



Antitrust Law Guidelines

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Selling Through Dealers – Antitrust Guidelines for Manufacturers

A manufacturer selling through independent dealers must navigate an array of legal issues in selecting, managing, or removing them. Many of these, like payment terms or service responsibilities, can be addressed in the dealer contract. Others, like termination or inventory repurchase, may be subject to state regulation. Still others, like limitations on resale pricing, may be subject to antitrust laws. Vertically integrated firms selling products through factory branches have no such issues.

In this article, we look at antitrust compliance in managing an independent dealer network and examine relations with dealers selling goods to consumers. Although manufacturers face many of the same antitrust issues in selling through wholesalers, we focus on relations with retail dealers, not wholesale distributors.

Guidelines

Working with independent dealers exposes a manufacturer to antitrust risks. Some of these may arise from dealer contract terms or pricing practices. Others may grow out of responses to dealer complaints, a decision not to appoint a dealer, involvement with dealer combinations, or selling in competition with dealers. We address these risks in this article.

A firm can control antitrust risks if it complies with these guidelines:

- Contract restraints on resale of goods. If a manufacturer restricts, through the dealer contract or otherwise, how a dealer resells its products, the restrictions, called vertical restraints, will be tested for legality under

federal and most state antitrust laws using the rule of reason. Except for resale price maintenance agreements in California and Maryland and restrictions imposed by a firm with monopoly power, vertical restraints should pass antitrust muster if they are implemented to strengthen a manufacturer's interbrand standing.

- Exclusive dealing. A manufacturer can secure a commitment from a dealer not to handle competing lines, and exclusive dealing, as it is called, is subject to evaluation for legality under the rule of reason. If implemented by a firm with monopoly power, an exclusive dealing arrangement, or programs that incentivize exclusive dealing, such as loyalty discounting or product bundling, may be unlawful if they exclude competitors from a downstream market.
- Price discrimination. A manufacturer should offer the same pricing terms to dealers competing with each other for the resale of its goods.
- Responding to dealer complaints. There is no way to prevent dealers from complaining about other dealers, especially price cutters, but a manufacturer must make its own decision, independently of dealer pressure and consistent with its economic self-interest, about whether to terminate a dealer, appoint a new dealer, or take other action following receipt of complaints.
- Dual distribution. If engaged in dual distribution, a manufacturer should determine independently, without soliciting dealer agreement, what restrictions on dealer selling may be needed to prevent interference with its direct marketing to consumers. The restrictions will be deemed vertical restraints subject to the rule of reason.

There is no guarantee that complying with these guidelines will prevent dealer litigation, but compliance should guarantee successful defense of any antitrust claims. We will first describe the range of legal issues associated with selling through dealers and then turn to specific antitrust risks.

Selling Through Dealers: Practical Considerations

Independent dealers can relieve a manufacturer of some of the costs of marketing, selling, and servicing products. Dealers give a manufacturer with national or international distribution the geographic reach essential for selling goods requiring point-of-sale assembly, startup service, or customer training.

Because a dealer is an independent business, a manufacturer needs assurance that the dealer's interests in promoting and selling products will align with its own. A dealer cannot give a manufacturer its best efforts if it concurrently handles a competing manufacturer's products. Nor can it serve effectively if it lacks experience in the target industry. Assuming appropriate due diligence has been carried out before a dealer appointment, manufacturer and dealer interests can usually be aligned through terms in the dealer contract.

Selling Through Dealers: The Legal Landscape, Generally

In most states, the relationship between a manufacturer and a dealer is subject to Article 2 of the Uniform Commercial Code, which governs contracts for the sale of goods. Codified by statute in every state except Louisiana, Article 2 of the UCC may provide guidance on matters not addressed in the dealer contract. If, for example, the written contract does not specify duration or provide for termination – or if there is no written contract – Section 2-309 supplies the applicable rules. Under Section 2-309, an agreement of indefinite duration can be terminated by either party on reasonable notice, provided it has been in effect long enough for the dealer to have had an opportunity to recoup its investment in handling the manufacturer's goods.¹

Contract rights, including those set out in the UCC, must yield to state statutes regulating the relationship between a manufacturer and its dealers, however. Some of these statutes are industry-specific, such as those protecting the interests of automobile dealers or dealers engaged in the sale of construction, industrial, or outdoor power equipment or farm implements. Others apply to a dealer's relationship with a manufacturer if the dealer meets the definition of "dealer" in the statute or if the relationship constitutes a "franchise." Whether industry-specific or general, these statutes prevent a manufacturer from terminating a dealer agreement without good cause, and many require a manufacturer to repurchase a dealer's inventory after termination. Some, such as those for automobile dealers, regulate a broad range of activities during the term of the dealership, including processing of warranty claims or addition of dealers to a dealer's market area.²

In contrast to state dealer statutes, which are intended to shield individual dealers from overreaching by manufacturers, antitrust laws protect competition. Harm to a single dealer will rarely have any effect on competition in the market for a manufacturer's goods, but dealers sue under the antitrust laws nonetheless. Manufacturers must be prepared for litigation and, at the same time, manage dealer relations to minimize antitrust risk.

Selling Through Dealers: The Antitrust Risks

Antitrust Risks from Contract Provisions and Minimum Price Restraints

Manufacturer antitrust liability can arise from the terms of its contract with a dealer. There are two types of provisions that may expose a manufacturer to liability:

- Restrictions on resale of goods
- Restrictions on handling competing goods

Federal and state antitrust laws treat these uniformly, except for provisions setting minimum resale pricing. Unless otherwise indicated below, the federal statute prohibiting agreements and conspiracies in unreasonable restraint of trade, Section 1 of the Sherman Act (15 U.S.C. § 1), provides the framework for testing the legality of these contract provisions.

Contractual Restraints on Resale of Goods, Including Minimum Pricing

A manufacturer's restriction on how, where, or to what customers a dealer can sell its products is a vertical restraint – i.e., it controls downstream distribution. Under federal antitrust law, vertical restraints are lawful if they satisfy the rule of reason.³ As long as they strengthen a manufacturer's position against competing firms in the market for the product in question and do not disproportionately limit intrabrand competition, they will be deemed reasonable. As a practical matter, unless a manufacturer's market share in the product line exceeds 30%, a vertical restraint is presumptively reasonable.⁴ The following restraints are subject to this standard:

- Limitations on the territory in which a dealer can sell
- Limitations on the locations from which a dealer can sell
- Limitations on the customers to which a dealer can sell, including prohibiting sales to other dealers
- Limitations on the channels in which a dealer can sell, e.g., prohibiting online sales or sales on specific platforms⁵

Rule of reason. Evaluating a vertical restraint under the rule of reason is a three-step process.⁶ The first step is to determine whether a restraint has a substantial anticompetitive effect in a relevant market – i.e., does it harm consumers by raising prices or limiting output? This is the plaintiff's burden of proof. Without at least 30% market share, a firm will not, in most cases, have the power to control prices or restrain output, referred to as market power. Before there can be any showing of market power, a plaintiff must prove the metes and bounds of the relevant product and geographic markets. This first step operates as a filter, and there is no need to go to the second step if a firm lacks market power. If a restraint does have a substantial anticompetitive effect because of a firm's market power, the second step is to determine whether there is a procompetitive justification for it – i.e., does it strengthen the manufacturer's position in relation to its competitors? This is the defendant's burden. If the restraint does have a procompetitive justification, the third step is to determine whether the same benefits and efficiencies could be achieved through less restrictive means. This is the

plaintiff's burden. If the plaintiff cannot show that less restrictive means are available, the restraint is lawful.

Some of the earlier cases suggest that rule-of-reason analysis is satisfied by engaging in a balancing exercise. If the benefits of a restraint to interbrand competition outweigh its adverse effects on intrabrand competition, it is lawful under Section 1 of the Sherman Act. There is no meaningful way to refine this balancing test, and it has proved to be, at best, a blunt instrument.⁷ The U.S. Supreme Court's recognition of the foregoing three-step process in its 2018 decision in *Ohio v. American Express Co.* makes future judicial resort to any such balancing analysis improbable.⁸

Resale price maintenance. Restrictions on resale pricing need to be addressed separately, because laws in some states differ from federal law. Under Section 1 of the Sherman Act, a manufacturer's requirement that a dealer not sell below a price set by the manufacturer is subject to the rule of reason,⁹ described in the preceding paragraphs. Under California and Maryland law, in contrast, such a discounting prohibition is deemed per se illegal.¹⁰ It is always unlawful, and the fact that it may be intended to strengthen the manufacturer's position in the interbrand market is irrelevant. Illegality of minimum resale price maintenance (RPM) in these two states means that a manufacturer having a dealer in either state must tailor its dealer agreement to give the dealer discretion to set its own minimum resale prices.

Despite these state laws, a manufacturer can implement an RPM policy if it is carried out unilaterally, without any agreement or input from dealers. Under this type of policy, called a *Colgate* policy after a 1919 U.S. Supreme Court decision,¹¹ the manufacturer announces minimum resale prices and noncompliant dealers are penalized. Penalties may be graduated, from temporary loss of access to the product in question, up to termination of the dealer relationship. A manufacturer subject to state relationship termination statutes, as described earlier in this article, must be prepared to respond to a dealer's claim that failure to adhere to a *Colgate* policy does not constitute good cause for termination. It likely would not provide good cause, since many statutes define good cause as failure substantially to comply with requirements of the dealer

agreement.¹² Noncompliance could not constitute a failure to comply with the dealer agreement, because, by definition, there is no agreement between a manufacturer and a dealer on pricing under a *Colgate* policy.

Contractual Limitations on Handling Competing Goods; Incentives for Exclusive Dealing

It is always in a manufacturer's interest for a dealer to commit not to handle competing products. In an exclusive dealing arrangement, as it is called, the dealer promises not to represent a competitor of the manufacturer. Exclusive dealing may also be achieved indirectly by providing a dealer with incentives to give its business in a particular product line to a single manufacturer.

Pure exclusive dealing. The legality of a contract prohibiting a dealer from handling a competing manufacturer's goods is evaluated under the rule of reason. Exclusive-dealing clauses are most often challenged by a manufacturer's competitors, and they can be expected to satisfy the rule if the dealer agreement does not have long duration and the percentage of a relevant market thereby foreclosed to a competitor is less than 30%. As long as competitors have practical access to consumers, through other dealers or direct selling, an exclusive dealing arrangement will not violate the antitrust laws.¹³

As an alternative to a contract prohibition against selling a competing manufacturer's goods, a firm may choose to incentivize dealers to buy its products through loyalty rebates or product bundling.

Loyalty rebates. Under a loyalty rebate program, a firm gives a discount or rebate for purchases of goods in proportion to the dealer's total purchases of goods in the category. For example, if a dealer buys widgets from three different firms, A, B, and C, and the dealer receives a 5% rebate if it buys 100% of its widgets from Firm C, the dealer would have an incentive to switch all of its widget purchases to Firm C. Rebates or discounts are typically graduated in such a program, starting with a smaller rebate, e.g., 1%, for a smaller percentage of total purchases, e.g., 60%. In common with objections to exclusive-dealing contract provisions, objections to loyalty rebate programs

are most often raised by competitors. They have been successfully challenged under Section 2 of the Sherman Act (15 U.S.C. § 2), which prohibits monopolization and attempted monopolization, when they have been shown to be exclusionary, effectively denying a firm access to the relevant market.¹⁴

Product bundling. In product bundling, a manufacturer with multiple product lines offers a discount to a reseller that purchases goods from more than one of its lines. While not as powerful an incentive as a loyalty rebate, product bundling can have the effect of siphoning sales away from a firm with a short product line that cannot discount a good deeply enough to offset the advantages to a consumer in purchasing the equivalent good from a firm that bundles it with other goods under a single discounted price. There is disagreement in the cases over the correct test for analyzing the legality of product bundling. Under the majority test, bundling is not exclusionary if, after allocation of all discounts to the good competitive with the plaintiff's good, the competitive good's price is above the defendant's incremental cost to produce it, measured by average variable cost.¹⁵

Pricing on Sales to Competing Dealers

Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)) and some comparable state statutes prohibit a supplier from engaging in price discrimination when selling similar goods to competing resellers, and a manufacturer must conform its pricing to this legal requirement. If two or more dealers compete in selling goods to the same pool of consumers, a manufacturer must offer each dealer the same price on goods of like grade and quality that it contemporaneously sells to both. Price includes discounts, rebates, credit terms, or other factors affecting the net price a dealer pays for goods.¹⁶ The Robinson-Patman Act also prohibits discrimination in payments for promotional services or in furnishing promotional services to competing resellers, but we will confine attention here to Section 2(a), its most consequential provision.

A price differential can be justified under some circumstances. If a dealer requests a discount to meet a price offered to a potential customer by its competitor, a

manufacturer can price a good to meet the competitive price. This is called the meeting competition defense.¹⁷ A manufacturer can also offer a lower price to a dealer if it is performing marketing, warehousing, or promotional services for the manufacturer that are not performed by other dealers and that the manufacturer would otherwise need to handle itself. In this situation, the discount to the dealer can be justified if it approximates the cost savings to the manufacturer. This is called a “functional” discount.¹⁸

A manufacturer can also offer a discount if a dealer’s purchases are such that the manufacturer realizes demonstrable per-unit cost savings in filling the dealer’s order. This is the cost justification defense, and it could be available if a dealer were to purchase goods in such volume that the manufacturer actually realizes cost savings or other efficiencies in their production. The defense is rarely successful, and the cost savings in support of any such discount need to be proved with something approaching mathematical certainty.¹⁹

If a discount is practically available to competing dealers but one of them chooses, for its own reasons – e.g., loyalty to another supplier – not to take advantage of it, there is no unlawful discrimination.²⁰

Section 2(a) applies only to sales made contemporaneously to two or more competing dealers. If two dealers are bidding on a single end-user contract, and only one of the dealers will get the sale, the statute should not apply, because the manufacturer will be selling goods only to the successful bidder.²¹

Dealer claims of price discrimination are frequently raised after a termination, either in conjunction with a claim of wrongful termination or as a free-standing lawsuit. By then, there is little possibility of negotiating a reasonable settlement, because the business relationship has already been severed. The Robinson-Patman Act was passed in 1936, near the height of the Depression, to protect small retailers from price advantages chain stores and other large purchasers received for high-volume buying, and it survives today as a trap for the unwary. The prudent business will structure its pricing to conform to the Act.

Antitrust Risks in Responding to Dealer Complaints

Dealers occasionally complain to a supplier about other dealers, sometimes about another dealer’s discount pricing or, if dealers have defined territories, about another dealer’s out-of-territory sales. A manufacturer must respond, if only to demonstrate that it is effectively managing the dealer network. To avoid an antitrust claim, the manufacturer should formulate its response independently and execute it unilaterally, without promising the complaining dealer that it will take specific remedial steps.

If a dealer is terminated or otherwise penalized in response to a complaint from a competing dealer, the affected dealer may claim that the manufacturer conspired with the complaining dealer to protect it from intrabrand competition. Proof of such a conspiracy under the Sherman Act is difficult, however, because a plaintiff must first offer evidence sufficient to exclude the possibility that the manufacturer acted unilaterally. Dealer complaints are commonplace,²² and, if the plaintiff’s evidence is equally consistent with independent action or conspiracy, the claim will fail.²³ If the plaintiff succeeds in excluding the possibility of independent action, it must then prove a violation of law on the merits. Except for a claim of RPM under California or Maryland law, the dealer will need to show that the manufacturer’s action restrained trade under the rule of reason. These types of claims rarely succeed, but the cost and disruption of litigation make it essential for a manufacturer to avoid conduct that would otherwise invite antitrust claims from disgruntled dealers.

Antitrust Risks in Rejecting Dealer Applicants

Rejecting a firm seeking to be appointed as a dealer can lead to litigation if the applicant believes the manufacturer acted at a competing dealer’s bidding. A manufacturer has the right to choose its customers, including downstream resellers. If it does so unilaterally and not in furtherance of monopolization of the market in which its products compete, the right is absolute. If the facts show, however, that the manufacturer denied the appointment after receiving objections from one of its authorized dealers, the sequence of events may constitute circumstantial evidence of the manufacturer’s agreement with the objecting dealer

not to make the appointment. Whether evidence of such an agreement would support a claim under Section 1 of the Sherman Act for unlawful joint conduct is subject to the same rule of evidence discussed in the immediately preceding paragraph about dealer terminations. The plaintiff bears the burden of presenting evidence sufficient to exclude the possibility that the manufacturer acted unilaterally. If the evidence is equally consistent with independent action or conspiracy, the claim will fail.²⁴ If a plaintiff excludes the possibility of independent action, it must then prove its case under the rule of reason, following the three-step process described earlier in this article.

Antitrust Risks in Cooperating with a Dealer Cartel

If multiple dealers seek to enlist a manufacturer to curtail sales to another dealer or take other action that would restrain or impair competition between that dealer and the petitioning dealers, the manufacturer's participation in the dealers' scheme could expose it to a claim that it is party to a horizontal conspiracy. While a manufacturer's agreement with a single dealer is subject to the rule of reason, the legal test changes dramatically if the downstream agreement involves multiple dealers. An agreement among firms at the same level in the distribution stream to fix prices, rig bids, boycott a supplier, allocate territories, or otherwise limit competition between them is per se illegal under the Sherman Act. Proof of the agreement establishes liability, and evidence of a benign or even procompetitive purpose or effect is inadmissible. When a manufacturer joins in such a conspiracy, it is liable in common with members of the dealer cartel.

One example will suffice. In response to complaints from Los Angeles-area Chevrolet dealers that certain dealers were selling cars to resellers that were, in turn, selling them at discounts to consumers, General Motors took steps to bar any further dealer sales to discounters. Working hand-in-glove with the complaining dealers, it secured commitments from the offending dealers to terminate any future sales to discounters. The Supreme Court held that GM had thereby participated in a group boycott that was per se illegal under Section 1 of the Sherman Act.²⁵ Decided in 1966, the ruling remains good law.

Antitrust Risks in Competing with Dealers: Dual Distribution

For any number of reasons, a manufacturer may bypass its dealer network and sell directly to some end users. Large accounts may insist on buying directly from the factory. Individual dealers may not have the capacity or expertise to sell to certain categories of buyers, e.g., the federal government. Offering direct-to-consumer online selling may be an essential response to changing buying habits for manufacturers of consumer goods, e.g., electronics and appliances. Whatever the justification for direct sales, dual distribution, as it is called, puts a manufacturer in competition with its dealers and requires management of multiple distribution channels. How direct selling impacts dealers will vary in relation to the distribution channel at issue.

A manufacturer is free to bar dealers from making direct sales to large accounts, often called national accounts, and, correspondingly, to bar a national account from purchasing from a dealer. These are matters of contract, and a prohibition against a dealer selling to a particular consumer is tested for legality under the rule of reason. Although an agreement between a manufacturer and its dealers that they may not sell to a particular category of customers is effectively a market allocation, the vast weight of judicial authority holds that such a restraint is subject to the rule of reason.²⁶ Because it is imposed by the manufacturer, it is evaluated as a vertical restraint, not as a horizontal agreement between direct competitors. This is equally true if a manufacturer has reserved to itself specific territories, excluding dealers from competing against it in those areas.

In the case of online selling by a manufacturer, consumers will make the decision whether to buy from the factory or from a brick-and-mortar store, but every sale online is a sale lost by a dealer. Competing with dealers for the same customer pool poses no antitrust risks, but online selling may disincentivize dealers, especially if the manufacturer offers terms, e.g., pricing or warranty, more favorable than what dealers can offer.

In implementing dealer restrictions in a dual distribution program, a manufacturer must focus on how they will strengthen its interbrand competitive position. It should

independently determine the scope of the class of consumers from which dealers are to be excluded, or the identity of consumers to which dealers can sell, consistent with its competitive objectives. While a manufacturer can take into account dealer interests in structuring a dual distribution network, its decisions should be made unilaterally. If not unilaterally formulated and implemented, there is risk that a decision to restrict competition between the manufacturer and its dealers may be viewed as facilitating a per se illegal market allocation among intrabrand retail competitors, not as a vertical restraint intended to further interbrand competition.

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¹ See generally *McGinnis Piano & Organ Co. v. Yamaha Int'l Corp.*, 480 F.2d 474, 480 (8th Cir. 1973) (Minn. law); *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F.Supp. 1039, 1050-51 (E.D. Mich. 1976) (Mich. law). Section 2-309 provides, in relevant part, as follows:

(B) Where the contract provides for successive performances but is indefinite in duration, it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(C) Termination of a contract by one party except on the happening of an agreed upon event requires that reasonable notice be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

OHIO REV. CODE §§ 1302.22(B), (C). *Accord*, e.g., FLA. STAT. § 672.309; 810 ILL. COMP. STAT. 5/2-309; MASS. GEN. LAWS, ch. 106, § 2-309; N. C. GEN. STAT. § 25-2-309; TEX. BUS. & COM. CODE ANN. § 2.309.

² For an overview of these statutes, particularly as they limit termination of supply relationships, see generally ABA SECTION OF ANTITRUST LAW, FRANCHISE AND DEALERSHIP TERMINATION HANDBOOK (2d ed. 2012).

³ E.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977).

⁴ Unlike the European Commission, which recognizes 30% market share as a bright-line divider for vertical restraints, see Comm'n Regulation (EU) No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010 O.J. (L 102) 1, there is no such formalistic market power identifier under the Sherman Act. Under the Commission Regulation, referred to as the Vertical Block Exemption Regulation, a vertical restraint is presumptively lawful if the market share held by the supplier in the relevant market does not exceed 30% and the market share held by the buyer does not exceed 30% of the relevant market in which it purchases the goods. *Id.*, art. 3(1). The case law reflects a comparable market power assessment for vertical restraints under the Sherman Act. See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 127-29 (2d ed. 2016) [hereinafter *ANTITRUST LAW OF PRODUCT DISTRIBUTION*].

⁵ For detailed discussion of the case law applying the rule of reason to territorial, location, customer, and channel restraints, see generally *ANTITRUST LAW OF PRODUCT DISTRIBUTION*, *supra* note 4, at 123-58.

⁶ E.g., *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

⁷ See, e.g., Herbert J. Hovenkamp, “The Rule of Reason,” 70 FLA. L. REV. 81, 131-34 (2018).

⁸ It has been argued that balancing should be the fourth step in rule of reason analysis, following failure by a plaintiff to rebut a defendant's showing of a procompetitive justification for a restraint. See Michael A. Carrier, “The Four-Step Rule of Reason,” 33 ANTITRUST 50 (Spring 2019). In a recent decision affirming a determination by the Federal Trade Commission that a pharmaceutical manufacturer had violated Section 1 in settlement of a patent infringement claim brought against a generic drug manufacturer, the Court of Appeals for the Fifth Circuit applied the *American Express* three-step analysis. *Impax Labs., Inc. v. FTC*, 2021 U.S. App. LEXIS 10555, at *14-30 (5th Cir. April 13, 2021). There was no occasion to consider any balancing test, since the court held that the FTC had satisfied the third step by showing the availability of settlement alternatives less restrictive than the terms of the parties' agreement.

⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

¹⁰ See *Alsheikh v. Superior Court of Los Angeles County*, 2013 Cal. App. Unpub. LEXIS 7187, at * 3 (Cal. Ct. App. Oct. 7, 2013) (“vertical price fixing is a per se violation of the Cartwright Act,” unaffected by the holding in *Leegin*); MD. COM. LAW CODE ANN. § 11-204(a)(1).

¹¹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

¹² For “good cause” definitions in dealer and franchise termination statutes of general application, see Thomas J. Collin & Matthew D. Ridings, “Franchising” § 129:32 nn. 7-8, in 12 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS (Robert L. Haig ed.) (4th ed. 2016). The definitions in industry-specific dealer legislation take the same approach – i.e., good cause is limited to a dealer's failure substantially to comply with obligations imposed in the dealer agreement.

¹³ For detailed analysis of the case law, see generally ANTITRUST LAW OF PRODUCT DISTRIBUTION, *supra* note 4, at 227-45.

¹⁴ For review of the case law in which loyalty rebate programs have been challenged under Section 2 of the Sherman Act, see generally *id.* at 256-60.

¹⁵ For discussion of product bundling, which is most often challenged as actual or attempted monopolization under Section 2 of the Sherman Act, see generally *id.* at 211-17, 257-58. The leading cases are *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), in which LePage's proved that 3M's bundled discounting unlawfully excluded it from making sales of its adhesive to large retailers, and *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), which rejected the Third Circuit's analysis in *LePage's*. The Ninth Circuit in *Cascade Health Solutions* adopted the majority test, referred to as the discount attribution standard.

¹⁶ For detailed discussion of Section 2(a), see generally ANTITRUST LAW OF PRODUCT DISTRIBUTION, *supra* note 4, at 265-97.

¹⁷ See *id.* at 292-94.

¹⁸ See *id.* at 294-95.

¹⁹ See *id.* at 294.

²⁰ See *id.* at 296-97.

²¹ See generally ABA SECTION OF ANTITRUST LAW, PRICE DISCRIMINATION HANDBOOK 23-24 (2013).

²² See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) (dealer complaints about price-cutters “arise in the normal course of business and do not indicate illegal concerted action” (citation omitted)).

²³ See, e.g., *id.* at 768 (“[T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor.”); *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579-81 (11th Cir. 1988).

²⁴ See, e.g., *Am. Contractors Supply, LLC v. HD Supply Constr. Supply, Ltd.*, 989 F.3d 1224, 2021 U.S. App. LEXIS 6319, at *14-33 (11th Cir. March 4, 2021) (manufacturer rejected attempt by distributor to enter Florida market following complaints by established Florida distributor, but plaintiff's evidence did not tend to exclude the possibility that manufacturer acted independently).

²⁵ *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966). For another case in which a party's involvement in a vertical conspiracy was held to be per se illegal under Section 1, see *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015). There, a book-publisher cartel was found to have been organized by a downstream reseller, Apple, Inc., and the reseller's participation in the conspiracy held to be per se illegal. *Id.* 314-29. The Court of Appeals for the Second Circuit turned aside Apple's argument that it had separately negotiated supply agreements with each of the publishers from which it intended to source ebooks and that the individual agreements had not facilitated the publishers' price-fixing cartel.

²⁶ See generally ANTITRUST LAW OF PRODUCT DISTRIBUTION, *supra* note 4, at 158-60.