> ... there are 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 without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Since 1970, the Court has in several cases demonstrated growing reluctance to use the *per se* rule. Moreover, the apparent dichotomy between the two approaches can be somewhat simplistic since, as the Court itself pointed out, "there is often no bright line separating *per se* from rule of reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anti-competitive conduct."[45] Notwithstanding this caution, however, some *per se* rules are firmly established. Although the rule of reason is increasingly the standard against which non-price vertical restraints are measured, the U.S. Supreme Court has consistently held that vertical price fixing agreements are *per se* illegal.

Yet this immediately raises the question as to why RPM has fallen into the *per se* category of antitrust offences. The case that is usually cited as support for this approach is *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* (220 U.S. 373 (1911)) which involved agreements to maintain prices set by the manufacturer and printed on medicine packages. Proponents of this position argue that RPM precludes intrabrand price competition by constraining resale price discretion. This reduction or elimination of intrabrand price competition results in the stabilization of prices in the interbrand market, thus facilitating interdependent pricing (cartelization) by competing manufacturers. Moreover, if a manufacturer cartel already exists, then resale price fixing serves to police the participants and prevent "cheating". Finally, resale price maintenance may intensify cartelization at the retailer level if the manufacturer imposes uniform prices in response to dealer pressure, as was discussed in section 3.1 above.

Nonetheless, other commentators have argued that the true conclusion to be drawn from the decision in *Dr. Miles* has been obscured. Alan H. Silberman states that the issue in this case was in fact framed as one involving a manufacturer's unfettered liberty to control all downstream behaviour by fiat — a proposition which has only a few adherents, even among those who believe that interbrand competition is the exclusive concern of antitrust.[46] He argues:

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[45] *N.C.A.A. v. Board of Regents of University of Oklahoma* 468 U.S. 85, 104, n.26 (1984).

[46] Alan H. Silberman, "Antitrust and the Distribution Process: an Outline of Vertical Antitrust Issues", mimeo., Sonnenschein Nath & Rosenthal, Chicago, Illinois, 1994, p. 20.