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RECENT DECISION

A CONSIGNMENT APPROACH TO VERTICAL MARKETING RESTRICTIONS (UNITED STATES V. ARNOLD, SCHWINN & CO.)

INTRODUCTION

There has been increasing concern, both in Congress² and the Supreme Court,³ regarding problems encountered by small, independent merchants in their attempts to compete effectively with the vertically integrated "giants."⁴ Many smaller manufacturers have entered into franchising⁵ or limited channels of distribution arrangements in order to become efficient and effective competitors of the large integrated firms.⁶ By selectively choosing his dealers, a manufacturer may be assured of qualified and effective outlets for his products, as well as a stabilization of distributors and dealers. The public is thus provided with the opportunity to get a uniform product through small independent businessmen rather than from a large chain. In these ways, the smaller manufacturer can theoretically compete effectively with his larger integrated competitor.

A franchise or other form of limited outlet agreement is not, however, a panacea for the problems of sustaining effective competition between the "small" and "large" firms. In their attempts to help establish

1. 388 U.S. 365 (1967).

2. See *Hearings on Distribution Problems Affecting Small Business before the Sub-Committee on Antitrust and Monopoly, Senate Committee on the Judiciary, 89th Cong., 1st Sess.* (1955).

3. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *United States v. Von's Grocery Co.* 384 U.S. 270 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). It has even been suggested that the Court is at times more interested in protecting competitors than the competitive process. See Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

4. Vertical integration is defined by Professor Oppenheim as a "mode of growth of an enterprise through integration of successive backward or forward steps in the production, financing, or distribution of goods or services." G. OPPENHEIM, *FEDERAL ANTI-TRUST LAWS* 429 (2d ed. 1959). The vertically integrated "giants" are the large firms which control the entire distribution process by integrating forward. There are no independent distributors or wholesalers; each stage of the distribution process is handled by the manufacturer.

5. Although different relationships are termed franchising, a franchising arrangement generally involves a license giving permission to engage in a particular type of business by following an established pattern. E. LEWIS & R. HANCOCK, *THE FRANCHISE SYSTEM OF DISTRIBUTION* 8 (1963).

6. See E. LEWIS & R. HANCOCK, *supra* note 5; M. WARSHAW, *EFFECTIVE SELLING THROUGH WHOLESALER*: (1961); Chadwell & Rhodes, *Antitrust Aspects of Dealer Licensing and Franchising*, 62 NW. U.L. REV. 1 (1967); Hall, *Franchising—New Scope for an Old Technique*, 1964 HARV. BUS. REV. 60; Jones, *The Growth of Importance of Franchising and the Role of Law*, 12 ANTITRUST BULL. 717 (1967).

guidelines for product distribution, the courts have been somewhat less than lucid; consequently, manufacturers have been left to plan distribution arrangements at their peril.⁷

In the most recent case concerning restricted channels of distribution, *United States v. Arnold, Schwinn & Co.*,⁸ the Supreme Court leveled a heavy blow against franchising arrangements. Justice Fortas, speaking for a majority of the Court, stated that vertically imposed⁹ restrictions requiring distributors to confine resales of purchased goods to franchised dealers were illegal per se.

Schwinn bicycles were marketed primarily by franchised retail dealers.¹⁰ Distribution to these dealers was achieved either through sales to wholesale distributors, sales to retailers by consignment arrangements with distributors, or sales to retailers under the "Schwinn Plan" in which Schwinn ships directly to the retailer and pays a commission to the distributor who places the order.¹¹ Each distributor was required to deal

7. For a discussion of customer and territory restrictions involved in product distribution see Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795 (1962).

8. 388 U.S. 365 (1967).

9. Vertical restrictions are between businessmen on different distribution levels, whereas horizontal restrictions are among businessmen on the same level of distribution. A restriction imposed by a manufacturer on a distributor is vertical, and a restriction agreed upon between two distributors is horizontal.

10. Schwinn formerly sold through unlimited retail outlets; however, as of 1951-52 it reduced its retail outlets from about 15,000 to about 5,500. The bicycle market and Schwinn's position are as follows:

[i]n 1951 Schwinn had the largest single share of the United States bicycle market—22.5%. In 1961 Schwinn's share of market had fallen to 12.8% although its dollar and unit sales had risen substantially. In the same period, a competitor, Murray Ohio Manufacturing company, which is now the leading United States bicycle producer, increased its market share from 11.6% in 1951 to 22.8% in 1961. Murray sells primarily to Sears, Roebuck & Company and other mass merchandisers. By 1962 there were nine bicycle producers in the Nation, operating 11 plants. Imports of bicycles amounted to 29.7% of sales in 1961.

Forty percent of all bicycles are distributed by national concerns which operate their own stores and franchise others. Another 20% are sold by giant chains and mass merchandisers like Sears and Montgomery Ward & Company. Sears and Ward together account for 20% of all bicycle sales. Most of these bicycles are sold under private label. About 30% of all bicycles are distributed by cycle jobbers which specialize in the trade, and the remaining 10% by hardware and general stores.

Schwinn sells its products primarily to or through 22 wholesale distributors, with sales to the public being made by a large number of retailers. In addition, it sells about 11% of its total to B. F. Goodrich for resale in B. F. Goodrich retail or franchised stores. There are about 5,000 to 6,000 retail dealers in the United States which are bicycle specialty shops, generally also providing servicing. About 84% of Schwinn's sales are through specialized dealers. Schwinn sells only under the Schwinn label, never under private label, while about 64% of all bicycles are sold under private label. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 368 (1967).

11. Under the Schwinn Plan, Schwinn also extends credit to its retailers.

only with franchised retailers within a specific geographical territory. The Supreme Court upheld these restrictions in the consignment or agency agreements¹² with the distributors, but struck down the same restrictions as illegal per se when distribution was achieved through sales to the distributors.¹³

THE LAW PRIOR TO SCHWINN

In previous decisions, courts focused on certain criteria to determine whether or not a given method of doing business was inherently illegal. In analyzing marketing restriction agreements, the courts have been concerned with: the form in which an agreement is cast; who is initiating the agreement; who is being benefited; and what is the purpose of the restriction.¹⁴ In *Schwinn*, the Supreme Court found the agreements between Schwinn and its distributors were purely vertical, initiated by Schwinn for its own benefit, and not ancillary to any conduct which in itself is illegal per se. These criteria of form, origin, and purpose have been carefully analyzed before a per se label has been placed on a particular type of conduct.

Traditionally, the courts have been particularly concerned with the form of agreement with respect to restraints that are illegal per se. Marketing restrictions of a non-price-fixing and tie-in nature have been subject to per se invalidity only when an agreement between parties standing on a horizontal relationship to each other has been found.¹⁵ Historically, horizontal restraints have been considered more pernicious as they are generally naked restraints of trade with no purpose except stifling of competition.¹⁶

In *Eastern States Retail Lumber Dealers v. United States*,¹⁷ retail lumber dealers joined together horizontally to boycott wholesale dealers

12. In a consignment or agency agreement, title, dominion, and risk of loss of goods remains with the seller.

13. The holding in *Schwinn*, however, is qualified somewhat. For the restraint not to be a violation of the Sherman Act, there must be competitive products readily available—in other words, sufficient interbrand competition. When a manufacturer has a dominant market position, foreclosure of intrabrand competition is, in effect, foreclosure of the only competition existing. However, if there is sufficient competition among various brands (interbrand competition), a restriction on intrabrand competition may not have an injurious effect on competition in general. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.D.C.), cert. denied, 355 U.S. 822 (1957).

14. For a discussion of marketing restrictions which have been considered illegal refusals to deal see Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

15. *United States v. General Motors*, 384 U.S. 127 (1966); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co. v. United States*, PA. L. REV. 847 (1955).

16. *United States v. White Motor Co.*, 372 U.S. 261, 263 (1963).

17. 234 U.S. 600 (1913).

who sold directly to consumers and in *Fashion Originators Guild of America, Inc. v. FTC*¹⁸ a large combination of manufacturers of women's garments boycotted retailers who sold systematically copied designs. In both cases the form of the agreement was horizontal and illegal. In *Klors, Inc. v. Broadway-Hale Stores, Inc.*,¹⁹ a combination of ten major appliance manufacturers and one retailer was formed to sell to the plaintiff at discriminatory prices or to refuse to sell to him entirely. The agreement was essentially horizontal and the Court held it was illegal per se.²⁰ And in the recent case of *United States v. General Motors*,²¹ G.M. cooperated with a group of its franchised dealers in an effort to stop bootlegging.²² Labeling this conduct a classic conspiracy in restraint of trade, the Court had no trouble in applying a per se rule.²³ In each of these cases and in other similar cases in which a per se rule was applied to combinations foreclosing market entry, the form of the agreement contained a horizontal element.²⁴

The Court of Appeals for the First Circuit, however, has also applied a per se rule to a purely vertical agreement which limited the class to whom a product could be resold. In *Ford Motor Co. v. Webster's Auto Sales*,²⁵ a new car dealer requested that Ford impose restrictions on all dealers such that "company cars"²⁶ purchased from Ford could not be resold to used car dealers. To protect this dealer, Ford wrote its other

18. 312 U.S. 457 (1940).

19. 359 U.S. 207 (1959).

20. The Court concluded that the boycott violated the statute without regard to the reasonableness of the conduct in the circumstances. A group boycott of a trader was from its very nature and character unduly restrictive. 359 U.S. 207, 211 (1959).

21. 384 U.S. 127 (1966).

22. "Bootlegging" is a practice employed in the automobile trade by which discount houses or other retailers (not franchised automobile dealers) purchase cars from co-operating franchised dealers and resell them to the public.

In the Los Angeles market, new Chevrolet automobiles were being sold through a few of the larger discount houses. During 1960, approximately a dozen of the eighty-five Chevrolet dealers in the area were furnishing cars to the discounters. In response to numerous complaints by the other Chevrolet dealers and three dealer associations, General Motors, together with the dealer associations, took steps to elicit from each dealer a promise not to do business with the discounters. To enforce compliance, General Motors and the dealer associations established extensive policing techniques.

23. Mr. Justice Fortas, speaking for the Court, felt that there was no doubt that this was an appropriate case for the application of a per se rule. He stated: "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct," *United States v. General Motors*, 384 U.S. 146 (1966).

24. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945); *Millinery Creators' Guild v. FTC*, 312 U.S. 469 (1941); *United States v. First National Pictures, Inc.*, 282 U.S. 44 (1930); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923).

25. 361 F.2d 874 (1st Cir. 1966).

26. Company cars were cars driven by Ford employees. Generally they were new Fords with low mileage.

dealers asking them not to bid on "company cars" for the purpose of reselling them to a used car dealer, particularly one in a town other than that of the purchasing dealer. The plaintiff, a cut-off used car dealer who had been purchasing "company cars" from a Ford dealer, alleged a horizontal conspiracy. The court denied the existence of any horizontal conspiracy, but felt the presence of a vertical agreement alone rendered the conduct illegal per se.²⁷

When a vertical restriction is present, illegality may hinge on what is sought to be accomplished; that is whether the manufacturer is acting for his own economic betterment or is attempting to benefit his distributors by stifling competition is important.²⁸ In *Klor's*, the agreement did not benefit the manufacturers, but only the dealers selling their products. The purpose of the agreement was to eliminate one competitor so that the other retailers could maintain their hold on the market. Likewise, in *General Motors* and *Ford*, the agreements were primarily for the economic benefit of the dealers. Thus in *General Motors* the dealers persuaded G.M. to impose restrictions which would prevent a diminution of their market share and in *Ford*, although the agreement was vertical, it had the sole purpose and effect of benefiting a Ford dealer and consequently achieved the same result as if the agreement were horizontal.

In cases where a horizontal agreement is entered into to deny a competitor access to a market, experience has shown that these agreements have no purpose other than stifling of competition.²⁹ Likewise, where the purpose of an agreement is solely to benefit one competitor at the expense of another, even though it is vertically imposed, per se illegality may be proper.

THE SCHWINN CASE

In *Schwinn*, the factual situation was somewhat different from that of previous cases; the agreement was not horizontal, nor was it initiated solely to benefit Schwinn's distributors or retailers. The situation is best illustrated in the Court's own words:

. . . we are dealing here with a vertical restraint embodying the unilateral program of a single manufacturer. We are not dealing with a combination of manufacturers, as in *Klor's*, or of distributors, as in *General Motors*. We are not dealing with a "division" of territory in the sense of an allocation by and among the distributors, . . . or an agreement among distributors

27. 361 F.2d 874, 881 (1st Cir. 1966).

28. *United States v. White Motor Co.*, 372 U.S. 253 (1963).

29. *Id.*

to restrict their competition,³⁰

. . . [n]or is this a case of territorial or dealer restrictions accompanied by a price fixing, for here the issue of unlawful price fixing was tendered, litigated, decided against the appellant, and appellant has not appealed. . . .³¹

We are here concerned with a truly vertical arrangement, raising the fundamental question of the degree to which a manufacturer may not only select the customers to whom he will sell, but also allocate territories for resale and confine access to his product to selected, or franchised, retailers.³²

Using the criteria of form, purpose, and origin of the agreement, a proper analysis of previous cases certainly does not require the application of a per se rule in *Schwinn*. The agreement, purely vertical in nature, originates with and is designed to benefit Schwinn and is not ancillary to conduct already illegal per se. On the basis of these criteria, *Schwinn* is distinguishable from previous cases applying a per se rule to distribution control restrictions.

In addition, the Court does not deal adequately with the one case, *United States v. White Motor Co.*,³³ which discussed a type of distribution practice quite similar to that in *Schwinn*. In *White Motor*, the Court was asked to extend the ban against horizontal combinations among competitors to a vertical arrangement which limited both the territory in which and the class of merchants to whom a distributor could sell. The Court, declining to apply a per se rule, stated: "[w]e do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against the aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and within the 'rule of reason.'"³⁴

In *White Motor*, the Court held that, as to horizontal practices found to be per se violations, experience and analysis established the utter lack of justification to excuse their inherent threat to competition. However, experience did not warrant the conclusion that vertical restraints have the same pernicious effect upon competition.³⁵ Inquiry into the effect upon competition and economic justification had not been made with regard to vertical agreements and, therefore, they were not to be

30. 388 U.S. 365, 378 (1967).

31. *Id.* at 373.

32. *Id.* at 378.

33. 372 U.S. 253 (1963).

34. *Id.* at 263.

35. *Id.*

judged by the same standard as horizontal agreements.³⁶

In *Schwinn*, the Court alludes to *White Motor* and states it is not ready to introduce the inflexibility of a per se rule³⁷ to prohibit all vertical restrictions because of the possibility of "seriously hampering" smaller enterprises in their attempts to compete with the "giants"³⁸; however, the Court holds that when the manufacturer parts with title, vertical resale restrictions are illegal per se.³⁹ The Court then justifies this conclusion on the basis of the ancient rule against restraints on alienation.⁴⁰ This rule may have been proper when a manufacturer had no legitimate interest in his product after it left his hands; however, with mass advertising and sophisticated marketing techniques, the manufacturer of today has a great interest in where and how his goods are sold.⁴¹

36. *Id.*

37. It is interesting to note that the government may not have argued that a per se rule should apply to vertical resale marketing restrictions. In oral argument, the government distinguished *Schwinn* from other cases, and felt that because the agreement was vertical and initiated by Schwinn, a per se rule was not applicable. 35 U.S.L.W. 3372 (U.S. Apr. 25, 1967). It is not clear, however, whether the government was referring only to agency agreements (as they were the only ones on appeal) or to all vertical restrictions. The argument can be made that the government felt all vertical marketing restrictions should be judged by a rule of reason. It should be noted that the government has not appealed from two vertical marketing decisions, both decided after *White Motor*. This may be viewed as a tacit recognition of the propriety of applying a rule of reason to certain vertical marketing restrictions. See text following note 53, *infra*.

38. 388 U.S. 365, 380 (1967).

39. Although the Court holds that when the manufacturer parts with title any effort to restrict the persons to whom the product is resold is a per se violation of section 1, a limited exception may be recognized. The Court states that the facts of this case do not come within the illustrations of *White Motor* because Schwinn is neither a failing company nor a new company breaking into the market. It can, therefore, be assumed that if a company is a failing company or a new entrant, any vertical restrictions will be measured by a "rule of reason" under *White Motor*. In this respect, the Court does not repudiate *White* as Mr. Justice Stewart suggests in his dissent, but rather unfortunately limits the application of the rule of reason to vertical agreements which involve a new entrant or a failing company.

40. 388 U.S. 365, 380 (1967).

41. Mr. Justice Stewart traces the origin of this rule to Coke on Littleton. 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND § 360 (Day ed. 1812). He states:

[c]enturies ago, it could perhaps be assumed that a manufacturer had no legitimate interest in what happened to his products once he had sold them to a middleman and they had started their way down the channel of distribution. But this assumption no longer holds true in a day of sophisticated marketing policies, mass advertising, and vertically integrated manufacturer-distributors.

. . . In any event, the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today. The problems involved are difficult and complex, and our response should be more reasoned and sensitive than the simple acceptance of a hoary formula. "It does seem possible that the nineteenth and twentieth centuries have contributed legal conceptions growing out of new types of business which makes it inappropriate" for the Court to base its "overthrow of contemporary commercial policies on judicial views of the reign of Queen Elizabeth." 388 U.S. at 392.

THE CONSIGNMENT APPROACH

The distribution path after *Schwinn* for manufacturers to insure that their products are sold only by selected retail outlets is through an "agency" route.⁴² When the arrangement between a manufacturer and a distributor is a "sale," a per se rule is applicable to marketing restrictions similar to those present in *Schwinn* but, if the arrangement is designated as an "agency" agreement, these *same* restrictions are not illegal per se. This is a curious distinction to make because in *Simpson v. Union Oil Co.*,⁴³ the Court explicitly emphasized that differences in form do not represent differences in substance. In *Schwinn* by making a "sale" versus "agency" distinction, the Court appears to be more concerned with the form in which the agreement is drafted than with its economic function and competitive effect. As the dissent points out, the record did not show that the competitive consequences of Schwinn's distribution program necessarily differed when Schwinn sold its bicycles to the distributors or entered into consignment agreements.⁴⁴

The Court, in *United States v. Masonite Corp.*,⁴⁵ stated:

[s]o far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the con-

42. A manufacturer may decide not to use any intermediary form of distribution, but rather sell directly to retail outlets. Absent monopolistic purposes, the manufacturer has the right to deal with whomever he chooses and the *limited* right to establish the price at which his product is sold. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Colgate & Co.*, 257 U.S. 441 (1922).

However, in order to handle the distribution function better, rather than selling directly to retail outlets, the manufacturer *may* be forced to channel his product through independent distributors. "Historically, intermediaries (distributors) arose because of the cost savings and efficiencies involved in time and cost of communication and transportation by reducing the number of transactions necessary to get a product from the manufacturer to the consumer." W. Alderson, *Distribution Channels* (1966). By using distributors, a manufacturer can assure himself of a greater possibility of reaching the market, making his product more widely and readily available to the "searching" consumer. A manufacturer who wishes to reach a large segment of the market is usually in no position to deal directly with retailers, but must channel his product through wholesale distributors.

If a manufacturer does not choose to distribute through independent wholesalers, he may decide to integrate forward into the distribution function. As the distributors are then merely employees of the manufacturer, they can be told to whom to sell the product.

However, vertical integration presents many problems. By vertically integrating, the manufacturer is replacing the small, independent businessmen with his own employees, a result surely not within the spirit of the antitrust laws. In addition, many larger manufacturers are reluctant to integrate forward into the wholesaling function; they prefer to use their capital for other purposes such as advertising, research, and development. The most recurrent consideration, however, against smaller manufacturers deciding not to integrate forward is simply financial inability. For a further discussion of this problem, see note 7 *supra*.

43. 377 U.S. 13 (1964).

44. 388 U.S. 365, 393 (1967).

45. 316 U.S. 265 (1941).

cepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade.⁴⁶

By labeling vertical "sale" restrictions illegal per se, the Court ignores the "economic and business stuff out of which these arrangements emerge." There is no showing of the economic differences between a sale or a consignment method of distribution and their consequent effects upon competition. *White Motor* called for the examination of vertical agreements in their competitive context to determine whether or not they were too restrictive. In *Schwinn*, however, without examining the economic consequences of vertical sale restrictions, the Court determines that they were too restrictive.

A further examination of vertical restrictions may reveal that there is sufficient economic justification for their presence. Smaller manufacturers may find that in order to compete successfully with larger manufacturers of other brands, it is necessary to have more control over who sells their products. By selecting only certain dealers to represent him, a manufacturer has the opportunity to compete effectively without developing a chain store or large integrated operation.⁴⁷ An independent dealership organization avoids the problems of large-scale capital investment and the costs of management and sales staffs necessary to vertical integration.⁴⁸

More important, however, by carefully choosing his outlets, a smaller manufacturer may insure that only well trained and aggressive salesman handle his product. He may insure that he is represented by businessmen who act to the best of their ability, take responsibility for adjusting customer problems, and use ingenuity to profit from an extra effort.⁴⁹ In addition, a manufacturer benefits from the independent businessman's sense of responsibility, industriousness, attention to costs, and a desire to earn a profit.⁵⁰

The willingness of a potential customer to buy a manufacturer's product may often be influenced by the customer's opportunity to secure prompt repairs, services, and instructions on proper use of the product.⁵¹ Consequently, the manufacturer does not want just anybody "selling its product in a carton, collecting the price paid, 'kissing the customer goodbye,' depositing his profit and forgetting the customer, manufacturer,

46. *Id.* at 280.

47. Jones, *The Growth and Importance of Franchising and the Role of Law*, 12 ANTITRUST BULL. 717, 723 (1967).

48. *Id.*

49. *Id.* at 724.

50. *Id.*

51. *United States v. Arnold, Schwinn & Co.*, 237 F. Supp. 323, 338 (N.D. Ill. 1965).

and the public generally."⁵²

Considering these factors which entice a customer to buy, a manufacturer would seem to have sufficient reasons to justify limiting distribution to outlets which offer significant customer services. Although enforcement of this policy results in a denial of some access to the market for the manufacturer's product, the manufacturer nevertheless has a legitimate interest in how his goods are marketed; thus, a restraint of this type is much different than one imposed solely to benefit a particular seller. The manufacturer may not be trying to place a restraint upon the distributor to benefit another, but rather a sanction to insure that his planning concerning the market segment to be served is realized. The manufacturer is using his economic power to benefit himself.

In two Federal Trade Commission decisions since *White Motor, Sandura Co. v. FTC*⁵³ and *Snap-On Tools Corp. v. FTC*,⁵⁴ a per se approach to vertical marketing restrictions has been rejected. In *Sandura*, the court upheld Sandura's vertical restrictions to enable a small manufacturer to compete more effectively with the large firms in the floor-covering industry and, in *Snap-On*, the court upheld Snap-On's restrictions on the basis of maintaining better interbrand competition in the hand tool industry. Neither of these cases has been appealed, and one writer feels that this may be viewed as a tacit recognition that vertical marketing restrictions may be justified under the rule of reason in appropriate cases.⁵⁵

In *Snap-On*, the court stated that :

. . . manufacturers should be encouraged by the workings of the anti-trust laws to meet and promote competition of their products with those of competing brands, rather than to be hampered by those laws in the 'orderly marketing of [their] products.'⁵⁶

By applying a per se rule to vertical resale marketing restrictions, the Court in *Schwinn* may be using the antitrust laws to hamper the orderly marketing of goods and prevent competition among competing brands. The Court in *White Motor* did not apply a per se rule to restrictions similar to those in *Schwinn* on the grounds that the economic consequences of such agreements were not known. In *Schwinn*, however, a per se rule was applied without investigating and settling the inquiries

52. *Id.*

53. 339 F.2d 847 (6th Cir. 1964).

54. 321 F.2d 825 (7th Cir. 1963).

55. Handler, *Recent Antitrust Developments—1965*, 40 N.Y.U.L. REV. 823, 850 (1965).

56. 321 F.2d 825, 833 (7th Cir. 1963).

invited by the Court in *White Motor*. It is questionable whether the Supreme Court in *Schwinn* had sufficient knowledge of the adverse competitive effects of vertical restrictions to justify the use of a per se rule.

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