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No. 82-914

In The

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER MONSANTO COMPANY

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Dated: May 14, 1983

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QUESTIONS PRESENTED

1. Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a *per se* rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?

2. Can a *per se* unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?

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Brief of Petitioner Monsanto Company[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 684 F.2d 1226 and appears as App. A in the Appendix to the petition for writ of certiorari ("Pet. App."). The district court's unreported ruling denying Monsanto's motion for a directed verdict appears as Pet. App. D. The district court denied Monsanto's motion for judgment notwithstanding the verdict on July 15, 1980.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1982. (Pet. App. B). A timely petition for rehearing,

[1]The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28 appears at page ii of the petition. There have been no changes to the parties in the interim.

suggesting that rehearing be *en banc*, was denied on September 8, 1982. (Pet. App. E). A timely petition for writ of certiorari was filed on December 7, 1982. On February 28, 1983 this Court granted the petition. Jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

Nature of the Case.

This private antitrust action arises from Monsanto's nonrenewal of the distributor contract of respondent Spray-Rite Service Corporation. Monsanto is a manufacturer of agricultural herbicides, which it markets through wholesale distributors. Spray-Rite was a wholesale distributor for Monsanto and other herbicide manufacturers. After its nonrenewal in 1968, Spray-Rite continued in business until 1972, when it ceased operations and filed this action for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. (Pretrial Order ¶6).

The central premise of Spray-Rite's action was that Monsanto conspired with some of its distributors to fix the resale prices of Monsanto herbicides in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Tr. 4350, J.A. 19-20).[2] Based on

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[2]The following abbreviations are used in this Brief: "J.A." (Joint Appendix filed in this Court by Petitioner and Respondent); "Pet." (Petition of Monsanto Company for Writ of Certiorari); "U.S. Amicus Brief" (Brief of the United States as

(footnote continued on next page)

that premise, Spray-Rite claimed, first, that certain promotional programs and distribution policies adopted by Monsanto in 1968 as part of a new marketing strategy were part of the alleged price-fixing conspiracy and, second, that the non-renewal of its distributor contract was pursuant to the alleged conspiracy. (*Id.*). Spray-Rite did not allege a horizontal conspiracy.

The Seventh Circuit affirmed a jury verdict for Spray-Rite on both claims.[3] Spray-Rite had disavowed any claim that Monsanto's promotional programs and distribution policies were illegal distribution restrictions under the *Sylvania* rule of reason standard.[4] It had agreed that Monsanto became a more effective competitor after their introduction. (Tr. 2990, 2993-95, 3983). The Seventh Circuit condemned them, however, applying a *per se* rule because Spray-Rite alleged that they were part of a price-fixing conspiracy. It held that *Sylvania* "applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices." 684 F.2d at 1237, Pet. App. A-12 (emphasis added). Holding this allegation to be determinative, the court made no rule of reason inquiry into the competitive effects of Monsanto's programs and policies. Nor did the court analyze whether any evidence linked them to the alleged price-fixing conspiracy.

(footnote continued from preceding page)

Amicus Curiae in Support of Petition); "Resp. Brief" (Respondent Spray-Rite's Brief in Opposition to the Petition); "Tr." (trial transcript); "PX" (plaintiff's exhibit); "DX" (defendant's exhibit); "Cir. Brief" (Brief for Defendant-Appellant Monsanto Company in the Seventh Circuit).

[3]The Seventh Circuit also affirmed the finding of a post-termination group boycott of Spray-Rite. Monsanto disagrees with, but did not seek review of, the Seventh Circuit's decision on this issue.

[4]*Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

The Seventh Circuit affirmed the finding of a price-fixing conspiracy although there was no evidence of an actual agreement to fix prices or evidence of adherence to Monsanto's suggested prices. The court based its affirmance solely on evidence that Monsanto, concerned about its distributors' resale prices, declined to renew Spray-Rite after receiving price complaints from other distributors. 684 F.2d at 1239, Pet. App. A-15 to 16. The court neither required nor identified any other proof of a causal connection between the complaints and the non-renewal.

This case presents two fundamental issues regarding application of the antitrust laws to manufacturer-distributor relations: (1) when should non-price distribution restrictions, normally tested under the rule of reason, be condemned as part of *per se* unlawful price fixing; and (2) can a *per se* unlawful price-fixing conspiracy be inferred solely from the termination of a distributor following price complaints from other distributors? Because vertical non-price restrictions are widely used and distributor terminations frequently occur, the resolution of these issues will broadly affect the nation's business.

Monsanto's Weak Competitive Position in 1967-1968.

Monsanto entered the agricultural herbicide market in 1956 by introducing the first "pre-emergent" herbicide. Unlike older products, which kill weeds after they emerge, pre-emergent herbicides prevent weeds from germinating. (Tr. 3217).

Although Monsanto's herbicides were acknowledged as excellent, they were slow in gaining acceptance by retail dealers and farmers. (Tr. 531-33, 3221). In 1967-1968 Monsanto remained a weak competitor facing dominant manufacturers. (Tr. 2147, 2881, 3234-35, 3241-43, 3293-94; DX 500-03, J.A. 112-15, Tr. 3300). Its sales in 1968 accounted for approximately 3% of the soybean herbicide market and 15% of the corn herbicide market. (DX 501-02, J.A. 113-14, Tr. 3300).

The entrenched market leader in corn herbicides commanded a 70% share. (*Id.*).

After internal study, Monsanto concluded that it could not remain in the herbicide business unless it overcame deficiencies in its marketing and distribution system and improved its market position. (Tr. 3243-44). Like most herbicide manufacturers, Monsanto markets through non-exclusive wholesale distributors who resell to retail dealers and other customers. (Tr. 534, 1355, 3395-98, 3551). Dealers play an important role in the marketing of herbicides. Most farmers purchase herbicides from dealers and look to them for product recommendations and technical advice. (Tr. 3237-38). This advice is essential to farmers, since the proper selection and application of a herbicide depends upon many variables, including the type of crop, the type of weeds to be controlled, climate, rainfall, and soil type. (Tr. 755, 915-16, 947-48, 1004). Improper use of a herbicide can damage or destroy a crop. (Tr. 512, 916, 945, 1004).

Monsanto concluded that it had failed to become an effective competitor because its products were inadequately represented at the dealer level and because dealers and farmers lacked a technical understanding of those products. (Tr. 3237-40, 3243-45). It decided that it needed the assistance of its distributors to overcome these problems. (Tr. 3246-48). Accordingly, Monsanto adopted a new marketing strategy that included technical education programs, an expansion of its technical support staff, and increased promotional and educational activities by Monsanto and its distributors. (Tr. 3244-45, 3294-3300).

Monsanto's New Marketing Strategy.

In September 1967 Monsanto notified its distributors by letter that they would be appointed for one-year terms and

evaluated for renewal in mid-1968 based on several criteria, including:

1) Whether the distributor's primary activity was soliciting sales to herbicide dealers;

2) Whether the distributor employed trained salesmen capable of carrying out Monsanto's technical education programs with dealers and farmers; and

3) Whether the distributor was adequately exploiting the market for Monsanto products in his area of primary responsibility. (Tr. 3239-40; PX 194, Tr. 602, 603).

Beginning in 1968 Monsanto strengthened its marketing strategy by introducing several programs and policies to increase the availability of Monsanto herbicides at retail outlets and to provide better product information to dealers and farmers. (Tr. 3244-45, 3296-98; PX 136, J.A. 43-45, Tr. 4208; DX 9 at p. 11, Tr. 4208). A key element of its strategy was a series of incentive programs to induce distributors to promote the sale of Monsanto herbicides to retail dealers, educate dealers and farmers on the technical advantages and applications of Monsanto's products, and stock dealers' shelves early in the selling season. (Tr. 1665-73, 1679-81, 3246-48; PX 136, J.A. 43-45, Tr. 4208; DX 9 at p. 11, Tr. 4208). These programs, which varied from year to year, provided for certain payments to distributors:

1) Payments ranging from $10 to $500 for sending distributor or dealer salesmen to Monsanto technical schools or clinics;

2) Payments ranging from $25 to $500 for holding farmer educational meetings, planting demonstration fields and conducting farmer field tours;

3) Payments ranging up to 60¢ per 100 pounds on herbicides purchased by the distributor before the herbicide selling season;

4) Payments ranging from 2¢ to 49¢ per 100 pounds on herbicides sold to dealers (conditioned from time to time on the distributor participating in Monsanto's technical schools, stocking dealers' shelves early in the herbicide selling season, or providing non-price customer information to Monsanto).[5]

As another element of its marketing strategy, Monsanto changed its shipping policies in 1968 to encourage distributors to develop the market potential in their areas. (Tr. 1513, 1563-65; PX 137, J.A. 48-49, Tr. 4208). Monsanto continued its long-standing policy of assigning distributors to non-exclusive areas of primary responsibility and designating between 10 and 20 distributors to cover each such area.[6] Beginning in 1968, it permitted distributors to pick up products only at Monsanto warehouses within each distributor's area of responsibility and provided free deliveries of products to the distributor or its customers only within that area. (Tr. 1558-60, 2480-81). These policies assisted Monsanto in coordinating the efficient movement of products through its warehouses and in ensuring their availability to customers during the busy planting season. (Tr. 2479-81).

The Success of Monsanto's New Marketing Strategy.

Monsanto's new marketing strategy succeeded. Its market share in soybean herbicides increased from approximately 3% in 1968 to 19% in 1972, while its share in corn herbicides increased from approximately 15% to 28%. (Tr. 3301-05; DX 501-02, J.A. 113-14, Tr. 3300). These increases came largely at the expense of the market leaders, and the soybean and corn herbicide markets became less concentrated. The combined market shares of the two leaders in soybean herbicides decreased from approximately 70% in 1968 to 52% in 1972. In

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[5](DX 9 at p. 11, Tr. 4208; DX 12, Tr. 3579, 4208; DX 36, Tr. 4208; DX 38, J.A. 88, Tr. 4208).

[6](DX 144, Tr. 1045, 1046; DX 189, Tr. 4208; DX 190, J.A. 95, Tr. 3060, 3063).

the same period, the share of the previously dominant corn herbicide manufacturer decreased from approximately 70% to 55%. (*See* Figure 1). This deconcentration was accompanied by an increase in total industry output following the introduction of Monsanto's marketing strategy. Between 1968 and 1972, use of soybean and corn herbicides grew by approximately 75% and 15% respectively.[7] Monsanto's output increased at an even greater rate. (DX 500, J.A. 112, Tr. 3300; DX 503, J.A. 115, Tr. 3300).

Spray-Rite agreed that Monsanto became a more effective competitor and that the herbicide market was highly competitive after Monsanto introduced its new marketing strategy. Its expert testified that the incentive programs tended to focus distributors' sales efforts on dealers and agreed that Monsanto's promotional efforts and emphasis on technical selling contributed to the improvement in its market position. (Tr. 2675, 2679, 2993-95). He described the herbicide industry as "highly competitive." (Tr. 2990).

The Nature of Spray-Rite's Business.

Spray-Rite became a Monsanto distributor in 1957 and was one of approximately 100 Monsanto distributors in 1968. (Tr. 598, 1528). It employed only one salesman, its principal owner, and operated as a high volume, low overhead seller. (Tr. 575-76, 1682). It publicized its "policy of selling as a brokerage house." (Tr. 3629-30; PX 19, J.A. 30, Tr. 666, 667). Its advertising explained that "[w]e spread ourselves quite thin in a large volume, small margin operation" and that "[a]s the season gets closer, our time gets so limited with our type of operation, that I cannot offer services that I feel are so necessary in this technical, exacting business of Agricultural Chemicals." (DX 465, J.A. 101, Tr. 4209). Spray-Rite sold primarily to large customers such as seed growers, rather than to the retail dealers on whom Monsanto's new marketing strategy was focused. (Tr. 597-98, 1107, 1682-85).

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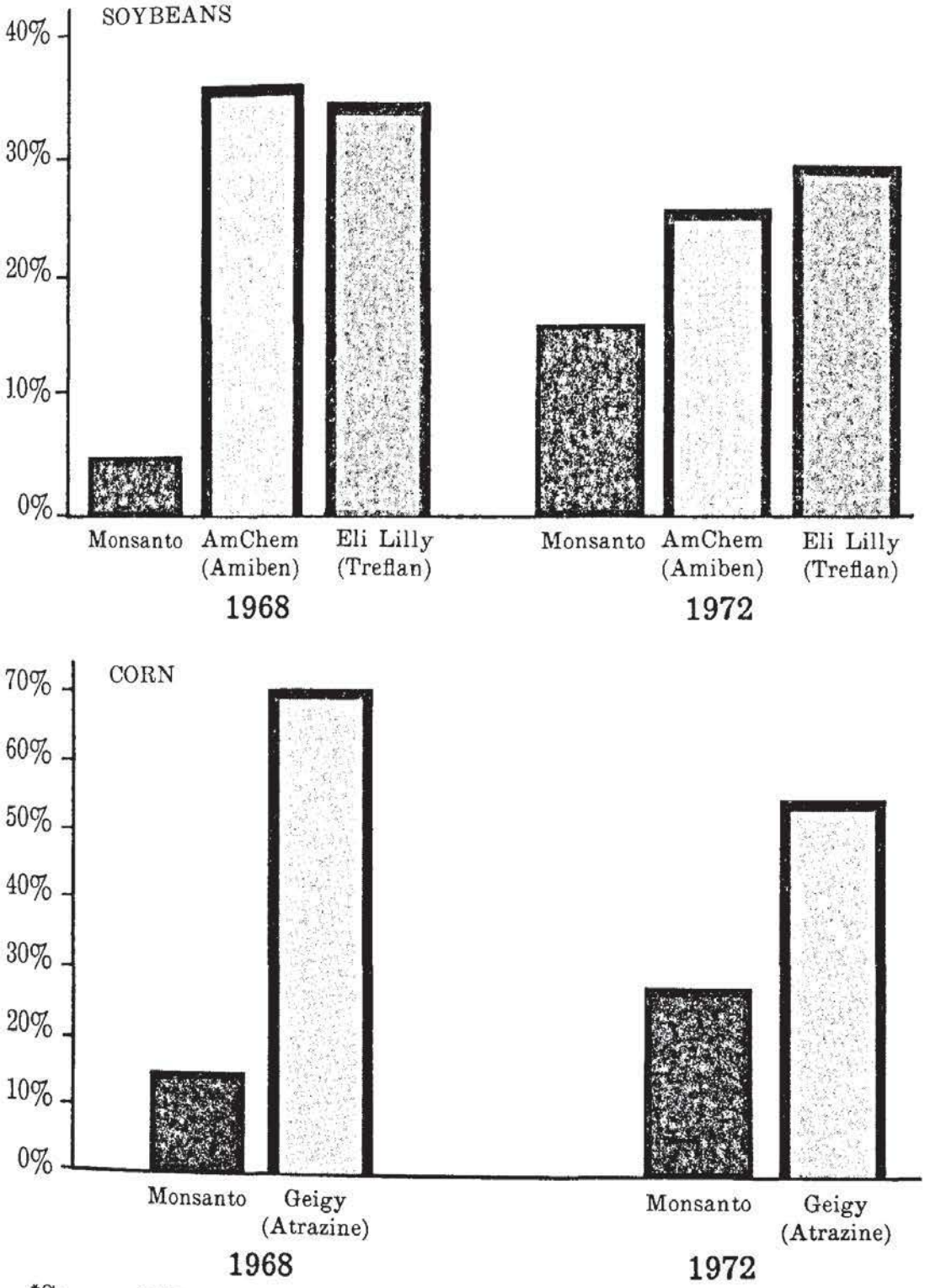
[7] (DX 213, Tr. 4208 (Table 6—Total U.S. Corn and Soybean Herbicides in 1972); DX 214 at 9, 11, Tr. 4208).

FIGURE 1

HERBICIDE MARKET SHARES: 1968 AND 1972*



*Source: DX 501, J.A. 113, Tr. 3300; DX 502, J.A. 114, Tr. 3300.

Spray-Rite concentrated on selling Atrazine, the product of Monsanto's dominant competitor. (Tr. 936-42, 1074). In April 1968, it advertised that Atrazine was "King of all corn herbicides," and would "remain master of all for some years to come." (PX 20, J.A. 33, Tr. 668, 670). In 1968, Spray-Rite's last year as a Monsanto distributor, Atrazine accounted for 73% of its herbicide sales, while Monsanto products accounted for only 16%. (Tr. 936; DX 454, Tr. 3079, 3085, 3086; DX 455, Tr. 3087, 3088).

Throughout its eleven-year tenure as a Monsanto distributor, Spray-Rite consistently sold Monsanto products below suggested resale prices. (Stipulation at Tr. 614; Tr. 611, 1218-19). Monsanto was aware of this price cutting from the outset and received price complaints about Spray-Rite from other distributors between 1964 and May 1967. (Tr. 92, 111-13, 115-18, 127-29, 1390-1401, 3626, 3631; PX 185, Tr. 1392, 1394, 1395). However, Monsanto continued Spray-Rite's distributorship and gave it a new contract in September 1967, four months after receiving the last price complaint. (PX 194, Tr. 602, 603; PX 201, Tr. 601, 603).

Monsanto's Non-Renewal of Spray-Rite.

Spray-Rite received Monsanto's distributor renewal criteria when its distributor contract was renewed in September 1967. (PX 194, Tr. 602, 603; PX 196, J.A. 59-60, Tr. 157-58, 199). Its owner, Donald Yapp, understood that Monsanto expected distributors to hire trained sales personnel, to focus on selling to dealers, and to participate in Monsanto's technical programs. (Tr. 1048-50). He understood that Monsanto would renew only those distributors who carried out that strategy. (Tr. 1052-53). He did not hire a sales force and continued selling on a high volume, low margin basis, concentrating on a few large customers. (Tr. 1059-63, 1106-07, 1682). In the year before its non-renewal, nearly 75% of Spray-Rite's sales of Monsanto products were to six customers. (DX 456, Tr. 3079, 3091, 3092).

In the fall of 1968, *fifteen months after receiving the last price complaint about Spray-Rite*, Monsanto declined to renew its contract. Monsanto witnesses testified that Spray-Rite was not renewed because it failed to hire additional salesmen and to adequately promote sales to dealers. (Tr. 1110, 2510-15, 3825-26). Spray-Rite claimed that it was not renewed solely because of its price-cutting. (Tr. 767-74).

Price Behavior in the Herbicide Market.

It is undisputed that there was vigorous price competition in the herbicide market both before and after Monsanto adopted its new marketing strategy. (Tr. 455-56, 692-93, 1465, 2140, 2990, 3349-53, 3413). In early 1969 Monsanto reduced by 10% the base price to distributors on its principal product and reduced its suggested resale price accordingly.[8] With rare exceptions, Spray-Rite and all other Monsanto distributors sold below—often substantially below—Monsanto's suggested resale prices.[9] As one of Spray-Rite's witnesses testified, "Price cutting was a way of life with distributors." (Tr. 2234). Distributors, *including Spray-Rite*, continually complained to Monsanto about other distributors' low resale prices. (Tr. 181, 184, 2471). Such complaints were "standard practice." (Tr. 184).

Like all manufacturers, Monsanto was interested in resale prices. It used resale price information to set its own prices and to suggest distributor resale prices at competitive levels. (Tr. 1678-79, 2301). Monsanto was also concerned that distributors' profit margins be adequate to support their participation in its promotional and educational programs. (Tr. 1640-43, 1654-58, 1679-81; PX 146, Tr. 1630, 1631). Monsanto

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[8](Tr. 1560, 1678-79, 3298-99, 3843-44; DX 19 at pp. 6-7, Tr. 4208; DX 467a-c, J.A. 109-11, Tr. 3821, 3842).

[9](Tr. 226, 406-08, 457, 575-77, 1077-1083, 1218-19, 1458-59, 1664-65, 1969-70, 1973, 2139, 2234, 2440, 2469-70, 2505, 3559-60, 3610, 3634-35, 3645-47, 3648-49, 3700, 3732-33, 3779; PX 309, J.A. 73, Tr. 1646, 1651 (*compare* col. 3 *with* col. 4); DX 464, Tr. 3079, 3124). Spray-Rite's resale prices were not the lowest. (Tr. 2139).

published suggested resale prices and, on occasion, encouraged Spray-Rite and other distributors to observe them. (Tr. 114; DX 17-21A, Tr. 4208).

The Trial and Verdict.

At trial, Spray-Rite sought to establish that its non-renewal resulted from a price-fixing conspiracy between Monsanto and other distributors. To link other distributors to the non-renewal, Spray-Rite relied on evidence that certain distributors complained to Monsanto about its prices between 1964 and May 1967, the last complaint occurring fifteen months before Spray-Rite's non-renewal.

Spray-Rite presented no evidence that distributors' resale prices were controlled or that intrabrand price competition was prevented. There is no evidence that Monsanto entered into written agreements requiring resale price maintenance. There is no evidence that distributors agreed to follow Monsanto's suggested resale prices or to observe any other price level. There is no evidence that any distributor acquiesced in any price coercion by Monsanto.[10] There is no evidence that distributors adhered to Monsanto's suggested resale prices, and there is unrebutted evidence that all distributors regularly sold below the suggested prices and that prices were not uniform. Finally, there is no contention that any of Monsanto's distributors agreed among themselves to fix prices.

At trial, Spray-Rite disavowed any claim that Monsanto's promotional programs and distribution policies were illegal

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[10] There is contradicted testimony that Monsanto employees threatened in the summer of 1966 and early spring 1968 to terminate Spray-Rite because of its low prices. (Tr. 617-19, 711, 1117-22). However, it is undisputed that Spray-Rite never changed its pricing in response to these alleged threats. (Tr. 1077-78). There was contradicted testimony by another Monsanto distributor that he was threatened with termination if he did not increase his prices (Tr. 306-07, 3468-69), but it is undisputed that he never changed his low prices. (Tr. 396-99, 457-58).

in themselves, conceding that "if those programs were implemented for Monsanto's own reason without a price fixing conspiracy, there is no contention that those programs . . . are illegal." (Tr. 3983). Instead, Spray-Rite contended that those practices were *per se* unlawful as part of the alleged price-fixing conspiracy. (Tr. 3984).

Spray-Rite based this contention on its expert's opinion that Monsanto's programs and policies would have an "influence" on distributors' resale prices and would tend to discourage distributors' sales to non-dealers and to customers outside their areas of primary responsibility. (Tr. 2667-68, 2674-79, 2908-14, 3018-19, 3986-88). The expert did not explain how these claimed economic effects could support a price-fixing scheme. Nor did Spray-Rite contest evidence that Monsanto designated between 10 and 20 distributors for each primary responsibility area and that distributors continued to sell large quantities of Monsanto products to non-dealers and to customers outside those areas.[11]

Spray-Rite presented no evidence that Monsanto introduced or implemented its programs or policies for the purpose of controlling resale prices. There is no evidence that Monsanto consulted with any distributor before implementing them. There is unrebutted evidence that the programs and policies were adopted by Monsanto to stimulate distributors' promotional and educational efforts with dealers and to improve Monsanto's distribution efficiency. (Tr. 1558-60, 1665-73, 1680-81, 2479-81, 3243-46, 3296-98).

Monsanto moved for a directed verdict on the grounds that the evidence was insufficient either to establish a price-fixing conspiracy or to link Monsanto's promotional programs and distribution policies to such a conspiracy. (Tr. 3044-46, 3984-91). The trial court denied the motions, but did not address

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[11] (Tr. 3600-03, 3729-31; DX 190, J.A. 95-97, Tr. 3060, 3063; DX 287, Tr. 3434, 3802, 3803; DX 288, Tr. 3434, 3802, 3803; DX 466, J.A. 102-08, Tr. 3805, 3806).

whether any evidence connected the programs and policies to the alleged price fixing.[12]

The jury returned a general verdict against Monsanto based on the combined effects of the non-renewal, the various programs and policies and an alleged post-termination boycott.[13] (2/21/80 Tr. 2-3). Spray-Rite was awarded approximately $10 million in trebled damages for the loss of a product line amounting to only 16% of its business, although Spray-Rite had never earned more than $89,000 per year in pre-tax profits. (PX 122-127, Tr. 716, 717; DX 454, Tr. 3079, 3085, 3086).

The Seventh Circuit Decision.

Monsanto appealed from the denial of its motion for a directed verdict on the price-fixing conspiracy claim. (Cir. Brief at 46-56). The Seventh Circuit affirmed, holding that an unlawful price-fixing conspiracy could be based solely on the circumstances surrounding Spray-Rite's non-renewal. It held that "proof of termination following competitor complaints is sufficient to support an inference of concerted

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[12] In denying the motion, Judge Roszkowski stated only:

> I think that there is some evidence that I think would allow that to go to the jury on the question of whether or not there was such a [price-fixing] conspiracy.
>
> . . .
>
> And I think there was also some evidence whether there were certain customer and territorial restrictions regarding the distribution of defendant's products.

(Tr. 3991-92; Pet. App. D).

[13] Spray-Rite's damage theory was premised on the aggregate effects of the non-renewal, the promotional programs and distribution policies, and the alleged group boycott. Its damage expert testified that he did not separately determine the effect on Spray-Rite of each element of the alleged violations. (Tr. 2891-93, 2897).

action." 684 F.2d at 1238, Pet. App. A-15 to 16.[14] The court did not address whether Spray-Rite had proven a price-fixing conspiracy beyond its non-renewal.

Monsanto also appealed from the denial of its motion for a directed verdict with respect to its promotional programs and distribution policies on the ground that no evidence connected them with the alleged price fixing. (Cir. Brief at 28-32). It urged that those practices should be tested under the *Sylvania* rule of reason. (*Id.*). The Seventh Circuit rejected Monsanto's reliance on *Sylvania* as "misplaced," holding that the mere allegation that the non-price practices were part of a price-fixing conspiracy mandated a *per se* rule:

> *United States* v. *Sealy* rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices. Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of an unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the *per se* rule.[15]

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[14] The Seventh Circuit held that Spray-Rite had satisfied this standard with evidence that: Monsanto had received complaints about Spray-Rite's prices and considered Spray-Rite a price cutter; some distributors had requested Spray-Rite's termination; Monsanto was concerned about the stability of resale prices for its herbicides; some Monsanto employees threatened to terminate Spray-Rite if it did not increase its prices; and Monsanto declined to renew Spray-Rite's contract. 684 F.2d at 1239, Pet. App. A-16. The court's characterization of the record regarding requests for termination is mistaken. *There is no evidence that any distributor requested Spray-Rite's non-renewal.*

[15] 684 F.2d at 1237, Pet. App. A-12 (emphasis added) (citations omitted). The court distinguished other decisions applying the rule of reason on the ground that the "plaintiffs in those cases *failed to allege* that the distributors' territorial restrictions were

(footnote continued on next page)

Because the court held that the allegation of a connection with price fixing compelled application of a *per se* rule, it did not inquire into the competitive effects of Monsanto's practices. Nor did it analyze whether there was any evidence connecting them to the alleged price fixing.

SUMMARY OF ARGUMENT

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977), establishes that the primary concern of antitrust policy is *inter*brand competition. It recognizes that non-price restrictions on *intra*brand competition can enhance interbrand competition by enabling a manufacturer to distribute its products more efficiently and compete more effectively. For those reasons, *Sylvania* holds that vertical non-price restrictions must be tested under the rule of reason.

In practical effect, the Seventh Circuit's decision reduces *Sylvania* to insignificance and vitiates the Sherman Act's crucial distinction between unilateral and concerted action. *First*, it holds that the mere allegation that non-price restrictions are part of a price-fixing conspiracy is enough to render the rule of reason inapplicable and to mandate application of a *per se* rule. *Second*, it permits the inference of a price-fixing conspiracy solely from evidence that a manufacturer, concerned about resale prices, terminated a distributor following price complaints from other distributors.

The decision will deter manufacturers from efficiently structuring their distribution systems and from adopting and enforcing procompetitive non-price restrictions. As *Sylvania* recognized, such restrictions are frequently used by manufacturers to implement marketing strategies requiring promotional activities by distributors. It is in that context, where some distributors may attempt to "free ride" by avoiding the cost of promotional activities, that distributor

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(footnote continued from preceding page)

ancillary to *per se* unlawful price-fixing schemes." 684 F.2d at 1238 n.6, Pet. App. A-13 n.6 (emphasis added).

termination, distributor price complaints and manufacturer concern about resale price levels are most likely. Thus, a manufacturer's use of non-price programs like Monsanto's will almost always give rise to the natural marketplace behavior that the Seventh Circuit held sufficient to establish a price-fixing conspiracy. Then, under the court's decision, an allegation that non-price programs are part of such a conspiracy will always warrant application of a *per se* rule.

The result here was the condemnation of non-price practices that had precisely the beneficial effects on interbrand competition contemplated by *Sylvania.* After Monsanto instituted its promotional programs and distribution policies, its market share increased at the expense of dominant manufacturers, and the market became less concentrated. Applying its *per se* rule based on a mere allegation, the Seventh Circuit held these programs and policies unlawful without considering their competitive effects and in the absence of any evidence linking them to the alleged price fixing. Applying its conspiracy rule, the court held that the requisite price-fixing conspiracy was proven by evidence of the termination of a distributor following price complaints.

The Seventh Circuit's mere allegation rule simply is not a rational test for distinguishing between those non-price restrictions that are part of unlawful price fixing and those that should be tested independently under the rule of reason. In the vertical context, this Court has defined *per se* unlawful price fixing as concerted action by a manufacturer and its distributors to control resale prices and prevent intrabrand price competition. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). Under the correct test, non-price restrictions should not be condemned as part of price fixing unless plaintiff establishes, first, that such a price-fixing conspiracy exists and, second, that the non-price restrictions were designed or used to achieve the prohibited effect on intrabrand price competition.

The Seventh Circuit's conspiracy standard unreasonably allows a jury to find a price-fixing conspiracy based on speculation. It permits the inference of conspiracy from normal marketplace occurrences—price complaints, price concern and termination—that are fully consistent with independent action. Such evidence is probative of conspiracy only if other evidence reasonably supports the inference that the manufacturer was acceding to the desires of complaining distributors in terminating the plaintiff, rather than exercising its independent business judgment.

Tested under the proper legal standards, neither the Seventh Circuit's decision nor the verdict with respect to price fixing and Monsanto's non-price programs can stand. The evidence does not establish either that Monsanto engaged in a price-fixing conspiracy or that Monsanto's non-price programs were part of such a conspiracy.

I. Monsanto's Procompetitive Non-Price Practices Were Condemned Under an Improper *Per Se* Rule and Were Not Part of Price Fixing.

In *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-52, 57 (1977), this Court held that vertical non-price restrictions must be tested under the rule of reason because of "their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." The Seventh Circuit's decision severely confines *Sylvania,* holding that it "applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices."[16] 684 F.2d at 1237, Pet. App. A-12. Where such an allegation is made, the court of appeals held that "*Sealy* and its progeny prescribe the *per se* rule." *Id.* Applying that improper standard, the court condemned Monsanto's promotional programs and distribution policies without inquiry into their

[16] One commentator has remarked that "[i]f this language is to be credited there is simply nothing left of *Sylvania.*" Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 U.C.L.A. L. Rev. 1, 42-43 n.127 (1982).

competitive effects or analysis of their relationship to the alleged price fixing. It did so on a record demonstrating their procompetitive effects and lacking any evidence linking them to the alleged price fixing.

A. *Sylvania* Establishes that Vertical Non-Price Restrictions Should Be Tested Under the Rule of Reason.

Sylvania was grounded in this Court's recognition that interbrand competition "is the primary concern of antitrust law," and that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." 433 U.S. at 52 n.19, 54. *See also Rice* v. *Norman Williams Co.*, __ U.S. __, 102 S. Ct. 3294, 3300 (1982).

The competitive benefits of vertical non-price restrictions are well supported by economic theory. "Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers." *Sylvania*, 433 U.S. at 54-55. In particular, "manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *Id.* at 55. These forms of non-price competition also benefit the consumer. For example, they may provide wider availability and selection of products, better product information, or more convenient and accessible service.[17] Thus, manufacturers and consumers share a common interest that these

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[17] *See, e.g.*, Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 Sup. Ct. Rev. 171, 180-81 (1977); Meehan & Larner, *A Proposed Rule of Reason for Vertical Restraints on Competition*, 26 Antitrust Bull. 195, 206-09 (1981); White, *Vertical Restraints in Antitrust Law: A Coherent Model*, 26 Antitrust Bull. 327, 336-38 (1981).

promotional and service activities be provided as efficiently as possible.[18]

However, "[b]ecause of market imperfections such as the so-called 'free rider' effect, these services might not be provided by [distributors] in a purely competitive situation, despite the fact that each [distributor's] benefit would be greater if all provided the services than if none did." *Sylvania*, 433 U.S. at 55. Since promotional and service activities entail costs, individual distributors have an obvious incentive to avoid those costs, cut prices, and free ride on the efforts of other distributors who provide promotion and services.[19] In the long run, free riders will tend to drive out distributor-provided promotion and services, to the detriment of consumers and the manufacturer.[20]

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[18] Because these activities form part of the cost of distribution (the difference between the manufacturer's price to its distributors and their resale prices), it will always be in the interest of the manufacturer to minimize their cost. *Sylvania*, 433 U.S. at 56 n.24; Bork, 1977 Sup. Ct. Rev. at 188; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283 (1975).

[19] *See Sylvania*, 433 U.S. at 55; *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 743-45 (7th Cir. 1982); Bork, 1977 Sup. Ct. Rev. at 181; Meehan & Larner, 26 Antitrust Bull. at 206-09; Posner, 75 Colum. L. Rev. at 285; White, 26 Antitrust Bull. at 332.

[20] *See* Bork, 1977 Sup. Ct. Rev. at 181; Meehan & Larner, 26 Antitrust Bull. at 207-208; Posner, 75 Colum. L. Rev. at 284-85; Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. Law & Econ. 86, 91-92 (1960). In the short run consumers may be able to obtain product information and services from some distributors, but purchase the product at lower prices from free riders who do not provide those services. In the long run consumers suffer, as the services are driven from the market or must be provided by less efficient, more costly means. Thus, free riding ultimately makes products more expensive and less desirable. *See* Meehan & Larner, 26 Antitrust Bull. at 206-08;

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Vertical non-price restrictions channel distributors' efforts into more effective promotion of the manufacturer's product, thereby enhancing interbrand competition. In particular, they limit the incentive for free riding and induce distributors to provide the promotional activities and services essential to the effective marketing of the manufacturer's products.[21] These "redeeming virtues" convinced this Court in *Sylvania* that, to the extent such restrictions stimulate interbrand competition, they are to be encouraged under the antitrust laws, not condemned. 433 U.S. at 54. The Court therefore abandoned the formalistic *per se* rule of *Schwinn*[22] and restored the rule of reason standard for testing such restrictions. *Id.* at 59.

B. The Seventh Circuit's *Per Se* Rule Substantially Undermines *Sylvania*.

The Seventh Circuit's application of a *per se* rule to Monsanto's non-price practices cannot be reconciled with this Court's precedents. By making determinative the mere allegation that such practices are part of price fixing, the Seventh Circuit violated this Court's admonition in *Sylvania* that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather

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Telser, 3 J. Law & Econ. at 92-95; White, 26 Antitrust Bull. at 332-33.

[21] *Sylvania*, 433 U.S. at 54-55. *See also* authorities cited *supra* notes 17-20. Because "manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products," *Sylvania*, 433 U.S. at 56, they have no incentive to institute non-price restrictions merely to enhance distributors' profits. R. Bork, *The Antitrust Paradox* 290 (1978); Posner, 75 Colum. L. Rev. at 283, 287-288.

[22] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

than . . . formalistic line drawing."[23] Basing a *per se* rule on a bare allegation is the ultimate formalism. An allegation simply is not a rational criterion for identifying those practices "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958).

The decision below will retard the procompetitive development of federal antitrust policy regarding vertical non-price restrictions and will deter their use by manufacturers. "Such restrictions, in varying forms, are widely used in our free market economy" and their antitrust legality is therefore "of considerable commercial importance." *Sylvania*, 433 U.S. at 57, 49. A manufacturer who uses them is always vulnerable to a facile claim that they "affect" price or restrict intrabrand price competition, particularly where they are used as part of a marketing strategy emphasizing non-price as well as price competition. So long as juries are permitted to speculate whether such restrictions are part of "price fixing," the manufacturer who uses them always risks treble damage liability. The Seventh Circuit's decision multiplies that risk, first, by prescribing an extreme *per se* rule based solely on the allegation of linkage to price fixing and, second, by permitting the inference of the underlying "price-

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[23] 433 U.S. at 58-59. This Court's antitrust decisions repeatedly have emphasized that the classification of particular conduct as *per se* unlawful must be based on a careful analysis of its substance and competitive impact, not on formalism. *See, e.g., Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9, 19-20 (1979); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977). *See also United States* v. *Sealy, Inc.*, 388 U.S. 350, 352-54 (1967).

fixing" conspiracy from normal market behavior flowing from the use of non-price programs.[24]

C. Vertical Non-Price Restrictions Should Not Be Condemned as Part of Price Fixing Absent Proof That They Were Designed or Used to Implement Price Fixing.

Sound antitrust policy requires a rational test for distinguishing between those vertical restrictions that are part of unlawful price fixing and those that should be tested independently under the rule of reason.[25] Under this Court's

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[24]The resulting threat to the antitrust policy underlying *Sylvania* has been succinctly described:

> Because of the enormous attraction of litigating under a *per se* rule, virtually every plaintiff now alleges that nonprice restrictions are horizontal and that vertical restrictions are intended to control price. These distinctions have caused considerable confusion in the lower courts, confusion that threatens to obscure the analytically important insights of *Sylvania* itself.

Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 Va. L. Rev. 1457, 1463 (1981). *See also* Liebeler, 30 U.C.L.A. L. Rev. at 40-48 & n.127; Pollock, *Customer Restrictions and Refusals to Deal in the New Age of Reason*, 13 Toledo L. Rev. 559, 563 (1982).

[25]There is substantial authority that resale price fixing itself does not warrant *per se* condemnation. *See, e.g.*, R. BORK, *The Antitrust Paradox* at 288-98; Baker, 67 Va. L. Rev. at 1465-68; Bork, 1977 Sup. Ct. Rev. at 190-92; Carr, *Some Reflections on Vertical Restraints,* 13 Toledo L. Rev. 587, 589-92 (1982); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. Chi. L. Rev. 6, 9-14 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 7-10 (1977). The amicus brief filed by the United States in support of Monsanto's petition for certiorari urges that all vertical restrictions "are sufficiently

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precedents, vertical non-price restrictions should not be condemned as part of price fixing unless it is established both that an unlawful price-fixing scheme exists and that the restrictions were designed or used to implement that scheme.[26] Absent proof of such linkage, non-price restrictions should be tested under the rule of reason. Only then can manufacturers be afforded realistic freedom to adopt procompetitive distribution practices, as the Court intended in *Sylvania.*

The common core of this Court's vertical price-fixing decisions is the condemnation of concerted action by a manufacturer and its distributors to control resale prices and prevent intrabrand price competition. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).[27] The Court has proscribed non-price practices as part of a price-fixing scheme only upon proof that such a scheme exists and that the non-price practices were designed or used to implement the manufacturer's control of distributors' prices and to prevent intrabrand price competition.

Thus, the Court has struck down customer restrictions that directly effectuated control of resale prices by confining distribution of the manufacturer's products to wholesalers and

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similar in their basic competitive characteristics that the rationale of this Court's decision in *Sylvania*—that *per se* rules should be applied only to practices that are clearly anticompetitive in almost every situation—compels the conclusion that resale price maintenance activities, too, should be analyzed under the rule of reason." (U.S. Amicus Brief at 15).

[26] The Court did not address this issue in *Sylvania,* where price-fixing claims were resolved against plaintiff at trial and not raised in this Court.

[27] *See infra* pp. 41-45.

retailers who maintain prices fixed by the manufacturer.[28] The Court also has condemned non-price mechanisms for detecting sales below fixed prices and identifying the offending wholesaler or retailer, thereby enabling the manufacturer to police compliance with a price-fixing scheme.[29]

The Court has applied the same standard to non-price restrictions challenged as part of horizontal price fixing. For example, in *United States* v. *Sealy, Inc.*, 388 U.S. 350, 356 (1967), territorial restrictions were condemned as "part of the unlawful price-fixing and policing" grounded on "specific findings of the District Court [that] they gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions."

Absent proof that vertical non-price restrictions are an integral part of price fixing, the Court has required that they be tested independently under the rule of reason. Thus, in

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[28] *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 45 (1960) (enlisting wholesalers to stop the flow of products to retailers who deviated from suggested resale prices effectuated a resale price-fixing scheme); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 720 (1944) (agreements with wholesalers to resell only to licensed retailers were illegal as an "integral part of the whole distribution system," which required licensed retailers to maintain prices); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (permitting wholesalers to deal only with retailers who maintained suggested resale prices was part of a price-fixing scheme); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911) (written agreements allowing wholesalers to sell only to licensed retailers who had entered into price maintenance agreements with the manufacturer were part of a price-fixing scheme).

[29] *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 454 (1922) (using a coding system to track the source of products sold by price cutters and refusing to sell to price cutters "[i]n its practical operation . . . necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it.").

White Motor Co. v. *United States*, 372 U.S. 253 (1963), the Court refused to apply a *per se* rule to defendant's territorial and customer restrictions, despite an uncontested finding of price fixing. The Court did not regard that finding as dispositive because the trial court had made no finding that the restrictions were an integral part of the price fixing:

> In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, where price fixing was "an integral part of the whole distribution system" (*id.*, 720) including customer restrictions. No such finding was made in this case . . . .

372 U.S. at 260.

Evidence that vertical non-price restrictions have an "effect" on price or restrict intrabrand competition is not enough to link them to price fixing. All such restrictions have some indirect effect on the level of intrabrand prices.[30] In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979), this Court made clear that "[n]ot all arrangements . . . that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints." Moreover, the Court fully understood in *Sylvania* that "[v]ertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers." 433 U.S. at 54. This Court nevertheless concluded that such restrictions must be tested under the rule of reason.

In sum, unless non-price restrictions are designed or used to implement a scheme to control resale prices and prevent intrabrand price competition, they must be tested under the

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[30] *See, e.g.*, Baker, 67 Va. L. Rev. at 1467; Liebeler, 30 U.C.L.A. L. Rev. at 45-46; Pollock, 13 Toledo L. Rev. at 563. Indeed, because virtually all non-price restrictions affect price, a rule condemning them on that basis "is flatly inconsistent with *Sylvania*." Baker, 67 Va. L. Rev. at 1467.

rule of reason. Proof that such restrictions affect price or limit intrabrand price competition is not enough to connect them with price fixing.

D. The Record Does Not Support the Verdict That Monsanto's Non-Price Practices Were Part of Price Fixing.

Since the Seventh Circuit held that the bare allegation of a connection with price fixing was determinative, it failed to analyze whether Monsanto's promotional programs and distribution policies were anticompetitive or were designed or used to implement price fixing. Had it done so, the court would have been compelled to reverse the denial of Monsanto's motion for a directed verdict.

There is no evidence that Monsanto's programs and policies were designed or used for the purpose of fixing resale prices. To the contrary, there is unrebutted evidence that they were unilaterally adopted by Monsanto for their self-evident purpose of encouraging distributors to carry out Monsanto's marketing strategy. (Tr. 1665-73, 1679-81, 3243-45). Thus, Monsanto designed its programs and policies to induce distributors to promote the sale of Monsanto herbicides to retail dealers in their areas of responsibility, stock dealers' shelves early in the selling season, educate dealers and farmers on the technical advantages of Monsanto's products, and provide technical advice. (Tr. 1665-73, 3246-49, 3294-98; PX 136, J.A. 43-45, Tr. 4208).

Spray-Rite presented no evidence explaining how these programs and policies supported or logically could support price fixing. Spray-Rite's expert hypothesized that, by rewarding distributors for selling to dealers, the incentive programs would "tend to discourage sales focus or sales efforts" with non-dealers when product was in short supply and would "influence" distributors' resale prices. (Tr. 2674-79, 2908-09, 3018-21). He conceded that when product was in

ample supply, as it was virtually without exception, Monsanto's programs would not cause a distributor to decline a sale to a non-dealer. (Tr. 2908-13).

As a matter of law and economics, Monsanto's incentive programs could not have implemented a price-fixing scheme. The prices a manufacturer charges its distributors necessarily influence their resale prices, but such an effect does not constitute "price fixing." *Cf. Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9, 23 (1979). Even if Monsanto's programs had precluded sales to non-dealers (which they did not), they could not have contributed to controlling distributors' resale prices or preventing intrabrand price competition. Those programs left distributors complete freedom to compete for sales to dealers and to determine their own resale prices. Unlike the restrictions in *Sealy* and *Bausch & Lomb*, Monsanto's programs did not insulate distributors from price competition, nor did they confine the distribution of Monsanto's products to distributors or dealers who agreed to sell at fixed prices.

Regarding Monsanto's primary responsibility areas and shipping policies, Spray-Rite's expert theorized that they "precluded" distributors from selling outside their designated areas because they increased shipping costs. (Tr. 2668). Even crediting that opinion, those territorial policies could not have contributed to a price-fixing scheme. Precluding extraterritorial sales would prevent intrabrand competition and might facilitate resale price control if the restrictions created "enclaves" in which distributors were insulated from price competition. *Cf. United States* v. *Sealy, Inc.*, 388 U.S. 350, 356 (1967). It could not have had those effects here, where Monsanto assigned from 10 to 20 distributors to each area of primary responsibility.

Moreover, uncontested marketplace evidence establishes that Monsanto's programs and policies did not have the preclusive effects hypothesized by Spray-Rite's expert. While these programs and policies induced distributors to

concentrate on selling to dealers within their areas of responsibility, distributors continued to sell substantial quantities of Monsanto products to non-dealers and to customers outside their areas. (DX 287, Tr. 3434, 3802, 3803; DX 288, Tr. 3434, 3802, 3803; DX 466, J.A. 102-08, Tr. 3805, 3806). *There is no evidence that any distributor ever declined to sell to a non-dealer or to a customer outside its area because of Monsanto's promotional programs or shipping policies.*

At bottom, Spray-Rite's theory is that Monsanto's non-price practices supported price fixing because they operated as customer and territorial restrictions and had an "effect" on resale prices. (Tr. 3986-88). Those hypothetical effects do not establish a connection with price fixing or justify *per se* condemnation of Monsanto's practices. In *Sylvania*, this Court recognized that non-price restrictions reduce intrabrand competition, including price competition, but nevertheless concluded that they should be tested under the rule of reason. 433 U.S. at 36, 54.

Monsanto's non-price practices could not have been condemned under the rule of reason. The incentive programs induced distributors to focus on promotional and informational activities that Monsanto considered essential to its becoming an effective competitor. The primary responsibility areas and shipping policies encouraged distributors to develop the market potential for Monsanto herbicides within those non-exclusive areas and contributed to the efficiency of product movement. All of these practices benefitted consumers by providing better product information, increasing the availability of Monsanto products on retailers' shelves, and increasing the efficiency of Monsanto's distribution system. (Tr. 1513, 1563-65, 1665-73, 1680-81, 2479-81, 3244-49).

There simply is no question that Monsanto's marketing strategy enhanced interbrand competition. Economic theory teaches that the procompetitive interbrand effects of vertical

non-price restrictions are manifested by an increase in a firm's output and market share:

> If its output expanded, the restriction must have made the firm's product more attractive to consumers on balance, thereby enabling the firm to take business from its competitors. This is an increase in interbrand competition and hence in consumer welfare, which is the desired result of competition.

Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 21 (1981). [31] This test was met. In 1968, before Monsanto adopted the challenged programs and policies, it was a weak competitor facing entrenched rivals. It was confronted with a choice between improving its competitive position or quitting the market. By 1972 Monsanto had become an effective competitor. Its sales increased; its market share improved; market concentration declined; and industry output increased.

In sum, Monsanto's non-price practices worked exactly as contemplated in *Sylvania*. Because Spray-Rite failed to present any evidence linking them to price fixing, the judgment that they were part of price fixing cannot stand.[32]

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[31] *See generally Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 446 U.S. 1, 19-20 (1979); 2 P. Areeda and D. Turner, *Antitrust Analysis*, ¶ 405c at 280-81 (1978); G. Stigler, *The Organization of Industry* 42 (1968); Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 901-02 (1981); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 972-74 & n.57 (1981).

[32] Reversal of any aspect of the district court's judgment will require reconsideration of the damage award, since Spray-Rite premised its damage theory on the combined effects of the various programs and policies, the non-renewal and a post-termination boycott. As the Seventh Circuit itself has held, "[i]t is essential that damages reflect only the losses attributable to unlawful competition." *MCI Communications Corp.* v. *American Telephone and Telegraph Co.*, 1982-3 Trade Cas. (CCH)

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II. The Price-Fixing Verdict Was Affirmed Under an Improper Conspiracy Rule and Cannot Be Sustained on Any Theory of *Per Se* Unlawful Price Fixing.

The Seventh Circuit affirmed the jury's finding of a *per se* unlawful price-fixing conspiracy on the ground that such a conspiracy may be inferred solely from evidence that a manufacturer, concerned about resale prices, declined to renew a distributor after receiving price complaints from other distributors. Holding that "termination following competitor complaints is sufficient to support an inference of concerted action," 684 F.2d at 1238, Pet. App. A-15, the court neither required nor identified any evidence probative of a causal connection between the complaints and the nonrenewal. Nor did the court address whether Spray-Rite had proven a price-fixing conspiracy as defined by this Court. Indeed, the unrebutted record of pervasive, vigorous price competition among Monsanto distributors belies the existence of such a conspiracy.

The Seventh Circuit's conspiracy rule is improper for two fundamental reasons. First, it vitiates the Sherman Act's crucial distinction between unilateral and concerted action by permitting a jury to infer conspiracy from normal marketplace behavior that is fully consistent with unilateral conduct. Second, it departs substantially from this Court's precedents by sustaining a verdict of *per se* unlawful price fixing in the absence of any evidence of actual agreement to fix prices or circumstantial evidence that distributors' resale prices were controlled and that intrabrand price competition was prevented. The practical effect of the decision is to expose a manufacturer to *per se* liability whenever it terminates a distributor, thereby deterring independent, procompetitive conduct.

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¶ 65,137 at 71,414 (7th Cir. 1983). *See also Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 304 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

A. The Seventh Circuit's Standard Is Based on Factors Not Probative of Conspiracy and Will Deter Procompetitive Conduct.

Here, as in any Section 1 conspiracy case, the threshold question is whether the defendant's conduct "stemmed from independent decision or from an agreement, tacit or express." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954). Absent direct evidence of agreement, a conspiracy may be proven by circumstantial evidence only if that evidence is "significantly probative of conspiracy." *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288 (1968). Circumstantial evidence is not probative of conspiracy unless it makes the hypothesis of concerted action more probable than that of unilateral action. Thus, in affirming summary judgment for the defendant in *First National Bank* the Court reasoned:

> [N]ot only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, *thus negating the probative force of the evidence showing such a failure*, but the former inference is more probable.

391 U.S. at 280 (emphasis added).

Underpinning *First National Bank* is the fundamental principle that conspiracy cannot reasonably be inferred from behavior that can naturally flow from the exercise of independent judgment. This principle follows directly from the maxim that a jury is allowed to draw only "reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." *Galloway* v. *United States*, 319 U.S. 372, 396 (1943). Circumstantial evidence that is consistent with independent behavior contributes nothing toward the identification of concerted action and thus has no "reasonable tendency to sustain" an inference of conspiracy.

This principle applies in any antitrust case. Where a vertical conspiracy to terminate a distributor is alleged, circumstantial evidence that points "with at least as much force toward unilateral actions" is insufficient as a matter of law to support an inference of conspiracy. *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, 685 F.2d 41, 48 (2d Cir.), *cert. denied*, __ U.S. __, 103 S. Ct. 362 (1982). Similarly, in the horizontal context consciously parallel business behavior is insufficient proof of conspiracy "unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).[33] In short, business behavior expected of a firm acting unilaterally is not proof of a conspiracy in restraint of trade.

The Seventh Circuit's conspiracy rule violates this principle. It permits the inference of a price-fixing conspiracy from three neutral circumstantial facts: (1) the termination of a distributor, (2) the manufacturer's concern about resale prices, and (3) the manufacturer's receipt of price complaints about a distributor from its rivals. 684 F.2d at 1239, Pet. App. A-15 to 16. Each of these occurs normally

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[33] *See also Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 327 (D.C. Cir.) (agreement may be inferred from parallel conduct "[o]nly when the observed parallel behavior is inconsistent with the behavior to be expected from each actor ... pursuing [his] own economic interest"), *cert. denied*, __ U.S. __, 103 S. Ct. 86 (1982); *Southway Theatres, Inc.* v. *Georgia Theatre Co.*, 672 F.2d 485, 493-96 (5th Cir. 1982) (parallel refusals to deal have "no significant probative force" where independent business judgment would similarly have resulted in each defendant's refusal to deal); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962) (parallel business behavior "is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*").

in a competitive market and is fully consistent with unilateral behavior. Neither separately nor collectively are these circumstantial facts "significantly probative" of a price-fixing conspiracy.

First, the termination of a distributor is not indicative of conspiracy, since manufacturers terminate distributors in the ordinary course of business for a host of independent reasons.[34] For example, in order to protect its marketing strategy a manufacturer might terminate a distributor who refuses to provide promotion, service or other forms of non-price competition that are part of that strategy.[35] Thus, the termination or replacement of distributors is an essential and normal aspect of the competitive process.

Second, evidence of a manufacturer's concern about resale prices, when added to the fact of termination, does not make the hypothesis of conspiracy any more plausible. All manufacturers have a natural interest in resale prices. For example, a manufacturer who requires promotional activities will be concerned that price cutting by free riders will undercut the ability and incentive of other distributors to undertake those activities. Far from evidencing conspiracy, this concern simply reflects the manufacturer's legitimate, independent interest in the success of a procompetitive strategy.[36] Evidence of a manufacturer's price concern therefore contributes nothing toward the identification of concerted action.

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[34] Unilateral termination, whatever its motivation, does not violate Section 1 of the Sherman Act. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919).

[35] *See, e.g., Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 945 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S. Ct. 176 (1982).

[36] *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d at 743-44; *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953, 956 (2d Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 362 (1982);

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Third, price complaints from rival distributors add no probative force to evidence of price concern and termination.[37] Such complaints are natural—and from the manufacturer's perspective unavoidable—reactions by distributors to the activities of their rivals. They are more likely where the manufacturer requires promotion, service and other forms of non-price competition that entail costs for distributors. Distributors who incur these costs will naturally complain about the price cutting of a perceived free rider.[38] In sum, price complaints "arise in the normal course of business and do not indicate illegal concerted action." *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *reh'g en banc granted*, No. 81-1562 (8th Cir. May 21, 1982).

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H.L. Moore Drug Exchange, v. *Eli Lilly & Co.*, 662 F.2d at 943; Meehan & Larner, 26 Antitrust Bull. at 217. Thus, "[i]t is unrealistic to expect the manufacturer that uses [vertical] restrictions in order to limit free riding to be indifferent to the dealer that circumvents the intent of the [restrictions] by discounting." Posner, 48 U. Chi. L. Rev. at 12.

[37] *See, e.g., Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856 (1st Cir. 1982); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *reh'g en banc granted*, No. 81-1562 (8th Cir. May 1, 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d at 943-44 & n.8; Baker, 67 Va. L. Rev. at 1507; Posner, 48 U. Chi. L. Rev. at 13. Price complaints are merely an aspect of the essential dialogue between a manufacturer and its distributors in a competitive market. Distributors are a valuable source of information about competitive conditions and the effectiveness of distribution programs. *See, e.g.*, Liebeler, 30 U.C.L.A. L. Rev. at 10; Meehan & Larner, 26 Antitrust Bull. at 204-05; Comment, *Vertical Agreement as Horizontal Restraint:* Cernuto, Inc. v. United Cabinet Corp., 128 U. Pa. L. Rev. 622, 647 n.151 (1980).

[38] *See, e.g., Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199-1200 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (U.S. November 19, 1982) (No. 82-848); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d at 744; Posner, 48 U. Chi. L. Rev. at 13.

The Seventh Circuit's holding that such marketplace behavior establishes conspiracy will inevitably deter procompetitive business conduct. A manufacturer who has received price complaints will be inhibited from terminating a distributor or enforcing distribution restrictions, regardless of the business justification. A distributor who has been identified as a price cutter thus may be able "to violate lawful provisions of the [distributorship] agreement with impunity, because the enforcement of *any* provisions against it may be deemed to have been motivated by its discounting." Posner, 48 U. Chi. L. Rev. at 12. In effect, the court's rule gives such a distributor a contract in perpetuity.

The anticompetitive impact of the Seventh Circuit's conspiracy rule will be greatest where a manufacturer adopts non-price restrictions to induce distributor promotional activities. Having adopted such a marketing strategy, the manufacturer has an interest in enforcing it, even to the extent of terminating a distributor who refuses to provide the required promotion. The manufacturer will be concerned about its distributors' prices, since price cutting is a clue that a distributor may not be providing the required promotional activities.[39] Independent of the manufacturer's concern, distributors who incur the costs of promotional activities may have complained about the price cutting of a perceived free rider. Thus, the three factors cited by the Seventh Circuit as sufficient to establish conspiracy—termination, price concern, and complaints—are most likely to be present when a distributor refuses to comply with procompetitive non-price programs.

In practical effect, the Seventh Circuit's rule restricts manufacturers' ability to use and enforce the types of non-

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[39] *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d at 744; Liebeler, 30 U.C.L.A. L. Rev. at 25.

price programs endorsed by *Sylvania* as enhancing interbrand competition and promoting consumer welfare.[40] Since the benefits of these programs can be realized only if distributors comply with them, *Sylvania* necessarily implies the manufacturer's freedom to enforce them. Only by requiring proof of a causal link between distributor complaints and manufacturers' termination decisions can this Court ensure that private antitrust actions by terminated distributors will not subvert *Sylvania*.

B. The Evidence Does Not Establish a Causal Connection Between Distributor Complaints and Termination and Therefore Is Not Probative of Conspiracy.

To be probative of conspiracy, the circumstances of a distributor termination must establish a causal nexus between the complaints of other distributors and the manufacturer's decision to terminate. *Cf. Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Because distributor terminations, manufacturers' price concerns, and price complaints occur normally and independently in a competitive market, these facts alone cannot establish that causal nexus. They take on probative significance only in the context of other facts or circumstances.[41] *See, e.g., H.L. Moore Drug Exchange* v.

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[40] The pernicious impact of the Seventh Circuit's decision is exemplified by the court's condemnation of Monsanto's nonprice programs as part of a price-fixing conspiracy. One commentator has described the decision as the "most egregious" example of how far the lower courts have strayed from *Sylvania*. Liebeler, 30 U.C.L.A. L. Rev. at 42-43 n.127.

[41] The inquiry in a vertical conspiracy case based on termination following complaints is thus analogous to that in horizontal conspiracy cases premised on a theory of conscious parallelism. *See, e.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280, 288-89 (1968); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). Even where parallel behavior is accompanied by evidence of contacts among the defendants, "it is necessary to review plaintiffs' other

(footnote continued on next page)

Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, —— U.S. ——, 103 S. Ct. 176 (1982).

Under a proper conspiracy standard, plaintiff should be required to adduce additional evidence from which a jury could reasonably infer that the manufacturer was acceding to the desires of the complaining distributors rather than exercising its own independent business judgment in terminating the plaintiff. *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982). Evidence that both the complaining distributors and the manufacturer desired to terminate plaintiff is not sufficient. So long as the termination is consistent with the manufacturer's exercise of independent business judgment, the coincidence of that business decision with other distributors' interests does not provide the requisite causal nexus. *Id.* at 744. *See also* Comment, *Vertical Agreement as Horizontal Restraint*: Cernuto, Inc. v. United Cabinet Corp., 128 U. Pa. L. Rev. 622, 647 (1980).

In affirming the price-fixing conspiracy verdict on the basis of Monsanto's concern about prices, distributor price complaints and the non-renewal, the Seventh Circuit neither required nor identified any evidence probative of a causal connection between the complaints and the non-renewal.[42]

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evidence before the importance of the contacts between defendants and the inferences the jury might legitimately draw therefrom may be determined." *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975).

[42] In addition to the evidence of non-renewal and price complaints, the court cited evidence reflecting Monsanto's concern about resale prices: that Monsanto desired more stable resale prices for its products, that Monsanto employees complained about Spray-Rite's prices on several occasions, and that Monsanto employees threatened on two occasions to terminate Spray-Rite because of its price cutting. 684 F.2d at 1239, Pet. App. A-16. Such evidence does not support the inference that Monsanto was acceding to complaining distributors rather than exercising its independent judgment.

The record contains no such evidence. Furthermore, the Seventh Circuit ignored undisputed evidence "negating the probative force" of Spray-Rite's circumstantial evidence and making "more probable" the inference that Monsanto declined to renew Spray-Rite for its own independent business reasons. *First National Bank* v. *Cities Service Co.*, 391 U.S. at 288.

First, the long interval between the complaints and the non-renewal makes the inference of a causal relationship unreasonable.[43] The final price complaint about Spray-Rite came fifteen months before its non-renewal, and Monsanto had renewed Spray-Rite's distributorship after that complaint. There was no evidence that Monsanto consulted with any other distributor during this fifteen-month period regarding Spray-Rite's pricing or the non-renewal of its contract.

Second, there is no evidence that Monsanto engaged in a pattern or practice of terminating price cutters following complaints, even though price complaints about distributors were "standard practice." (Tr. 184). Indeed, Monsanto had continued Spray-Rite's distributorship from 1957 until late 1968, even though it was always aware Spray-Rite was a price cutter and had received price complaints about Spray-Rite as early as 1964. (Tr. 92, 111-13, 115-18, 127-29, 1397-1400, 3626-3631). That Monsanto regularly received price complaints but did not terminate other distributors undermines the inference that it was acceding to the desires

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[43] *See, e.g., H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 944 (2d Cir. 1981) (reversing jury verdict and entering judgment for defendant where complaints preceded termination by over two years), *cert. denied*, ____ U.S. ____, 103 S. Ct. 176 (1982). *Cf. Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 114 (3d Cir. 1980) (affirming directed verdict for defendant), *cert. denied*, 451 U.S. 911 (1981).

of complaining distributors when it declined to renew Spray-Rite.[44]

Third, there is no evidence that any of Monsanto's distributors were able to influence Monsanto's choice of distributors or that the distributors who complained about Spray-Rite possessed or exerted coercive power over Monsanto. Nor is there any evidence that any distributor requested Spray-Rite's non-renewal. The lack of any evidence of coercive power further negates an inference of conspiracy.[45]

Finally, the Seventh Circuit failed to consider undisputed evidence that the non-renewal of Spray-Rite was consistent with Monsanto's marketing strategy requiring promotional and educational activities by distributors. Monsanto had announced in late 1967 that distributors would be evaluated for renewal based upon their promotional efforts with dealers and employment of trained salesmen capable of carrying out Monsanto's technical education programs. (Tr. 3237-40; PX 196, J.A. 59-60, Tr. 157-58, 199). Spray-Rite failed to implement key elements of Monsanto's marketing strategy by refusing to hire salesmen and failing to emphasize the sale of Monsanto products to dealers. (Tr. 1059-63, 1106-07, 1682, 3829). Monsanto declined to renew Spray-Rite's contract only

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[44] *See, e.g., Schwimmer* v. *Sony Corp. of America*, 677 F.2d at 954 (affirming judgment n.o.v. for defendant where there was no evidence defendant had ever terminated other distributors following complaints).

[45] *See, e.g., Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d at 1199 (affirming verdict for defendant where plaintiff adduced "no evidence that would establish dealer coercion"); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 845 (10th Cir. 1981) (affirming judgment for defendant where "defendants were not in any position to coerce or exert substantial leverage" on the manufacturer); *A.H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1307 (9th Cir. 1981) (affirming summary judgment for defendant where plaintiff "advanced no evidence of dealer coercion").

after it had failed to satisfy these key elements of Monsanto's renewal criteria. (Tr. 3825-26).[46]

The Seventh Circuit justified its disregard of this evidence on the ground that, while "the evidence concerning Monsanto's reasons for terminating Spray-Rite was conflicting, the jury was not required to accept Monsanto's version of the case." 684 F.2d at 1239, Pet. App. A-17. This begs the question. It would not have been sufficient for Spray-Rite to have discredited business reasons advanced by Monsanto to justify its termination decision. If a plaintiff fails to adduce evidence that the manufacturer terminated it at the behest of other distributors, it has not met its burden of proof, and there is no issue for the jury.[47]

In sum, there is no evidence from which the jury could reasonably have inferred that Monsanto acceded to desires of complaining distributors in terminating Spray-Rite, and unrebutted evidence negates that inference. In sustaining the conspiracy verdict solely on the basis of normal marketplace behavior, the Seventh Circuit violated the fundamental principle that "mere speculation be not allowed to do duty for probative facts." *Galloway* v. *United States*, 319 U.S. 372, 395 (1943). Here, the jury's finding of a conspiracy could have been based only on impermissible speculation.

C. The Record Does Not Support the Price-Fixing Conspiracy Verdict.

The Seventh Circuit's error goes beyond permitting the inference of a conspiracy from evidence equally consistent with unilateral business conduct. Its holding that Spray-Rite had proven a price-fixing conspiracy is fundamentally

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[46] One commentator has described Monsanto's termination of Spray-Rite as "clearly consistent with alleviating the free rider problems of the type described in *Sylvania*." Liebeler, 30 U.C.L.A. L. Rev. at 42-43 n.127.

[47] *See, e.g., H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d at 941; *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975).

inconsistent with this Court's vertical price-fixing decisions. Those decisions define *per se* unlawful price fixing as concerted action by a manufacturer and its distributors to control resale prices and prevent intrabrand price competition. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911). The Court has condemned as vertical price fixing only those types of concerted behavior that have that purpose or effect.

In *Dr. Miles*, the Court's first vertical price-fixing decision, a manufacturer's express written agreements with all of its wholesalers and dealers fixing their resale prices were held *per se* unlawful. The Court reasoned that such agreements could fare no better than horizontal agreements among the dealers because they had "for their sole purpose the destruction of competition and the fixing of prices." 220 U.S. at 408. *See also California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. at 103 (holding a state's resale pricing statute *per se* unlawful because it gave producers "the power to prevent price competition by dictating the prices charged by wholesalers"); *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 21 (1964) (holding *per se* unlawful consignment contracts "used to cover a vast gasoline distribution system, fixing prices through many retail outlets").

Subsequent decisions extended the *per se* price-fixing rule to include implied agreements having the purpose or effect of pervasive resale price maintenance. In *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), for example, the defendant prescribed its wholesalers' resale prices and required licensed retailers to maintain locally prevailing prices. The Court held that a price-fixing conspiracy was perfected when the wholesalers "accepted [defendant's] proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." *Id.* at 723. *See also Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 457 (1940) (affirming a finding of *per se* unlawful price fixing where the manufacturer and its refiner-wholesalers created

"a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them").

Finally, the Court has held that a manufacturer's use of coercive measures "which effect adherence to his resale prices" constitutes *per se* unlawful price fixing. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). In *Parke, Davis*, the defendant "used the refusal to deal with [its] wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices." *Id.* at 45. The Court held that defendant had created an unlawful price-fixing combination by using coercion to achieve "uniform adherence" to its suggested prices. *Id.* at 45-47. *See also Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455 (1922) (sustaining a finding of *per se* unlawful price fixing where "[t]he specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose").[48]

The Court has instructed that, before condemning conduct as *per se* unlawful price fixing, "it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing'." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979). Here, the evidence does not establish any of the categories of conduct this Court has held to

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[48] The Court has also condemned a manufacturer's cooperation in horizontal price fixing by its dealers. In *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), dealers conspired among themselves and later enlisted General Motors' assistance to effectuate such a scheme. The Court concluded that by its cooperation General Motors had participated in a *per se* illegal conspiracy with its dealers. Here there is no evidence that Monsanto's distributors agreed among themselves to fix resale prices.

constitute a vertical price-fixing conspiracy. First, there is no evidence that Monsanto entered into written agreements with its distributors requiring resale price maintenance. Second, there is no evidence that distributors adhered to suggested resale prices. Third, there is no evidence that distributors acquiesced in any price coercion by Monsanto.

The evidence of price behavior in the herbicide market belies the existence of a price-fixing conspiracy. In contrast to the circumstantial evidence that this Court has held probative of such a conspiracy, the record here demonstrates no control of distributors' resale prices or prevention of intrabrand price competition. Uncontested evidence establishes intense price competition among Monsanto distributors both before and after Spray-Rite's non-renewal. (Tr. 455-56, 692-93, 1465, 2140, 2990, 3349-53, 3413). All of Monsanto's distributors regularly sold below suggested resale prices. (*See supra* note 9). No distributor, including Spray-Rite, ever conformed its resale pricing as a result of any alleged pressure from Monsanto. (Tr. 396-99, 457, 1218-19). In sum, there was no evidence from which the jury could reasonably have found a conspiracy to fix the resale prices of Monsanto herbicides.

By holding that a price-fixing conspiracy can be predicated solely on the termination of a single price cutter, even assuming concerted action, the Seventh Circuit created a new category of *per se* unlawful price fixing. It did so without considering whether such a termination "always or almost always" has the prohibited effect of controlling distributors' resale prices and preventing intrabrand price competition. *Broadcast Music, Inc.,* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 19-20 (1979). That inquiry is essential. The establishment of *per se* rules requires courts "to make broad generalizations about the social utility of particular commercial practices." *Sylvania,* 433 U.S. at 50 n.16. For this reason,

"[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972).

The Seventh Circuit neither relied upon "considerable experience" with the conduct it condemned as *per se* unlawful price fixing nor considered whether a "broad generalization" about the anticompetitive impact of such conduct is warranted. The likelihood that such conduct will result in the control of resale prices or the prevention of intrabrand price competition will depend upon the particular circumstances of each case. Indeed, the record of intense intrabrand price competition in this case demonstrates that the competitive significance of terminating a single distributor cannot be predicted apart from the context in which it occurs. A rule of reason inquiry, which "focuses directly on the challenged restraint's impact on competitive conditions," is therefore required. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978).

Neither the price-fixing conspiracy verdict nor the Seventh Circuit's affirmance can be sustained. The evidence does not establish a *per se* unlawful price-fixing conspiracy as defined by this Court. Nor does the new category of conduct defined by the Seventh Circuit on this record as "price fixing" warrant *per se* condemnation.

CONCLUSION

In affirming the district court's denial of Monsanto's motion for a directed verdict with respect to both the alleged price fixing and Monsanto's non-price programs, the Seventh Circuit applied incorrect legal standards that will broadly affect the nation's business. Under the proper legal standards, no jury could reasonably have concluded that Monsanto conspired with any of its distributors to terminate Spray-Rite's distributorship or to fix prices. Nor could a jury

reasonably have concluded that Monsanto's non-price practices were designed or used to implement resale price fixing. Thus, neither issue should have been submitted to the jury. For the foregoing reasons, Monsanto respectfully requests that the judgment of the Seventh Circuit be reversed, with directions to remand to the district court for entry of judgment on behalf of Monsanto on both issues.

Respectfully submitted,

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