Case Notes

ANTITRUST—SHERMAN ACT SECTION ONE—AGREEMENTS WHEREBY FRANCHISEE AGREES TO SELL BRAND-NAME MERCHANDISE ONLY FROM APPROVED FRANCHISE LOCATIONS ARE NOT PER SE VIOLATIONS OF SHERMAN ACT BUT ARE TO BE CONSIDERED UNDER THE RULE OF REASON TEST.—*GTE Sylvania Inc. v. Continental T.V., Inc.* (9th Cir. 1976).

GTE Sylvania Inc., a major manufacturer and seller of radios and television sets, found itself in 1962 with a declining sales volume and approximately only one to two percent of the television market. In fear of being forced out of the market and with the hope of improving sales, Sylvania changed from its former "saturation" type method of distribution to an "elbow room" or "selective distribution" policy whereby sales were made directly to a limited number of franchised retailers who in turn sold directly to consumers.[1] To protect this newly-established "elbow room," it was agreed that the franchisees would sell Sylvania brand merchandise only from Sylvania approved franchise locations.[2]

In May of 1964, Continental became a franchised dealer for several locations and rapidly achieved a prosperous status. However, Continental, in violation of the location restriction, moved some Sylvania merchandise to an unauthorized location and sold the merchandise from that site beginning September 7, 1965.[3] Nine days later Sylvania reduced Continental's credit limit

1. The "saturation" method of distribution was used by most television manufacturers during the black and white era whereby sets were sold to dealers and distributors without any limit upon the number of retail sellers in a given area. The goal of the system was volume. The "elbow room" policy adopted by Sylvania was a selective policy utilized to attract more aggressive and effective dealers who would be identified as authorized Sylvania dealers, with a revised goal of establishing a prestige image. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 982-83 (9th Cir. 1976).

2. Sylvania argued at trial that the "elbow room" policy was merely a unilateral announcement and involved no express or implied agreement with any dealers. For purposes of this appeal, however, Sylvania argued upon the premise that there was an implied agreement to prohibit the shipment of merchandise to unauthorized locations. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 983 n.4 (9th Cir. 1976).

3. During this same summer, another situation developed concerning Continental's credit ratings. Prior to June of 1965, Sylvania received information that the chief operating officer and principal shareholder of Continental had a criminal record. A Dun and Bradstreet report later confirmed this information.

In June of 1965, Sylvania franchised a Young Brothers store which was located about one mile from a Continental franchised location. This triggered a strenuous objection by Continental. Following the franchise, Continental cancelled a large order from Sylvania, ordered additional merchandise from Philco, a Sylvania competitor, and gave Sylvania notice it would continue to reduce future orders from Sylvania.

In early September, Continental requested approval of a franchise for a new location it had leased in Sacramento, which was about one mile from another franchised Sylvania dealer, Handy Andy. Sylvania refused approval as it felt additional distribution in the Sacramento area would be undesirable.

In addition, Continental had increased its obligations to Philco and had failed to

from $300,000 to $50,000[4] and on October 13, Sylvania cancelled Continental's franchise. At the same time, John P. Maguire and Co., the company through which Sylvania had previously extended credit to Continental, instituted suit against Continental for the collection on the remaining indebtedness, repossessed all of Continental's Sylvania television sets[5], levied attachments upon its bank accounts and places of business, and caused the main store and warehouse to be closed.[5]

Continental filed suit in the United States District Court for the Northern District of California seeking damages from Sylvania and Maguire, charging Sylvania's "elbow room" policy was a policy in restraint of trade, a per se violation of section 1 of the Sherman Act.[6] The jury returned a verdict for Continental, finding that Sylvania did "engage in a contract or conspiracy in restraint of trade in violation of the antitrust laws with respect to locations restrictions alone."[7] Continental also prayed for and was granted injunctive relief prohibiting Sylvania from enforcing its location clause.[8]

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pay some past due obligations to Sylvania. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 984-85 (9th Cir. 1976).

The additional facts included in notes 3 and 4 have importance as a possible basis for the jury's findings, if one accepts the minority's view that the jury did find that a territorial restriction occurred. *See* note 46 *infra.*

4. Continental's credit was reduced on September 16. Continental then withheld all payments due to John P. Maguire and Co., the company through which Sylvania had previously extended credit to Continental. Then on September 24, Continental informed Sylvania that all future obligations would be paid by deposits to Continental's attorneys pending resolution of the disagreement over the requested approval for the Sacramento store. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 985 (9th Cir. 1976).

5. *Id.* at 985, 1006.

6. Section one of the Sherman Act reads in pertinent part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal; . . ." 15 U.S.C. § 1 (1975). For a discussion of the "per se" concept, see note 19 *infra.*

7. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 985-86 n.6 (9th Cir. 1976). The jury also found damages resulting from the violation in the amount of $591,505. *Id.*

8. The Ninth Circuit ruled that the trial judge's finding that Sylvania requested Maguire to sue Continental as a part of the attempt to prevent Continental from selling Sylvania merchandise in Sacramento was in conflict with the jury's findings. The jury had found that Sylvania *did not* engage in a contract, combination, or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions and price fixing as an integral part of a single distribution policy; that Sylvania *did* engage in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to locations restrictions alone; and that Maguire *did not* engage with Sylvania in a contract, combination or conspiracy in respect to the location restrictons and price fixing or in respect to the locations restrictions alone. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 985-86 n.6 (9th Cir. 1976).

Therefore, relying upon Beacon Theatres, Inc., v. Westover, 359 U.S. 500 (1959), and the proposition that findings of a jury on legal issues are generally binding on the court in a subsequent grant of equitable relief, the Ninth Circuit vacated the equitable decree. The court noted that the injunctive relief granted was predicated upon the *trial court's* findings which were inconsistent with the *jury's* findings, and in addition, that the injunctive relief was granted upon the misapplication of the per se doctrine. *Id.* at 986-87 nn.7-9.

The minority disagreed with the basis for the ruling, stating that the jury's conclusion that Maguire was not part of a conspiracy with Sylvania to impose resale restrictions on Continental was consistent with the trial judge's finding that Sylvania did use Maguire

On appeal to the Ninth Circuit, the major issue was whether the trial court had erred in its jury instructions and in its grant of equitable relief by relying on the theory that "by seeking to restrict the locations from which Continental could sell Sylvania products, Sylvania had committed a *per se* violation of section 1 of the Sherman Act."[9] Sylvania contended the jury should have been instructed that the location practice was violative of section 1 only if it *unreasonably* restrained trade.[10] *Held*, reversed. Agreements whereby franchisee agrees to sell brand-name merchandise only from approved franchise locations are not per se violations of section 1 of the Sherman Act, but are to be considered under the Rule of Reason test. *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976).[11]

Since 1967, when Justice Fortas delivered the opinion of the Court in *United States v. Arnold, Schwinn & Co.*,[12] the courts have struggled to interpret and apply,[13] or distinguish[14] the effect of *Schwinn* on vertical restraints of

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in carrying out the conspiracy between Sylvania and the franchise dealer in Sacramento, Handy Andy. *Id.* at 1010 n.3 (Kilkenny, J., dissenting).

9. The trial judge instructed the jury as follows:

> Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion and control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions.

GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 987 (9th Cir. 1976). The majority writes that the above instructions incorporated the per se theory, and that the trial judge erred by instructing that because Sylvania entered into the location agreement with Continental, or because of the subsequent enforcement of that agreement, Sylvania committed a per se violation. *Id.* at 987.

The minority viewed the instructions differently, and in its perception created the major reason for the 7-4 division. "Despite what is said . . . the district judge *did not* instruct the jury that Sylvania's practice of fixing by agreement the locations from which Continental was authorized to sell Sylvania products was illegal *per se* . . . . [The instructions] . . . clearly informed the jury that Sylvania would be liable only if it exercised its control to restrict the territories in which the dealers resold." *Id.* at 1006 (Kilkenny, J., dissenting). *See* note 38 *infra*.

10. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 987 (9th Cir. 1976).

11. The 7-4 decision in *Sylvania* was reached after an en banc hearing by the Ninth Circuit. The majority and dissenting opinions of the three-judge panel which first heard the appeal was withdrawn by the full court's order of December 19, 1974. The original opinions were unofficially reported in 1974-1 TRADE CAS. ¶ 75,072 (9th Cir. May 9, 1975). GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 982 n.1 (9th Cir. 1976).

12. 388 U.S. 365 (1967).

13. *See, e.g.*, Reed Bros. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 787 (1976); Eastex Aviation, Inc. v. Sperry & Hutchinson Co., 522 F.2d 1299 (5th Cir. 1975); Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975); Hobart Bros. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973); United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969), *rev'd in part on other grounds*, 410 U.S. 52 (1973). *See also* Note, *Vertical Territorial and Customer Restrictions in the Franchising Industry*, 10 COLUM. J.L. & SOC. PROB. 497, 505-11 (1974) [hereinafter cited as COLUM. Note].

14. *See, e.g.*, Good Inv. Promotions, Inc. v. Corning Glass Works, 493 F.2d 891 (6th Cir. 1974); Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); Tripoli Co. v. Wella Corp., 425 F.2d 932 (3rd Cir.), *cert. denied*, 400 U.S. 831 (1970); Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); Plastic Packaging Materials, Inc. v.

trade.[15] In *Schwinn*, Arnold, Schwinn & Co. had designed exclusive geographical sales territories for its distributors which prohibited them from selling to customers outside their area or to any unfranchised dealers. The Supreme Court held that after Schwinn had sold its product to the distributors, thereby parting with title and risk, such territorial and customer restraints were illegal per se under section 1 of the Sherman Act[16] which provides that "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[17] Although the Sherman Act states that *every* contract is illegal, the Rule of Reason doctrine, formulated in *Standard Oil Co. v. United States*[18] provides that only those restraints which are found to be unreasonable are illegal under section 1. However, since the formulation of that doctrine, several categorized restraints have been declared illegal per se by the Supreme Court,[19] one of its more recent declarations being the *Schwinn* decision.

It appears the Ninth Circuit, however, found *Schwinn* so disagreeable that it refused to recognize the applicability of the per se prohibition of vertical restraints to *Sylvania* and instead declared the Rule of Reason to be the appropriate test.

Writing for the majority of a divided court in *Sylvania*, Judge Ely criticized the trial court for applying "literally . . . sweeping language from the opinion of Mr. Justice Fortas for the Court in *United States v. Arnold, Schwinn & Co.* . . . ."[20] According to the majority opinion, by not taking the *Schwinn* decision

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Dow Chem. Co., 327 F. Supp. 213 (E.D. Pa. 1971). *See also* COLUM. Note, *supra* note 13, at 505-11.

15. Vertical agreements are agreements between a seller and his customer. Horizontal agreements are those among competitors. Although the Supreme Court has made it clear that a horizontal agreement to divide territories in furtherance of price fixing is illegal per se under section 1 of the Sherman Act, and that horizontal allocation of territories, even without price fixing, "in order to minimize competition" is a per se violation of section 1, *Schwinn* remains the last word from the Supreme Court on vertical territorial and customer restraints. United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 240-41 (1899).

16. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

17. 15 U.S.C. § 1 (1975).

18. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

19. United States v. Topco Associates, Inc., 405 U.S. 596 (1972) (horizontal agreements to divide market territories); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (vertical agreements which allocate territories to dealers and distributors, and limit the customers to whom they can sell); United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (price fixing); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (group boycotts); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (price fixing).

The per se concept allows courts to judge the action without a judicial inquiry into reasonableness. "Per se" denotes ". . . certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . ." Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958). *See* Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419, 1420-21 (1968); von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Anti-Trust Law*, 11 U.C.L.A. L. REV. 569, 570 (1964).

20. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 988 (9th Cir. 1976). Judge Ely did acknowledge that there was other language in *Schwinn* upon which the district court may have relied in ruling that the location clause used by Sylvania was

in the context in which it was written, the trial court gave an overly broad meaning to the *Schwinn* ruling. Thus, the majority concluded that the alleged violation should be decided under the Rule of Reason test rather than the per se test of *Schwinn*.

The Ninth Circuit opinion limits the breadth of the *Schwinn* per se rule by first distinguishing the *type* of restriction involved in that case from those imposed upon Continental in the instant case. *Schwinn* prohibited: 1) types of "customer" restrictions which did not allow sales to certain classes of persons or certain individuals; and 2) types of "territorial" restrictions which prohibited sales to customers outside of a specified geographic area.[21] By contrast, in the instant case Sylvania's dealers could sell to any customer from any territory with the only restriction being that the dealer's store remain in a location approved by Sylvania.[22] From this, the majority concluded that the Sylvania location clauses were distinguishable from the vertical restraints prohibited by *Schwinn*, primarily because Sylvania did not specifically designate customers with whom Continental could not deal.[23]

Secondly, the court noted that the *Schwinn* restrictions were said to be illegal per se largely because any intrabrand competition that may have existed between Schwinn distributors was forbidden by the operation of the territorial restrictions.[24] In *Sylvania*, intrabrand competition among retailers was preserved[25] as no dealer was prohibited from selling to any particular person from any prescribed area. Thus, customers were free to patronize any of the franchised locations in any area. Moreover, the procompetitive effect of using the "elbow room" policy to increase sales and preserve the once-lagging Sylvania as a viable competitor was also realized,[26] thus promoting additional interbrand competition among other major television retailers.[27]

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within the *Schwinn* holding. *Id.* at 989 n.14. However, the majority of the circuit court chose to deal only with what it referred to as the "sweeping language" of *Schwinn*. The language Judge Ely refers to is most commonly cited as the mandate of the *Schwinn* holding: "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act." United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

21. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 989 (9th Cir. 1976). *See also* Pollock, *Alternative Distribution Methods After Schwinn*, 63 NW. U.L. REV. 595 (1968).

22. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 989-90 (9th Cir. 1976). *See* Robinson, *Recent Antitrust Developments: 1974*, 75 COLUM. L. REV. 243, 278 (1975) [hereinafter cited as Robinson].

23. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 990 (9th Cir. 1976).

24. *Id.* at 1000.

25. *See* Robinson, *supra* note 22, at 278.

26. Sylvania argued that if it did not increase its share of the market, it would have been forced to abandon its television manufacturing business. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1004 n.41 (9th Cir. 1976). Sylvania did increase its market share from one or two percent in 1962 to five percent by 1965. *Id.* at 983-984. It was recognized at trial, however, that many other reasons existed in addition to the locations practice that could explain the increase in Sylvania's market share. *Id.* at 1026 (Browning, J., dissenting).

27. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1000 (9th Cir. 1976).

As further support for its decision, the *Sylvania* court noted the district court's decree on remand in *Schwinn*. Although the *Schwinn* decision did not allow the customer or territorial restrictions to continue, the remand decree clearly allowed Schwinn to designate the locations for which the franchises were issued.[28] Thus, to prohibit location clauses in reliance on the territorial and customer restraints declared to be illegal per se by *Schwinn* would appear to be inconsistent with the remand decree which allowed location clauses.

The majority charged that there was even more of an inconsistency when one considered the effect upon exclusive dealerships which the *Schwinn* decision also exempted from its per se restrictions.[29] To allow exclusive dealerships, and yet disallow location clauses as illegal per se would render the concept of exclusive dealerships meaningless.[30] It is the location clauses which are implemented to insure the exclusivity of an exclusive dealership. According to the majority, the latter cannot exist without the former.[31]

Thus, the majority concluded that the type of restriction involved in *Sylvania* is not within the *Schwinn* per se ruling. First, it is not a territorial or customer restriction in that there were never any specific customers designated as off-limits to Sylvania retailers; consequently, intrabrand competition was not forbidden. Secondly, there is a benefit achieved in keeping Sylvania in the television competition.[32] Finally, there is an inconsistency in labeling the *Sylvania* location clause illegal per se in light of the exemption of exclusive dealer-

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The majority also discusses at great length in its opinion, the policy of the Sherman Act in regard to the procompetitive effects of a location agreement. *Id.* at 1000-1004. Because policy determination is beyond the scope of the appellate court when the Supreme Court has already made a definitive ruling on the matter, see note 83 *infra*, policy should not be, as Judge Ely states, a compelling reason for the majority's conclusion. *Id.* at 1000. Rather, application of *Schwinn*, regardless of dissatisfaction with the policy implications, should be the rule for the appellate courts.

For a discussion of the two conflicting views concerning the value and proper notice to be given to procompetitive effects, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966) and Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419 (1968). *See also* Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 941-43 n.5 (5th Cir. 1975); United States v. Topco Associates, Inc., 405 U.S. 596, 610-12 (1972); Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 LAW & CONTEMP. PROB. 506, 515 (1965); Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795, 824-25 (1962).

For a response to the policy arguments of the majority in *Sylvania*, see GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1018-29 (9th Cir. 1976) (Browning, J., dissenting).

28. United States v. Arnold, Schwinn & Co., 291 F. Supp. 564 (N.D. Ill. 1968). The majority in *Sylvania* cites McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices, and Refusals to Deal*, 37 ANTITRUST L.J. 137, 144-45 (1968), who writes that *Schwinn* clearly exempts location clauses from the rule of per se illegality because "the right to 'franchise' . . . is the right to have a 'location clause.'" GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 991 n.17 (9th Cir. 1976).

29. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967).

30. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 997-98 (9th Cir. 1976). *Cf.*, COLUM. Note, *supra* note 13, at 503-04.

31. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 997-98 (9th Cir. 1976).

32. *See* note 27 *supra*.

ships from the *Schwinn* per se restriction and the specific allowance of location clauses in the *Schwinn* decree on remand.

However, "[n]owhere in its . . . opinion does the majority come to grips with the fundamental tenet of antitrust law established in *Schwinn*."[33] Although the majority chides the trial court for relying strictly on the *Schwinn* mandate,[34] the majority ignores the fact that this "sweeping language" of the *Schwinn* mandate is supported throughout the *Schwinn* opinion.[35] The Supreme Court in *Schwinn* left no doubt that after a manufacturer parts with title and risk, any effort thereafter to restrict territory or persons to whom its property may be sold, is a per se violation of section 1 of the Sherman Act.[36] Sylvania did part with title and risk[37]—that is not an issue. The issue evolves from the fact that after parting with title, Sylvania made an attempt through its location clause to restrict the territory in which the property could be sold.[38]

The majority is correct in its insistence that Sylvania is not in violation of section 1 of the Sherman Act by the isolated use of a location clause.[39] But when a location clause operates as a territorial restriction, it is quite a different matter. Simply because *Schwinn* gave immunity to location clauses in its decree on remand, the majority illogically concludes that one then has the right to justify using a "legal" device—the location clause—to impose an illegal territorial

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33. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1008 (9th Cir. 1976) (Kilkenny, J., dissenting).

34. *See* note 20 *supra*.

35. . . . [W]here a manufacturer *sells* products to his distributor subject to territorial restrictions . . . a *per se* violation . . . results. . . . [T]he same principle applies to restrictions . . . upon retailers. . . . If the manufacturer parts with dominion over his product . . . he may not reserve control over . . . the conditions of its resale. To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale. . . . But to allow this freedom where the manufacturer has parted with dominion . . . would violate the ancient rule against restraints on alienation. . . .

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379-80 (1967) (footnote omitted).

36. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1008 (9th Cir. 1976) (Kilkenny, J., dissenting).

37. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 983 (9th Cir. 1976).

38. That Sylvania made an attempt to restrict the territory is inherent in the jury's answer to Question No. 2 of the antitrust special interrogatories whereby the jury responded that Sylvania did engage in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to locations restrictions alone.

In considering the differences in the majority and minority's views, it is important to keep in mind the respective interpretations the majority and minority place on the trial court's instructions to the jury. The majority's analysis is premised upon the view that the jury was instructed that the practice of utilizing a location clause was illegal per se. The minority's approach more accurately reflects the contents of the instructions. The minority writes that the instructions called for a finding of a per se violation only if the jury found that Sylvania ultimately made an attempt to restrict territories, a recognized per se violation. Indeed, the jury was cautioned by the trial judge that a manufacturer did have the right to grant an exclusive franchise to selected dealers and to designate the location of such franchise; but that "if . . . Sylvania entered into a contract, combination or conspiracy with one or more of its dealers . . . any effort thereafter to restrict outlets or store locations . . . [is] a violation of Section 1 . . . ." GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1006-1007 n.1-a (9th Cir. 1976) (Kilkenny, J., dissenting). *See* note 9 *supra*.

39. *Cf.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

restraint. When one examines the similarity of the effects of the *Schwinn* restrictions and the *Sylvania* location restriction, it is conclusive that a territorial restriction was imposed by implementation of the location clause.[40]

The Supreme Court faced a similar issue in *Simpson v. Union Oil*[41] and appropriately held that it is the *effect* of the device or conduct, and not the manipulative draftsmanship, that is the determinative factor in ruling on its legality.[42] Admittedly the structure of the territorial restriction in *Sylvania* was different from that in *Schwinn*. In *Schwinn*, the territorial restrictions were fixed geographical lines and the distributor was prohibited from selling beyond these lines. Sylvania imposed only *economic* limitations upon the franchisee's marketing area by its restrictive location clause on the franchisee itself.[43] The Ninth Circuit's opinion would allow this distinction to operate as a basis for excluding the operation of the location clause from the per se ruling, even though the effect is that of a territorial restriction. That such was the effect was shown by the district court's[44] conclusion that "for all practical purposes" the territories of the dealers were limited to a radius of twenty-five to fifty miles from the stores' locations.[45] In addition, the jury found that there existed an illegal territorial restraint.[46] Thus, the effect of the economic based location clause in *Sylvania* was the same as that of the geographic territorial restriction in *Schwinn* in that both restricted the dealers' territories. Concerning this, the *Schwinn* Court said: ". . . where a manufacturer *sells* products . . . subject to territorial restrictions upon resale, a *per se* violation . . . results. . . . Such restraints are so obviously destructive of competition that their mere existence is enough."[47] A restriction does not require hard geographical lines, as the findings of the trial judge and jury indicate.

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40. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1009-1011 (9th Cir. 1976) (Kilkenny, J., dissenting).

41. 377 U.S. 13 (1964).

42. In *Simpson*, a consignment agreement was used as a defense against a price fixing system in the gasoline industry. However, in reality, the retailers assumed the risk of loss in spite of the consignment and the Supreme Court held that price fixing, achieved through the coercive consignment agreement, was illegal. Simpson v. Union Oil Co., 377 U.S. 13, 17, 24 (1964). *See* Reed Bros. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 787 (1976); Hobart Bros. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 901 (5th Cir. 1973).

43. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1009 (9th Cir. 1976) (Kilkenny, J., dissenting).

44. The trial judge was Associate Justice Tom C. Clark (retired), sitting by designation in the District Court.

45. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1010 (9th Cir. 1976) (Kilkenny, J., dissenting). *But see* GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 983 (9th Cir. 1976), where the majority explains that Sylvania made specific efforts to avoid anticompetitive practices by not allowing dealers exclusive dealerships for a particular area.

46. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1017 (9th Cir. 1976) (Kilkenny, J., dissenting). *See* note 38 *supra*. It is not known what specific facts the jury considered in its determination that there was an effort by Sylvania to enforce territorial restrictions. For example, it is possible the jurors may have viewed Continental's refusal of the Sylvania request for a franchise in Sacramento as an attempt at a territorial restraint. What is important is that the jury found a territorial restraint did occur. *See* notes 3 & 4 *supra* and accompanying text.

47. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967).

The *Sylvania* court would still maintain there is an inconsistency between holding the Sylvania restriction illegal per se and adopting the *Schwinn* decree on remand.[48] However, it is the *territorial restriction* created in the *Sylvania* set of facts, and not the location clause which was alleged as illegal per se. Thus, there is no inconsistency inasmuch as the decree on remand refers to franchise or location agreements and does not extend to an incidental territorial restriction.

It is well settled that a manufacturer may make a unilateral decision not to deal with a certain franchisee or dealer for independent business reasons; it is equally well recognized that he may announce in advance such circumstances under which he will elect not to deal.[49] These same principles are applicable to other vertical restraints,[50] such as location clauses. Thus, Sylvania's location clause is not illegal when used as nothing more than an announcement in advance of the circumstances under which Sylvania would terminate a franchise. However, no matter what the use of the location clause, when it has the effect of restricting the territory which the franchisee or dealer wishes to utilize in his efforts to dispose of the goods, it is no longer recognized as a location clause, but as a territorial restriction.[51] This is, under *Schwinn*, a per se violation of section 1 of the Sherman Act.

Additionally, the rationale of the Ninth Circuit majority in establishing the interdependence of location clauses and exclusive dealerships fails to recognize a crucial distinction.[52] When Sylvania chose to confine its sale of merchandise to Continental as a part of the franchise agreement, this constituted an exclusive dealership—"a manufacturer's self-imposed promise not to contract with another distributor in the general area."[53] On the other hand, a location clause deals with the freedom of the franchisee to choose its own course of behavior in selling its own goods.[54] For a manufacturer to restrict its own actions is entirely separate from restricting the actions of an independent business entity.[55] In this regard, the *Schwinn* decision is clear: "If the restraint stops at that point—if *nothing more is involved* than vertical 'confinement' of the manufacturer's own

48. *See* note 28 *supra* and accompanying text.

49. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967); Bushie v. Stenocord Corp., 460 F.2d 116, 119 (9th Cir. 1972); Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214 (9th Cir. 1970); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Scanlan v. Anheuser-Busch, Inc., 388 F.2d 918, 921 (9th Cir. 1968); Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283, 286-87 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963).

50. *See* Reed Bros. v. Monsanto Co., 525 F.2d 486, 495 n.3 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 787 (1976).

51. This is the finding the jury made. *See* note 38 *supra*.

52. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1013 (9th Cir. 1976) (Kilkenny, J., dissenting).

53. *Id.* *See* Schmitt, *Antitrust and Distribution Problems in Tight Oligopolies—A Case Study of the Automobile Industry*, 24 HASTINGS L.J. 849, 907-08 (1973) [hereinafter cited as Schmitt]. *But see* Comment, 49 N.Y.U.L. REV. 957, 967-8 (1974).

54. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1013 (9th Cir. 1976) (Kilkenny, J., dissenting).

55. *Id.* at 1014.

sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act."[56] Thus under *Schwinn*, the exclusive franchise or dealership arrangement is expressly allowed and the location clause is certainly not a per se violation of section 1 of the Sherman Act. However, when there is more than the manufacturer's self-imposed promise to confine its own sales to selected dealers and the location clause results in a restriction of the territory in which the franchisee or dealer may dispose of his goods, it is a per se violation. Indeed, the trial judge in *Sylvania* informed the jury in the instructions that a manufacturer may grant an exclusive franchise and he may refuse to grant additional franchises; however, he may not enter into a contract, combination or conspiracy and thereafter make any effort to restrict outlets or store locations.[57] It was on the basis of these instructions that the jury found that the territorial restriction did occur;[58] thus the Rule of Reason is not applicable to the situation inasmuch as territorial restrictions are recognized per se violations of section 1.[59]

The *Sylvania* court cites several cases as authority for its holding, primarily relying on four major cases including *Boro Hall Corp. v. General Motors Corp.*[60] and *United States v. General Motors Corp.*[61]

Boro Hall involved a location clause, but the holding in that case was limited in view of the fact that the manufacturer did allow Boro Hall to establish a used car outlet outside the "zone of influence" as long as it would "not . . . unduly prejudic[e] . . . the interests of other dealers."[62] Secondly, *Boro Hall* was later distinguished by the District Court for the Northern District of Ohio in *United States v. White Motor Co.*[63] There, the court ruled that *Boro Hall* related to location clauses, but did not, as the defendant proposed, stand for the proposition "that a manufacturer's agreements with its distributors or dealers which restrict their sales territories are lawful." Later in *White Motor Co. v. United States*,[64] the United States Supreme Court reversed, holding that the Court was not yet ready to apply a per se rule to vertical restrictions, even to those similar to the restrictions in *Schwinn*. Later *Schwinn* did hold vertical territorial restrictions per se unlawful, and thus implicitly overruled whatever effect *Boro Hall* might still claim on the legality of location clauses. Additionally, *Boro Hall* was decided many years prior to *Schwinn* and its age alone

56. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967) (emphasis added). For the argument that location clauses are an unnecessary substitution for decisions which should be made according to the dictates of the market see Schmitt, *supra* note 53, at 905-06.
57. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1006-07 n.1-a (Kilkenny, J., dissenting).
58. *Id.*
59. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
60. 124 F.2d 822 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943).
61. 384 U.S. 127 (1966).
62. Boro Hall Corp. v. General Motors Corp., 124 F.2d 822, 823 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943).
63. 194 F. Supp. 562, 581 (N.D. Ohio 1961).
64. 372 U.S. 253, 263 (1963).

makes it questionable.[65] Finally, *Boro Hall* is further antedated in light of the recent exhaustive study conducted by Jost J. Schmitt, wherein he states: "[I]n the context of automobile dealerships, the location clause constitutes a flat territorial prohibition."[66] Thus, *Boro Hall*'s age and history clearly indicates its impact is no longer relevant in regard to territorial restrictions.

General Motors was also decided prior to *Schwinn*, and additionally, although a location clause was a part of the facts in *General Motors*, the Court specifically declined to rule on the legality of the location clause. Instead the Court found a classic horizontal conspiracy in restraint of trade.[67] Thus, *General Motors* would not be applicable to the *Sylvania* case.

The majority also cited the more recent cases of *Kaiser v. General Motors Corp.*[68] and *Salco Corp. v. General Motors Corp., Buick Motor Division.*[69]

Salco and *Kaiser* are more current cases which involve location clauses, but their impact is weakened by their reliance on *Boro Hall*, which had been antedated by *Schwinn*. *Salco* completely fails to recognize *Schwinn* as the controlling mandate of the Supreme Court,[70] in that the *Salco* court cites *Schwinn* only to the effect that a manufacturer may franchise certain dealers, and then rests its decision upon the *Boro Hall* language.[71] Additionally, the holding in *Salco* is somewhat distinguishable from that in *Sylvania*. The *Salco* court states that "the Section 1 allegations were properly dismissed, since the location clause is valid as a matter of law, and *there are no allegations that would amount to an unlawful use of the clause.*"[72] The *Sylvania* set of facts created a different situation. The location clause created the illegal territorial restriction, resulting in an "unlawful use of the clause." Thus, the authority the majority relies upon is questionable.[73]

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65. *Boro Hall* was decided in 1942, *Schwinn* in 1967.
66. Schmitt, *supra* note 53, at 904. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1017 (9th Cir. 1976) (Kilkenny, J., dissenting).
67. United States v. General Motors Corp., 384 U.S. 127, 139-40 (1966).
68. No. 75-1805 (3d Cir. Feb. 2, 1976), *aff'g* 396 F. Supp. 33 (E.D. Pa. 1975).
69. 517 F.2d 567 (10th Cir. 1975).
70. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1016 (9th Cir. 1976) (Kilkenny, J., dissenting).
71. Salco Corp. v. General Motors Corp., Buick Motor Division, 517 F.2d 567, 575-76 (10th Cir. 1975).
72. *Id.* at 576 [emphasis added].
73. Additional cases noted by the Ninth Circuit as support for its holding sought to distinguish *Schwinn* in a variety of ways. *Colorado Pump & Supply Co. v. Febco, Inc.* and *Superior Bedding Co. v. Serta Associates, Inc.* involved primary responsibility clauses. *Superior Bedding* also had a profit passover clause. In both instances, however, the courts noted that there was no evidence of territorial restriction. Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 639 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); Superior Bedding Co. v. Serta Associates, Inc., 353 F. Supp. 1143, 1147-48, 1150-51 (N.D. Ill. 1972). In contrast, the more recent case of *Reed Brothers v. Monsanto Co.* reached a different result. This case involved primary responsibility areas, a shipping and pickup policy which increased transportation costs for areas outside of the primary areas, and a rebate program which had the effect of eliminating wholesalers and discounters. Justice Clark, writing for the Eighth Circuit, stated that "[w]hatever their appellation or garb, policies which have the effect of being unlawful territorial and customer

The consequence of the Ninth Circuit's decision is to add *Sylvania* to the list of cases challenging the Supreme Court's decision in *Schwinn*.[74] In essence, *Sylvania* is even more of a challenge to *Simpson v. Union Oil Co.*,[75] which "teaches that when a court is faced with a new restricting device, the *effect* of which is substantially the same as that of a method previously condemned as illegal, the *per se* rule must be applied to the new device."[76] In other words, where a device such as the location clause creates a territorial restriction, the result must be a per se violation.

Two schools of thought have resulted from an analysis of such a result. One reports that if location clauses are viewed in this manner, the franchisors will be forced to vertically integrate and there will be a consequential loss of opportunities for the small businessman.[77] The other view responds that when one takes away the control over the location from which products are to be sold, the franchisee becomes merely a puppet for the franchisor and consequently loses the right to operate as an independent businessman.[78] The *Sylvania* court appears to have adopted the former approach and consequently allowed its fears of a per se ruling to invade its analysis. "We cannot believe Congress intended to implement a rigid *per se* rule . . . that portends . . . serious risk to franchising arrangements," writes Judge Ely for the majority.[79] Whatever the Con-

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restraints are *per se* violations of the Sherman Act." Reed Bros. v. Monsanto Co., 525 F.2d 486, 499-500 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 787 (1976).

In *Sylvania*, the jury found the effect to be a territorial restraint and thus it was rightly held to be illegal *per se*.

Plastic Packaging Materials, Inc. v. Dow Chemical Co., 327 F. Supp. 213, 225, 228 (E.D. Pa. 1971), also dealt with a primary responsibility clause, but again the court found that the action in *Plastic Packaging* "was not an attempt . . . to enforce territorial exclusivity." In addition, the *Plastic Packaging* court specifically recognized the *Schwinn* prohibition on restricting territories after parting with title.

Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968), involved a customer limitation clause, but the jury found the customer limitation clause did not operate to restrict resale of the product.

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), was a factual situation that involved an exclusive dealership. However, an exclusive dealership is separate and distinct from a location clause. *See* notes 50-53 *supra*, and accompanying text.

Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970), involved customer restrictions which limited sales of some products to professionals only. The Third Circuit distinguished the restrictions from the *Schwinn* per se rule on the basis of health and safety reasons. *But see* United States v. Glaxo Group, Ltd., 302 F. Supp. 1 (D.D.C. 1969), *rev'd in part on other grounds*, 410 U.S. 52 (1973), where the court imposed the per se rule on post-sale restraints regardless of market context or purpose. *But cf.* Tripoli Co. v. Wella Corp., 425 F.2d 932, 936-37 n.3 (3d Cir. 1970).

Even if one accepts the distinction *Tripoli* offers, there are no health or safety factors involved in *Sylvania*. All that Sylvania purports is a self-serving justification of bettering its position in the television market.

74. *See* note 14 *supra*.

75. 377 U.S. 13 (1964).

76. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1010-11 (9th Cir. 1976) (Kilkenny, J., dissenting).

77. *Id.* at 999-1000.

78. *Cf.* Comment, 49 N.Y.U.L. REV. 957, 967-68 (1974). *But contra*, Comanor, *Vertical Territorial and Customer Restrictions: White Motor and its Aftermath*, 81 HARV. L. REV. 1419, 1435-36 (1968). *See also* Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 LAW & CONTEMP. PROB. 506, 512 (1965).

79. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1000 (9th Cir. 1976).

gress' intention, the Ninth Circuit and the other courts have not been offered a choice. Their only recourse is to recognize the route the Supreme Court has chosen to pursue in *Schwinn*.

It is true that much has been written on the merits of the *Schwinn* rationale[80]—Justice Fortas called it "the ancient rule against restraints on alienation"[81]—including some commentaries which have appealed to the Court to reevaluate its decision.[82] Critical as one may be, it is not the role of an intermediate appellate court to make policy decisions when those decisions have already been made by the Supreme Court.[83] The courts cannot allow criticisms of *Schwinn* to distract them from their duty.[84] For until the categoric "per se" approach of *Schwinn* is modified by the Supreme Court, the appellate courts have a rule to follow—when one parts with title, risk and dominion, one must also part with control.[85]

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80. *See* Handler, *Twenty-Fifth Annual Antitrust Review*, 73 COLUM. L. REV. 415, 458-59 (1973); Handler, *The Twentieth Annual Antitrust Review—1967*, 53 V.L. REV. 1667, 1680-86 (1967); McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers, and Handling of Competitive Products*, 13 ANTITRUST BULL. 161, 168 (1968); Pollack, *Alternative Distribution Methods After Schwinn*, 63 NW. L. REV. 595 (1968); Sadd, *Territorial and Customer Restrictions After Sealy and Schwinn*, 38 U. CIN. L. REV. 249 (1969); Note, *Restrictive Distribution Arrangements After the Schwinn Case*, 53 CORNELL L. REV. 515 (1967); Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 GEO. WASH. L. REV. 123 (1971); Note, *Territorial Restrictions and Per Se Rules—A Re-evaluation of the Schwinn and Sealy Doctrines*, 70 MICH. L. REV. 616 (1972); Comment, *The Impact of the Schwinn Case on Territorial Restrictions*, 46 TEXAS L. REV. 497, 511 (1968).

81. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380 (1967).

82. *See* Robinson, *supra* note 22, at 279; COLUM. Note, *supra* note 13, at 523.

83. *See* Breakefield v. District of Columbia, 442 F.2d 1227 (D.C.C. 1970), *cert. denied*, 401 U.S. 909 (1971).

84. The Ninth Circuit recognized this in its opinion. "If we thought the opinion of Mr. Justice Fortas in *Schwinn* to control our present decision, our duty would compel us to apply *Schwinn*. And this we would do, despite the fact that the opinion . . . has frequently been criticized. . . ." GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 988 n.13 (9th Cir. 1976).

85. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

CONTRACTS—IN APPROPRIATE CASES, THERE MAY BE RECOVERY FOR MENTAL DISTRESS, ABSENT PHYSICAL TRAUMA, ARISING OUT OF A BREACH OF CONTRACT TO PERFORM FUNERAL SERVICES.—*Meyer v. Nottger* (Iowa 1976).

Plaintiff Meyer's father and stepmother were killed in an automobile accident. Defendant Nottger, a funeral director, was engaged to handle the funeral arrangements. Meyer told Nottger that he wished his father's funeral to be separate from that of his stepmother's. However, Nottger falsely stated that Meyer had no choice in the matter and Meyer was thereby forced to agree to a double funeral. Nottger then told Meyer that he would have to choose an expensive sealer casket because of the harsh and unpleasant odors from the body, when in fact there were no such odors. Meyer also expressed his wish to see his father's body, but Nottger advised Meyer not to do so because of the offensive odors and because the body was in a gruesome condition. Meyer returned the next day and demanded to view the body. Nottger acquiesced in the matter only after Meyer's attorney advised him to do so. Upon viewing the body, Meyer saw that it was in good condition and noticed that there were no offensive odors. After the funeral service, Nottger dismissed the pallbearers, contrary to Meyer's wishes. As the hearse was about to start toward the grave-site, Meyer became detained and told Nottger to delay the procession until he returned. The procession, in fact, started without him, and Meyer suffered a heart attack as the probable consequence of his effort to catch up to it. As a result of this series of events, Meyer brought an action against Nottger, alleging causes of action in both tort[1] and contract. In the division sounding in contract, Meyer contended that Nottger breached the contract between the parties in failing to perform the duties incident to the funeral service in a workmanlike manner. In both counts, Meyer asked for damages for his mental distress and the heart attack he suffered as a result thereof. The trial court granted summary judgment for the defendant funeral director, holding, *inter alia*, that the Supreme Court of Iowa would not recognize a cause of action for mental anguish, unaccompanied by physical trauma, caused by a breach of contract to perform funeral services.[2]

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1. Under his tort cause of action, Meyer alleged that Nottger's conduct constituted the commission of the tort of intentional infliction of severe emotional distress. It should be noted at this juncture that this case note will not attempt to discuss at length the court's reasoning and holding as it relates to the intentional infliction of severe emotional distress issue. However, it bears mentioning that the *Meyer* court did determine that there was sufficient evidence in the record from which a reasonable trier of fact could conclude that there was intentional infliction of severe emotional distress in this case, based upon the Iowa court's previous holding in Amsden v. Grinnell Mutual Reinsurance Co., 203 N.W.2d 252 (Iowa 1972). Meyer v. Nottger, 241 N.W.2d 911, 918 (Iowa 1976).

2. However, the trial court did acknowledge that plaintiff's petition "appeared to