Vertical Refusals to Deal under the Sherman Act: Products Liability and Malley-Duff Divide the Circuits

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INTRODUCTION

A manufacturer and D1, a distributor, enter into a contract that designates D1 as distributor of the manufacturer's product within a certain locale. At the behest of D2, a competing distributor, the manufacturer refuses to renew the contract with D1 when it expires and instead installs D2 as its new distributor. Left without a product line and unable to sue under the expired distributorship contract, D1 files an antitrust suit against both the manufacturer and D2, alleging that the elimination of D1 from the marketplace constitutes a vertical refusal to deal that is per se unlawful under section 1 of the Sherman Act.

In response, the defendants argue that their conduct is not actionable. See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464, 1469 (1984) (noting that independent action is not proscribed by § 1 of the Sherman Act; a conspiracy between the manufacturer and distributor(s) is required); Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 711 (11th Cir. 1984) (observing that allocation solely by a franchisor of franchisee territories is per se illegal because such restraints are imposed unilaterally).

Vertical refusals to deal are a conspiracy between two or more actors who stand in a vertical relation to each other in a market structure, such as a manufacturer and a distributor, to eliminate a competing actor, usually another distributor or a retailer, from the market. See Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1978). The term refusal to deal refers to the attempt to terminate the eliminated actor's source of supply. Vertical refusals to deal are also referred to as vertical group boycotts. There is no substantive difference between these terms and they are used interchangeably in this Note.

Vertical refusals to deal between parties at different levels of the market structure are entirely distinct from horizontal refusals to deal, which are agreements among competitors to eliminate other competitors or to divide territories and allocate customers. Such horizontal agreements are clear per se violations of the Sherman Act. See United States v. Topco Assocs., Inc., 405
should not be deemed per se illegal, but rather should be judged by a rule of reason. Before a section 1 violation can be found under a rule of reason inquiry, D1 must establish that its termination had a substantial anticompetitive effect in that it significantly diminished the price and quality choices of the consumer.

3. A per se violation results when conduct is conclusively presumed to be pernicious in its effects on competition. Thus, engaging in such conduct is sufficient for the attachment of antitrust liability; anticompetitive impact need not be shown. See Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). Examples of per se violations of § 1 of the Sherman Act include price fixing, see, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940), horizontal allocation of customers and territories among competitors, see, e.g., United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972), and bid rigging in construction contracts, see, e.g., United States v. Koppers Co., 652 F.2d 290, 294 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); cf. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.28 (1977) ("There may be occasional problems in differentiating vertical restrictions from horizontal restrictions in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal per se, . . . but we do not regard the problems of proof as sufficiently great to justify a per se rule [for vertical restraints].") (citations omitted).


The agreement becomes violative of § 1 of the Sherman Act only if it is anticompetitive in purpose or effect—in sum, it must be tested by the rule of reason. Without any consideration of the anticompetitive purpose or effect, arbitrarily seeking to protect Oreck simply because Whirlpool refused to renew a contract with Oreck which it had terminated by its own terms, even though this refusal was in whole or in part, due to persuasion by Sears, disregards the well established rule that "the antitrust laws . . . were enacted for 'the protection of competition, not competitors . . . .'" Id. at 133-34 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (ellipses in Oreck)) (emphasis in Oreck).
A court faced with Dl’s antitrust claim will discover that
the Supreme Court has found vertical refusals to deal per se il-
legal under section 1 of the Sherman Act only when the refus-
als were accompanied by price fixing or horizontal
conspiratorial activity.\(^5\) The Court has not squarely addressed
the appropriate standard to be applied when these factors are
absent, leaving lower courts faced with such claims without
clear guidance.\(^6\) Two recent court of appeals’ decisions consid-
ering this issue illustrate the conflict between the circuits that
has arisen due to the lack of direction from the Court. In both
Products Liability Insurance Agency, Inc. v. Crum & Forster
Insurance Cos.\(^7\) and Malley-Duff & Associates, Inc. v. Crown
Life Insurance Co.,\(^8\) an insurance company terminated an
agent’s distributorship at the request of a competing agent. In
Products Liability, the Seventh Circuit applied the rule of rea-
son to find that the vertical distributor termination did not vio-
late section 1 of the Sherman Act.\(^9\) In contrast, the Third
Circuit in Malley-Duff found such conduct to be a per se viola-
tion of section 1.\(^10\)

This Note examines the precedents and policies applicable
to the choice between the per se rule and the rule of reason in
vertical distributor terminations and other vertical refusals to
deal. Part I discusses Supreme Court decisions applying a per
se rule to vertical refusals to deal and a more recent decision
applying a rule of reason to an analogous vertical territorial re-
straint. It also reviews the mixed signals that these decisions
have sent to lower courts and the resulting confusion over the
test to be applied to vertical refusals to deal not involving price
fixing or horizontal conspiratorial activity. Part II examines
the facts and reasoning in Products Liability and Malley-Duff,
and Part III analyzes the different approaches adopted by these
cases under applicable precedent and the policies underlying
the antitrust laws. Part III also discusses the impact that the
per se rule and the rule of reason will have on economic effi-
ciency. The Note concludes that the per se rule should be re-

notes 11-21, 38-40, and accompanying text.
6. See infra notes 27-40 and accompanying text.
7. 682 F.2d 660 (7th Cir. 1982).
9. See Products Liab., 682 F.2d at 663-65; infra text accompanying notes
59-60.
10. See Malley-Duff, 734 F.2d at 139-44; infra text accompanying notes 72-
75.
stricted to cases involving price fixing or horizontal conspiratorial activity and that the rule of reason should govern other vertical refusals to deal.

I. ORIGINS OF THE PER SE RULE AND CURRENT COURT OF APPEALS APPLICATION

Per se treatment of vertical refusals to deal can be traced to *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,11 in which an appliance retailer attempted to prevent a competing retailer from selling at discount prices by persuading several suppliers to cease selling to its competitor or to sell only at discriminatorily high prices.12 The Supreme Court found that a "wide combination"13 of manufacturers and a retailer that bars a competing retailer from purchasing goods at the same prices and conditions made available to other retailers in a competitive market is a group boycott and thus per se unlawful under section 1 of the Sherman Act.14

The Court faced a similar factual situation in *United States v. General Motors Corp.*,15 in which retail automobile dealers enlisted the aid of their manufacturer to prevent discount retailers from obtaining the product.16 The Supreme Court reiterated the *Klor's* per se rule for vertical refusals to deal, holding that "[e]limination, by joint collaborative action, of discounters from access to the market is a per se violation of the [Sherman] Act."17 Unlike its opinion in *Klor's*, however, the Court's opinion placed great emphasis on the conspiracy's potential for fixing the retail prices of automobiles.18 According

12. See id. at 209, 213.
13. Id. at 213.
14. See id. at 212-13; see also Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1185, 1187-71 (1959) (discussing the attempts by the Ninth Circuit and the Supreme Court to formulate a general rule regarding the legality of vertical group boycotts).
16. In *General Motors*, an association of retail Chevrolet dealers in the Los Angeles area complained to General Motors management about the sale of new Chevrolets by competing, discount dealers. In response, General Motors personnel obtained promises from all nondiscount dealers to refrain from dealing with the discounters. The dealers' association enforced these agreements and, within one year, retail sales through discount dealers had virtually ended. See id. at 133-38. The United States brought a civil action to enjoin the alleged conspiracy between General Motors and the dealers. The trial court granted summary judgment in favor of the defendants. See id. at 129.
17. See id. at 145.
18. The *Klor's* Court emphasized the "wide combination" of defendants
to the General Motors Court, the group boycott was instituted to maintain high retail prices through the elimination of discount sellers, a goal that the Court found to be per se unlawful even though the price fixing was accomplished indirectly.20

After Klor's and General Motors, most courts are in basic agreement that when the purpose and effect of a conspiracy is to fix prices, the conspiracy is per se illegal under section 1 of the Sherman Act.21 In Cernuto, Inc. v. United Cabinet Corp., for example, a manufacturer and a distributor conspired to prevent a discounter from obtaining the manufacturer's cabinets.22 Citing Klor's and General Motors, the Third Circuit held that where "the purpose and effect of the challenged conduct is to restrain price movement and the free play of market forces, it is then illegal per se."26 Lower courts are in conflict, however, over whether a per se rule or a rule of reason should govern when the vertical refusal to deal is not accompanied by a conspiring to drive the plaintiff out of the retail business. See Klor's, 359 U.S. at 212-13; supra text accompanying notes 13-14.

19. See General Motors, 384 U.S. at 147 ("We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful per se when sought to be effected by combination or conspiracy.") (citations omitted).

20. See id. at 147-48.


22. 595 F.2d 164 (3d Cir. 1979).

23. Id. at 165.

24. See id. at 166 n.8.

25. See id. at 166 n.11.

26. See id. at 169. Although the Cernuto court followed Klor's and General Motors on the price-fixing issue, its market-structure analysis is inconsistent with that contained in the Supreme Court cases. The Cernuto court intimated that a vertical group boycott consisting of a single manufacturer and a single distributor could be per se illegal, even in the absence of price fixing. See id. at 168. Such a result does not follow from Klor's or General Motors because, in those cases, there were multiple conspirators at one level of the market structure. See infra notes 38-49, 85-91, and accompanying text. The Cernuto opinion does not clearly reveal which ground, price fixing or market structure, the court found determinative, see Cernuto, 595 F.2d at 170; Stewart & Roberts, Viability of the Antitrust Per Se Illegality Rule: Schwinn Down, How Many to Go?, 58 WASH. U.L.Q. 727, 749 (1980), and thus it is uncertain whether, absent price fixing, the Cernuto court would have imposed per se liability.
Part of the conflict over the appropriate rule to be applied in the absence of price fixing results from the amenability of *Klor's* and *General Motors* to different interpretations. Many antitrust plaintiffs invoke *Klor's* and *General Motors* in an attempt to have the per se rule applied against vertical refusals to deal that do not involve price fixing. These plaintiffs argue that the facts of *Klor's* and *General Motors* clearly are analogous to those in the challenged refusals to deal because the relationship of the relevant actors in each case was vertical, involving a conspiracy between manufacturers and a retailer. They further contend that the conspiracies in *Klor's* and *General Motors* restrained the availability of appliances and automobiles, just as vertical distributor terminations, for example, restrain the availability of the distributed product. Some courts have accepted this interpretation and have applied a per se rule regardless of the purpose and effect of the conspiracy.

Several courts look beyond these vertical aspects of the

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27. Compare Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660 (7th Cir. 1982) (applying rule of reason) with Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir.) (applying per se rule), *cert. denied*, 105 S. Ct. 564 (1984). Since *Klor's* and *General Motors*, the Supreme Court has not directly addressed the per se illegality of vertical refusals to deal. Although the Supreme Court has granted certiorari in *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984), its decision may not shed much light on the traditional scenario because the case does not involve a manufacturer's termination of a distributor at the behest of another distributor. Rather, the plaintiff in *Pacific Stationery* alleges that it was wrongfully expelled from a nonprofit, industry trade association without sufficient cause or notice. See 715 F.2d at 1395.


29. See Malley-Duff*, 734 F.2d at 140-41 (holding that a conspiracy between a manufacturer and a single dealer is per se illegal because, though actually a vertical restraint, its desired impact is "horizontal and on the dealer . . . level"); Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 410-12 (6th Cir. 1982) (holding that an initial conspiracy between the manufacturer and a distributor was transformed into a per se illegal refusal to deal when other dealers responded to the distributor's pressure; per se illegality was found because the desired impact of the restraint was horizontal and on the dealer level); *Cernuto*, 595 F.2d at 168 (same as Malley-Duff); *cf.* Stewart & Roberts, *supra* note 26, at 749 (noting that the compelling nature of *Cernuto*'s "horizontal im-
conspiracies, however, and read Klor's and General Motors as primarily price-fixing cases. This interpretation may rest in part on General Motors's explicit emphasis of the price-fixing potential of the group boycott. Some courts also suggest that the result in Klor's may have been influenced by the price-fixing effect of that conspiracy. These courts reason that the conspiracy in Klor's essentially eliminated a discount retailer from the market by preventing it from obtaining appliances or by requiring it to obtain the appliances at discriminatorily high prices. If the manufacturers refused to sell the discount retailer any appliances, the price level maintained by other retailers would control. Similarly, if the manufacturers sold the appliances at discriminatorily high prices, the discount retailer's advantage of low overhead costs would be lost, forcing it to sell appliances at the same price as other retailers. Price competition thus would be substantially affected by the conspiracy, and consumers would be deprived of a price choice.

This reading of Klor's and General Motors mandates that per se liability attach to vertical refusals to deal only when the refusal is accompanied by price fixing or equivalent anticompetitive acts. With Klor's and General Motors so limited, several courts apply the rule of reason to vertical refusals to deal that do not involve price fixing. In Oreck Corp v. Whirlpool Corp., for example, Whirlpool terminated Oreck's distributorship at the behest of Sears, a competing distributor, and re-
tained Sears as its exclusive distributor. Relying on *Klor’s* and *General Motors*, Oreck alleged that the actions of Whirlpool and Sears constituted a per se illegal vertical group boycott. The Second Circuit rejected Oreck’s allegation, in part because the termination was not motivated by a desire to reduce price competition.

An additional factor apparently influencing some courts’ rejection of the per se rule for purely vertical group boycotts is the horizontal aspect of the conspiracies in *Klor’s* and *General Motors*. Numerous appliance manufacturers were involved in the *Klor’s* refusal to deal, leading the Court to stress that a “wide combination” of conspirators was involved and not merely “a single trader refusing to deal with another, [or] a manufacturer and a dealer agreeing to an exclusive distributorship.” Similarly, the *General Motors* conspiracy involved a “wide combination” including nearly all nondiscount Chevrolet dealers in the Los Angeles area. Thus, both cases revolved around conspiracies containing horizontal activity among competitors at the same market level.

Since *General Motors*, the Supreme Court has indicated that purely vertical arrangements may be subject to a less stringent standard than are horizontal agreements. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court held that vertical territorial resale restrictions imposed by a manufacturer on a

35. 579 F.2d at 128.
36. See id. at 131.
37. See id. at 130 (“[I]t is undisputed that, at all times relevant, Sears was selling its ‘Kenmore’ vacuum cleaners at prices below those charged by Oreck for comparable ‘Whirlpool’ models. . . . [T]here is no evidence] that Whirlpool was attempting to maintain high resale prices for its products by conspiring with its distributors or that its actions toward Oreck were an effort to chastise a dealer for refusing to cooperate in a scheme to fix or maintain prices.”) (citations omitted) (emphasis in original); see also A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1306-07 (9th Cir. 1981) (observing that “in most circumstances dealer terminations or substitutions do not adversely affect competition in the [relevant product] market”) (citations omitted).
38. See *Klor’s*, 359 U.S. at 212-13 (footnote omitted). Admiral, Emerson, General Electric, Olympic, Philco, Rheem, RCA, Tappan, Whirlpool, and Zenith were named as defendants in *Klor’s*. See id. at 209 n.1.
39. See *General Motors*, 384 U.S. at 129 (noting that the defendants included three associations of retail Chevrolet dealers in the Los Angeles area and that “[a]ll of the Chevrolet dealers in the area belong[ed] to one or more of the . . . associations”).
40. Thus, the *Oreck* court distinguished *Klor’s* and *General Motors* as involving horizontal restraints, in contrast to the vertical restraint created by the Sears/Whirlpool agreement. See *Oreck*, 579 F.2d at 131.
wholesaler are to be judged by the rule of reason.\textsuperscript{42} The Court based this conclusion on the premise that competition between differing brands of the same product, or interbrand competition, is more deserving of the protection of the antitrust laws than is competition between sellers of the same brand, or intrabrand competition.\textsuperscript{43} The Court recognized that vertical distribution restrictions, while reducing intrabrand competition, may foster interbrand competition by allowing the manufacturer to achieve more control and greater efficiencies in the distribution of its products.\textsuperscript{44} The Court therefore concluded that

\textsuperscript{42} See id. at 57-59. The Court in \textit{GTE Sylvania} overruled its earlier decision in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), which held that vertical restrictions on the resale of products sold by a manufacturer to a distributor are per se illegal, see Schwinn, 388 U.S. at 378-81. In addition, the Court had held that when Schwinn sold goods on consignment to its distributors and retained title, dominion, and risk, vertical distribution restraints should be judged by a rule of reason standard. See id. at 380-81. This distinction was criticized as lacking a logical basis, see, e.g., Pollock, \textit{The Schwinn Per Se Rule: The Case for Reconsideration}, 44 \textit{Antitrust L.J.} 557, 562-63 (1975), and was abandoned in \textit{GTE Sylvania}.

\textsuperscript{43} See \textit{GTE Sylvania}, 433 U.S. at 54-57. The protection of interbrand competition is the primary concern of antitrust law. Id. at 52 n.19; see also Copy-Data Sys., Inc. v. Toshiba Am., Inc., 663 F.2d 405, 411 (2d Cir. 1981) (holding that “restrictions imposed by this dual distributor on its competitor-customers have sufficient potential for enhancing interbrand competition that they should be judged by the rule of reason notwithstanding the adverse impact that they may have on intrabrand competition”); Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119, 127-30 (8th Cir. 1973) (holding that BankAmericard bylaw prohibiting member banks from joining Master Charge system not per se illegal because it may have promoted interbrand competition between the two national credit card systems; absent the bylaw, the systems would eventually merge and competition would be substantially lessened), cert. denied, 415 U.S. 918 (1974); U.S. DEP'T OF JUSTICE, \textbf{VERTICAL RESTRAINTS GUIDELINES} § 2.1, at 4 (1985) (observing that the appropriate focus of antitrust laws is interbrand competition because restraints on interbrand competition have a negative impact on economic welfare, whereas vertical restraints affecting only intrabrand competition generally represent little anticompetitive threat) [hereinafter cited as DOJ GUIDELINES], reprinted in [Jan.-June] \textit{Antitrust & Trade Reg. Rep.} (BNA) No. 1199 (Spec. Supp. Jan. 24, 1985).

\textsuperscript{44} See \textit{GTE Sylvania}, 433 U.S. at 54-56. The Court noted that “[s]ervice and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product.” See id. at 55. Commentators have argued persuasively that vertical restrictions such as those at issue in \textit{GTE Sylvania} promote interbrand competition because they allow manufacturers to achieve maximum efficiency in the distribution of their products and to ensure that, where necessary, presale, point-of-sale, and postsale services are provided. See, e.g., Butler & Baysinger, \textit{Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics, and Organization Theory}, 32
territorial resale restrictions affecting intrabrand competition had not been shown to be so pernicious in their anticompetitive effects as to require per se treatment.45

By interpreting Klor's and General Motors as involving horizontal activity, courts can rely on GTE Sylvania's reasoning to conclude that purely vertical refusals to deal should, like the analogous vertical territorial restrictions, usually be judged by a rule of reason.46 Even using this interpretation, however, courts face the difficult question of whether the facts before them warrant application of the per se rule despite the presumption for the rule of reason. The GTE Sylvania Court did not establish a blanket rule of reason for all vertical restrictions, but instead stated that its holding does "not foreclose the possibility that particular applications of vertical restrictions


46. Although vertical territorial restraints are distinct from vertical refusals to deal, the Supreme Court's move to a rule of reason treatment of vertical distribution restraints may portend a similar shift on vertical refusals to deal. See Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. CHI. L. REV. 6, 22-26 (1981) (suggesting that all purely vertical distribution restraints should be legal per se); Stewart & Roberts, supra note 26, at 745-49 (discussing the impact of GTE Sylvania on boycotts and concerted refusals to deal).

The shift to a rule of reason is already apparent in the opinions of some lower courts. For example, in A.H. Cox & Co. v. Star. Mach. Co., 653 F.2d 1302 (9th Cir. 1981), the Ninth Circuit affirmed a summary judgment against a distributor that challenged the manufacturer's decision to terminate it in favor of another distributor. The court explained:

It is well established that exclusive distribution arrangements, while restraints in one sense, nevertheless serve to promote interbrand competition. . . . Manufacturers therefore may grant exclusive dealerships, and even cut off an existing dealer in order to do so . . . , provided there is no overriding purpose to eliminate competition in the relevant market . . . . Competition is promoted when manufacturers are given wide latitude in establishing their method of distribution and in choosing particular distributors. . . . Judicial deference to the manufacturer's business judgment is grounded on the assumption that the manufacturer's interest in minimum distribution costs will benefit the consumer. . . . A contrary rule would foster rigidity in distribution arrangements, a result antithetical to a market dependent on vigorous competition.

Id. at 1306 (citing GTE Sylvania) (other citations omitted).
might justify *per se* prohibition."

The Court qualified this statement by declaring that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." The vagueness of this standard leaves trial courts with virtually no framework within which to weigh the anticompetitive effects against the procompetitive benefits of a challenged vertical restraint when deciding which rule should govern.

II. PRODUCTS OF CONFUSION: PRODUCTS LIABILITY AND MALLEY-DUFF

*Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.* and *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.* highlight the conflict surrounding the appropriate rule to be applied to vertical refusals to deal presenting neither price-fixing motives or effects nor any horizontal activity. Although both cases presented almost identical factual patterns, the Seventh Circuit in *Products Liability* applied the rule of reason, whereas the Third Circuit in *Malley-Duff* applied a *per se* rule.

In *Products Liability*, the plaintiff had sold Crum & Forster’s line of products liability insurance, obtaining the insurance through Paris, O’Day & Reed, Inc., a Crum & Forster agent. After a falling out with Paris, plaintiff requested that Crum & Forster appoint it as an agent authorized to sell the insurance. Crum & Forster refused, whereupon plaintiff initiated an antitrust action against both Crum & Forster and Paris, alleging that plaintiff’s exclusion from the products liability insurance business was the result of a collective refusal to deal with competitors.

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47. See *GTE Sylvania*, 433 U.S. at 58.
48. See id. at 58-59.
49. See Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1370 n.43 (1978) (discussing the varying responses of the lower courts to *GTE Sylvania*); cf. *Strasser*, supra note 44, at 784 (“The *GTE Sylvania* Court recognized that cases of this sort require a determination of how much intrabrand competition must be sacrificed in order to gain an imprecise measure of interbrand competition but gave no guidance or methodology for the application of this weighing process.”) (footnote omitted).
50. 682 F.2d 660 (7th Cir. 1982).
52. See *Products Liability*, 682 F.2d at 663.
53. See *Malley-Duff*, 734 F.2d at 140-42.
54. *Products Liability*, 682 F.2d at 661.
55. Id. at 661-62.
that was per se unlawful under section 1 of the Sherman Act.\textsuperscript{56} The trial court granted summary judgment in favor of the defendants, reasoning that the plaintiff had not established the existence of a conspiracy between Crum & Forster and Paris.\textsuperscript{57}

On appeal, the Seventh Circuit affirmed, agreeing with the district court that plaintiff was unable to prove that its exclusion was "anything more than a unilateral act of Crum & Forster"\textsuperscript{58} and also holding that vertical refusals to deal are per se illegal only when used to fix prices.\textsuperscript{59} Other vertical refusals to deal, stated the court, are governed by the rule of reason, which requires the offended party to demonstrate the anticompetitive effect of the refusal.\textsuperscript{60} The court concluded that plaintiff had presented no evidence in support of its claim that its elimination from the insurance market had detrimentally affected the consumers' price and quality choices for insurance\textsuperscript{61} and, therefore, plaintiff had failed to establish an antitrust injury.\textsuperscript{62} The court rejected plaintiff's attempt to rely on Klor's, distinguishing the decision as a "horizontal combination"\textsuperscript{63} involving a "wide combination" of conspirators,\textsuperscript{64} as opposed to plaintiff's "private squabble [that] does not threaten consumers' welfare even remotely."\textsuperscript{65}

In Malley-Duff, the plaintiff was an insurance agent in Pittsburgh, Pennsylvania, for Crown Life Insurance Company.\textsuperscript{66} Plaintiff's agency with Crown Life was terminated

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\item\textsuperscript{56} See id. at 661.
\item\textsuperscript{57} See id. at 662.
\item\textsuperscript{58} See id. at 663.
\item\textsuperscript{59} See id.
\item\textsuperscript{60} See id.; supra note 4 and accompanying text.
\item\textsuperscript{61} See Products Liab., 682 F.2d at 664.
\item\textsuperscript{62} See id. at 663-65.
\item\textsuperscript{63} See id. at 665.
\item\textsuperscript{64} Id.
\item\textsuperscript{65} Id. On the same day that Products Liability was decided, another three-judge panel of the Seventh Circuit stated that "[a] per se unlawful [group] boycott has two essential elements: (1) at least some of the boycotters are competitors of each other and the target and (2) the boycott is designed to protect the boycotters from competition with the target." See Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1236 (7th Cir. 1982) (citations omitted), aff'd, 104 S. Ct. 1464 (1984). This rule is somewhat more restrictive than Products Liability's holding that vertical refusals to deal are to be judged by the rule of reason, but the Seventh Circuit, in a more recent case, indicated in dicta that Products Liability is the law of the circuit. See Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1497 (7th Cir. 1983), aff'd on other grounds, 726 F.2d 1150 (7th Cir. 1984) (en banc), rev'd on other grounds, 105 S. Ct. 1327 (1985).
\item\textsuperscript{66} See Malley-Duff, 734 F.2d at 137. Plaintiff was one of two Crown Life
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when Clarke Lloyd, a Crown Life vice president, created a holding company to act as Crown Life's new general agent in western Pennsylvania, Ohio, and Illinois. Following the termination, plaintiff sued Crown Life, Lloyd, and the holding company, alleging a per se illegal group boycott. Plaintiff did not allege that the termination was motivated by a desire to fix prices or that it had such an effect. The trial court, relying on Products Liability, granted a directed verdict for the defendants on the antitrust claim, stating that "no antitrust offense could be established without proof that the alleged anticompetitive conduct adversely affected consumers."

The Third Circuit reversed the antitrust judgment, holding that a per se illegal refusal to deal exists when the termination is not unilateral but results from distributors working in concert with a supplier to exclude a competing distributor from the market. The court expressly rejected Products Liability's holding that vertical refusals to deal are per se illegal only when employed to fix prices. The court stated that a vertical general agents in the Pittsburgh area and had represented Crown Life continuously for 23 years until its termination. Between 1967 and 1977, plaintiff had produced over $58 million in business for Crown Life. See id. at 137-39. To accomplish the termination, an unrealistic production quota was imposed on plaintiff, and Crown Life terminated plaintiff when it was unable to meet the quota. Id. at 138-39. Because Crown Life complied with the 30-day notice of termination clause, see id. at 137, 139, plaintiff's termination did not violate the agency agreement.

Plaintiff also alleged that defendants were liable under Pennsylvania law for conspiring to tortiously interfere with Malley-Duff's contract and for tortiously interfering with the contract. Id. The jury returned a $900,000 verdict on the conspiracy claim, id. at 139, but the Third Circuit reversed the jury verdict because of inconsistent answers to interrogatories, see id. at 144-47.

Plaintiff relied entirely on a group boycott theory. Id. at 140.

The trial court determined that the defendants had not committed an antitrust violation under either a per se or a rule of reason theory. Id. The trial court relied on Products Liability, 682 F.2d 660 (7th Cir. 1982), in making its finding that no per se violation had occurred. See Malley-Duff, 734 F.2d at 140-41. The court's rejection of Products Liability's holding that vertical refusals to deal are per se illegal only when employed to fix prices.

Implicit in the court's finding of per se illegality is a determination that defendants Agency Holding, Lloyd, and Kerry Craig, a former Crown Life employee who left Crown Life to work for Lloyd at Agency Holding, were competitors conspiring among themselves and with Crown Life to exclude plaintiff. See id. at 141; supra note 1. This, however, was not so. Lloyd and Craig were principals of Agency Holding, not insurance agents competing with plaintiff. See Malley-Duff, 734 F.2d at 137-39. Thus, Agency Holding was the only agent conspiring with Crown Life to cause plaintiff's termination.

The court's rejection of Products Liability's holding that vertical refusals to deal are per se illegal only when employed to fix prices.

The court stated that a vertical
refusal to deal can assume horizontal aspects, and thus become per se illegal, if one of the conspirators and the terminated party are at the same level of the market structure. Therefore, according to the Third Circuit, if a distributor is involved in a conspiracy to eliminate another distributor, the refusal to deal is judged as horizontal activity even when the conspiracy is a purely vertical one between a single manufacturer and a lone distributor. The court consequently found that the refusal to deal in Malley-Duff was per se illegal even though exerted vertically by an insurer and another agent because its desired impact, the elimination of an agent, was on the horizontal, or dealer, level.


The conflict between the Seventh Circuit in Products Liability and the Third Circuit in Malley-Duff has arisen in part from their different interpretations of the precedents applicable to vertical refusals to deal. Although both circuits cited essentially the same cases in support of their results, each attached radically different meanings to those cases. Only the Seventh Circuit in Products Liability evaluated its choice between the rule of reason and the per se rule in light of the purposes of the antitrust laws and the impact of each rule on the underlying policy of promoting economic efficiency. Only by examining these concerns in light of relevant precedent can a rational choice be made between the applicability of the per se rule or the rule of reason to vertical refusals to deal.

Liability followed shortly after its observation that Products Liability is a factually similar case. See id. at 140.

74. See id. at 140-41. In reaching this conclusion, the court revived the faulty market-structure analysis of Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3d Cir. 1979). See supra note 26. For a discussion of the flaws in the Cernuto analysis, see infra notes 85-91 and accompanying text.

75. See Malley-Duff, 734 F.2d at 143-44. A peripheral issue in Malley-Duff was whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), exempts insurers from antitrust liability. The court concluded that it does not. See Malley-Duff, 734 F.2d at 144. The Seventh Circuit did not confront this issue in Products Liability.

76. See infra notes 79-99 and accompanying text.

77. See infra notes 100-10 and accompanying text.

78. See infra notes 111-22 and accompanying text.
A. Applicable Precedent

As previously noted,\textsuperscript{79} the Supreme Court decisions squarely confronting vertical refusals to deal, \textit{Klor's} and \textit{General Motors}, indicate that price-fixing considerations were paramount in finding the refusals to be per se illegal. Although \textit{Klor's} focused more on plaintiff's forced exclusion from the market than on the price-fixing issue,\textsuperscript{80} the \textit{General Motors} Court stated that the attempt to eliminate discounters was a major, if not decisive, factor in its finding of per se illegality.\textsuperscript{81}

In contrast, price competition was not an issue in \textit{Products Liability} and \textit{Malley-Duff} because neither plaintiff alleged or attempted to prove that its elimination would affect retail insurance prices.\textsuperscript{82} Absent any allegations of price fixing, the presumption is that the new agents would charge the same prices as the terminated agents\textsuperscript{83} and that price competition consequently would not suffer. The Third Circuit's unqualified reliance on \textit{Klor's} and \textit{General Motors}\textsuperscript{84} therefore appears unjustified because both cases involved price fixing.

The refusals to deal in \textit{Klor's} and \textit{General Motors} also contained elements of horizontal conspiratorial activity: both cases involved multiple competitors at the same level of the market structure acting in concert.\textsuperscript{85} Where horizontal activity at one level of a vertical group boycott is absent, \textit{Klor's} and \textit{General Motors} are far less compelling as precedent. Because such joint action is the justification for the per se illegality of horizontal refusals to deal,\textsuperscript{86} vertical group boycotts that involve such joint

\textsuperscript{79} See supra Part I.
\textsuperscript{80} See \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.}, 359 U.S. 207, 212-13 (1959); supra text accompanying notes 13-14.
\textsuperscript{81} See \textit{United States v. General Motors Corp.}, 384 U.S. 127, 147 (1966); supra text accompanying notes 18-20.
\textsuperscript{82} See \textit{Malley-Duff}, 734 F.2d at 140 (reversing a directed verdict that was based on the absence of price-fixing allegations or other anticompetitive conduct); \textit{Products Liab.}, 682 F.2d at 663 (noting that there was no evidence of an intent to raise prices).
\textsuperscript{83} See \textit{Products Liab.}, 682 F.2d at 664. The Seventh Circuit noted that if Crum & Forster was in a competitive market, the plaintiff's customers would not be hurt by plaintiff's exclusion from the insurance-underwriting business because competition would force Crum & Forster to offer terms competitive with other insurers. No evidence was presented concerning the structure or competitiveness of the insurance-underwriting market. See \textit{id.}
\textsuperscript{84} See \textit{Malley-Duff}, 734 F.2d at 141-42. In contrast, the Seventh Circuit distinguished \textit{Klor's} as inapplicable to the facts presented in \textit{Products Liability}. See supra text accompanying notes 63-65.
\textsuperscript{85} See supra text accompanying notes 38-40; supra note 2; infra note 94.
\textsuperscript{86} Horizontal activity among competitors has been termed a "naked [re-
action also should be illegal per se. Conversely, in the absence of joint action at one level of the market structure, per se illegality should not attach to a refusal to deal. Instead, the rule of reason should control unless the "demonstrable economic effect" of the refusal to deal indicates otherwise.

Because the collaborations in *Products Liability* and *Malley-Duff* involved only one actor at each level of the market structure, the *Klor's* and *General Motors* per se rule should be inapplicable. The Seventh Circuit expressly recognized this factual distinction in *Products Liability* when it rejected the plaintiff's invocation of *Klor's*: "But the Court in *Klor's* distinguished the case of 'a manufacturer and a dealer agreeing to an restraint] of trade with no purpose except stifling of competition." See *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); see also *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 608 (1972) (noting that horizontal territorial restraints are per se illegal); *Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 697 n.62 (1979) (suggesting that advance agreement among competitors not to do business with a company is the evil justifying per se treatment).

87. For example, in *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982), plaintiff bid on a subcontract to install a DuKane-manufactured sound system in a school. Defendant Central Sound, a DuKane-franchised distributor, also bid on the contract. When plaintiff was awarded the contract, Central Sound refused to supply plaintiff with DuKane equipment, and plaintiff then obtained commitments from two nearby DuKane distributors. Central Sound then persuaded DuKane to try to prevent plaintiff from obtaining DuKane equipment. The conspiracy was successful and plaintiff, unable to obtain the required equipment either from Central Sound or from its other two putative suppliers, resigned from the project. See id. at 406-08.

Despite the absence of price fixing and the vertical nature of the refusal to deal, the Sixth Circuit found the defendant's conduct to be per se illegal because the desired impact of the boycott was on the distributor level. See id. at 409-14. The *Com-Tel* court's market-structure analysis is more consistent with *Klor's* than is the *Cernuto* court's analysis. See supra note 28. In *Com-Tel*, the conspiracy was not, as in *Cernuto* and *Oreck*, an agreement between a single manufacturer and a single distributor. Joint activity among competitors was established when competing distributors succumbed to DuKane's demand that they not sell to plaintiff. At that point, the conspiracy was no longer a purely vertical refusal to deal between DuKane and Central Sound. Cf. *Case Comment, Vertical Agreements to Terminate Competing Distributors: Oreck Corp. v. Whirlpool Corp.*, 92 HARV. L. REV. 1160, 1163 (1979) ("A vertical element is usually present in boycott cases . . ., since the success of a boycott often depends on the cooperation of suppliers or customers in refusing to deal with the boycott victim. But it is the horizontal element that justified applying a rule of per se illegality.") (footnote omitted).


exclusive distributorship[,] . . . which is one way of describing an agreement . . . between Paris and Crum & Forster that [plaintiff] would not be allowed to compete with Paris as a Crum & Forster agent." 90 The court thus found that any agreement between the Products Liability defendants would not be a "wide combination" employed to eliminate plaintiff from the insurance business, unlike the attempt of the multiple appliance manufacturers and the retailer to drive a discount retailer out of business in Klor's. 91 The Seventh Circuit therefore properly restricted Klor's to vertical group boycotts containing horizontal elements.

In contrast, the Malley-Duff court found that the per se rule of Klor's and General Motors was applicable to a vertical group boycott involving a single insurer and a single agent. The Third Circuit reasoned that the vertical refusal to deal had horizontal elements because the terminated party was a competitor of one of the conspirators. 92 The court concluded that the vertical refusal to deal had its desired impact on the horizontal level and was therefore per se illegal. 93 This transformation of a vertical refusal to deal into a horizontal group boycott masks a fatal flaw in the court's analysis. A per se illegal horizontal group boycott consists of conspiratorial activity among competitors, not a horizontal relationship between a conspirator and the terminated party. 94 Unless the plaintiff conspired with its

90. Products Liab., 682 F.2d at 665 (quoting Klor's, 359 U.S. at 212).
91. See id.; supra text accompanying notes 63-65.
92. The court attempted to convert the facts of Malley-Duff into a Klor's situation by creating the appearance of concerted action among competitors at one level of the boycott. See Malley-Duff, 734 F.2d at 141. This is an inaccurate interpretation of the facts. See supra note 72.
93. See Malley-Duff, 734 F.2d at 140-41; supra note 74 and accompanying text.
94. In contrast, although the Seventh Circuit indicated it would follow Cernuto, see Products Liab., 682 F.2d at 663, the context in which the court cited Cernuto demonstrates that this approval applied only to the Cernuto decision's price-fixing aspect. See supra text accompanying notes 22-26.
95. See A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1306 (9th Cir. 1981) (holding that a purely vertical refusal to deal between a distributor and a manufacturer is not transformed into a per se illegal horizontal group boycott by the distributor's "anticompetitive animus" toward its terminated competitor); supra note 2. The most cogent explanation was offered by the Second Circuit in Oreck:

The present case, involving as it does an alleged agreement between a single manufacturer and a single dealer, is, in essence, an exclusive distributorship controversy and the "group boycott" doctrine, is, therefore, not applicable. Because Sears is a large company presumably selling a large number of vacuum cleaners does not, ipso facto,
competitor, there is no horizontal conspiracy in a case involving an agreement between two parties on different levels of the market structure. Absent collaboration among competitors at one level of a vertical refusal to deal, the per se rule of *Klor's* and *General Motors* should not control.

Finally, the Third Circuit's rationale in *Malley-Duff* is inconsistent with *GTE Sylvania*, in which the court stated that departure from the rule of reason standard in vertical restraint cases is justified only upon a showing of "demonstrable economic effect rather than . . . upon formalistic line drawing." *Malley-Duff*’s reasoning encompasses more of the latter than of the former. After characterizing the refusal to deal as horizontal, the court held it to be per se illegal without even a cursory examination of the economic effects of the defendants’ conduct. Because neither price nor consumer choice was affected, the termination of the *Malley-Duff* plaintiff had little, if any, economic effect on consumers. Under the rationale of *GTE Sylvania*, therefore, application of a per se rule was unwarranted; the *Products Liability* court reached that very conclusion after an analysis of the group boycott's effect on competition.

**B. THE PURPOSES OF THE ANTITRUST LAWS**

The essential purpose of the antitrust laws is, in the Supreme Court's view, to ensure that retail purchasers of goods and services will find fair price competition in an open market. Because injuries to competition adversely affect general consumer welfare, the Court has instructed that the antitrust laws exist for "the protection of competition, not competi-

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convert this case into a horizontal conspiracy warranting per se treatment.

*Oreck*, 579 F.2d at 131 (footnote omitted).

95. 433 U.S. 36 (1977); see supra notes 41-49 and accompanying text.


97. *See Malley-Duff*, 734 F.2d at 140 (finding that the district court erred in holding that no antitrust offense could be established without proof that the challenged conduct adversely affected consumers; in a per se case, the court need not determine whether public injury occurred).

98. *See infra* notes 106-10 and accompanying text.

99. *See Products Liab.*, 682 F.2d at 663-64; supra text accompanying notes 61-65.


Antitrust injuries therefore "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." In the absence of injury to competition, antitrust laws should not provide a remedy.

Ensuring protection of the consumer through competition requires the preservation of interbrand competition because such competition guarantees the existence of numerous brands and thus provides the consumer with a wide choice of product price, style, and quality. Moreover, the presence of strong interbrand competition renders it difficult, if not impossible, for a manufacturer to wield sufficient market power to control price by restricting intrabrand competition. When neither interbrand competition nor price is affected, consumer choice is unhindered and any injury incurred should not be redressed by the antitrust laws.

In Products Liability and Malley-Duff, only intrabrand competition was involved. In both cases, insurance remained available to the terminated agents' former customers, albeit through new agents. Furthermore, no effect on the price of insurance was alleged to have occurred or likely to occur from the terminations. Although the plaintiffs' business interests

103. See id. at 489.
104. See supra notes 43-45 and accompanying text. Professor Wesley J. Liebeler argues that restraints on interbrand competition should be equated with horizontal restraints and deemed per se illegal, while limitations on intrabrand competition are, in terms of their effect on competition, on a par with vertical restraints and thus governed by the rule of reason. See Liebeler, Intrabrand "Cartels" Under GTE Sylvania, 30 UCLA L. Rev. 1, 29-30 (1982). This approach, Professor Liebeler argues, is consistent with GTE Sylvania. See id.

Professor Richard A. Posner has taken an even stronger position, advocating a rule of per se legality for all purely vertical restraints not affecting price competition because of "the absence of either theoretical or empirical grounds for condemning purely vertical restrictions as anticompetitive." See Posner, supra note 46, at 23.

105. See GTE Sylvania, 433 U.S. at 52 n.19 ("[W]hen interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product."); Oreck, 579 F.2d at 130 n.5; supra note 44 and accompanying text. For example, in Oreck, the plaintiff could show no anticompetitive effects from its elimination. See Oreck, 579 F.2d at 130. Thus, even though Sears and Whirlpool were able to eliminate Oreck, resulting in a restriction of intrabrand competition, they did not have sufficient market power to control prices.
were harmed, competition was unimpaired. A per se approach to these vertical refusals to deal therefore is unjustified because per se liability would not advance the consumers' interest in competition. Moreover, any antitrust recovery would be inappropriate because an injury to competition is a prerequisite to a successful antitrust suit.\textsuperscript{106}

The Seventh Circuit in \textit{Products Liability} recognized these limited purposes of the antitrust laws. In dismissing plaintiff's case as a "private squabble [that] does not threaten consumers' welfare even remotely,"\textsuperscript{107} the court correctly concluded that trebled antitrust recoveries are appropriate only when competition is impaired.\textsuperscript{108} In contrast, the Third Circuit in \textit{Malley-Duff} failed to consider that the plaintiff's termination did not harm consumer welfare.\textsuperscript{109} The proper course would have been to restrict the plaintiff to its contract and tort remedies\textsuperscript{110} and not to allow it the windfall of treble damages. No other approach is consistent with the purposes of the antitrust laws.

C. THE IMPACT ON ECONOMIC EFFICIENCY

Commentators recently have argued that application of per se rules to vertical restraints may cause economic inefficiencies by reducing business flexibility.\textsuperscript{111} These commentators con-

\begin{footnotesize}
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\item \textsuperscript{106} See supra text accompanying note 103; cf. Klingsberg, supra note 101, at 364 (suggesting that, in merger cases, a "terminated distributor who claims injury [that is] not . . . a consequence of a lessening of competition . . . would probably be unable to recover") (footnote omitted).
\item \textsuperscript{107} See \textit{Products Liab.}, 682 F.2d at 665; supra text accompanying note 65.
\item \textsuperscript{108} See \textit{Products Liab.}, 682 F.2d at 663-64; supra notes 100-03 and accompanying text.
\item \textsuperscript{109} By confining its analysis to the market-structure aspects of \textit{Klor's}, the \textit{Malley-Duff} court was able to avoid this issue. The court examined the vertical relationship of the defendants and their attempt to exclude plaintiff from the market and, without a discussion of the price-fixing aspects of \textit{Klor's}, imposed per se liability. See \textit{Malley-Duff}, 734 F.2d at 140-41; supra text accompanying notes 72-75. Once per se liability was imposed, the court did not need to consider the type of injury sustained by the plaintiff or the lack of anticompetitive effect. See \textit{Malley-Duff}, 734 F.2d at 140-42.
\item \textsuperscript{110} Where a concerted refusal to deal is employed to ensure the conspirators a monopoly in their line of business, the refusal to deal has often been enjoined as illegal under the common law. See P. KEETON, PROSSER AND KEETON ON TORTS § 130, at 1023-26 (5th ed. 1984). Moreover, if a distributor is terminated in contravention of the distributorship agreement, it will be able to sue under the contract. This option, however, was unavailable to the plaintiff in \textit{Malley-Duff}. See supra note 67.
\item \textsuperscript{111} See, e.g., Bork, \textit{The Rule of Reason and the Per Se Concept: Price Fixing and Market Division} (pt. 2), 75 YALE L.J. 373, 403 (1966); Bork, \textit{Vertical Restraints: Schwinn Overruled}, 1977 SUP. CT. REV. 171, 180-82 [hereinafter cited as Bork, \textit{Vertical Restraints}]; Posner, supra note 45, at 283-85; Comment,
tend that commercial entities employ vertical restraints only to achieve more efficient operations.\textsuperscript{112} For example, a manufacturer will restrict distributors to certain territories only if consumers are more attracted by the possible benefits of the restraint, such as the distributors' ability to provide increased services and product information, than they would be by the lower prices possible if such benefits were not available.\textsuperscript{113} Thus, the commentators assert, such restraints should not be deemed to violate antitrust laws because they will be adopted only when they are economically efficient.\textsuperscript{114}

This analysis is pertinent to vertical refusals to deal.\textsuperscript{115} Just as judicial limitations on vertical distribution restraints reduce economic efficiency by preventing manufacturers from providing increased services or information, attaching per se liability to vertical refusals to deal makes manufacturers reluctant to terminate inefficient distributors.\textsuperscript{116} In \textit{Oreck Corp. v. Whirlpool Corp.},\textsuperscript{117} the Second Circuit endorsed this justification for permitting vertical terminations, reasoning that under freedom of contract principles the manufacturer has the prerogative to decide with whom it will deal.\textsuperscript{118} Therefore, a manufacturer should not be liable under the antitrust laws when it elects not to renew a distributor's contract, even if its decision is at the behest of a competing distributor, unless the termina-
tion causes some anticompetitive effect in the relevant product market.119

The Malley-Duff court, however, did not address the possibility that the defendants' actions were justified by valid business reasons. Lloyd's attempt to centralize all Crown Life general agencies in the Pittsburgh-Cleveland-Chicago area into one holding company could have been motivated by a desire to increase efficiency and sales of Crown Life insurance.120 The Malley-Duff court focused only on the circumstances of the plaintiff's termination without searching for anticompetitive effects.121 In contrast, the Products Liability court recognized the manufacturer's right to select its distributors and the necessity that a plaintiff prove anticompetitive effects in order to prevail.122

CONCLUSION

Purely vertical refusals to deal that are not employed to fix prices and that do not contain elements of horizontal conspiratorial activity should not be deemed to be per se violations of section 1 of the Sherman Act but rather should be judged by a rule of reason standard. This result is consistent with Supreme Court precedent and conforms with the consumer protection policy underlying the antitrust laws. Moreover, analyzing vertical refusals to deal under the rule of reason maximizes economic efficiency and business flexibility.

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119. See Oreck, 579 F.2d at 133. The court reasoned that if Sears could do a better job distributing and marketing Whirlpool vacuum cleaners than plaintiff could, Whirlpool's decision to replace plaintiff with Sears should not have antitrust consequences. See id. at 132 n.7 (Whirlpool's decision to terminate plaintiff motivated by legitimate business concerns; plaintiff apparently had disregarded terms of its contract and refused to follow Whirlpool's marketing strategy).

120. See, e.g., Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-53 (5th Cir. 1977) (registration rules intended to improve the quarter horse breed); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76-78 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970) (horizontal refusals by manufacturers to renew exclusive sales rights motivated by their dissatisfaction with plaintiff's performance as a distributor).

121. See Malley-Duff, 734 F.2d at 140-42.

122. See Products Liab., 682 F.2d at 663-65.