min	Appliances	Terminated dealer
Androit v. Quickprint of America (1983)	Min	Franchise printing	Dealer
Clippard Instrument Laboratory v. Norman Equip. Co. (1983)	Min	Pneumatic equipment	Terminated dealer
Martin Ice Cream v. Chipwich (1983)	Min	Ice cream	Terminated dealer

SOURCE: **CCH Trade Cases**, 1976 - 1982.

NOTES: [1] Year of first recorded decision.

[2] "Yes" indicates that the RPM charge appeared to be the primary charge.
"No/Other AT" indicates that other antitrust charges were the primary focus of the case with RPM as a subsidiary charge.
"No/Contract" indicates that contract charges were the primary focus of the case.

[3] "." indicates the "frivolous" cases as defined for Table 6.
"+" indicates the potential collusion cases as indicated by allegations of collusion. See Table 5. Letters indicate whether the alleged horizontal price fixing was at the supplier (s), wholesaler (w), or retail dealer (d) levels.

[4] "Continued" is used to denote all cases in which some initial decision was issued on preliminary legal issues (e.g., standing, preliminary injunctions, etc.) but no further decisions were reported. Presumably most of these cases were dropped or otherwise settled.

RPM Primary Charge[2]	RPM Final Decision	Special Cases[3]	Other Vertical Charges	Other Antitrust Charges	Comments
Yes	Not Guilty	.	None	Refusal to deal	
No/ Contract	Continued		None	None	Franchise distribution
No/ Other AT	Not Guilty	.	Exclusive dealing, tying	None	
Yes	Continued		None	Monopoly, price discrimination	New entrant 1981; exclusive dealers

TABLE A2

Court and CCH Citations For Cases With a Vertical Price-Fixing Allegation, 1976 - 1982

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
US v. Scott Aviation Division (64,998, 70,148)		WD NY	2	
US v. Quaker State Oil Refining Co. (63,627)		WD Pa	3	
Mailand v. Powerine Oil Co. (Burckle) (61,818, 74,472)	Cal	CD Cal	9	
Merit Motors Inc. v. Chrysler Corp. (60,959, 61,772, 74,116, 74,288, 74,346)		DC	11	
US v. R&G Sloane Mfg. Co. (60,846, 74,289)		CD Cal	9	
FTC v. Rubbermaid, Inc. (D-8939, 62,016)			6	
Perry v. Amerada Hess Corp. (61,295, 61,531, 74,972)		ND Ga	5	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts		
	State	District	Circuit Supreme
Phillips v. Crown Central Petroleum Corp. (60,335, 61,524, 61,525, 61,526, 61,396, 61,377, 61,599, 62,743, 74,786)		Md	4
Sargent-Welch Scientific Co. v. Ventron Corp. (61,146, 61,761, 62,483, 74,791)		ND Ill	7
Kane v. Martin Paint Stores Inc. (60,176, 60,379, 60,743, 61,668, 75,296)		SD NY	2
Knutson v. Daily Review Inc. (60,670, 61,196, 62,532, 63,079, 64,421, 75,273)		ND Cal	9
Matarazzo v. Friendly Ice Cream Corp. (61,217, 74,923)		ED NY	2
Milonas v. Amerada Hess Corp. (60,242, 61,069, 75,262)		SD NY	2
World-Wide Volkswagon v. Autobahn Motors (62,391, 63,601, 75,077, 75,135)		SD NY	2
Call Carl Inc. v. BP Oil Corp. (60,775, 61,401)		Md	4

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
FLM Collision Parts Inc. v. Ford Motor Co. (60,658, 60,784, 61,103)		SD NY	2	
FTC v. Amway Corp. (D-9023)				
General Beverage Sales Co. v. East-Side Winery (60,409, 61,283, 61,815)		ED Wis	7	
Minnesota v. Sloneker Milk Co. (60,716)	Minn			
Mt. Vernon Sundat v. Nissan Motor Corp. in USA (60,842, 61,507)		ED Va	4	
Pitchford v. PEPI, Inc. (60,653, 60,744, 61,741)		WD Pa	3	
US v. Saks & Co. (60,219, 60,741, 61,056, 61,201)		SD NY	2	
Alaska v. Simmons Co. (60,882)	Alaska			

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts		
	State	District	Circuit Supreme
Allen v. Oil Shale Corp. (61,916, 61,917)		ED Tenn	6
BP Oil v. Park Stations Inc. (60,853)		SD NY	2
Clairol v. Boston Disc. Center Of Berkeley (61,108, 62,988)		ED Mich	6
Colorado v. James B. Beam Distilling Co. (60,920, 60,993)	Colo		
Continental Distributing v. Somerset Importers (61,171)		ND Ill	7
Davison v. Crown Central Petroleum Corp. (61,277)		Md	4
Denton v. Fairfield Publishing Co. (60,872)	Cal		
Freed Oil v. Quaker State Oil Refining Corp. (61,305, 61,758)		WD Pa	3

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
FTC v. Shaklee Corp. (C-2790)				
FTC v. Levi Strauss and Co. (D-9081)				
FTC v. United Audio Products, Inc. (C-2828)				
FTC v. Nikko Electric Corp. of America (C-2829)				
FTC v. Pande, Cameron & Co. of New York (C-2850)				
FTC v. Medalist Industries (C-2851)				
Garrett's Inc. v. Farah Manufacturing Co. (60,833)		SC	4	
Gelardi Corp. v. Miller Brewing Co. (61,755, 63,745)		NJ	3	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Krutsinger v. Mead Foods, Inc. (61,161, 61,286)	Okla	WD Okla	10	
Mass. v. Datamarine Int'l Inc. (60,994)	Mass			
Minnesota v. Schott Brothers Inc. (60,850)	Minn			
Newberry v. Washington Post Co. (60,736, 61,657, 61,759)		DC	11	
Roberts v. Exxon Corp. (60,869, 61,451)		WD La	5	
Sulmeyer v. Seven-Up Co. (60,799)		SD NY	2	
Vane v. Amerada Hess (61,528)		Md	4	
Weight Watchers of Rocky Mountains v. WW Int'l. (61,157)		ED NY	2	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Workman v. State Farm Mutual Auto Insurance (64,772)		ND Cal	9	
Alaska v. Zale Corp. (62,303)	Alaska			
Blackwelder Furniture v. Seilig Manufacturing (61,292)		WD NC	4	
Burch v. A. S. Abell Co. (61,463)	Md			
California v. CBS Inc. (61,392)	Cal			
Co. Nouvelle des Parf. D'Arsay v. D'Arsay Perfumes (61,482)	NY			
Crown Central Petroleum v. Brice (61,333)		ED Va	4	
FTC v. Salomon/North America, Inc. (C-2859)				

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts		
	State	District	Circuit Supreme
FTC v. Olin Ski Co. (C-2895)			
FTC v. Copco, Inc. (C-2900)			
Golf City Inc. v. Wilson Sporting Goods Co. (61,521, 63,345)		ED La	5
H.L. Moore Drug Exchange v. Eli Lilly & Co. (61,462, 62,082, 62,196, 62,674, 63,300, 63,657, 64,335)		SD NY	2
Hardin v. Houston Chronicle Publishing Co. (61,374, 61,561, 62,032)		SD Tex	5
Jacobson & Co. v. Armstrong Cork Co. (60,953, 61,264, 61,479)		SD NY	2
Keener v. Sizzler Family Steak Houses (61,682, 62,712)		ND Tex	5
Kramer Motors v. British Leland Motors (61,285)		CD Cal	9

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Number or FTC Docket Number)	Courts				
	State	District	Circuit	Supreme	
Louisiana Attorney General Opinion (61,457)	La				
NJ v. Lawn King, Inc. (61,635, 62,800, 63,488)	NJ	ND Cal	9		Yes
NJ v. McClatchy Newspapers (61,444, 61,558, 62,723)		ND Cal	8		
Naify v. Sonotone Corp. (61,383, 61,558, 62,688, 63,212)		Minn	9		
Reiter v. Sonotone Corp. (61,360, 62,098, 62,183, 62,688, 63,212)		Alaska			
Santa Clara Valley Dist. Co. v. Pabst Brewing Co. (61,537)		Alaska	8		
Alaska v. Bulova Watch Co. (63,397)		Minn			
Alaska v. Texaco, Inc. (62,284)					
Alaska v. Int'l Snowmobile Industry Assoc. (62,191)					
Beckers v.					

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Belk-Avery Inc. v. Henry I. Siegel Co. (62,880)		MD Ala	5	
Blatt v. Lorenz-Schneider Co. Inc. (& Borden) (61,875, 63,670, 63,982)		SD NY	2	
California v. Armstrong Enterprises, Inc. (62,335)	Cal			
California v. Tom Morey & Co. (62,328)	Cal			
Canadian American Oil Co. v. Union Oil Co. of CA (61,910)		ND Cal	9	
Cernuto, Inc. v. United Cabinet Corp. (62,060, 62,509)		WD Pa	3	
Eastern Scientific Co. v. Wild Heerbrugg Instruments (61,926)		RI	1	
Eiberger v. Sony Corp. of America (62,336, 63,328, 63,963)		SD NY	2	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
FTC v. Performance Sailcraft In (C-2922)				
FTC v. Interco, Inc. (C-2929)				
Haden Co. v. Johns-Manville Sales Corp. (62,853)		ND Tex	5	
Hardwick v. Nu-Way Oil Co. (61,909, 62,482)		SD Tex	5	
Kahn Music Co. v. Baldwin Piano & Organ Co. (62,377, 62,785)		SD NY	2	
Karkell v. Blue Shield of Massachusetts (62,480, 62,481, 64,842)		Mass	1	
Kestenbaum v. Falstaff Brewing Corp. (62,100)		WD Tex	5	
Krehl v. Baskin-Robbins Ice Cream Co. (61,870, 62,806, 64,449, 64,927, 65,907, 66,300)		CD Cal	9	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts		
	State	District	Circuit Supreme
NJ Guild of Hearing Aid Dispersers v. Long (62,842)	NJ		
Quality Discount Tires v. Firestone Tire & Rubber (61,848)	Md		
Rice v. ABC Appeals Board (62,054)	Cal		
US v. B.F. Goodrich Co. (62,389, 63,353, 63,898)		ND Cal	9
US v. Great Western Sugar Co. (62,235)		ND Cal	9
Uniroyal Inc. v. Jetco Auto Services Inc. (62,194, 63,806)		SD NY	2
Universal Lite Distrib. v. Northwest Ind. (62,157, 62,789)		Md	4
Whims Appliance Service v. General Motors (62,093)		ND Ohio	6

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Aladdin Oil Co. v. Texaco Inc. (62,890)		WD Tex	5	
Arnott v. American Oil Co. (62,967)		SD	8	
Cal. Retail Liquor Dealers v. Midcal Alum. (62,612, 63,201)	Cal			Yes
Carr Electronics v. Sony Corp. of America (62,540)		ND Cal	9	
Colorado v. Torbuc Corp. (63,020)	Colo			
Comfort Trane Air Cond. v. Trane Co. (62,578)		ND Ga	5	
Connecticut v. Viking Sewing Machines Co. (63,101)	Conn			
Del Rio Dist. Inc. v. Adolph Coors Co. (60,128, 62,454)		WD Tex	5	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Fine Paper Cases (62,551, 63,120, 63,211, 63,564, 64,843, 65,083, 65,475)		ED Pa	3	
FTC v. Huk-a-Poo Sportswear, Inc. (C-2962)				
FTC v. Appliance Dealers Cooperative (C-2969)				
FTC v. Motherhood Maternity Shoppes (C-2974)				
FTC v. Jonathan Logan, Inc. (C-2977)				
FTC v. Pendleton Woolen Mills, Inc. (C-2985)				
FTC v. Gant, Inc. (C-2996)				
FTC v. Jaymar-Ruby, Inc. (C-2997)				

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts		
	State	District	Circuit Supreme
Highspire Inc. v. UKF America Inc. (62,621)		SD NY	2
Iowa v. CESH Corp. (63,000)	Iowa		
Levi Strauss & Co. v. Federal Pants Co. (62,727, 62,728)		CD Cal	9
Marty's Floor Covering Co. v. GAF Corp. (62,762)		ED Va	4
Morrison v. Nissan Motor Co. (62,724)		Md	4
NY v. Lawn-A-Mat Chemical & Equipment (62,591)	NY		
Pure Water Resources v. Consolidated Foods (63,064)		ND Cal	9
Reno-West Coast Dist. Co. v. Mead Corp. (62,544)		ND Cal	9

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Schwimmer v. Sony Corp. of America (62,632, 63,434, 63,580, 63,766, 64,724, 65,022)		ED NY	2	Yes
Sweeney & Sons Inc. v. Texaco Inc. (62,951, 62,955, 63,611)		ED Pa	3	
US v. Areofin Corp. (62,598)		SD NY	2	
Wedgewood Investment v. Int'l Harvester (62,643)	Ariz			
Alloy International v. Hoover-NSK Bearing (63,148)		ND Ill	7	
Auburn News Co. v. Providence Journal Co. (63,640, 64,298)		RI	1	
California v. Levi Strauss (63,685)	Cal			
FTC v. The Hartz Mountain Corp. (C-3008)				

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
FTC v. Russell Stover Candies, Inc. (D-9140, 65,640)			8	
FTC v. Clinique Laboratories, Inc. (C-3027)				
FTC v. Towle Manufacturing Company (C-3029)				
FTC v. Darvel, Inc. (C-3034)				
FTC v. Totes, Inc. (C-3040)				
FTC v. Tingley Rubber Corp. (C-3041)				
Heir v. Degnan (63,269)	NJ			
Koerner & Assoc. v. Aspen Labs (63,404)		SD Tex	5	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Mich. Assn. of Psycho. Clinics v. Blue Cross (63,351, 63,791, 65,035)	Mich	ED Mich	6	
New Jersey v. Breuer Electric Mfg. (63,393)	NJ			
Sausalito Pharmacy v. Blue Shield of Cal. (63,695, 63,885, 64,766)		ND Cal	9	
Sharon Sez, Inc. v. Interco, Inc. (63,667)		SD NY	2	
Sprayrite Service Corp. v. Monsanto Co. (64,808, 65,906)		ND Ill	7	Yes
Tennessee v. Levi Strauss & Co. (63,558, 64,076)	Tenn			
Texas v. Scott & Fetzer Co. (63,331, 65,503)	Tex	WD Tex	5	
US v. E. I. Dupont de Nemours & Co. (63,570)		ND Ohio	6	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
US v. Jos. Schlitz Brewing Co. (63,184, 63,621)		Hawaii	9	
Wagner & Sons v. Appendagez, Inc. (63,169)		SD NY	2	
Wisconsin v. Marigold Foods, Inc. (63,597)	Wis			
Yentsch v. Texaco, Inc. (63,349)		Conn	2	
Young v. Jo-Ann's Nut House, Inc. (63,746)		NJ	3	
Arizona v. Arizona License Beverage Assn. (63,933)	Ariz			
Ballo v. James S. Black Co. (64,877, 66,366)	Wash			
Battle v. Lubrizol Corp. (64,198, 64,576, 65,488)		ED Mo	8	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
CUSCO v. Certain-teed Products Corp. (63,714)		SD IL	7	
California v. Morris-Tait Associates (64,160)	Cal			
Carlson Machine Tools v. American Tool (64,628, 64,806)		D Tex	5	
City of NY v. Toby's Electronics (64,732)	NY			
FTC v. Palm Beach Co. (C-3073)				
Hawes Office Systems v. Wang Laboratories (64,354)		ED NY	2	
JBL Enterprises v. Jhirmack Enterprises (63,870, 64,158, 65,199)		ND Cal	9	
Janush v. U-Haul Co. of Detroit (64,070)		ED Mich	6	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Medical Arts Pharmacy v. BC&BS (64,433, 64,673)		Conn	2	
Mesirow v. Pepperidge Farms, Inc. (64,292, 65,164)		ND Cal	9	
Metts v. Clark Oil & Refining Corp. (64,148)	Mo			
Mezzetti Assoc. v. State Liquor Authority (63,738)	NY			
Minnesota v. Marigold Foods Inc. (64,226)	Minn			
Mulhearn v. Rose-Neath Funeral Home Inc. (64,731)		WD La	5	
Murphy v. White Hen Pantry (64,845, 64,846)		ED Wis	7	
New Mexico v. Naus (63,844)	NM			

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts				
	State	District	Circuit	Supreme	
Olsen v. Progressive Music Supply Inc.	NM	CD Utah 10	2	Yes	
(64,928, 65,257)		ED Mo 8			
Roesch Inc. v. Star Cooler Corp. (64,119, 64,575, 65,487)		Conn 2			
Rogers v. Consolidated Distributors Inc. (63,882)		Conn 11			
Serlin Wine & Spirit Merchants Inc. v. Healy (63,950, 65,661)		DC 6			
US v. Cuisinarts, Inc. (63,979)		SD Ohio 8			
US v. Under Sea Industries Inc. (64,480)		ND			
Wardell v. Certified Oil Co. (64,477)					
Westgo Industries v. W.J. King Co. (63,984)					

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TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
AAA Liquors Inc. v. Jos. E. Seagrams & Sons (65,075)		Colo	10	
ABC Board of KY. v. Taylor Drug Stores Inc. (64,554, 64,831)	Ky			
Battipaglia v. NY State Liquor Authority (64,964, 66,206)		SD NY	2	
Blake Associates, Inc. v. Omni Spectra, Inc. (65,155)		Mass	1	
Bruce Drug Inc. v. Hollister Inc. (64,941)		Mass	1	
California v. Sanyo Electric Inc. (65,201)	Cal			
Conway v. Bulk Petroleum Corp. (64,967)		ND Ill	7	
Delaware v. Russell Stover Candies Inc. (64,950)	Del			Yes

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TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts		
	State	District	Circuit Supreme
Enrico's Inc. v. Rice (65,172, 65,857)		ND Cal	9
Feldman v. Health Care Service Corp. (65,042)		ND Ill	7
FTC v. Onkyo USA Corp. (C-3092)			
FTC v. Germaine Monteil Cosmetiques Corp. (C-3098)			
General Cinema v. Buena Vista Distrib. (64,847, 64,875)		CD Cal	9
Kolling v. Dow Jones & Co. (65,113)	Cal		
Levicoff v. General Motors Corp. (65,112)		WD Pa	3
Mass. v. Russell Stover Candies (64,836)		Mass	1

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Maykuth v. Adolph Coors Co. (64,996)		Mont	9	
Mendelovitz v. Adolph Coors (65,090)		SD Tex	5	
NY v. Queensboro Farm Products (65,071)	NY			
New York v. Elmhurst Milk & Cream Co. (65,070, 65,215)	NY			
Olympic Distributors Inc. v. Perkins Co. (64,999)		ND Ill	7	
Parsons v. Ford Motor Corp. (64,581)		ND Tex	5	
Valley Liquors v. Renfield Importers Ltd. (64,744)		ND Ill	7	
White v. Hearst Corp. (64,491)		Mass	1	

Table continued on next page.

TABLE A2 -- *Continued*

Case Name (CCH Paragraph Numbers or FTC Docket Number)	Courts			
	State	District	Circuit	Supreme
Zell-Aire of New England v. Zell-Aire Corp. (64,835)		NH	1	
Androit v. Quickprint of America Inc. (65,182)		SD Ohio	6	
Clippard Instrument Lab v. Norman Equip. (65,200)		SD Ohio	6	
Martin Ice Cream Co. v. Chipwich Inc. (65,142)		SD NY	2	