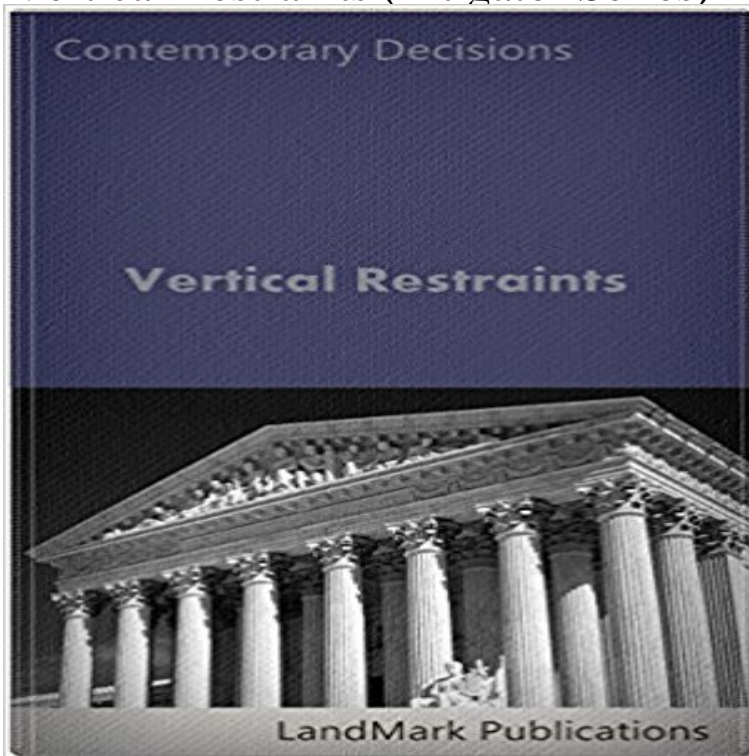


## Vertical Restraints (Litigator Series)



THIS CASEBOOK contains a selection of 77 U. S. Court of Appeals decisions that analyze and discuss issues arising from alleged vertical restraints of trade that violate the antitrust statutes. The selection of decisions spans from 1990 to the date of publication. When determining whether to use the per se rule or the rule of reason, courts must consider the type of restraint at issue whether it is horizontal or vertical. *Expert Masonry*, 440 F.3d at 344. An agreement between competitors at the same level of the market structure is horizontal. *Sancap Abrasives Corp. v. Swiss Indus. Abrasives*, 19 Fed.Appx. 181, 191 (6th Cir.2001) (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805-06 (6th Cir.1988)). Horizontal restraints are considered to be more threatening, and thus result in per se treatment more regularly. See *Expert Masonry*, 440 F.3d at 344 (citing examples from cases). Vertical restraints agreements between parties at different levels of the market structure, such as manufacturers and distributor have more redeeming qualities (e.g., allowing for distribution efficiencies) and are subjected to the rule of reason. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir.2008) (quoting *Leegin Creative Leather Products*, 551 U.S. 877, 127 S.Ct. 2705); see also *Expert Masonry*, 440 F.3d at 344-45. In *re Southeastern Milk Antitrust Litigation*, 739 F. 3d 262 (6th Cir. 2014). [T]he Supreme Court has recognized the legitimacy of vertical integration and vertical contracts by firms without market power. See, e.g., *Leegin Creative Leather Products*, 551 U.S. 877, 127 S.Ct. 2705; *State Oil Co.*, 522 U.S. 3, 118 S.Ct. 2705; *Business Electronics*, 485 U.S. 717, 108 S.Ct. 1515; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). Vertical integration and vertical contracts become potentially

problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are procompetitive. Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies and thus reduce prices and lead to better goods and services for consumers. See Douglas H. Ginsburg, Vertical Restraints: De Facto Legality Under the Rule of Reason, 60 ANTITRUST L.J. 67, 76 (1991) (Antitrust law is a bar to the use of vertical restraints only in markets in which there is no apparent interbrand competition to protect consumers from a potentially welfare-decreasing restraint on intrabrand competition.); Dennis L. Weisman & Robert B. Kulick, Price Discrimination, Two-Sided Markets, and Net Neutrality Regulation, 13 TUL. J. TECH. & INTELL. PROP. 81, 99 (2010) ([M]onopoly power in one market is a necessary condition for anticompetitive effects in almost all models of anticompetitive vertical integration.); see also 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 756a, at 9 (3d ed.2008) (vertical integration is either competitively neutral or affirmatively desirable because it promotes efficiency); ROBERT H. BORK, THE ANTITRUST PARADOX 226 (1978) (vertical integration is indispensable to the realization of productive efficiencies). Comcast Cable Communications, LLC v. FCC, 717 F. 3d 982 (DC Cir. 2013). . . .

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