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OVERVIEW

This survey reviews two recent Tenth Circuit opinions which deal with antitrust law interpretations. In the first opinion, *Westman Commission Co. v. Hobart International, Inc.*,[1] the court of appeals found no conspiracy in restraint of trade nor a per se antitrust violation when a manufacturer refused to grant a distributorship. In reaching this holding, the court determined the scope of the relevant product market to be restaurant equipment generally sold by dealers, irrespective of the "one-stop shopping" classification. The relevant geographic market was determined to include nothing less than the Denver metropolitan area.[2] In the second opinion, *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*,[3] the Tenth Circuit held that there was no per se tying arrangement which could be construed to be in violation of antitrust laws. The court concluded that such arrangements were actually procompetitive rather than anticompetitive.[4]

Both decisions involved vertical agreements where the trial court erroneously found the arrangements to be illegal per se. The analysis of the Tenth Circuit opinions focused on the fundamental problem of the lower court's desire to protect specific competitors in lieu of properly protecting competition in general. In addition, these decisions involved end distributors or dealers who were unable to prevent the procompetitive impact of the manufacturers' actions. The Tenth Circuit concluded that the actions of the dealers did not limit intrabrand competition but rather ultimately benefited the consumer by creating interbrand rivalries. Thus, the dealers did not violate the purpose of the antitrust laws, which is to promote consumer welfare.[5]

This article discusses: (1) vertical price fixing and tying arrangements, and (2) the Tenth Circuit's most recent approach in determining whether price fixing and tying arrangements are anticompetitive.

I. PRICE FIXING AND TYING ARRANGEMENTS IN GENERAL

A. *The Right to Refuse to Deal and Exclusive Dealing*

The antitrust laws do not inhibit a seller's or buyer's right to refuse to deal with anyone. However, refusal to deal must not stem from an illegal motive or an anticompetitive result. For example, exercising the right of refusal in conjunction with others, on a horizontal level, to

1. 796 F.2d 1216 (10th Cir. 1986)[hereinafter *Westman II*].
2. *Id.* at 1229; *see* Westman Comm'n Co. v. Hobart Int'l, Inc., 461 F. Supp. 627 (D. Colo. 1978)[hereinafter *Westman I*].
3. 806 F.2d 953 (10th Cir. 1986).
4. *Id.*
5. *Westman II*, 796 F.2d at 1220.

freeze another out of business will bring such motive and action within the "combination . . . or conspiracy" language of section one of the Sherman Act.[6] In addition, the refuser must demonstrate lack of dominance in the market place, otherwise there is a violation of the monopolization concept in section two of the Sherman Act.[7] Under present Tenth Circuit law, a unilateral refusal to deal is normally permitted.[8]

Refusal to deal is critical to a manufacturer's ability to control his distributor's resale price and, so long as there is no concerted action or monopoly power, a manufacturer may refuse to deal or even threaten to refuse to deal with any distributor who cuts resale prices.[9] Accordingly, resale price maintenance is permissible so long as the motive or intent behind it is not unlawful, such as concerted action.[10] In other words, for the refusal itself to be lawful, it must be unilateral, and must effect only the one refusing and the one refused.[11]

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6. 15 U.S.C. § 1 (1982).

> 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. See 2 L. ALTMAN, CALLMANN UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES 11, § 10.03 (4th ed. 1982); *see, e.g.*, United States v. General Motors, 384 U.S. 127 (1966).

7. 15 U.S.C. § 2 (1982).

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1342 (9th Cir. 1970). A manufacturer who enjoys a dominant position in the market cannot choose or replace distributors at will if "the public is left with only the manufacturer instead of the manufacturer and the independant distributor."

8. Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979).

9. 2 L. ALTMAN, *supra* note 6, § 10.03, at 11.

10. *Id.* The anticompetitive aspect of exclusive dealing is that it restricts a buyer from being able to choose and buy from any other seller. Consequently, exclusionary dealing precludes the buyer from participating in a competitive market. 16A J. VONKALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST TRADE LAWS: TRADE REGULATION, § 6G.02[1], 6G-10 (1987). The crux of antitrust law is protection of the consumer and the economy from the abuses commonly associated in a private monopoly. Therefore, any activity between buyer and seller which impinges on the free market place is considered unlawful. *See* D.J. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL 47 (1986).

11. 2 L. ALTMAN, *supra* note 6, § 10.04, at 19. Unilateral refusal to deal is likely to be anticompetitive unless and until it can be shown that multiple parties are involved. Presently, an exclusive dealing arrangement is tested for its anticompetitiveness and, as such, is probably not violative under section one of the Sherman Act unless it affects 50% of the relevant market. 16A J. VONKALINOWSKI, *supra* note 10, § 6G.03 [2], at 6G-29. The rule of reason determines whether a competitor is foreclosed from access to the relevant market. Thus, an exclusive agreement does not foreclose a competitor's access to a market if the excluded competitor has an alternative means to the consumer. *See, e.g.*, M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984). For further discussion on the rule of reason approach to exclusive dealing arrangements see 16A J. VONKALINOWSKI, *supra* note 10, § 6G.04 [1](a), at 6G-30.

The principal "refusal to deal" has a corollary to it: the manufacturer may in good faith refuse to market his product, but good faith need not be shown when selecting distributors.[12] When an anticompetitive action is employed to achieve exclusive dealing arrangements and in effect restricts the competition's access to the market, then it is an unlawful restraint of trade and a violation of the antitrust laws.[13]

A vertical agreement between a manufacturer and a dealer is lawful if reasonable. This is also true for a vertical arrangement with several manufacturers. However, agreements which tend to eliminate competition between horizontal competitors may be found to be illegal per se.[14] Therefore, it is often the legality of the *purpose* for the agreements, horizontal or the vertical found to be horizontal in nature, that will determine the legality of the restraint itself.[15]

B. *Anticompetitive Distribution Practices: Tying Arrangements*

Tying arrangements are a form of exclusive dealing arrangements whereby a seller, who has sufficient control over an item supplied (the "tying" product), will condition the availability of the original product. Usually, the seller will require the purchase or lease of a second product, whether or not that product (the "tied" product) is complementary or supplementary to the originally supplied item.[16] Tying arrangements create the opportunity for a manufacturer to expand his economic power from one product to another. Often tying arrangements are employed to boast the sales of one product which lacks demand.[17] Anticompetitive tying arrangements are generally found to be illegal per se.[18] The "tied" product, not the "tying" product, is insulated from competition and causes an antitrust violation.[19]

12. 2 L. ALTMAN, *supra* note 6, § 10.06, at 19. The reasonableness or unreasonableness of an exclusive dealing arrangement depends upon the overall anticompetitive effect. Specifically, this requires analysis of the effect in light of : (1) the relevant product market (reasonable interchangeability of use, cross-elasticity of demand); and (2) the relevant geographic market (ability of buyer to find other sources of supply, transportation costs of the seller). 16A J. VONKALINOWSKI, *supra* note 10, § 6G.04 [1], at 6G-31. However, a business usually has the right to deal or refuse to deal with whomever it wishes. This includes the right of a franchisor either to refuse to grant a franchise, or having already granted a franchise, the right to terminate it. *See* 16A J. VONKALINOWSKI, *supra* note 10, § 6H.02 [2], at 6H-6; 2 L. ALTMAN, *supra* note 6, § 10.16, at 98.

13. United States v. General Motors, 384 U.S. 127 (1966); White Motor Co. v. United States, 372 U.S. 253 (1963). Both Courts stated that if a manufacturer initiates restrictions to eliminate competition, then the restrictions are illegal per se.

14. All exclusive dealerships are illegal per se when they tend to stifle competition or promote a pernicious effect. 2 L. ALTMAN, *supra* note 6, § 10.16, at 98.

15. United States v. National Soc'y of Professional Eng'rs, 435 U.S. 679, 692 (1978)("Price is the 'central nervous system of the economy,' and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face."); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3d Cir. 1979)(price-fixing motives were the main reason for refusal to deal).

16. 2 L. ALTMAN, *supra* note 6, § 10.18, at 104.

17. There may be several reasons for this. For example, a manufacturer may want to insulate himself against competition in the tied product, protect his goodwill with respect to the tying product, or facilitate introduction of a new product into the market. *Id.*

18. *Id.*

19. *Id.* The sale of the tied product is no longer based on demand, rather the sale of

The fundamental requirement in demonstrating a violation is that the arrangement involves two separate and distinct products that are so unrelated that they are considered disassociated from each other.[20] Although tying arrangements are voluntary contractual agreements between buyer and seller, these agreements result in restricting the buyer in certain ways.[21] Historically, tying arrangements were believed to be harmful to competition and the final consumer.[22] Recently courts have leaned toward the idea that vertically restrictive agreements might be procompetitive in that they could serve to discriminate prices[23], preserve goodwill, shift business risks, and financially strengthen a distribution or reduce inefficient "free riding" activity.[24] However, a tying arrangement will be held anticompetitive for one of several reasons: (1) if its probable effect is to "substantially lessen competition or tend to create a monopoly in any line of commerce," a violation of section three of the Clayton Act; [25] (2) if it results in an unreasonable restraint which effects a "not unsubstantial amount of interstate commerce," a violation of section one of the Sherman Act;[26] or (3) if it is shown to be "in conflict with basic policies" of the antitrust laws, a violation of section five of the Federal Trade Commission Act.[27]

Special note should be given to the distinction between an exclusive

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the product is dependent on the demand of the tying product. *See supra* notes 6 and 7 and accompanying text.

20. *See, e.g.*, 2 L. ALTMAN, *supra* note 6, § 10.16, at 98 *citing* United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961). The four criteria used in determining the relation or distinction of two products in a tying arrangement are: (1) trade usage or practice in the field; (2) sale of a consistently homogeneous combination of the two products; (3) lump sum billing for the combination; and (4) existence of other related products not included in the unit. 2 L. ALTMAN, *supra* note 6, § 10.16, at 98.

21. Restrictions imposed on the consumer include territorial restrictions, full line forcing, and tie-in sales. D.J. ARMENTANO, *supra* note 9, at 48; *see also supra* note 15 and accompanying text.

22. D.J. ARMENTANO, *supra* note 10, at 49.

23. Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1345 (9th Cir. 1970)(manufacturer offers prices to other distributors which discriminate against another distributor).

24. The inefficiency of "free ride" services take place in, for example, the computer industry when a manufacturer wants the distributor to provide pre-sale information, and/or post-sale service. The inefficiency of this system occurs where the consumer takes full advantage of the pre-sale information and ultimately buys the product from the discount distributor. The intrabrand competition may drop the price of the product, thereby causing the manufacturer to suffer with respect to interbrand competition. Courts therefore feel that permitting the manufacturer to impose limited territorial restrictions and resale price maintenance agreements may serve to remedy the situation by creating "more efficient" rivalries with other manufacturers. D.J. ARMENTANO, *supra* note 10, at 49-50 (citing R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTUS 171-84 (1976)).

25. 15 U.S.C. § 14 (1982).

26. 15 U.S.C. § 1 (1982).

27. 15 U.S.C. § 45 (1982). *See* 2 L. ALTMAN, *supra* note 6, § 10.19, at 118; *see, e.g.*, Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953). Buyers of space for general display and classified advertising in the Times-Picayune could only purchase combined insertions appearing in both the morning and evening papers, and not in either separately. Suit was filed under the Sherman Act, which challenged the "forced combination" contracts as unreasonable restraints of interstate trade, and as tools in an attempt to monopolize a segment of interstate commerce. The contracts were viewed as tying arrangements. *Times-Picayune*, 345 U.S. at 597.

dealing arrangement and a tying arrangement. The Tenth Circuit views an exclusive dealing arrangement as a manufacturer's general response to market conditions, and is therefore procompetitive rather than anticompetitive. On the other hand, a tying arrangement is viewed as a restriction imposed by a dominant seller, and serves no economic purpose.[28] In both *Westman* and *Fox*, the Tenth Circuit focused on violations of section one of the Sherman Act. Both decisions reflect an approach followed in *United States v. Arnold Schwinn & Co.*[29] *Schwinn* balanced the anticompetitive effects versus the procomptitive effects of exclusive dealing and tying arrangements.

II. Relevant Product Market, Geographic Market, and Per Se Analysis: *Westman Commission Co. v. Hobart International, Inc.*

A. *Facts*

Defendant, Hobart International (Hobart), is a manufacturer of one of fifty-three lines of kitchen equipment sold by Westman Commission Company, plaintiff. Westman is a Denver metro restaurant equipment supplier in competition with Nobel, Inc. Until 1977, Nobel was one of eight successful competitors in the Denver area, which sold kitchen equipment products to the restaurant and food service industry. Until 1973, Westman was involved only in the wholesale grocery business, but thereafter acquired the assets of the WE-4 Division of Wilscam Enterprises, Inc. (WE-4), and became an active competitor in the restaurant supply market.[30]

At the time Westman acquired WE-4, WE-4 had an informal distributor agreement with Hobart. This relationship was continued by Westman for about fourteen months after acquisition, at which time Hobart informed Westman that it had no intention of formally offering Westman a distributorship. Hobart then permanently terminated its casual sales relationship with Westman in 1976.[31]

Given the above circumstances, Westman brought an antitrust action claiming that the denial by Hobart to grant Westman a distributorship was a conspiracy on the part of Nobel and Hobart to prevent Westman from competing with Nobel in the Denver area restaurant supply market.[32] The trial court agreed with Westman, and found that Ho-

28. 2 L. Altman, *supra* note 6, § 10.18, at 104; *see Westman II*, 796 F.2d 1216 (10th Cir. 1986); *see also* Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc., 806 F.2d 953 (10th Cir. 1986).

29. 388 U.S. 365 (1967)(overruled on other grounds by Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)). *Schwinn* was rejected by the trial court since this case did not involve an exclusive distributorship or franchise, and the evidence revealed that "much of Hobart's product line [did] not have equivalent brands available in the market." *Westman II*, 796 F.2d at 1225 (quoting *Westman I*, 461 F. Supp. 627, 637 (D. Colo. 1978)). *See infra* note 72 and accompanying text.

30. *Westman II*, 796 F.2d at 1219.

31. *Id.*

32. The record of the lower court revealed that Nobel had informed Hobart that granting WE-4 a distributorship would "jeopardize" Hobart's pre-existing business rela-

bart Int'l violated section one of the Sherman Antitrust Act.[33]

B. *Analysis*

The Tenth Circuit concluded that the lower court's decision was incorrect because the analysis provided by the trial court was improper. More specifically, the lower court incorrectly defined the relevant product market and relevant geographic market, and consequently erroneously found a per se violation.[34]

i. Relevant Product Market

In *Westman I*, the court found that the relevant product market was the "one-stop shopping" market.[35] This type of market is a method of marketing whereby the distributor carries multiple lines of the same type of product in addition to a line of complimentary products. As a result of this type of marketing, one distributor can provide for all of the needs of a food service operator.[36]

Proper determination of the relevant product market requires an examination of the commodities which are reasonably interchangeable by a consumer for the same purpose.[37] The critical error on the part of the lower court was its improper focus on the marketing methods of the restaurant supply competitors and not on the product selection of the ultimate consumer.[38] The Tenth Circuit Court found nothing in the record to suggest that the cross elasticity of Hobart products was inelastic.[39] The Tenth Circuit also found that the trial court erroneously fo-

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tionship with Nobel. The appeals court found that this "veiled threat" was the underlying reason for denying the distributorship. *Id.* (citing *Westman I*, 461 F. Supp. 627, 635 (D. Colo. 1978)).

33. *Westman I*, 461 F. Supp. at 627; *see also* 15 U.S.C. § 1 (1982). Here, the sole basis for Westman's action was that denial of the distributorship based upon the "veiled threat" was a conspiracy, and, therefore, a per se violation. *Westman II*, 796 F.2d at 1219.

34. *Westman II*, 796 F.2d at 1219-20.

35. This type of sales based strategy is also known as full line distribution where the consumer of the distribution is able to benefit more from the convenience, cost savings, and better service offered here than from a specialty house distributor. *Id.* at 1220 (citing *Westman I*, 461 F. Supp. at 628).

36. *Westman II*, 796 F.2d at 1220.

37. *Id.* at 1221 (citing United States v. E.I. du Pont de NeMours & Company, 351 U.S. 377, 395 (1956)). In *Westman I*, an expert witness gave testimony saying that "in certain lines of restaurant equipment there is a noticeable absence of acceptable substitutes at a price comparable with that of Hobart products." *Westman I*, 461 F. Supp. at 628. The importance being that substitutes *do* in fact exist, however it is difficult to find a substitute at an equivalent price. In other words, the simple fact that one manufacturer is more prominent than another does not necessarily mean that other manufacturers' products are not reasonably interchangeable. *Westman II*, 796 F.2d at 1221.

38. "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." *Westman II*, 796 F.2d at 1220-21 (quoting United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958)).

39. The expert witness testified that there were other manufacturers competing with Hobart in the same market. *Westman II*, 796 F.2d at 1221. Elasticity and inelasticity merely relate to the freedom of demand within the relative product market. In other words, are the buyers able to chose freely what product they wish to buy (an elastic market) or are they limited in their choices due to inadequate selections and excessive prices (an inelastic market). Elasticity is most important with respect to the court's determination of the rele-

cused on the products generally sold by restaurant equipment dealers, and that it was irrelevant whether or not the brands sold by other restaurant equipment dealers were classified as "one-stop shopping."[40]

On appeal, Westman attempted to support the lower court's decision by defining the relevant restaurant supply market as a "cluster or package" of goods and services.[41] Westman relied on *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*[42] This argument, as well as the "one-stop shopping" analysis, was rejected by the appellate court on the basis that the restaurant equipment market, unlike the beauty supply market of the *JBL* case, did not generally operate at the full-line-of-services level.[43] In addition, the availability of other products in the market created elasticity. In the final analysis, the court stated that if Hobart were ever to raise its prices, this would only force the buyer of restaurant equipment supplies to purchase a lower priced competing brand rather than cause other restaurant supply manufacturers to raise their prices.[44] Consequently, Hobart's pricing strategy was not found to be an anticompetitive price fixing scheme.

ii. The Relevant Geographic Market

The relevant geographic market is defined as "the narrowest market which is wide enough so that products from adjacent areas . . . cannot

vant product market and the optimum cross-elasticity of demand, which is the extent to which a consumer is able to shift freely between two or more products. 16A J. VONKALINOWSKI, *supra* note 10, at § 6G.04 [1](1)(a) & (b), at 6G-30.

40. *Westman II*, 796 F.2d at 1221. The court focused on a line of commerce that ignored what buyers actually do and considered mainly what sellers do or can do. However, the focus of the lower court was misplaced in determining the relevant market (i.e. "[t]he fact that a distributor is able to satisfy all of his customer's needs at one location does not mean that it is free from competition from other types of distributions"). *Id.* (citing United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958)).

41. *Westman II*, 796 F.2d at 1211.

42. 698 F.2d 1011, 1016-17 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983).

43. Evidence of the "one-stop-shopping" market strategy was the fact that, until Westman entered the restaurant supply market, Nobel was the only one of eight Denver area metro suppliers, that used the "one-stop-shopping" method. Furthermore, nothing in the lower court record suggested that such a market strategy existed outside the Denver metro area. Moreover, the lower court erroneously determined the relevant geographical market to include even less than the Denver area. The appeals court found that the relevant geographic market also included "non-one stop shopping" restaurant distributors. *Westman II*, 796 F.2d at 1222. On appeal, Westman sought to have the court consider the findings of authorities which suggested that sellers who provide a full line of products or services create a separate product market or a "cluster or package" of goods and services. However, the "cluster" must be the object of consumer demand and is only appropriate where the "product package" appeals to the buyer on a significantly different basis than would an individual product considered separately. *Id.* at 1221 (quoting JBL Enters., Inc. v. Jhirmack Enters., Inc., 698 F.2d 1011, 1016-17 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983). The court therefore felt that the "cluster" of goods was *not* the object of consumer demand in the restaurant equipment market, unlike the hair care and cosmetics industry, where it is generally necessary to carry a "full-line" of products and the generally accepted practice in advertising and promoting is to group the products together. *Westman II*, 796 F.2d at 1221.

44. The fact that there were other manufacturers competing with Hobart reveals cross-elasticity within the market and not inelasticity. *Westman II*, 796 F.2d at 1221. The elasticity of the market place makes Hobart's actions procompetitive, rather than anticompetitive, and supportive of intrabrand rivalry.

compete on substantial parity with those included in the market."[45] The Tenth Circuit held that the relevant geographic market should have included those restaurant equipment distributors who compete to supply to the Denver area restaurants, including those distributors from the multistate region that bid on Denver area contracts.[46] Accordingly, the appellate court held that it was unreasonable for the lower court to conclude that the relevant geographic market included less than all the restaurant equipment suppliers located in the Denver metro area.[47]

iii. The Per Se Test in Vertical Restraints

Since the lower court found that Westman had been excluded from participating in the relevant product and geographic markets, it held that Hobart had committed a per se violation of section one of the Sherman Act.[48] However, the Tenth Circuit, holding this analysis and conclusion erroneous, found the per se test in vertical restraint cases to be in a "state of evolution," and chose to align itself with the approach of the Seventh Circuit.[49] The Seventh Circuit holds that "in the absence of any evidence of intent to raise prices . . . an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se."[50] Other circuits, such as the Third Circuit, have rejected this

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45. [T]he outer boundary of the relevant product market is reached, if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume.

Satellite Televisions and Assoc. Resources, Inc. v. Continental Cablevision of V.I., Inc., 714 F.2d 351, 356 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984) (citing L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 41, § 12 (1977)). *Satellite Television* involved the challenging of an exclusivity provision of a contract between Continental and apartment owners, where the provision gave apartment owners the option of either paying the expense of wiring their building for cable or giving Continental exclusive pay television rights to their apartments. The exclusivity provision was not found to be in violation of any antitrust laws. *Satellite Television*, 714 F.2d at 353.

46. *Westman II*, 796 F.2d at 1222. Distributors from a multistate region competed with Westman and Nobel, thus falling within the relevant geographic market. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1222-23.

50. *Id.* (quoting Products Liability Ins. Agency, Inc. v. Crum and Forster Ins. Cas., 682 F.2d 660, 663 (7th Cir. 1982); *see also* Business Elecs. Corp. v. Sharp Elecs. Corp., 780 F.2d 1212, 1218 (5th Cir. 1986) ("In order for a manufacturer's termination of a distributor to be illegal per se, it must be pursuant to a price maintenance agreement with another distributor."); Ron Tonkin Gran Turisimo, Inc. v. Fiat Distributors, 637 F.2d 1376, 1386-87 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981)(citing A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1306 (9th Cir. 1981)). The Ninth Circuit held that restraints solicited by a distributor but implemented by a manufacturer were not automatically illegal per se but only came within the per se analysis if they "clearly had or [were] likely to have, a pernicious effect on competition and lacked any redeeming virtue." *Ron Tonkin*, 637 F.2d at 1386-87. Other courts have rejected the views of the Seventh, Fifth, Sixth, and Tenth Circuits by stating that a manufacturer who refused to deal with a distributor commits a per se antitrust violation if the refusal is made at the request of a competing distributor even though the manufacturer's refusal to deal is a vertical restraint. The agreement becomes horizontal in nature when the distributor seeks to "supress its competition by utiliz-

view.[51] However, the court in *Westman II* found that such a rejection has occurred in situations where a price fixing motive has been the basis of the manufacturer's refusal to deal.[52]

Here, the court of appeals relied on the reasoning of *Monsanto Co. v. Spray Rite Service Corp.*[53] In *Monsanto*, the Supreme Court held that the plaintiff's failure to establish a price fixing agreement, as a prerequisite to per se liability in a distributor termination case, precluded it from surviving a directed verdict.[54] Similarly, Westman failed to assert, and the record did not reveal, any price fixing or tying arrangements on the part of Hobart. Therefore, Hobart's refusal to deal could not be found to be illegal per se.[55]

C. *Conclusion*

The court of appeals, in rejecting the lower court's analysis, concluded that a manufacturer should generally be given wide discretion in determining the "profile" of its distributors, and cited *Schwinn* for support. Unlike *Schwinn*, the appeals court agreed that the case at hand did not involve an exclusive franchise agreement. However, the court held that *Schwinn* was applicable in that a manufacturer's ability to choose its own customers should not hinge on whether the limited distribution is by exclusive contract or not.[56] A manufacturer's ability to grant or deny distribution rights should not be restricted by whether or not its decision is made to obtain an exclusive franchise agreement.[57] The decision to distribute or not will involve not only customer loyalty, but will ultimately turn on whether more or less distribution would make a manufacturer's products more or less competitive in the market.[58]

A manufacturer's ability to expand or limit distributorships should not be restricted merely because of an absence of equivalent brands within the market place unless such a distributor possesses market power.[59] "Market power" is the ability to raise prices above those that would be charged in the competitive market, and requires a showing of either "power to control prices" or "power to exclude competition."[60]

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ing the power of a common supplier." Cernunto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3d Cir. 1979).

51. *Westman II*, 796 F.2d at 1223. *See also, supra* note 54 and accompanying text.

52. *Westman II*, 796 F.2d at 1223.

53. 465 U.S. 752, *reh'g denied*, 466 U.S. 994 (1984).

54. Plaintiff must show that the "distributors are *not* making independent pricing decisions." *Monsanto*, 465 U.S. at 762.

55. If there was evidence of price fixing and tying arrangements, then the approach would have been quite different. *See Westman II*, 796 F.2d at 1224-25.

56. In addressing the issue of vertical restraints, the *Schwinn* court stated: "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." United States v. Arnold, Schwinn & Co., 388 U.S. 363, 376 (1967).

57. *Westman II*, 796 F.2d at 1225.

58. *Id.*

59. *Id.*

60. *Id.* at 1225 n.3 (quoting Board of Regents v. NCAA, 707 F.2d 1147, 1158 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984)).

The existence or lack of market power depends upon the availibility of competing products to which a purchaser can turn when faced with price increases.[61] The appellate court relied on "sound economic theory" to conclude that the "only real incentive for a manufacturer to *restrict* distribution" is to make its product more competitive.[62] The manufacturer therefore gains nothing by limiting its distribution.[63] If a manufacturer decides to limit the number of distributors with whom it wishes to deal, the Tenth Circuit will permit it to do so. However, such refusals to deal with the distributors would be invalidated if the refusals were related to illegal pricing or tying arrangements.[64]

D. *Concurring Opinion*

In the concurring opinion, Judge Seth arrives "at the same result but by a slightly different route."[65] He felt that there were no "substantial problems" with the product market analyses of the lower court.[66] This was evident when he stated that the lower court tried the case with the understanding that the relevant product market was the restaurant supply market, and the use of "one-stop shopping" distribution methods was not a market conclusion, rather it was a marketing method description.[67]

Justice Seth's definition of the relevant geographic market differs from the majority in that he would disregard the location of suppliers, and instead examine the trade area. For example, a trade area would be defined by the area "where a price increase or supply reduction would cause a prompt influx of products of others not already in the area."[68] Although Justice Seth agreed with the majority that the trial court's reference to the "one-stop shopping" was *not* a market conclusion but rather a marketing method description in the Denver area, he believed that use of the "one-stop shopping" method alone could not be considered a restraint of trade.[69]

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61. However, only as it applies to the relevant geographic market. *Westman II*, 796 F.2d at 1226; *see also supra* notes 42 and 43 and accompanying text.

62. *Westman II*, 796 F.2d at 1227.

63. The court listed several reasons why it is procompetitive to permit a manufacturer to limit its distribution:

> First, when a manufacturer limits the number of its distributors, it may reduce its distribution costs by allowing each distributor to achieve economies of scale and to spread fixed costs over a large number of products. . . . Second, refusals to deal may facilitate the entry of a new manufacturer into the market. . . . Third, limiting the number of outlets that distribute a product may encourage distributors to provide promotional activities. . . . Finally, restricting distribution can reduce transaction costs by permitting a manufacturer to deal only with distributors with whom it believes it can develop an efficient working relationship.

Id. at 1227. *See* Bork, *Vertical Restraints & Schwinn Overruled*, 1987 SUP. CT. REV. 171, 180-81.

64. *Westman II*, 796 F.2d at 1229 (only one distributor in the Denver area used "one-stop shopping").

65. *Id.* (concurring opinion).

66. *Id.* (concurring opinion).

67. *Id.* (concurring opinion).

68. *Id.* (concurring opinion).

69. *Id.* (concurring opinion).

In addition, Justice Seth agreed with the majority that the defendant exercised no market power, and for the trial court to find otherwise was clearly erroneous.[70] He further agreed with the majority that no evidence existed to find a per se violation since nothing in the facts alleged illegal pricing or tying arrangements.[71]

On the other hand, Justice Seth disagreed with the majority's reliance on *Schwinn*[72] because *Schwinn* had been overruled by *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*[73] Furthermore, *Schwinn* relied on unsupported and unreliable authorities.[74] Justice Seth concluded that reliance on "sound economic theory," as reiterated in part V of the majority opinion, depends on one's view of a given situation.[75]

III. Tying Arrangements, Sales Based Allocation Systems: *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*

A. *Facts*

Mazda automobiles are manufactured in Japan and distributed, once imported, throughout the United States to numerous dealers.[76] One of those dealers was Central who distributed Mazdas to thirty-one western and mid-western states. Central distributed to Gulf, the defendant, who was an independently owned company and distributor of Mazda automobiles to dealers in eleven states in the southern Gulf of Mexico area. Plaintiffs, Fox and Meyers are dealers within the Gulf distribution area and have dealt with Mazda since 1972. Neither Fox nor Meyers carried competing manufacturer's products with Mazda even though this freedom had been available since 1973.[77]

Between 1974-1977 Mazda experienced a slump in sales, and in 1978 the only available Mazda automobile was the Mazda "GLC." As a

70. *Id.* at 1230 (concurring opinion).

71. *Id.* (concurring opinion).

72. 388 U.S. 365 (1967). Antitrust suit under section one of the Sherman Act was brought against Schwinn, which challenged the consignment or agency arrangements with distributors and retailers. The arrangements involved direct shipment to retailers with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributors taking orders. In addition, specific territories were assigned to each wholesale distributor and all were instructed to sell only to franchised dealers in their respective territories. *Id.* at 370-71. The Court found this type of price fixing to be anticompetitive. Furthermore, the Court found that the promotion of self-interest alone did not invoke the rule of reason to immunize illegal conduct. *Id.* at 381-82.

73. 433 U.S. 36 (1977). GTE sold television sets through retailers who were allowed only to sell within a given geographic area. Continental, a retailer, claimed a violation of section one of the Sherman Act. *Id.* at 43. However, the Court affirmed the appellate court's decision that the location restriction had less potential for competitive harm than the restrictions invalidated in *Schwinn* and, thus, should be judged under the rule of reason. Moreover, the Supreme Court overruled the per se rule in *Schwinn*. *Id.* at 58-59.

74. *Westman II*, 796 F.2d at 1230 (concurring opinion).

75. *Id.* (concurring opinion). It would seem Justice Seth viewed the "sound economic theory" approach as purely subjective and of very little substance in determining antitrust issues.

76. *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, 806 F.2d 953 (10th Cir. 1986). This case dealt with claims in antitrust as well as claims based on the Dealers Day in Court Act, 15 U.S.C. § 1222 (1982).

77. *Fox Motors*, 806 F.2d at 956.

result of the slump, Gulf had a glut of GLC models in stock which created a financial burden for many dealers. Dealers were encouraged by their distributors that newer and better models would soon be available to "take up the slack."[78] In 1978 Mazda followed through with the introduction of the "RX-7" which became extremely popular and scarce in supply. To better serve the interests of each individual dealer, distributors were encouraged to establish an allocation system.[79]

In the case at bar, the allocation system was commenced by Central and passed on to Gulf and its dealers. Pursuant to the Gulf allocation system, those dealers who had been more successful at moving the GLC were to receive the greater number of RX-7s. The crux of the allocation system was that a dealer could not get RX-7s merely by *purchasing* more GLCs, but instead it had to *sell* more GLCs. Thus, many dealers were selling the GLCs at a discount in order to move them more quickly and improve their inventory. There were also many new dealers being signed up with Gulf who were not initially affected by the allocation system and were given an allotment of RX-7s. As a result, new dealers were not initially dependent upon their success of moving the GLCs.[80] This allocation system lasted from 1978-1979.[81]

In conjunction with the implementation of the allocation system, the "drastic action" system, was used by Gulf to eliminate established but financially failing dealerships.[82] Fox and Meyers were targets of this system, and Gulf even threatened to terminate Meyers for contemplating legal action in response to its allocation system.[83]

At the trial level, the antitrust claims were submitted to a jury, which found that Gulf's allocation method constituted a presumptively illegal tying arrangement, and that Central had conspired with Gulf to implement the system. A verdict and damages were rendered in favor of Fox and Meyers.[84]

On appeal, Gulf and Central argued that the trial court errored in sending the tying arrangement issue to a jury pursuant to a per se instruction. Plaintiffs claimed that the tying arrangement should not have been characterized as per se since the elements thereof were never established as a matter of law. Gulf also claimed that the evidence of a conspiracy that was alleged to have taken place between Central and Gulf was insufficient to even have been submitted as a jury issue.[85]

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* The Tenth Circuit considered the "drastic action" in determining whether there was a violation of the Dealer's Act. However, the Tenth Circuit found nothing illegal with the "drastic action." *Id.* at 960.

84. *Id.* at 956.

85. Gulf and Western submit that nothing in their actions could be taken as collusive or conspiring to restrain trade, especially in view of the fact that no "tying arrangement" existed or was established by Fox. *See supra* notes 14-27 and accompanying text.

B. *Analysis*

The Tenth Circuit held that it was unreasonable to apply antitrust principles in a way that assumes every tying arrangement to be illegal per se.[86] As viewed by the Tenth Circuit, an arrangement violates the antitrust laws when a seller exploits his control over a market and forces buyers to purchase an unwanted product.[87]

The court suggested that a three-part analysis be used in order to determine whether exploitation has been the motive behind the tying arrangement.[88] This analysis requires a finding of the following: (1) purchase of the tying product must be conditioned upon purchases of a distinctly tied product,[89] (2) a seller must possess sufficient power in the tying market to compel acceptance of the tied product,[90] and (3) a tying arrangement must foreclose to competitors of the tied product a "not insubstantial" volume of commerce.[91]

To support the procompetitive approach to tying arrangements, the court cited *NCAA v. Board of Regents*,[92] where the Supreme Court held that a tying arrangement may have procompetitive justifications making condemnation thereof inappropriate without a substantial amount of market analysis.[93] The Tenth Circuit determined that when the above three-part analysis is fulfilled, then it is appropriate to presume an unlawful restraint which warrants a per se condemnation pursuant to the antitrust laws.[94] Therefore, the court held that the initial characterization of a challenged restraint as a tying arrangement is crucial in determining which method of analysis, the per se or rule of reason, is most appropriate.[95]

86. *Fox Motors*, 806 F.2d at 957 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9-14 (1984)).

87. Where a seller has power in one market, he is not permitted, pursuant to the antitrust laws, to use such power to impair competition. In addition, purchasers may not be denied the freedom to select the best buy in the market. *Fox Motors*, 806 F.2d at 957 (citing *Hyde*, 466 U.S. at 1559-60).

88. *Fox Motors*, 806 F.2d at 957.

89. *Id.* (citing Fixture Enters. v. United States Steel Corp., 394 U.S. 495 (1969); Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953)).

90. Where a seller offers a unique or otherwise desirable product which competitors cannot economically offer themselves, or where the market shares are high, then the seller posses power to compel buyers to accept a tied product. *Fox Motors*, 806 F.2d at 957 (citing *Fixture Enters.*, 394 U.S. at 504-06 n.2; *Times-Picayune*, 345 U.S. at 611-13).

91. *Fox Motors*, 806 F.2d at 957 (quoting Northern Pac. Ry Co. v. United States, 365 U.S. 1, 5-6 (1958)); *see* Fortner Enter. v. United States Steel, 394 U.S. 495, 499 (1969). In determining "not insubstantial," the Court discussed the "small percentage" of land that was foreclosed to competitors for development.

92. 468 U.S. 85 (1984).

93. This analysis concerns only the elements which would establish a presumption of anticompetitive forcing. *Fox Motors*, 806 F.2d at 957 n.2 (citing *NCAA*, 468 U.S. 85 (1984)).

94. Where these elements are found to exist, then any procompetitive approach is discharged and the per se analysis is used alone to determine whether there is a sufficiently great anticompetitive effect. The per se analysis requires no further determination of the market conditions. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), states that the court may utilize strict treatment for certain tying arrangements, and precludes any application of the rule of reason where the three part analysis has been met.

95. *Fox Motors*, 806 F.2d at 958; *see* P. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES, 30-32 (1981).

The facts in *Fox* were unlike the traditional violative tying arrangement because the availability of the alleged "tied" product (the RX-7) was not based on *purchases* but rather on *sales*.[96] This distinction appeared to make a great difference to the Tenth Circuit because this meant that the allocation system achieved a procompetitive effect by promoting price competition and, thereby, avoided the inherent evils associated with tying arrangements.[97]

C. *Conclusion*

Since the allocation system was based on sales rather than purchases, it did not violate any antitrust laws.[98] Aside from lack of negative consumer impact, the allocation system did not satisfy the per se requirements because it did not foreclose competing manufacturers of the GLC from participating in the market.[99] For the foregoing reasons, Fox and Meyers were complaining only of interference with their freedom of choice in purchasing the GLC.[100] Unfortunately for them, the antitrust laws were established to protect competition and not competitors.[101] Thus, the judgment of the lower court which held originally for Fox and Meyers was reversed.[102]

CONCLUSION

In both *Westman II* and *Fox Motors*, the Tenth Circuit was faced with allegations of vertical restraints on trade. When a vertical restraint on trade is so alleged, the courts are permitted to apply one of two standards: (1) the rule of reason standard (used to determine Sherman Act legality or illegality taking into account all factors which may impair competition);[103] and (2) the per se standard (under which certain re-

96. *Fox Motors*, 806 F.2d at 958.

97. Since Gulf had succeeded in moving its inventory of GLCs to dealers as a result of dealers' discount sales, the ultimate consumer obtained the advantage of the lowered price and helped successful dealers to obtain a greater number of RX-7s. *Id.*

98. Here, unlike the normal tying arrangement, a dealer had to depend entirely on consumer demand in order to obtain more RX-7s. Thus, for a dealer, any increase in retail purchases of the GLC flowed from legitimate dealer discounts or independent market factors. The ultimate consumer made his choice free of any tie, and most likely in accordance with the advantageous discount. *Id.*

99. The testimony of dual dealers in the lower court record revealed that there was no claim on their part that they were ever precluded from buying those vehicles competitive with the GLC as a result of the allocation system. There is also no evidence in the record that the alleged tying arrangement influenced the level of dealer purchases from competing manufacturers. *Id.*

100. *Id.*

101. *Id.* (citing, Atlas Bldg. Prods., Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959)). *Hyde* held: "[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller . . . there can be no adverse impact on competition because no portion of the market which would otherwise have been available . . . has been foreclosed." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

102. *Fox Motors*, 806 F.2d at 959.

103. In using the rule of reason analysis, factors considered are: positive or negative economic effects of the restraint, the market power of the parties involved in the restraint, and the intent underlying the restraint. Friedman, *Permissable and Impermissible Vertical Re-*

straints are presumed to violate the the Sherman Act on their face without any proof of actual effect on competition).[104] In order for a party to prevail under a rule of reason analysis it is necessary to prove that the anticompetitive effect of the restraint outweighs the procompetitive effect.[105] On the other hand, per se analysis permits courts to make expedient determinations on the underlying assumption that some conduct, by its nature, gives way to serious anticompetitive consequences and is at the outset, without further consideration, deemed illegal.[106]

In both *Westman II*, where the court addressed an alleged conspiracy in restraint of trade and *Fox*, where the court addressed the proper approach to be given to an alleged tying arrangement, the Tenth Circuit rejected the lower court's findings. Both cases permitted the Tenth Circuit to reject the alleged per se violations and utilize the rule of reason standards to capitalize on the procompetitive effects of each vertical arrangement. Both *Westman II* and *Fox* are illustrative of the liberal rule of reason preferance given to the vertical arrangements when plaintiffs are unable to allege and prove that the anticompetitiveness of the circumstances falls within the per se standard.[107] Neither of these cases presents innovation with respect to antitrust laws as they are applied to vertical restraints, but rather, both follow the present law.[108]

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straints Under the Sherman Antitrust Act: Does "Justice" Care?, 63 DEN. U.L. REV. 127, 128 (1985); *see* Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Cl. 1971).

104. Friedman, *supra* note 103, at 128.

105. *Id.*

106. *Id.*

107. Restraints determined to be illegal per se include price fixing and tying arrangements. For further in-depth discussion see *supra* notes 6-28 and accompanying text.

108. *See, e.g.*, Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Cl. 1971); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).