unreasonable?

## CHAPTER 1. THE STANDARD OF LEGALITY: PER SE OR RULE OF REASON?

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- § 2:2 What statutes and legal principles govern refusals to sell?

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- § 2:16 —What principles of law govern announced sales policies and subsequent refusals to deal?
- § 2:17 —May Seller announce a policy of refusing to sell to Buyer if Buyer does not maintain adequate quality? Purchase a specified quantity? Pay its bills on time?
- § 2:18 —May Seller include quality, volume, or credit terms in a dealer agreement without risking antitrust liability?
- § 2:19 —May Seller announce a policy of refusing to sell to Buyer if Buyer sells outside of its prescribed territory? Sells from an unauthorized location? Sells to unauthorized customers? Purchases products from Seller's competitors? Does not purchase Seller's full product line?
- § 2:20 —May Seller include territorial, location, customer, or product restrictions in a formal dealer agreement?
- § 2:21 —May Seller announce a policy of refusing to sell to Buyer if Buyer does not adhere to Seller's suggested prices?
- § 2:22 —May Seller solicit assurances from Buyer that Buyer will abide by Seller's pricing policies?
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- § 2:28 —What are the relevant principles governing the legality of communication between Seller and Competing Buyer resulting in Seller's refusal to sell to Buyer?
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- § 2:31 —What if the purpose of the refusal to sell is to protect Competing Buyer from Buyer's price competition? To enforce nonprice vertical restraints? To maintain quality standards? To enforce vertical price agreements?
- § 2:32 —Is joint action between Seller and more than one Competing Buyer, resulting in Seller's decision to refuse to deal with Buyer, unlawful?
- § 2:33 —What if Competing Buyer is a subsidiary of Seller?
- § 2:34 May Seller engage in joint action with Competing Seller(s) to refuse to sell to Buyer or to a class of Buyers?
- § 2:35 —What if the purpose of the joint action is to restrain competition among Buyers?
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- § 2:38 May monopolist Seller refuse to deal with Buyer?
- § 2:39 —What statutes and principles govern monopolist Seller's right to refuse to sell?
- § 2:40 —How is the existence of monopoly power determined?
- § 2:41 —When does monopolist Seller unlawfully obtain or exercise monopoly power?
- § 2:42 —May monopolist Seller refuse to sell to Buyer for legitimate business reasons?
- § 2:43 —May monopolist Seller refuse to sell to Buyer if the purpose of such refusal is to maintain or enhance Seller's monopoly position?
- § 2:44 —May monopolist Seller refuse to sell to Buyer because it competes with Buyer?
- § 2:45 —When is monopolist Seller required to deal with competitors?

- § 2:46 —Does monopolist Seller have a duty to notify Buyer of its reasons for refusing to deal?
- § 2:47 —How do the antitrust laws treat the right of large, but not monopolistic, Sellers to refuse to sell?

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§ 3:1 § 3:2	What laws restrict the price at which Seller may sell? What conditions led to the passage of the Robinson-
§ 3:3	Patman Act? What practices are covered by the Robinson-Patman
	Act?
§ 3:4	What are the elements of a violation of § 2(a) of the Robinson-Patman Act?
§ 3:5	—What is a discrimination in price?
§ 3:6	—Is functional availability of the lower price to the plaintiff a defense to a charge of price discrimination?
§ 3:7	—What transactions are in interstate commerce?
§ 3:8	—Does the Robinson-Patman Act apply to export and import transactions?
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§ 3:10	—What is a sale?
§ 3:11	—Who is a purchaser?
§ 3:12	—Can there be a violation if the higher and lower
0	priced sales were not contemporaneous?
§ 3:13	—What are commodities of like grade and quality?
§ 3:14	May Seller charge end-users lower prices than resellers?
§ 3:15	What kind of injury to competition will violate the Robinson-Patman Act?
§ 3:16	What are the elements of competitive injury to competitors of the Seller?
§ 3:17	What are the elements of competitive injury to customers of the Seller?
§ 3:18	—How may the inference of competitive injury to Seller's customers be rebutted?
§ 3:19	May Seller grant functional discounts?
§ 3:20	What are the elements of unlawful brokerage payments?
§ 3:21	What are the elements of an unlawful discrimination involving promotional allowances and services?
§ 3:22	What are promotional allowances and services as distinguished from price concessions?
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§ 3:24	—What form of notice must Seller provide?
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	functionally available to all competing customers?
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$\S 3:27$	What defenses exist to charges of price discrimination?
§ 3:28	How can Seller establish a meeting competition defense?
§ 3:29	How can Seller establish a cost justification defense?
§ 3:30	How can Seller establish a changed conditions defense?
§ 3:31	Are sales to nonprofit institutions and government entities exempt?
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§ 3:34	—What liability does Buyer have for receiving an unlawful promotional allowance or service?
§ 3:35	How vigorously does the government enforce the Robinson-Patman Act?
§ 3:36	May private plaintiffs enforce the Robinson-Patman Act?
§ 3:37	When does a private plaintiff have standing to sue for a Robinson-Patman violation?
§ 3:38	What must a private plaintiff prove in order to recover damages for price discrimination?
§ 3:39	Will the Robinson-Patman Act continue to have a substantial impact on the distribution of goods?

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#### I. INTRODUCTION

§ 4:1 Do the antitrust laws prohibit Seller from restricting what Buyer buys?

#### II. TYING

- § 4:2 May Seller condition or tie its sale or lease of one item to the purchase or lease by Buyer of a second item offered by Seller or a related third party?
- § 4:3 Is tying a *per se* violation of the antitrust laws?
- § 4:4 Does it make any difference whether the items tied together are commodities as opposed to services, licenses, or other intangible items?
- § 4:5 —What is a commodity?

§ 4:27

§ 4:6	—Is the definition of commodities in the tying context different than that used for analysis of exclusive
	dealing arrangements or under the Robinson-Patman Act?
§ 4:7	—What are examples of items that have been held to be commodities?
§ 4:8	—What are examples of items that have been held not to be commodities?
§ 4:9	—Is a trademark a commodity?
§ 4:10	Is it tying to require the purchase of two items that are part of the same product or are related?
§ 4:11	—When are two items separate items for tying purposes?
§ 4:12	—Does it matter if the two items are normally sold as a unit or package in the industry?
§ 4:13	—What are examples of items that have been found to be separate products?
§ 4:14	—What are examples of items that have been found not to be separate products?
§ 4:15	—Is Seller's trademark a separate item from Seller's products?
§ 4:16	—Is a group of franchise-related items a single package or are they separate items?
§ 4:17	Does it matter that there was no actual sale or lease from Seller to Buyer?
§ 4:18	If two separate items are sold or leased by Seller to Buyer, when are those sales or leases considered to be tied?
§ 4:19	—If Seller does not expressly tie the purchase of item A to the purchase or lease of item B, but nevertheless induces Buyer to purchase or lease item B, is there tying?
§ 4:20	—When will a court find that Seller coerced rather than convinced Buyer to purchase or lease item B in order to get item A?
§ 4:21	—If Seller offers item A at a lower cost when item B is also purchased or leased, is there tying?
§ 4:22	—If Buyer purchases a tied package because it wants to, not because it is coerced to do so by Seller, is there a tie?
§ 4:23	Must Seller have economic power or leverage over the market in item A to have tying?
§ 4:24	—What level of power must Seller have in the market for item A in order to have tying power?
§ 4:25	—What are examples of market power?
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—Is there market power if item A is covered by a

patent, copyright, or trademark?

§ 4:28 What effect on competition in the market for item B is necessary for tying to be found unlawful? § 4:29 Can tying be justified in certain cases? § 4:30 —Can tying be justified because use of item B is necessary to the proper functioning of item A, and use of another item might undermine Seller's reputation? § 4:31 —Can tying be justified because sale of another product in place of item B might undermine Seller's goodwill or reputation? § 4:32 —Can tying be justified because Seller is a new competitor trying to enter the market? § 4:33 —Can tying items be justified because Seller is providing an entire franchise or trademark package? § 4:34 Does it matter that all tie-in sales are in foreign countries, or within a single state? § 4:35 May Seller require Buyer to purchase Seller's full line of a certain type of product? § 4:36 May Seller require Buyer to purchase item B from a specified third party or list of third parties? § 4:37 May Seller require Buyer to purchase related items that meet certain quality specifications or are approved by Seller? § 4:38 Who can challenge a tying arrangement? § 4:39 What are the penalties for tying?

#### III. EXCLUSIVE DEALING

- § 4:40 May Seller condition its sale or lease of an item on Buyer's agreement not to obtain that item from anyone else or Buyer's agreement to purchase all its needs for the item from Seller?
- § 4:41 —If Buyer buys or leases the item only from Seller, when is this considered to be an exclusive dealing arrangement?
- § 4:42 —Is a requirements contract exclusive dealing?
- § 4:43 Does it make any difference whether the item is a commodity as opposed to a service or intangible item for exclusive dealing purposes?
- § 4:44 —What is a commodity?
- § 4:45 Is there exclusive dealing where Buyer refuses to accept the exclusive dealing agreement or Seller refuses to sell without it?
- § 4:46 If Seller does not expressly condition its sale of the item on Buyer's agreement to purchase the product only from Seller, can there be exclusive dealing?
- § 4:47 Is there exclusive dealing where Buyer is not forced to purchase exclusively from Seller, but agrees to do so voluntarily?

- § 4:48 Is there exclusive dealing if Seller offers a significantly better price to Buyer for making all or substantially all of its purchases from Seller?
- § 4:49 How do the courts determine if the exclusive dealing arrangement has substantially lessened competition?
- § 4:50 Must Seller have sufficient power over the market to impose the exclusive dealing condition in order to find exclusive dealing?
- § 4:51 Can exclusive dealing be justified where Seller is a new or small competitor seeking to obtain penetration or viability in the market?
- § 4:52 Can exclusive dealing be justified where the condition is necessary to assure proper service, promotion, or inventory of the product?
- § 4:53 Can exclusive dealing be justified where it does not include all sales or exclude all competitors?
- § 4:54 Does it matter that the sales are in foreign countries, or are only made within a single state?
- § 4:55 What are the penalties for exclusive dealing?

#### IV. RECIPROCAL DEALING

§ 4:56 Where Seller purchases item A from Buyer, may Seller condition those purchases on Buyer's agreement to purchase item B from Seller?

### CHAPTER 5. MAY SELLER RESTRICT WHERE OR TO WHOM BUYER RESELLS?

#### I. WHAT ARE THE GENERAL RULES REGARDING RESTRICTIONS ON WHERE OR TO WHOM BUYER RESELLS?

- § 5:1 What are vertical nonprice resale restrictions?
- § 5:2 How do vertical nonprice resale restrictions fit together with an exclusive territory for Buyer?
- § 5:3 Are vertical nonprice resale restrictions *per se* illegal or are they tested by the *rule of reason*?
- § 5:4 How important is interbrand competition?
- § 5:5 How important is intrabrand competition?
- § 5:6 What factors does the court consider in judging the reasonableness of a vertical nonprice resale restriction?

# II. HOW HAVE THE RULES CHANGED WITH REGARD TO VERTICAL NONPRICE RESALE RESTRICTIONS?

§ 5:7 What rule for analyzing vertical nonprice resale

- restrictions was first articulated by the Supreme Court?
- § 5:8 How was this rule changed in 1967?
- § 5:9 What exceptions to the *Schwinn* rule did the lower courts carve out?
- § 5:10 Why did the Supreme Court return to the rule of reason in *Sylvania*?

### III. MAY SELLER RESTRICT THE TERRITORIES IN WHICH BUYER MAY RESELL?

- § 5:11 What are vertical territorial resale restrictions?
- § 5:12 What valid business purposes can vertical territorial resale restrictions serve?
- § 5:13 What anticompetitive purposes can vertical territorial resale restrictions serve?
- § 5:14 How is the legality of vertical territorial resale restrictions determined?
- § 5:15 May Seller restrict the right of Buyer to resell outside a designated territory except at specified prices?

### IV. MAY SELLER RESTRICT THE CUSTOMERS TO WHOM BUYER MAY RESELL?

- § 5:16 What are vertical customer resale restrictions?
- § 5:17 What valid business purposes can vertical customer resale restrictions serve?
- § 5:18 What anticompetitive purposes can vertical customer resale restrictions serve?
- § 5:19 How is the legality of vertical customer resale restrictions determined?

# V. DOES IT MATTER WHETHER THE GOODS ARE DISTRIBUTED ON AN AGENCY OR CONSIGNMENT BASIS?

- § 5:20 What is an agency?
- § 5:21 What is a consignment?
- § 5:22 Have territorial and customer restrictions in agency and consignment arrangements been treated differently from outright sales under the antitrust laws?

# VI. DOES IT MATTER WHETHER THE PARTY IMPOSING THE RESTRICTIONS IS A LICENSOR?

§ 5:23 How are territorial and customer restrictions in

- licensing arrangements treated under the antitrust laws?
- § 5:24 Is the rule any different with regard to restraints imposed on the resale of patented articles?

# VII. DOES IT MATTER WHETHER A NONPRICE RESALE RESTRICTION IS MOTIVATED BY SELLER OR BUYER?

- § 5:25 Does the source of the restraint affect its legality?
- § 5:26 What factors do the courts consider in determining whether a restraint is vertical or horizontal?

# VIII. MAY SELLER ARBITRATE OR SETTLE DISPUTES AMONG BUYERS CONCERNING TERRITORIES OR CUSTOMERS?

- § 5:27 Will Seller's participation in an arrangement among Buyers be treated as a horizontal or vertical resale restriction?
- § 5:28 Will Seller's involvement in a dispute among Buyers automatically implicate the Seller in an unlawful horizontal conspiracy?
- § 5:29 Is it significant that Seller is controlled or owned by Buyers?

#### IX. WHAT ROLE DOES MARKET SHARE PLAY?

- § 5:30 Does Seller's market share make a difference under the rule of reason?
- § 5:31 Does the market share of Seller's competitors make a difference under the rule of reason?

#### X. WHAT ROLE DOES PURPOSE PLAY?

- § 5:32 In its rule of reason analysis, does the court consider Seller's purpose in imposing the resale restrictions?
- § 5:33 Can a valid business purpose save an otherwise unreasonable resale restriction?
- § 5:34 Is Seller's attempt to introduce a new product a valid business purpose?
- § 5:35 Is Seller's attempt to enter a new territory or sell to a new class of customers a valid business purpose?
- § 5:36 Is Seller's attempt to stop an erosion of its market share a valid business purpose?
- § 5:37 Is Seller's attempt to encourage Buyers to perform promotional or postsale services, or to discourage free riding, a valid business purpose?

- § 5:38 Is Seller's attempt to promote consumer safety, avoid product liability suits, maintain quality control, or fulfill warranty obligations a valid business purpose?
- § 5:39 Is Seller's attempt to promote distribution of its goods a valid business purpose?

#### XI. MUST SELLER ADOPT THE LEAST RESTRICTIVE TERRITORIAL OR CUSTOMER RESTRAINT THAT WILL ACHIEVE SELLER'S LEGITIMATE PURPOSE?

- § 5:40 What role does the existence of less restrictive means to achieve the desired end play under the rule of reason?
- § 5:41 What less restrictive alternatives have been upheld by the courts?

# XII. WILL A PRIMARY AREA OF RESPONSIBILITY CLAUSE LESSEN SELLER'S ANTITRUST RISK?

- § 5:42 What is a primary area of responsibility clause?
- § 5:43 How is the legality of such a restriction tested?
- § 5:44 Under what circumstances have primary area of responsibility clauses been held unlawful?

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- § 5:45 What is a profit pass-over clause?
- § 5:46 How is the legality of such a restriction tested?
- § 5:47 Under what circumstances have profit pass-over clauses been held unlawful?

### XIV. WILL A LOCATION CLAUSE REDUCE SELLER'S ANTITRUST RISK?

- § 5:48 What is a location clause?
- § 5:49 How is the legality of such a restriction tested?
- § 5:50 Under what circumstances have location clauses been held unlawful?

# XV. MAY SELLER WHO ALSO DISTRIBUTES IN COMPETITION WITH BUYERS PLACE RESALE RESTRICTIONS ON BUYERS?

§ 5:51 What is a dual distributor?

§ 5:52 Are nonprice resale restrictions imposed by dual distributors deemed vertical or horizontal?

### CHAPTER 6. MAY SELLER RESTRICT THE PRICES AT WHICH BUYER RESELLS?

•	1010	ESTRI WILLELI BUTER RESERVE.
§	6:1	May Seller control the prices at which Buyer resells Seller's products?
8	6:2	—When is a resale price fixed?
	6:3	—Does it make a difference if the prices imposed by Seller are maximum prices, rather than minimum prices?
§	6:4	—Does it make a difference if the product is an alcoholic beverage?
§	6:5	—Under what circumstances does Seller's control over Buyer's prices have an adverse impact on competition sufficient to render the conduct unlawful?
§	6:6	—May Seller control the prices charged for servicing its products?
§	6:7	—May Seller suggest the prices at which Buyer should resell its products?
§	6:8	Is there any general rule for distinguishing between lawful price suggestion and unlawful price-fixing?
§	6:9	—When does Seller go beyond the outer limits of its right to suggest prices?
§	6:10	Under what circumstances may Seller refuse to deal with Buyers that do not adhere to its suggested retail prices?
§	6:11	—May Seller terminate a discounting Buyer in response to complaints from other Buyers?
§	6:12	—What evidence, other than complaints from other Buyers, will support an inference that Buyer was terminated as the result of an unlawful conspiracy between Seller and other Buyers?
§	6:13	Aside from suggesting prices, what may Seller do to influence the prices charged by Buyer?
§	6:14	—May Seller employ persuasion, argument, or pressure?
§	6:15	—May Seller condition its prices to Buyer on Buyer's adherence to Seller's suggested resale prices?
§	6:16	—May Seller use a competitive allowance or other form of price support to influence resale prices?
§	6:17	—May Seller use price promotions?
_	6:18	—May Seller use preticketing or price lists?
_	6:19	—To what extent may Seller control or influence price
o		advertising by Buyer?
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- § 6:21 —To what degree may Seller police Buyer's resale prices?
- § 6:22 May Seller give rebates to the customers of Buyer?
- § 6:23 May Seller control prices by utilizing agents or consignees?
- § 6:24 —What factors are used to determine whether a consignment or an agency program is an improper attempt to control resale prices?
- § 6:25 Under what circumstances may Seller control the prices charged to national accounts?
- § 6:26 May Seller eliminate the intermediate Buyer and shift to a direct distribution system in order to control the price to the end-user?
- § 6:27 Does the Seller of a patented product have any greater rights to influence Buyer's resale prices?
- § 6:28 What control does Seller have over copyrighted or trademarked products?
- § 6:29 What are the penalties for unlawful resale price maintenance?

### CHAPTER 7. MAY SELLER CEASE SELLING TO BUYER?

- § 7:1 What are the sources of law regarding termination of Buyer by Seller?
- § 7:2 —What is termination?
- § 7:3 —May Seller and Buyer agree on the grounds and procedures for termination?
- § 7:4 —Suppose Seller and Buyer have no explicit agreement regarding termination?
- § 7:5 —When and how does the U.C.C. govern termination?
- § 7:6 —When do special industry laws govern termination?
- § 7:7 —What if Buyer is a motor vehicle dealer?
- § 7:8 —What if Buyer is a petroleum dealer?
- § 7:9 —What if Buyer is a franchisee?
- § 7:10 —When does antitrust law apply in termination situations?
- § 7:11 May Seller terminate Buyer without cause?
- § 7:12 —Suppose the agreement provides for termination without cause?
- § 7:13 —Suppose the agreement is silent about termination?
- § 7:14 —Suppose the agreement is silent about termination, but has a definite duration?
- § 7:15 —Suppose the agreement has no definite duration, but permits termination in specific circumstances?
- § 7:16 If Seller may not terminate Buyer without cause, what reasons are sufficient to justify termination?

8 7:17	—what statutes require good cause for termination?
8 7.18	—What is good cause under the statutes?

- g 7.10 What is good cause under the statutes:
- § 7:19 —Suppose Buyer fails to pay its debts to Seller?
- § 7:20 —Suppose Seller is apprehensive about Buyer's ability to pay?
- § 7:21 —Suppose Buyer fails to meet sales quotas?
- § 7:22 —Suppose Buyer fails to exercise its best efforts on behalf of Seller?
- § 7:23 —Suppose Buyer establishes relationships with other Sellers?
- § 7:24 —Suppose Buyer transfers part or all of its interest in its own business?
- § 7:25 —Suppose Buyer fails to meet standards of operation set by Seller?
- § 7:26 —Suppose Buyer violates the law?
- § 7:27 —Suppose Buyer and Seller are continually at odds with each other?
- § 7:28 May Seller terminate Buyer for reasons unrelated to Buyer's performance?
- § 7:29 —Suppose Seller is losing money in its dealings with Buyer?
- § 7:30 —Suppose Seller wants to change its marketing strategy?
- § 7:31 —Suppose Seller wants to discontinue a product line or withdraw from the market?
- § 7:32 —Suppose Seller wants to enter the market itself?
- § 7:33 —Suppose a third party is involved in Seller's decision to terminate Buyer?
- § 7:34 Must Seller give Buyer notice and an opportunity to cure before termination?
- § 7:35 —What is a reasonable notice period before termination?
- § 7:36 —Must formal notice be given?
- § 7:37 —If afforded the opportunity, what must Buyer do in order to cure?
- § 7:38 —Suppose Buyer has been in default before?
- § 7:39 May Seller refuse to renew its agreement with Buyer?
- § 7:40 What circumstances may be deemed the equivalent of a termination or a nonrenewal by Seller even though they are not described as such?
- § 7:41 Is there any limitation on the right of Seller to enforce the terms of the agreement strictly?
- § 7:42 May Seller increase competition in Buyer's market by adding other outlets or dealers?
- § 7:43 What issues should Seller consider when deciding whether to terminate Buyer?

- § 7:44 May Buyer cease purchasing from Seller?
- § 7:45 —May Buyer assign its contractual rights and obligations to another party?
- § 7:46 —May Buyer act in concert with other Buyers in ceasing to purchase from Seller?
- § 7:47 Do Seller and Buyer owe obligations to each other after termination?
- § 7:48 —What post-term obligations may be imposed on Buyer?
- § 7:49 —What post-term obligations may be imposed on Seller?
- § 7:50 What remedies are available to a wrongfully terminated Buyer?

# CHAPTER 8. WILL THE ANSWERS BE DIFFERENT IF SELLER IS ALSO COMPETING WITH BUYER?

- § 8:1 What is dual distribution?
- § 8:2 Why should dual distribution be a matter for antitrust concern?
- § 8:3 How has dual distribution analysis evolved?
- § 8:4 Can dual distribution lead to an intra-enterprise conspiracy?
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