

Policies Towards Vertical Restraints in the 1970s

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1970s: A Decade of Change in Policies towards Vertical Restraints (1)

Legal Arena

- 1975, Repeal of Miller-Tydings and McGuire Acts which authorized the state "fair trade" laws.
- 1977, *Sylvania* decision retreats from standard of *per se* illegality towards non-price restraints.
- These two actions set the "high water" mark for a policy against vertical constraints.

1970s: A Decade of Change in Policies towards Vertical Restraints (2)

Economic and Policy Arena

- Publication of books by Richard Posner and Robert Bork that rapidly created a new "conventional wisdom" towards vertical restraints.

Richard A. Posner, *Antitrust Law: An Economics Perspective*, 1976.

Robert Bork, *The Antitrust Paradox*, 1978.

- Proposed a total confluence of interests between manufacturers and consumers in regard to vertical relationships.
- Questioned circumstances where vertical restraints can have anti-competitive effects.
- Called into question *per se* illegality standard against vertical price restraints. [Noted by Justice White in his concurring opinion in *Sylvania*.]

A Policy in Flux

- Considerable uncertainty on how to proceed.

Some embraced the new conventional wisdom and proposed a complete policy shift (led by some B.E. economists).

Some emphasized that legal standards had not changed, and also questioned the new wisdom (led by B.C. lawyers).

- Chairman Pertschuk, under considerable political pressure for his initiative on Children's Television Programming, took a conservative position.
- Few policy initiatives taken in late 1970s towards vertical economic relationships.

Data on FTC Vertical Restraints Cases Initiated between 1975 and 1981 ⁽¹⁾

- 1975: 15 cases: all settled by consent
7 concerning RPM
5 concerning Tying
- 1976: 11 cases: 10 settled by consent, 1
complaint dismissed
6 concerning RPM
3 concerning shopping center lease
restrictions
1 concerning Tying
- 1977: 6 cases: all settled by consent
3 concerning RPM
2 concerning Tying
1 concerning shopping center lease
restrictions
- 1978: 3 cases: all settled by consent
2 concerning RPM

Data on FTC Vertical Restraints Cases Initiated between 1975 and 1981 (2)

1979: 9 cases: all settled by consent
7 concerning RPM
1 concerning shopping center lease
restrictions

1980: 6 cases: 5 settled by consent, 1 case where
FTC found liability but 8th Circuit reversed
6 concerning RPM
5 concerning Tying

1981: 2 cases: all settled by consent
1 concerning RPM

Of the 52 Vertical Restraints cases for which
Complaints issued:

32 (or 62%) concerned RPM

50 (or 96%) were settled by consent

32 Complaints issued between 1975 and 1977.

18 Complaints issued between 1978 and 1980.

Number of complaints declined by nearly half.

On the Edge of a Revolution

- Antitrust policy standards shifted sharply in 1981.
- Few vertical restraints cases were brought by the federal enforcement agencies in the 1980s.
- With advantages of hindsight, we can see the precursors of the new standards adopted in the 1980s.
- Economists played a leading role, but not well understood at the time.
- Culminated in Vertical Restraints Guidelines, which have since with withdrawn.

New Standards Supported in FTC BE Staff Reports

FTC Report Overstreet, 1983:

"The general conclusion drawn here is that the current rigidly applied standard of per se illegality appears to be unnecessarily costly when evaluated in terms of economic efficiency." (p. 1)

FTC Report by Lafferty, Lande and Kirkwood, 1984:

"Evaluations of RPM cases...[suggest] the following policy conclusions: (1) an approach that allows RPM by a new entrant is very likely to be socially beneficial, and (2) a provision... that allows dealer selection on the basis of quality is also likely to be beneficial." (p. 5)

A Conflicting Standard

Scherer and Ross, 1990: "The weight of the evidence...supports a conclusion that prices are on average elevated [by RPM], perhaps appreciably. ...[Studies] suggest average price differentials of 10 to 23 percent." (pp. 555-6)

- Is this a relevant factor?
- Is consumer welfare likely to be enhanced when final prices are higher?

Has the Enforcement Pendulum Shifted Again?

- *FTC v. Toys "R" Us*
Opinion by Chairman Pitofsky, 1998
Affirmed by Court of Appeals (7th Cir.), 2000
- *U.S. v. Microsoft*
Opinion by Judge Jackson, 2000
Affirmed liability by Court of Appeals (D.C. Cir.), 2001
- *LePage's, Inc. v. 3M*
Opinion of Judge Sloviter, Court of Appeals (3rd Cir.), 2003
- These cases have important vertical components.
- Do these cases signal a more active enforcement policy towards vertical restraints?
- Has the post-Chicago economic literature played a role?