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THE "IS" AND "OUGHT" OF VERTICAL RESTRAINTS AFTER *MONSANTO CO. v. SPRAY-RITE SERVICE CORP.*

*John J. Flynn**

"[O]ur quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive."[1]

Great hopes and great fears accompanied the Supreme Court's decision to review the Seventh Circuit's decision in *Spray-Rite Service Corp. v. Monsanto Co.*[2] Proponents of a neoclassical economic model of antitrust analysis, including the Reagan administration, saw *Monsanto* as a vehicle for bringing coherence to the analysis of vertical market restraints. The neoclassicists hoped that the *Monsanto* Court would declare purely vertical price fixing per se lawful, or at least apply a rule of reason similar to the one applied to vertical divisions of territories and customers after *Continental T.V., Inc. v. GTE Sylvania Inc.*[3] Opponents of legalizing vertical price fixing, on the other hand, saw *Monsanto* as a serious challenge to their goal of a rule of per se illegality for vertical price fixing. The opponents included many members of Congress who thought that Congress had mandated per se illegality for vertical price fixing when it repealed the exemption for state fair trade laws.[4] The Antitrust Division of the Department of Justice, however, favored legalizing vertical price fixing, and it improperly sought to lead the charge by way of a subsequently aborted amicus brief in the case.

Although the Supreme Court gave neither side a clear victory or defeat, it created significant ambiguity about central issues in vertical price fixing litigation and other antitrust cases that were certain to follow.[5] As with many other interpretations of important laws

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* Hugh B. Brown Professor of Law, College of Law, University of Utah.

1 Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 644 n.40 (1944) (Jackson, J., dissenting).

2 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984).

3 433 U.S. 36 (1977) (measuring agreements between manufacturers and retailers restricting geographical retail sales areas by rule of reason standard).

4 Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 3, 89 Stat. 801 (1975) (deleting paragraphs of 15 U.S.C. § 45(a) which permitted fair trade pricing of articles for retail sale and state enactment of nonsigner provisions).

5 Professor Hay perceptively explored this result in Hay, *Vertical Restraints After* Monsanto, 70 CORNELL L. REV. 418 (1985); *see also* Floyd, *Vertical Antitrust Conspiracies After* Monsanto *and* Russell Stover, 33 U. KAN. L. REV. 269 (1985).

during times of doctrinal or economic upheaval or following significant changes in the Court's membership, the *Monsanto* decision is not satisfying. *Monsanto* reflects deep problems with the Burger Court's decision making. By using *Monsanto* and its progeny to illustrate problems with the Court's values and methodology in analyzing antitrust issues, this Article seeks to explore these deeper implications, for their significance for antitrust litigation reaches beyond vertical restraint cases.

Part I of this Article examines *Monsanto* and the issues that decision left unresolved. Part II examines post-*Monsanto* lower court decisions dealing with these open issues. Rather than attempting to reconcile these often contrary rulings, this survey demonstrates that, absent Supreme Court guidance, lower courts are reaching opposite conclusions on similar facts. Finally, Part III discusses the flaws of the neoclassical approach to antitrust adjudication. The Article concludes that neoclassicists fail to respect the antitrust laws' proper consideration of social and political values and that courts adopting the neoclassical argument injudiciously invade the legislature's role.

I

MONSANTO: ITS LEGAL AND DOCTRINAL SHORTCOMINGS

A. Unresolved Legal Issues

The *Monsanto* Court held that there was sufficient evidence at trial to find that Monsanto unlawfully terminated the plaintiff's distributorship of Monsanto herbicides.[6] Specifically, the Court upheld the jury's finding that Monsanto terminated the plaintiff, a price-cutting distributor, "pursuant to a price-fixing conspiracy between Monsanto and its distributors"[7] to fix the resale price of Monsanto's herbicides. The Court also found sufficient evidence of a causal connection between the conspiracy to fix prices and the plaintiff's antitrust injury to sustain a damage award under section 1 of the Sherman Act.[8] Beyond the scope of the immediate controversy, however, the decision left at least four issues unresolved: (1) whether the Court will continue to hold vertical price fixing a per se violation of section 1 of the Sherman Act; (2) what constitutes sufficient evidence to send to a jury the questions of whether there is a contract, combination or conspiracy to fix prices and whether that conspiracy caused antitrust injury to the plaintiff; (3) what conduct

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6 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

7 *Id.*

8 *Id.* at 767-68. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1982).

can courts identify as price fixing within the meaning of the per se rule prohibiting vertical price fixing; and (4) what factors identify conduct as horizontal or vertical for purposes of analyzing distribution restraints under section 1 of the Sherman Act?

The issue of the per se status of vertical price fixing remains unclear. Attempts by the Solicitor General and other *amici* to raise the issue before the Supreme Court were rejected because neither party had raised the issue in the courts below.[9] Justice Brennan's concurrence shed no light on this issue, but it underscored the majority opinion's ambiguity with regard to the future status of the per se rule against vertical price fixing. By stressing Congressional acquiesence to the rule of *Dr. Miles Medical Co. v. John D. Park & Sons*[10] and the majority's "adhere[nce] to that rule,"[11] Justice Brennan implicitly suggested that the Court's refusal to reconsider the per se rule fell short of a ringing endorsement.

The second issue *Monsanto* left unclear deals with the evidence sufficient to prove contract, combination or conspiracy and a causal connection between the conspiracy and the plaintiff's alleged antitrust injury. Instead of providing criteria for future litigation, the Court's legal analysis focused on rejecting appellate court dicta asserting that "proof of termination following competitor complaints is sufficient to support an inference of concerted action."[12] The *Monsanto* Court did find, however, sufficient evidence for the jury to infer a conspiracy from certain facts unique to this case.[13] The Court's naked identification of evidence sufficient in this case falls woefully short of a general test for evidentiary sufficiency, leaving future courts to guess where the Court meant the line dividing judge and jury functions to fall.[14]

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9 465 U.S. at 761 n.7.

10 220 U.S. 373 (1911).

11 465 U.S. at 769 (Brennan, J., concurring).

12 Monsanto Co. v. Spray-Rite Serv. Corp., 684 F.2d 1226, 1238 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984).

13 Specifically, the Court found sufficient evidence in the following: (1) competitor complaints plus efforts by Monsanto employees to coerce other price cutters into line (including communicating with one price cutter's parent corporation to secure adherence to Monsanto's resale prices); (2) Monsanto's failure to fill the plaintiff's herbicide orders during the shipping season (when the product was in short supply) in order to force compliance with suggested prices; and (3) a distributor's newsletter reporting a meeting with Monsanto officials who discussed efforts "to get the market in order" and represented that Monsanto agreed not to undercut retailer prices in its own retail outlets. 465 U.S. at 765-66 & n.10.

14 Justice Powell, writing for the majority in the post-*Monsanto* decision of Matsushita Elec. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986), characterized *Monsanto* as holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1357. This reading of *Monsanto* appears to increase the standard of proof for the conspiracy element of the offense. In *Monsanto* the Court held that "[t]here must be evidence that

The *Monsanto* Court also neglected an opportunity to define more clearly the concept of "price fixing" prohibited by the per se rule. The Court refused to address the argument proffered by the Solicitor General as amicus that:

> If a supplier adopts a bona fide distribution program that includes nonprice restraints and if that program is reasonably addressed to distribution problems, the case must be judged by the rule of reason unless the plaintiff can show—by direct or circumstantial evidence—an *explicit* agreement about the prices distributors are to charge.[15]

The Court sidestepped this question by noting that Monsanto had conceded the applicability of the per se rule if nonprice restraints were found part of a price fixing conspiracy.[16] The Court acknowledged the difficulty of drawing a line between price and nonprice vertical restraints,[17] but offered little guidance to help resolve the difficulty. Consequently, subsequent courts have had to answer questions such as: (1) whether the conduct at issue should be categorized as "price fixing" within the meaning of the per se rule; (2) whether the conduct fits some other per se category; or (3) whether the conduct is some other form of vertical restraint to be measured on a more generous, but undefined, rule of reason basis.

The final issue left unresolved by *Monsanto* is the distinction between horizontal and vertical restraints. *Monsanto* implicitly raised this issue because Monsanto functioned as a dual distributor, selling its herbicides both to distributors and in its own retail outlets.[18] Although the Court did not make much of this fact, the opinion does note that the plaintiff's evidence to prove conspiracy included a distributor's newsletter reporting Monsanto's alleged agreement

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tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " 465 U.S. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). To the extent that *Matsushita* held that one may use motivations in the neoclassical model's hypothetical world to determine whether real-world evidence tends to prove a conscious commitment to a common scheme, the opinion goes considerably further than the *Monsanto* holding on the questions of what evidence is legally sufficient to prove conspiracy and whether the factual determination is one for court or jury.

15 Summary of Argument Before the Court, 52 U.S.L.W. 3448 (U.S. Dec. 13, 1983) (No. 82-914); *see generally* Comment, Spray-Rite Service Corp. v. Monsanto Co.: *The Justice Department Challenges The Per Se Rule Against Resale Price Maintenance*, 46 U. PITT. L. REV. 171 (1984) (arguing that per se rule should govern legality of both vertical nonprice restraints and resale price maintenance plans).

16 465 U.S. at 759 n.6.

17 *Id.* at 762.

18 *See id.* at 766.

to set the price of Monsanto herbicides at its own retail outlets at or above the suggested retail price.[19] Hence, one may argue that *Monsanto* is really a horizontal price fixing case involving a conspiracy among Monsanto's retailers. This horizontal aspect of the case could be used to distinguish *Monsanto* from future cases in which the conspiracy is more clearly vertical.

B. Unresolved Doctrinal Issues

A more general problem lies at the heart of the *Monsanto* decision. The question of how the moral or normative objectives of the relevant legal standards should inform the application of those standards underlies the resolution of any legal dispute. Stated another way, a court engaged in the application of a legal standard is also engaged in a complex series of "ought" decisions requiring a determination of the facts and rules relevant to the dispute.

The central paradox of legal reasoning is that whereas application of the appropriate rule presupposes knowledge of the relevant facts, determination of the relevancy of a given fact presupposes a knowledge of the appropriate rule. In addition, courts must interpret the concepts invoked by the rules in light of the facts found relevant and decide how those concepts ought to apply in light of the consequences such an interpretation will have in this and future cases. Unlike the deductive and mechanical application of premises to facts in some forms of economic analysis,[20] legal analysis should explore the moral and factual assumptions hidden in premises. Informal logic, not deductive logic, constitutes the essence of legal reasoning. It is in this sense that concepts are tools of analysis in law and that every legal decision is unavoidably a moral decision—a question of "ought."[21]

Different schools of antitrust thought disagree over the deeper social and economic values and objectives underlying the antitrust laws and how courts should bring those values to bear upon a specific dispute. Ought courts view antitrust solely as a means for achieving economic "efficiency," as that concept has been variously defined,[22] or ought they regard antitrust as invoking broader policy considerations encompassing additional economic, social and polit-

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19 *Id.* at 766.

20 *See* Mason, *Some Negative Thoughts on Friedman's Positive Economics*, 3 J.POST KEYNESIAN ECON. 235 (1980).

21 *See* F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 3-7 (1959).

22 The concept "efficiency" has been used to mean, among other things, "productive" efficiency and "allocative" efficiency. *See, e.g., Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980). Often the same author invokes first one, then another, and sometimes hybrid concepts of efficiency when discussing antitrust policy. *See* Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination*

ical values?[23] Judge Posner, a relentless advocate of the deductive logic methodology inherent in neoclassical economic analysis, summed up succinctly the consequences of the "economic efficiency" approach in *Roland Machinery Co. v. Dresser Industries*[24]:

> The welfare of a particular competitor who may be hurt as the result of some trade practice is the concern not of the federal antitrust laws, . . . but of state unfair competition law . . . .
>
> The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.[25]

One of many difficulties with Posner's position and such cliches as "the 'antitrust laws . . . were enacted for the protection of *competition*, not competitors,' "[26] is that courts, including the Supreme Court, continue to grant antitrust relief in cases lacking any showing of injury to "competition" in Posner's sense. Indeed, in the context of per se violations courts assume an injury to competition even though the proof often shows only injury to a particular competitor.

If one adopts Posner's view of antitrust, and the libertarian consequences its premises and rigid reliance upon deductive logic compel, then proof of injury to competition in a relevant market, or even proof of a reduction in output,[27] should be a prerequisite to a finding of illegality for conduct currently classified as per se illegal.[28]

Argument, 1984 DUKE L.J. 1205, 1287 (1984) (discussing confusion in Richard Posner's writings concerning various meanings of "efficiency").

23 Among the social or political values antitrust policy might invoke is ensuring that an individual's or a firm's success or failure be guaranteed by a competitive process free from unreasonable collective or unilateral acts of others, without regard for whether the challenged conduct necessarily injures competition by increasing price above marginal cost or reducing output. Professor Fox has defined the "qualitative" goals of antitrust policy: "There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor." Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 CORNELL L. REV.1140, 1182 (1981); *see also infra* notes 219-27 and accompanying text.

24 749 F.2d 380 (7th Cir. 1984).

25 *Id.* at 394.

26 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.14 (1984) (quoting Brown Shoe Co. v. United States, 370 U.S. 294 (1962), opinion reflecting the Warren Court's view that competition is dynamic, not static).

27 *See* Bork, *Vertical Restraints:* Schwinn *Overruled,* 1977 SUP. CT. REV. 171 (1977).

28 Judge Easterbrook, Judge Posner's co-author of ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS (2d ed. 1981), adopted, or a least came close to adopting, such an approach in Polk Bros. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985). The case involved a horizontal division of product markets by the plaintiff/landlord, who ran an appliance business, and the defendant/tenant, who owned a building supply business. Before plaintiff constructed a building to house both businesses, the parties negotiated a covenant running with the land which restricted each of them from selling certain products carried by the other. When the tenant realized that the restriction prevented it from running advertising for all of its stores on certain products because the products were not available in the store subject to the covenant, it advised the landlord

Given this requirement and the other assumptions of the neoclassical model, very little collaborative conduct would be of antitrust concern, with the possible exception of horizontal price fixing by dominant firms. Even then, neoclassicists might claim that market forces would remedy the problem more efficiently than government interference through the legal process.

Justice Powell, writing for the majority in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[29] purported to reject the position asserted by the dissent below that social and political values are goals that courts are bound to protect in giving meaning to and applying the antitrust laws. Justice Powell observed that"[c]ompetitive economies have social and political as well as economic advantages, . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks."[30] Justice Powell's statement hardly represents a resounding rejection of injecting social and economic values and broader economic goals into the interpretation of antitrust concepts, nor does it endorse a complete acceptance of limiting antitrust analysis to considerations of economic efficiency as defined by neoclassical economic analysis. Yet the statement, particularly when coupled with Justice Powell's acknowledgment of "free rider" analysis in *Monsanto*,[31] is a sufficient endorsement of efficiency to raise several questions. Among other issues, Powell's statement calls into question whether courts should require proof of adverse market ef-

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that it would no longer abide by the covenant. The tenant defended a suit to enforce the covenant by claiming that the covenant was an illegal division of markets, 776 F.2d at 187-88, and therefore void under the Illinois Antitrust Act, ILL. REV. STAT. ch. 38, § 60 (1975), a statute patterned after federal antitrust laws.

The case was removed to a federal district court which held the covenant an illegal horizontal division of product markets. Polk Bros. v. Forest City Enters., 1985-1 Trade Cas. (CCH) 66,450 (N.D. Ill.), *rev'd*, 776 F.2d 185 (7th Cir. 1985). In the course of reversing the district court, Judge Easterbrook wrote:

> Although federal law treats almost all contracts allocating products and markets as unlawful *per se*, . . . the *per se* rule is designed for "naked" restraints rather than agreements that facilitate productive activity. . . .
>
> Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production. . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment. When cooperation contributes to productivity through integration of efforts, the Rule of Reason is the norm.

776 F.2d at 188 (citations omitted). Distinguishing "ancillary" from "naked" restraints, Judge Easterbrook found the restraint ancillary because the agreement was a cooperative venture with "prospects for increasing output." *Id.* at 190. He reasoned that a showing of "market power" is required before such a restraint may be struck down. *Id.* at 191. Finding none, the court reversed the district court's opinion that the horizontal restraint dividing markets was illegal. *Id.*

29 433 U.S. 36 (1977).

30 *Id.* at 53 n.21 (citations omitted).

31 465 U.S. at 762-63.

fects in all section 1 cases, whether they should require proof of a relevant market in all rule of reason cases, whether the Supreme Court is preparing to abandon the per se rule against vertical price fixing, and whether trial courts should interpret the antitrust standards strictly to ensure that a restraint deemed illegal injures both consumers generally and targeted firms.

Judicial disagreement over the goals of antitrust (the "oughts") rumbles beneath the surface of post-*Monsanto* opinions. Indeed, *Monsanto*'s condemnation of vertical price fixing on a per se basis ensures perpetuation of the ideological conflict. While the *Monsanto* majority held vertical price fixing illegal per se because such agreements deprive dealers of the ability to exercise judgment in "making independent pricing decisions,"[32] it made no mention of the plaintiff's need to prove an injury to consumers by demonstrating that the manufacturer's marketing strategy restricted output or fixed prices above marginal cost.

Judicial condemnation of horizontal and other restraints on a per se basis, without proof of a relevant market and injury to competition in that market, suggests a judicial recognition that Congress intended the antitrust laws to serve goals other than preventing reductions in output.[33] The *Monsanto* Court's failure to resolve this issue has spawned continuing ideological controversy over the goals of antitrust and the identity and definition of the elements of the per se and rule of reason standards—controversy which is reflected in the litigation following that case.

II

THE "IS" OF LOWER COURT DECISIONS FOLLOWING *MONSANTO*

By the first quarter of 1986, over sixty reported antitrust decisions and several unreported decisions had cited *Monsanto*. Perhaps a dozen other cases did not cite *Monsanto* directly but did involve vertical restraints relevant to the policies discussed therein. All these cases share a general characteristic, one that should surprise no one familiar with the Reagan administration's antitrust ideology: none have been brought by the Antitrust Division of the United States Department of Justice.

Another striking feature of these cases is that more than half have involved rulings on motions for summary judgment or directed

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32 *Id.* at 762. Justice Powell also recognized the validity of a manufacturer's control over "marketing strategy," *id.*, for his products in order to "assure an efficient distribution system," *id.* at 763.

33 A dealer's freedom to compete on the merits would be an example of an antitrust goal unrelated to output reduction. *See* Fox, *supra* note 23, at 1169.

verdict in favor of defendants. In many of the summary judgment cases, courts cite precedent suggesting that summary judgment should rarely be granted in antitrust cases where intent and motive play a major role.[34] Nevertheless, many of the same courts grant, or affirm the granting of, the summary judgment motion. Judges often grant preliminary motions with little or no mention of the constitutional right to a jury trial on contested matters of fact or of the Federal Rules of Civil Procedure philosophy of de-emphasizing pleadings. Indeed, judges frequently use preliminary motions in ways which suggest that code pleading has returned to federal courts in antitrust cases.[35] Surprisingly, these particularly significant issues are little noticed in post-*Monsanto* litigation.[36]

The post-*Monsanto* decisions may be categorized according to the issues with which they deal: (1) the evidence sufficient to allow the fact-finder to infer the existence of a conspiracy and whether the conspiracy caused antitrust injury;[37] (2) whether the conspiratorial activity is price fixing or some other form of per se illegal conduct;[38] and (3) whether the conduct involved is horizontal or vertical.[39] Litigation concerning these issues continues against the background controversy over the goals of antitrust policy.

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34 Lower courts regularly cite the standard set forth in Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962) ("summary procedures should be used sparingly in complex litigation where motive and intent play leading roles"). *See, e.g.*, Terry's Floor Fashions Inc. v. Burlington Indus., 763 F.2d 604 (4th Cir. 1985) (citing *Poller* but granting summary judgment for defendant).

35 *See, e.g.*, Mueller v. Rayon Consultants, Inc., 170 F. Supp. 555 (S.D.N.Y.) (function of pleading under Federal Rules of Civil Procedure is to give fair notice of claim asserted, and no more), *appeal denied*, 271 F.2d 591 (2d Cir. 1959); *see also* Trebuhs Realty Co. v. News Syndicate Co., 12 F.R.D. 110 (S.D.N.Y. 1951); Shepard v. Popular Publications, 10 F.R.D. 389 (S.D.N.Y. 1950).

36 One could interpret *Monsanto* as dealing with the appropriate functions of judge and jury in vertical restraint cases or even as an indirect endorsement of the Federal Rules of Civil Procedure's notice pleading philosophy. These two issues supplement the question of the character and degree of evidence necessary to prove the elements of an antitrust conspiracy involving vertical or other restraints.

The post-*Monsanto* cases share another general characteristic: former law professors are writing many of the significant antitrust decisions. *See* Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985) (Easterbrook, J.), *cert. denied*, 106 S. Ct. 1659 (1986); Polk Bros. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.); Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir.) (Posner, J.), *cert. denied*, 469 U.S. 1018 (1984); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984) (Posner, J.); Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984) (Breyer, J.), *cert. denied*, 105 S. Ct. 2040 (1985). Some of these judges use the cases before them to criticize still-binding Supreme Court opinions in extensive dicta. The institutional constraints on a lower court judge, namely, following the decisions of the Supreme Court and deferring to congressional purposes in enacting economic regulation, apparently carry little weight with some of the appointees from the academic ranks.

37 *See infra* notes 42-94 and accompanying text.

38 *See infra* notes 102-52 and accompanying text.

39 *See infra* notes 156-68 and accompanying text.

A. Sufficiency of the Evidence to Infer Conspiracy

Following *Monsanto,* a plaintiff alleging a conspiracy in violation of the antitrust laws must prove: (1) a "conscious commitment to a common scheme"; and (2) that the alleged conspiracy caused an antitrust injury to the plaintiff.[40] Some of the post-*Monsanto* cases were filed or tried prior to *Monsanto*, with motions or appeals argued after the Supreme Court's decision. Hence, some of these cases involve mere competitor complaints followed by termination of the plaintiff and lack the additional "plus" necessary to prove a "conscious commitment to a common scheme," a "unity of purpose," or a "meeting of the minds."[41] Although courts usually dismiss such cases with a citation to *Monsanto* or the *Colgate* doctrine's[42] recognition of the right of traders to unilaterally refuse to deal,[43] some of these cases present close questions as to whether there was sufficient evidence of a "plus" to permit a jury to infer the existence of a conspiracy.[44] Other decisions confuse the question of whether there was any con-

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40 *See Monsanto,* 465 U.S. at 767.

41 *See* National Marine Elec. Distrib., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985); Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919 (2d Cir. 1985); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 1513 (1986); McMorris v. Williamsport Hosp., 597 F. Supp. 899 (M.D. Pa. 1984).

42 *Colgate* provides:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

United States v. Colgate & Co., 250 U.S. 300, 307 (1919). For an argument that the *Colgate* doctrine should be abolished, see Andersen, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case For Presumptive Illegality,* 54 WASH. L. REV. 763 (1979); *see also* Note, *A Definition of Agreement: Identifying Purely Unilateral Conduct in Vertical Price Restriction Cases,* 19 VAL. U.L. REV. 766 (1985) (proposing motive as basis for distinguishing permissible vertical price restraints).

43 *See, e.g.,* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 374 (3d Cir. 1985) (manufacturer's unilateral decision to rearrange its distribution scheme does not violate § 1 of the Sherman Act); Landmark Dev. Corp. v. Chambers Corp., 752 F.2d 369, 372 (9th Cir. 1985) (evidence of exchange of correspondence between manufacturer and complaining distributor too "highly ambiguous" to justify inference of agreement to fix prices). *See also* Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 684 (9th Cir. 1985) (insufficient evidence to infer conspiracy); Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984) (no conspiracy where entities are not competitors in same market and no independent decision-making was compromised), *cert. denied,* 105 S. Ct. 2040 (1985); Morrison v. Murray Biscuit Co., 617 F. Supp. 800 (N.D. Ind. 1985) (same), *aff'd,* 797 F.2d 1430 (7th Cir. 1986); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (C.D. Cal. 1985) (same), *aff'd,* 792 F.2d 1464 (9th Cir. 1986); Moffat v. Lane Co., 595 F. Supp. 43 (D. Mass. 1984) (same).

44 *See* National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985); Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919 (2d Cir. 1985).

spiracy with that of whether the conspiracy was one to "fix prices."[45] Still other decisions dispose of the case on the ground of insufficient evidence of a causal connection between the agreement to fix prices and antitrust injury to the plaintiff.[46] None of the opinions adequately discuss whether such issues should be determined by the judge or the jury.

Northwest Publications, Inc. v. Crumb[47] presents a rare case in which the plaintiff had no difficulty proving a contract, combination, or conspiracy. The defendant newspaper publisher had contracts with its "independent contractor" distributors which fixed the maximum price at which they could resell its newspapers. Despite Judge Posner's claim in another case that the rule of *Albrecht v. Herald Co.*[48] condemning maximum resale price maintenance "is in doubt after *Continental T.V., Inc. v. GTE Sylvania, Inc.*,"[49] the Ninth Circuit in *Northwest Publications* found no indication that the Supreme Court had questioned *Albrecht*'s per se rule.[50] The court went on to find, however, that the plaintiff had failed to show that the contract fixing maximum prices had caused it not to raise prices; the evidence instead supported a finding that other market factors prevented plaintiff from raising prices.

Although the *Northwest Publications* court did not refer to *Monsanto,* its decision mirrors *Monsanto*'s two-step analysis.[51] The Ninth Circuit's opinion ignores, however, the issue of whether such questions ought to be decided by a judge or a jury.

Other cases have focused on the first part of the *Monsanto* conspiracy test, discussing the minimum level of evidence required to send to the jury the question of whether there was a conscious commitment to a common scheme. In *National Marine Electronics Distributors, Inc. v. Raytheon Co.*,[52] a mail-order distributor of Raytheon's marine electronics products claimed that Raytheon had conspired

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45 *See* Motive Parts Warehouse v. Facet Enters., 774 F.2d 380 (10th Cir. 1985); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (D.C. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822 (N.D. Cal. 1984), *aff'd*, 779 F.2d 56 (9th Cir. 1985).

46 Other cases have involved unusual fact patterns which produce equally unusual analyses. *See* Beutler Sheetmetal Works v. McMorgan & Co., 616 F. Supp. 453 (N.D. Cal. 1985) (absence of anticompetitive purpose by builders and lenders in acquiescing to "union-only" policy for mortgage funds from union trust fund justified dismissal of complaint; trust fund could not be co-conspirator absent competition with nonunion subcontractors denied funding).

47 752 F.2d 473 (9th Cir. 1985).

48 390 U.S. 145 (1968).

49 Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698, 706 (7th Cir.), *cert. denied,* 469 U.S. 1018 (1984).

50 752 F.2d at 475.

51 *See supra* note 40 and accompanying text.

52 778 F.2d 190 (4th Cir. 1985).

with its regular distributors to terminate plaintiff's distributorship. The evidence was unclear about whether dealer complaints were based on plaintiff's pricing or lack of a service facility[53] and whether the dealer complaints also included threats to discontinue dealing with Raytheon if it continued to do business with the plaintiff.[54] Raytheon countered the plaintiff's claim by arguing that its termination of the plaintiff arose from an internal review resulting in a decision against selling through mail-order dealers. The district court directed a verdict for Raytheon on the ground that the plaintiff had failed to produce sufficient evidence to go to the jury on the question of conspiracy. Citing *Monsanto,* the court of appeals affirmed, holding that there was a lack of evidence that Raytheon and its dealers "schemed to terminate the plaintiff for the purpose of restraining price competition."[55] Citing evidence that the defendant dictated neither the plaintiff's nor any of its other dealers' prices, the court found the evidence insufficient to prove a conspiracy to restrain prices.

The Tenth Circuit, on the other hand, reaffirmed its finding of sufficient evidence of a conspiracy to withstand a motion for summary judgement in *Black Gold, Ltd. v. Rockwool Industries,*[56] From 1975 until 1979, the Public Service Company of Colorado (PSC) had operated and subsidized a program whereby residential customers could upgrade the insulation of their homes. Participants could choose either PSC-approved brands of rockwool, fiberglass, or cellulose insulation. The defendant, Rockwool Industries, sold the only brand of rockwool insulation so approved.[57] The plaintiff in *Black Gold* claimed that the defendant had illegally tied the sale of blown rockwool insulation to the sale of rockwool insulation in batts and had engaged in a concerted refusal to deal[58] in the fiberglass batt insulation. The court upheld the trial court's directed verdict for the defendant on the plaintiff's tying claim, but reversed the lower court's directed verdict for the defendant on the plaintiff's allegation of a concerted refusal to deal. The court of appeals found that the evidence demonstrated a firm policy of refusing to deal with buyers who refused to buy both forms of its insulation, that the defendant had continued to deal with the plaintiff's competitors who

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53 *Id.* at 191-92.

54 *Id.* at 192. There was also evidence that Raytheon agreed to supply the plaintiff on the condition that the plaintiff not advertise its prices for certain Raytheon products in its catalogues. *Id.*

55 *Id.* at 192-93.

56 729 F.2d 676, *reh'g denied,* 732 F.2d 779 (10th Cir.), *cert. denied,* 469 U.S. 854 (1984)). The Tenth Circuit issued its original opinion in *Black Gold* before the Supreme Court's *Monsanto* decision; after *Monsanto,* the Tenth Circuit denied a rehearing.

57 729 F.2d 676, 679.

58 *Id.*

purchased both forms of insulation, and that the defendant had terminated the plaintiff for refusing to do so.[59] The court also found evidence from which a jury could infer that the defendant, by manipulating its prices, was aiding the plaintiff's competitor to regain a customer lost to the plaintiff.[60]

In its opinion denying a rehearing after *Monsanto*, the Tenth Circuit reaffirmed its prior holding, citing a specific example of evidence that the *Monsanto* Court deemed sufficient to permit inferring the existence of a conspiracy. The Tenth Circuit stated:

> Among other things, the [*Monsanto*] Court noted that a threat to cut off a nonacquiescing distributor during a time when the product is in short supply is probative evidence of concerted action because it permits a jury to conclude that the manufacturer "sought this agreement at a time when it was able to use supply as a lever to force compliance."[61]

Post-*Monsanto* cases exhibit considerable disagreement over the degree to which coercion can transform unilateral, and thus protected, conduct into conduct amounting to a "conscious commitment to a common scheme." The *Monsanto* opinion expressly sanctions the announcement of a *Colgate*-type policy, that is, a unilateral refusal to deal with price cutters,[62] even though this policy often causes the distributor to forego his or her independent pricing discretion. Although *Monsanto* sanctions such conduct when purely unilateral, it also suggests that coercion can constitute evidence of a "plus" from which, in addition to complaints and termination, a jury may infer a section 1 conspiracy.

Several lower courts faced with resolving this conflict held that finding coercion to follow a seller's suggested prices allows a jury to find a price fixing conspiracy, either between the seller and the complaining buyer or between the seller and others. In these cases, courts found that evidence of dealer complaints permitted an inference that the seller had agreed with the complaining dealers to terminate the plaintiff.[63] In one case, for example, the Tenth Circuit

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59 *Id.*

60 *Id.*

61 *Black Gold, Ltd.*, 732 F.2d at 780 (quoting *Monsanto*, 465 U.S. at 765 n.10); *see also* Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204 (N.D.Ill. 1985) (refusing summary judgment where jury could infer conspiracy from competing distributor's threats to manufacturer).

62 *Monsanto*, 465 U.S. at 761 ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. . . . Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply.") (citations omitted).

63 *See, e.g.*, World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 (10th Cir.), *cert. denied*, 106 S. Ct. 77 (1985); Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985); Motive Parts Warehouse v. Facet Enters., 774 F.2d 380 (10th Cir. 1985).