

## NOTE

### EXCLUSIVE DEALING IMPLEMENTED THROUGH REFUSALS TO DEAL: THE REFUSED PARTY

Exclusive dealing arrangements exist in a number of forms. They may be created by requirements contracts or by contracts which provide for future purchases on a scale that is designed to meet all of the buyer's needs. Exclusive dealing may also be achieved without the use of a contract when the buyer is coerced on a continuing basis to purchase from only one source in order to maintain the business contact. These arrangements may be highly desirable to a seller for many reasons, some of which are anticompetitive, such as foreclosure of competitors' sales opportunities.<sup>1</sup> Exclusive dealing is thus a form of vertical integration,<sup>2</sup> *i.e.*, it is designed to secure a channel for sale of goods or services which is not open to competitive alternatives.

Congress has provided statutory protection against anticompetitive practices, including exclusive dealing arrangements, in section 1 of the Sherman Act and section 3 of the Clayton Act<sup>3</sup> (hereinafter referred

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1. There is little work on the effects of exclusive dealing arrangements, but what exists is best discussed under the more general problem of vertical integration in Kessler & Stern, *Competition, Contract and Vertical Integration*, 69 *YALE L.J.* 1, 21 (1959) [hereinafter cited as Kessler & Stern].

2. See Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements under the Clayton Act*, 1961 *SUP. CT. REV.* 267, 306-08.

3. There is a further proscription which arises under section 2 of the Sherman Act, 15 U.S.C. § 2 (1963). "Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ." The act of an individual dealer could comprise either monopolizing or attempting to monopolize. Monopolizing is the unlawful acquisition or maintenance of monopoly power. The process is unlawful when it contains the element of intentional exclusion of competitors, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1964). The consistent nemesis of the courts has been defining monopoly power. Judge Learned Hand speculated that 90% of a market certainly meant monopoly power, 64% was doubtful, and 33% was clearly insufficient. *United States v. Aluminum Co. of America supra* at 464. The most recent and reasonable attempt at a comprehensive rationalization of the diverse definitions of monopoly power defines it as the power to control prices and exclude competition. Petitioner's Brief for Certiorari to the Supreme Court, *Hiland Dairy, Inc. v. The Kroger Co.*, No. 886 October Term, 1968. Proof of the other

to as section 1 and section 3). Section 1 declares illegal "Every contract, combination . . . or conspiracy, in restraint of trade . . ." <sup>4</sup> Section 3 declares it unlawful to "make a sale or contract for sale conditioned on the purchaser's not dealing in goods of a competitor of the seller if the effect would be such as to substantially lessen competition." <sup>5</sup> It is doubtful that the differences in the wording of the statutes will result in differences in application, <sup>6</sup> and with respect to the specific area discussed herein there has been no judicial declaration of a basis for differing results under the two statutes. <sup>7</sup> The prohibitions of these provisions are given force by private litigants under section 4 of the Clayton Act with a private right of action for treble damages, costs, and attorney's fees to "any person . . . injured by reason of anything forbidden in the antitrust laws . . ." <sup>8</sup>

Despite the prohibitions of sections 1 and 3 and the relief which is provided for injured parties in section 4 of the Clayton Act, the majority of lower courts facing the question have refused to recognize any

offense, attempt to monopolize, requires a showing both that the acts were such that they "would be likely to accomplish such monopolization," *Kansas City Star v. United States*, 240 F.2d 643, 663 (8th Cir. 1957), and that there was an accompanying specific intent to monopolize, as distinguished from an acceptance under monopolization, as sufficient proof of intent in the recognized consequences of business practices. *United States v. Griffith*, 334 U.S. 100, 107 (1948).

In several exclusive dealing cases, the terminated dealers have attempted to bring an action under section 2, but the theory has not proven successful. *E.g.*, *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 380 F.2d 112 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968). Should the approach to the offense of monopolization which has been raised in *Hiland Dairy, Inc. v. The Kroger Co.* be successful, proving the offense of monopolization should be much easier and should find a ready application in the area of exclusive dealing, since exclusive dealing is directed toward the imposition of competitively irrelevant restraints upon competitors.

4. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (1963).

5. Clayton Act § 3, 15 U.S.C. § 15 (1963).

6. It has been found "difficult to produce evidence of the view that any instance of foreclosing competition bad enough to infringe the Clayton Act would escape condemnation under the Sherman Act." A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 195 (1960). *But cf.* *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

7. This may derive from a reluctance on the part of the courts to consider the section 1 issue in favor of simply deciding the issue under section 3. *See, e.g.*, *Standard Oil and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *Alles Corporation v. Senco Products Inc.*, 329 F.2d 567 (6th Cir. 1964).

8. Clayton Act § 4, 15 U.S.C. § 15 (1963). "The Statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

cause of action for a dealer whose business has been injured as a result of his refusal to participate in an unlawful exclusive dealing arrangement.<sup>9</sup> Private suits have been further frustrated by frequent judicial statements that one has the right unilaterally to refuse to deal for any reason.<sup>10</sup> The refused buyer is faced with three basic problems in determining whether he has recourse against the seller under antitrust law: (1) Does an arrangement created by refusals to deal enjoy special exemption from the antitrust laws, and does the situation in which he is acting fall within any such exemption? (2) Does there exist, or, had he complied, would there have existed, an arrangement in violation of the antitrust laws? (3) If the acts of the refusing seller do result or would have resulted in an antitrust violation, does the refused party have a cause of action?

### I. RIGHT OF REFUSAL TO DEAL: THE COLGATE DOCTRINE

Though it is not without limits,<sup>11</sup> the courts have recognized the general right of an individual to refuse to deal.<sup>12</sup> This right has been maintained despite the fact that the refusal may be in furtherance of an arrangement which is basically similar in purpose, effect and imple-

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9. *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 380 F.2d 112 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968); *Associated Beverages Co. v. P. Ballantine & Sons*, 287 F.2d 261 (5th Cir. 1961) (dictum); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959); *Allied Equipment Co. v. Weber Engineered Products*, 237 F.2d 879 (4th Cir. 1956); *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956); *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9th Cir.), *cert. denied*, 348 U.S. 875 (1954); *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *cf. Hunter Douglas Corp. v. Lando*, 215 F.2d 372 (9th Cir. 1954). The Sixth Circuit has not taken the majority approach. *Alles Corp. v. Senco Products, Inc.*, 329 F.2d 567 (6th Cir. 1964); *cf. Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11 (6th Cir. 1959).

10. *United States v. Colgate*, 250 U.S. 300 (1919).

11. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

12. The courts have consistently applied restraints when the action included group boycotts or refusals to deal. *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), held that the Sherman Act was violated when the members of the association agreed not to deal with wholesalers who also sold directly to the public. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). In order to destroy competition from those not in the guild, the defendants had a policy of declining to sell to retailers who sold the products of manufacturers who copied the products of the Guild members. The plan of the Guild was found in violation of the Sherman Act because (1) it restricted outlets for the sale of goods of manufacturers, (2) it imposed a boycott against all purchasers who did not comply with the restrictions, and (3) it restricted the business action of the members of the Guild.

mentation to arrangements illegal under the antitrust laws,<sup>13</sup> such as exclusive dealing arrangements. The protection for bare refusals to deal by an individual is lost when such refusals are to further a monopolistic plan<sup>14</sup> or are accompanied by unlawful acts.<sup>15</sup>

The earliest statement of this position on one's right to refuse to deal under the antitrust laws came in *United States v. Colgate & Co.*<sup>16</sup> The Court accepted the indictment as charging only simple refusal to deal and stated:

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce,—in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, or course, he may announce in advance the circumstances under which he will refuse to sell.<sup>17</sup>

Anticipating the policy adopted by the Supreme Court in *Colgate*, the Second Circuit, in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, found that qualifying the antitrust laws in this manner was justified to insure the continued protection of the right to refuse to deal with anyone despite the fact that the refusal might rest on "prejudice

13. Compare *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963) with *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

14. *Lorain Journal v. United States*, 342 U.S. 143 (1951) (plan to force advertisers to cease using the radio station by refusal to accept advertising in the newspaper from anyone advertising on the radio declared to be unlawful as an attempt to monopolize); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (held that defendant Kodak had attempted to monopolize film distribution through purchase of competitors of the plaintiff wholesaler and refusal to sell to the plaintiff except at retail prices after an unsuccessful attempt to purchase plaintiff's business); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945) (held that there was an attempt to monopolize in a refusal to deliver rugs to the plaintiff after plaintiff successfully underbid the defendant on a government contract).

15. E.g., *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

16. 250 U.S. 300 (1919).

17. *Id.* at 307. Automobile manufacturers no longer have this degree of discretion. There is a special statutory provision for treble damages for an automobile dealer if his franchise is cancelled or not renewed when the manufacturer has not acted in "good faith." See Freed, *A Study of Dealers' Suits under the Automobile Dealers' Franchise Act*, 41 DER. L.J. 245 (1964).

or malice."<sup>18</sup> Modern thinking would seem to have modified this rationale to allow regulation of business decisions when they would frustrate some governmental policy.<sup>19</sup>

*United States v. Parke, Davis & Co.*<sup>20</sup> is presently the controlling case interpreting *Colgate*. Parke, Davis had an announced policy of refusing to deal with retailers who failed to observe its suggested minimum resale prices. It induced its wholesalers to stop selling to non-complying retailers and then told several retailers that, if they would adhere to the resale price, other retailers would also comply. Parke, Davis permitted the discontinued retailers to be reinstated if they were willing to maintain the suggested prices. The Supreme Court held that Parke, Davis went beyond the allowances of *Colgate* in refusing to deal with wholesalers in order to obtain their assistance to gain retailer compliance. In obtaining the assistance of the wholesalers, Parke, Davis created a conspiracy<sup>21</sup> (with the Court terming the violation under the now broader generic term, "combination")<sup>22</sup> in restraint of trade with the retailers and wholesalers, thereby violating section 1.<sup>23</sup> By this standard the manner in which the refusal to deal is used becomes determinative of legality to a great extent. The proper emphasis should be on the purpose with which the refusal to deal is made.

The essential similarity of economic effect from arrangements accomplished through prior warnings with subsequent refusal to deal

18. 227 F. 46, 49 (2d Cir. 1915). Fulda, *Individual Refusal to Deal: When Does Single-Firm Conduct Become Vertical Restraint*, 30 LAW & CONTEMP. PROB. 590, 603 (1966), suggests that a reason for distinguishing unilateral from collective conduct lies in the fact that collective power is inherently dangerous because of the likelihood of its detrimental use.

19. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

20. 362 U.S. 29 (1960).

21. As *Parke, Davis* was interpreted in *Albrecht v. The Herald Co.*, 390 U.S. 145, 149 (1968), the combination with the retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers.

22. *Albrecht v. The Herald Co.*, 390 U.S. 145, 149 (1968) (discussed in note 100 *infra*).

23. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); see *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963) (held that when one employs any other means to obtain compliance with a policy which has been announced and then effectuated through refusals to deal, there exists an arrangement which is subject to the antitrust laws). Describing the permissible scope of the refusal to deal, the Second Circuit in *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960), stated that, "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."

and those arising from illegal combinations or contracts was recognized in *Parke, Davis*. However, the Court felt that, so long as *Colgate* was not overruled, the result would be tolerated to maintain the right of discretion in dealing.<sup>24</sup> It has been suggested that the Court ought to overrule *Colgate* or at least allow it to die peacefully.<sup>25</sup> While the right to refuse to deal is important, it may be more important to limit that right when it is used in a manner offensive to public policy, namely in unreasonable restraint of trade or in a manner such as to substantially lessen competition.

The Court has maintained a limitation on refusals to deal when they were being used to monopolize in violation of section 2 of the Sherman Act.<sup>26</sup> If the right to refuse to deal is limited by section 2, then it should just as clearly be limited by section 1 and section 3. There is no clear logical difference between dealing on a condition by express agreement and dealing on that same condition obtained through prior announcement and threats of refusal to deal.<sup>27</sup> Indeed, the use of threats of refusals to deal may be limited to the economically more powerful and thus truly the antithesis of modern antitrust policy. Preventing the manufacturer from refusing to deal for anticompetitive reasons would not compel him to deal with anyone. We simply could not make an objectionable intent a decisive factor in choosing his customers.<sup>28</sup> Such an approach would help to alleviate a present weakness in the antitrust laws.<sup>29</sup>

The Supreme Court, while continuing to assert *Colgate's* vitality, has

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24. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45-46 (1960).

25. *Adams-Mitchell Co. v. Cambridge Distributing Co.*, 189 F.2d 913, 917 (2d Cir. 1951) (dissenting opinion).

26. See note 14 *supra*.

27. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 689 (1962).

28. *Id.* at 689. It has been suggested that the present decisions should lead to this result to be consistent. "After all, why is it any more an 'implied agreement' or a 'combination' for a manufacturer to reinstate a repentant, discontinued dealer who had been deviating from suggested resale prices after assurance of reform, than for a manufacturer to commence relations with a new dealer who is told that deviation from stipulated prices will result in termination of his dealership?" Weisbard, *Resale Price Maintenance, Exclusive Dealing and Tying Arrangements*, 10 ANTITRUST BULL. 341, 351 (1965).

29. In prohibiting contracts, combinations, and conspiracies by which unreasonable effects arise rather than prohibiting the effects themselves, the laws have a limited capacity to deal with unilateral actions. Note, *An Interstate Circuit Approach to The Refusal to Deal Dilemma Under Section 3 of the Clayton Act*, 64 YALE L.J. 581, 584-85 (1955); Brief for Justice Department as Amicus Curiae at 5-8, 12, *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 389 U.S. 1036 (1968) (denying cert.).

not yet applied the *Colgate* rule to protect an arrangement.<sup>30</sup> Lower courts have, however, found occasion to apply it. For example, *Tobman v. Cottage Woodcraft Shop*<sup>31</sup> held that the seller came within the protection of *Colgate* when employees of the defendant-seller sought the names of price cutters and acted on the basis of that information to eliminate the offending parties from further dealing. Such an approach would not seem to be consistent with the spirit of the antitrust laws, and a clear departure from the dogma of *Colgate* may be necessary to prevent the recurrence of such holdings by the lower courts. Of course, an insistence by the courts on the permissiveness of *Colgate* will not necessarily be detrimental to a litigant seeking to prevent exclusive dealing. Nevertheless, so long as the *Colgate* doctrine is not overruled, a potential course of conduct is perpetuated under cover of legality which has no economic justification and which effectively achieves the identical result as conduct which is illegal.

## II. CRITERIA FOR ILLEGALITY OF EXCLUSIVE DEALING ARRANGEMENTS<sup>32</sup>

All dealing arrangements impose some restraint upon trade<sup>33</sup> and would be unlawful under a literal reading of the statutes. But since the antitrust laws are intended to protect competition, the basic test of illegality turns on defining the conditions surrounding the dealing or elements of dealing which are inimical to it.<sup>34</sup> With respect to exclusive dealing, there is disagreement as to the proper interpretation of the cases, and formulating readily applicable tests which would prove anticompetitive effects remains "a cloudy, much disputed, and difficult question."<sup>35</sup>

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30. Weisbard, *Resale Price Maintenance. Exclusive Dealing and Tying Arrangements*, 10 ANTITRUST BULL. 341, 347 (1965).

31. 194 F. Supp. 83 (S.D. Cal. 1961); see *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965).

32. The analysis in this section of the tying and exclusive dealing cases was suggested by Gray L. Dorsey, Professor of Law, Washington University School of Law.

33. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

34. Wilson, *Some Problems Relative to Franchise Agreements*, 11 ANTITRUST BULL. 473, 479 (1966).

35. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 693 (1962); see Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267; Smith, *Vertical Arrangements in Antitrust Law: Exclusive Dealing Arrangements*, 22 ABA ANTITRUST SECTION 18 (1963).

The criteria for illegality of imposed exclusive dealing arrangements appear to be derived from the cases dealing with "tying" arrangements. "Tying" refers to situations in which the sale of one line of articles is conditioned on the purchase of a second line or at least on the promise that, if products within the second line are purchased, they will be purchased from the other party to the agreement. The demand for the tying product is used to create a demand for the tied product not on a basis of the tied product's desirability or any independent business judgment on the part of the purchaser in a competitive offering but, rather, on terms which foreclose independent business judgment and competitive sales to the extent that the purchaser would not have purchased the same products absent the agreement.

Present decisions on tying follow from the opinion of the Supreme Court in *International Salt Co. v. United States*.<sup>36</sup> International Salt had patents on two machines which it leased to manufacturers across the country upon the condition that the salt for use in the machines had to be purchased from the lessor unless the lessee could purchase the salt at a lower price after giving International Salt a chance of meeting any offer. The Court affirmed summary judgment on the simple proof of the sale of \$500,000 worth of salt in 1944 under the condition of the lease, holding that "it is unreasonable, *per se*, to foreclose competitors from any substantial market."<sup>37</sup> As a result of this decision, tying joined price fixing, division of markets, and group boycotts as *per se* offenses.<sup>38</sup> Proof of the arrangement under the other *per se* offenses is sufficient proof of a violation. The reason the Court requires proof of foreclosure from some substantial market in tying cases probably lies in the difference between the nature of the practices. Among the *per se* offenses, only tying arrangements and combinations for resale price maintenance are achieved through coercing the buyer into agreeing to the restrictive terms. Resale price maintenance may result either by agreement or from the use of coercion. Proof of a combination to maintain resale prices requires a showing that there was effective coercion.<sup>39</sup> Otherwise, price setting along with market division and group boycotts is an offense in which the parties may join in anticipation of eventual

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36. 332 U.S. 392 (1947).

37. *Id.* at 396.

38. *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941) (group boycotts); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (division of markets).

39. *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968).



profit. In tying, however, there is no anticipated benefit which may accrue to the purchaser; otherwise, he would be a willing participant and there would be no reason for the inclusion of such purchase requirements in the contract. Tying is wrongful when coercion results in the overcoming of an independent business choice.<sup>40</sup> The importance of this foreclosure being attached to a substantial market is that the imposition of such conditions on a number of purchase situations raises the inference that some purchases of the tied product were made under the influence of the tying condition so that probably the requisite element of overcoming independent business judgment exists. This reasoning is apparent in the case of *Northern Pacific Railway v. United States*.<sup>41</sup> Northern Pacific had conditioned a large number of leases of various property holdings on the use of its railway system. The Supreme Court restated the test for illegality as requiring that "a 'not insubstantial' amount of interstate commerce is affected."<sup>42</sup> Under this requirement, proof of any effect would seem adequate. Sufficient proof would then lie in simply establishing that the independent business judgment of any purchaser was actually overcome. In the tying cases, there arises the further problem as to the requisite power for an unlawful foreclosure simply because there can be no real foreclosure if the dealing is not under compulsion. At one time, it appeared that the power to foreclose might have to be proved to be on the scale of classic monopoly concepts.<sup>43</sup> *Northern Pacific* foreclosed this line of argument in holding that the power to be feared existed at any time there was "sufficient" power actually to tie and by stating the prohibition with this term.<sup>44</sup> There is no real concern here with proving that there has been an effect on competition, for the pernicious anticompetitive character of the *per se* offenses obviates any need for discussing that problem.<sup>45</sup> Proof of *foreclosure* of a market accrues by proving the actuality or by proving the probability that business judgment has been overcome.

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40. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953).

41. 356 U.S. 1 (1958).

42. *Id.* at 6.

43. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606-08 (1953).

44. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 11 (1958) (though this appears to be a far more practical approach, its ready acceptance was by no means certain as witnessed in the courts' handling of monopoly problems under classical concepts when there is a readily available practical alternative also defining the elements of the offense in terms of the policy behind the statute. See note 3 *supra*).

45. *White Motor Co. v. United States*, 372 U.S. 253, 265 (1963).

The basic approach to the tying situation developed in *International Salt* was found applicable to test the legality of imposed exclusive dealing arrangements in *Standard Oil & Standard Stations, Inc. v. United States (Standard Stations)*.<sup>46</sup> Prior to this decision, exclusive dealing cases required an analysis of comprehensive market details to determine whether the probable effect of the arrangement would be to substantially lessen competition.<sup>47</sup> In *Standard Stations*, the company had sales which in one year comprised about 23% of the gasoline sold in the area. In this period, 6.7% of total sales were made under exclusive dealing contracts with independent service stations. The lower court, seemingly, adopted a test near that of *International Salt*,<sup>48</sup> such that the issue presented to the Supreme Court was:

. . . whether the requirement of showing that the effect of the agreements "may be to substantially lessen competition" may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished, or probably will diminish.<sup>49</sup>

Section 3 forbids tying and exclusive dealing in the same terms,<sup>50</sup> which meant that the Court was faced with a comparison of the two in order to determine if a different test would be more effective in implementing the purpose of the act. In the comparison, tying arrangements were found to be justifiably restricted as serving "hardly any purpose beyond the suppression of competition."<sup>51</sup> On the other hand, requirements contracts were said to have some purpose in promoting competition by assuring supply and price, thus allowing long-term planning. Such contracts might also reduce selling expenses, protect against price fluctuations, and offer a predictable market.<sup>52</sup> Because of possible legitimate economic objectives in exclusive dealing, the inference of competitive injury solely from evidence of substantial sales under restriction was felt to be weakened.<sup>53</sup> That is, to the Court it seemed less likely that the independent business judgment of a purchaser under an

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46. 337 U.S. 293 (1949).

47. Weisbard, *Resale Price Maintenance, Exclusive Dealing and Tying Arrangements*, 10 ANTITRUST BULL. 341, 366 (1965).

48. See text accompanying notes 36-37 *infra*.

49. *Standard Oil Co. and Standard Stations, Inc. v. United States*, 337 U.S. 293, 299 (1949).

50. See text accompanying note 5 *supra*.

51. *Standard Oil Co. and Standard Stations, Inc. v. United States*, 337 U.S. 293, 305-06 (1949).

52. *Id.* at 306-07.

53. *Id.* at 307.

exclusive dealing contract had been overcome simply by proving substantial sales under such, as it seemed more likely that such agreements would be undertaken willingly because of the legitimate economic advantages. The Court did not consider possible differences between imposed and negotiated exclusive dealing arrangements.

A number of tests were suggested that could be used in determining the legality of an exclusive arrangement if the courts were to attempt to define an effect upon competition, but it was recognized that "serious difficulties would attend the attempt to apply these tests."<sup>54</sup> The Court concluded "that the qualifying clause of section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."<sup>55</sup> One would have to anticipate the same interpretation of this as may be derived from the tying cases in light of the fact that where the exclusive dealing is the result of coercion and a substantial amount of dealing has been done on the basis of the exclusive agreement the same inference as to the overcoming of independent business judgment arises as was found applicable in the tying cases.<sup>56</sup> As a result, either proof of any actually effective coercion or proof of substantial sales under coercion would be sufficient to prove the illegality of an exclusive dealing arrangement.

The purpose of imposed exclusive dealing arrangements is the restriction of competition, and one would assume that they would not be used but for the belief that they would have such an effect. If those

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54. *Id.* at 308.

55. *Id.* at 314.

56. Robinson, *Providing for Orderly Marketing of Goods*, 15 ABA ANTITRUST SECTION 282, 306 (1959). On the other hand, if the dealing were the result of negotiation the same inference could not arise at all. The justifications suggested by the Supreme Court in *Standard Stations* for the application of a different rule to exclusive dealing would have substantial validity. The elements for providing illegality of exclusive dealing contracts where there is no seller's coercion but where the contract is the result of negotiation are the subject of *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). Just as tying uses economic power in one market to restrict competition on its merits in another market, coerced exclusive dealing uses economic power in one market to restrict competition on its merits in the same market. Negotiated exclusive dealing is competition on its merits which may or may not be carried so far as to become destructive. Yet, most writers, e.g., Timberg, *Some Working Antitrust Rules in Distributing Through Franchised and Non-Franchised Outlets*, 11 ANTITRUST BULL. 447, 448-50 (1966), feel that the application of the title "exclusive dealing arrangement" in both *Tampa Electric* and *Standard Stations* requires that the test of *Tampa Electric* be basic and that it establish the necessary elements of proof in all "exclusive dealing" cases.

Similar coercion has also been handled under section 5 of the Clayton Act which prohibits unfair methods of competition. E.g., *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965).

who create such arrangements are correct about the anticompetitive effects, prevention of them will be beneficial to competition. Thus, the justification for forbidding such arrangements is based on the view that they constitute unnecessary market restrictions, the removal of which can do little harm, while freeing markets for trading on competitive bases.<sup>57</sup>

Discussion of the criteria of illegality in litigation by a discontinued party is relevant only if the court requires proof of a prior illegal arrangement with the discontinued dealer or an existing illegal arrangement with other dealers. As will become apparent in subsequent discussion, one possible approach to cases of the type discussed herein would not require proof concerning the illegality of an existing arrangement; other approaches would require such proof. If the courts would define illegality in terms of attempt,<sup>58</sup> there would seem to be no need to prove any illegal exclusive dealing arrangement. In the event the courts define illegality from past dealing between the parties,<sup>59</sup> it would seem sufficient for the dealer simply to show that he was coerced into the relationship. If the courts would approach illegality on the basis of being in implementation of some existing arrangement,<sup>60</sup> proof of the illegality of that relationship under the terms of *Standard Stations* would be required.

### III. UNLAWFUL EXCLUSIVE DEALING: PRESENT APPROACH TO A TERMINATED DEALER'S CAUSE OF ACTION

When faced with an apparently unlawful exclusive dealing arrangement in *Nelson Radio & Supply Co. v. Motorola, Inc.*,<sup>61</sup> the Fifth Circuit dismissed an action brought by a dealer who was cancelled for failure to comply. After distributing Motorola's products for several years, the plaintiff was informed by Motorola that it would be cancelled as a distributor of Motorola products unless it discontinued the sale of products of Motorola's competitors. The plaintiff refused these conditions and, after its cancellation, brought a treble damage action. The court seemingly presumed that the dealings of the defendant with others in the scheme which it was implementing came within the ban of section 3 and were subject to any action brought against those actual

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57. A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA*, 196 (1960).

58. See section IV(B) *infra*.

59. See section IV(A) *infra*.

60. See section IV(C) *infra*.

61. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

dealings, but the court affirmed a dismissal on the basis of a failure to state a cause of action. It reasoned that section 3 covered only contracts or actual dealings and not refusals to deal. As a further basis for the dismissal, the court relied on what in its view was the unquestioned right under *Colgate* unilaterally to refuse dealings with any person for any reason.<sup>62</sup> This holding was coupled with a refusal to recognize an actionable causal connection between the arrangements entered into with other dealers and the injury to the plaintiff on the basis that it was not those contracts but the absence of a contract with Motorola which led to the injuries suffered by the plaintiff. By implication, the court held that the same causal problems would prevent the application of section 1.

The court rejected the claim by the plaintiff that the acts of the defendant's agents were illegal as resulting in an intra-corporate conspiracy.<sup>63</sup> Since the complaint was dismissed on the pleadings, the court never considered the possible illegality of the arrangement with other dealers as anticompetitive by the requirements of *Standard Stations*; nor was consideration given to the possible illegality of the arrangement which would have existed between the plaintiff and the defendant if the plaintiff had acceded to the defendant's demands.

The Ninth Circuit was faced with a similar situation in *Leo J. Meyerberg Co. v. Eureka Williams Corp.*<sup>64</sup> The alleged violation of section 3 was based on the defendant's termination because of the plaintiff's refusal to deal exclusively in the defendant's products. There was no indication in the case as to whether the defendant had exclusive arrangements with others or even that the arrangement would have been unlawful if entered into. The evidence merely showed an attempt to create an exclusive dealing arrangement. Perhaps a further look at the facts would have clarified these points; but the court affirmed the dismissal, without citing authority, on the same reasoning that prevailed in *Nelson v. Motorola*, viz. that, absent a contract as required by the wording of section 3, the plaintiff had no grounds on which to base a cause of action.

More recently, in *Amplex of Maryland, Inc. v. Outboard Marine*

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62. See section I *supra*. The *Colgate* doctrine, however, is not concerned with denying a cause of action to a party because he has been discontinued as happened in *Nelson v. Motorola*. It is concerned with protecting the overall legality of arrangements which are created through bare refusals to deal. Thus, it is difficult to determine specifically what support the court was asserting for its decision by reference to *Colgate*.

63. See note 88 *infra*.

64. 215 F.2d 100 (9th Cir.), cert. denied, 348 U.S. 875 (1954).

*Corp.*,<sup>65</sup> the Fourth Circuit implied a limited departure from the approach adopted by the earlier exclusive dealing cases. The court found no violation of section 1, under which the plaintiff presented his claim. The court accepted as findings of fact that the termination of the plaintiff was not held out threateningly to the other dealers, that there was no evidence of any combination or conspiracy linking Outboard to its other dealers, and that the contracts with them were not on a basis of exclusive dealing.<sup>66</sup> Though section 3 was not pleaded by the plaintiff, the court then considered that provision. The court quoted an earlier analysis<sup>67</sup> of the same problem which relied on *Nelson v. Motorola*,<sup>68</sup> and *Leo J. Meyberg Co. v. Eureka Williams Corp.*<sup>69</sup> The *Amplex* decision is notable for the implication that in future decisions the Court will take a different approach when there is a connection between the use of cancellation as a threat to other dealers or when there is a combination between the manufacturer and other dealers regarding exclusive dealing which is in violation of section 3 and in which the dealer is cancelled as a result of implementing that combination. Yet the court is still holding that a cancellation of a dealer for refusal to enter into what would be an unlawful exclusive dealing arrangement is not actionable under the antitrust laws. Moreover, the court appeared to accept the earlier view that there is no relationship between an existing arrangement and a cancellation or refusal of another so long as the refusal is not used threateningly in the arrangement.

The Justice Department supported the plaintiff, Amplex, in its petition for *certiorari* to the Supreme Court.<sup>70</sup> It took the position, on the basis of its reading of the facts, that a refusal to deal is actionable by a private litigant when it is used to gain or in an attempt to gain agreement to an arrangement which, if agreed to, *would be one of a number* of contracts in unreasonable restraint of trade or on condition or understanding of unlawful exclusive dealing, *i.e.*, in violation of section 1 or section 3. This proposal is broader than would at first

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65. 380 F.2d 112 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968).

66. *Id.* at 114.

67. *Id.* at 115, citing *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959).

68. *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

69. 215 F.2d 100 (9th Cir.), *cert. denied*, 348 U.S. 875 (1954).

70. Brief for Justice Department as Amicus Curiae, *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 389 U.S. 1036 (1968) (denying cert.).

appear as it is in conjunction with a proposal within the same brief for a strong limitation on the meaning of *Colgate*.<sup>71</sup>

Apparently only the Sixth Circuit, in *Alles Corporation v. Senco Products, Inc.*,<sup>72</sup> has gone against the majority view and held actionable the cancellation of a dealer in a manufacturer's implementation of an illegal exclusive dealing arrangement. Yet, even this approach may not be as complete as the Supreme Court may be willing to accept, since the Court may not require that the attempted violation be one of a number of contracts or have been actually in effect but may find a violation in the *attempted* creation of a single illegal arrangement.<sup>73</sup>

If the system seems to deny the right of a private action, the question arises as to whether there is need to encourage such suits. The purpose of section 4 of the Clayton Act is to "supplement Government enforcement of the antitrust laws,"<sup>74</sup> through multiplying the numbers who are actively enforcing them.<sup>75</sup>

In support of the need for private actions as a supplement to potential governmental litigation, it has been suggested that private actions are more effective in implementing the antitrust laws for several reasons. First, it would take a vast bureaucratic army to equal quantitatively the effectiveness of interested private parties. Second, the private action gives enforcement over to persons more familiar with the situation and likely to be in possession of the evidence upon which to found a suit with the financial incentive to bring the evidence forward. Third, there is much to be said for repairing injury which has arisen either as a result of an attempted antitrust violation or as the result of maintaining a successful one.<sup>76</sup> Yet the majority of decisions in the area of exclusive dealing have held that a dealer cancelled or refused dealing for his refusal to enter into or abide by an illegal exclusive dealing arrangement has no cause of action against the seller.

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71. *Id.* at 12.

72. 329 F.2d 567 (1964).

73. Injury to a single party was found sufficient as the basis for an antitrust suit in *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968). See *Stanton v. Texaco, Inc.*, 289 F. Supp. 884 (D.R.I. 1968).

74. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS* 873-75 (1968).

75. *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 893 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

76. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 *ANTITRUST BULL.* 167, 168-69 (1958).

## IV. SUGGESTED ALTERNATIVES

As an example of possible litigation from the same factual setting, the government was successful in *United States v. Sun Oil Co.*<sup>77</sup> in obtaining a judgment against the defendant for violation of section 3. The dealers were given franchises on the condition that if one failed to operate his business according to the terms of Sun, he would be terminated and replaced by another dealer. One such term was Sun's policy of requiring its dealers to handle its gasoline exclusively, and pursuant to that end, Sun coerced its dealers to enter various contracts by which they pledged to buy exclusively from Sun.<sup>78</sup> This was enforced by investigations of dealers and reminders to the dealers of Sun's right to terminate the agreements on thirty days' notice if they failed to comply.<sup>79</sup> On these facts, the court, relying on *Standard Stations*,<sup>80</sup> found that competition had been foreclosed in a substantial share of the market. The court enjoined the defendant from coercing retailers under written contracts and tacit agreements to purchase defendant's products exclusively.

Presumably, a competitor of the manufacturer would be able to bring an action at any time that the government could act if he could prove injury. If we assume a situation in which either the government or a competitor could bring an action against an arrangement, do the antitrust laws provide a basis for relief in a suit brought by a dealer injured by the manufacturer in the implementation of the plan? The majority position creates a weakness in the enforcement of the anti-trust laws in effectively denying the most powerful tool of enforcement, private litigation. Several reasonable and simple means of reaching the opposite result may be suggested: (1) a cause of action for one who complies but subsequently refuses to continue in the illegal arrangement, (2) a cause of action for refusal to deal because of a refusal to enter into an unlawful agreement, or (3) a cause of action based on the causal connection between the arrangement (between the seller and the other dealers) and the injury to the cancelled dealer.<sup>81</sup>

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77. 176 F. Supp. 715 (E.D. Pa. 1959).

78. *Id.* at 727.

79. *Id.* at 723, 725.

80. See section II *supra*.

81. Intra-corporate conspiracy is an additional approach which has enjoyed some popularity. The proponents of this theory, *e.g.*, Kessler & Stern at 88-91, suggest that the agents of a corporation conspire in deciding to refuse to deal and that a sufficient conspiracy arises within the corporation to bring the corporation within the ambit of section 1 on the basis of respondeat superior. The first judicial test of this theory occurred



### A. *Suit for Termination after Compliance then Refusal to Continue*

The discontinued dealer may have an action if he is refused dealing for a failure to abide by an unlawful agreement with the seller. The Fourth Circuit held in *Osborn v. Sinclair Refining Co.*<sup>82</sup> that the termination of the plaintiff for refusal to abide by an unlawful agreement between Sinclair and its dealers was actionable. Osborn's failure to purchase sufficient quantities of tires, batteries, and accessories contributed to the cancellation of his lease and the sales of gasoline from the defendant. There was a recognition that a seller has a limited right not to deal and that, if the seller uses any one of the various proscribed arrangements to suppress competition which is created by something beyond a simple announcement of policy and declination to sell (*Parke, Davis*), his conduct falls under the proscription of the anti-trust laws. The holding of the court is, in summary, that "Where the customer is cut off in a coercive attempt to further a forbidden arrangement . . . he is entitled to recover all damages issuing from that

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in *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), in which the court refused it. If one does accept the argument that the corporation can be guilty under respondeat superior for the acts of its agents in conspiring to restrain trade, the fact that the conspiracy was unsuccessful does not destroy its actionability. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59 (1940), held section 1 applicable whether the concerted activity were abortive or successful. *Kessler & Stern*, at 89.

The intra-corporate conspiracy argument derives its primary value from elimination of the problems of causation with respect to the dealings with others on the plaintiff's level such as were important in *Nelson v. Motorola*. Since the conspiracy is directed against the plaintiff, it is readily actionable through the use of the contracts with others to show the general illegality of the arrangement as being in restraint of trade. The problem in this analysis is that it is clearly intended as no more than a device to avoid what the courts have held to be a limitation in the law. It admits of no general application; for example, "it should not be applied to per se situations; otherwise, to give one illustration, every corporate refusal to deal would constitute a boycott, illegal per se." *Kessler & Stern* at 90. If such an approach were taken by the courts, it would not only create a dangerous precedent for expansion into other areas but would create a need to maintain an unusual inconsistency of interpretation of the same statutory language. Preferably, if the courts see a need for closing this loophole in antitrust enforcement, they will do so by maintaining a consistent interpretation of conspiracy under section 1 while acting on the basis of the real policy arguments for seeking a change, i.e., either the real causal connection between the refusal to deal and the implementation of an illegal arrangement, or, more broadly, on the basis of the possible need for making section 1 applicable against attempted violations.

A presentation of various cases and reference to a number of articles dealing with intra-corporate conspiracy appear in S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS* 202-09 (1968).

82. 324 F.2d 566 (4th Cir. 1963).

punitive action. To deny him this would eviscerate section 4."<sup>83</sup> The court, to its satisfaction, concluded that the cases, "show without exception that damages may be recovered for a refusal to deal in furtherance of an arrangement condemned by the antitrust laws, whatever form of trade restraint the arrangement takes."<sup>84</sup> Does this logic go beyond the facts of the case? What if there have been no prior dealings?<sup>85</sup> This case was claimed to be consistent with the cases following *Nelson v. Motorola* on the basis that they all involved "either the question whether there existed an unlawful arrangement or the question whether the particular refusal to deal was to further such an arrangement."<sup>86</sup> At least some of those cases, in the reasoning of the printed opinions, do not appear to be consistent with this assertion by the court.<sup>87</sup>

Reversing a summary judgment for the defendant, the Fifth Circuit held in a similar case that the plaintiff had stated an actionable claim under both section 1 regarding resale price maintenance and section 3 regarding a tying arrangement.<sup>88</sup> The defendant leased a service station to the plaintiff on a yearly basis. At the same time, the plaintiff and the defendant entered into a sales arrangement for certain quantities of the defendant's gasoline and motor fuels. There was a conflict in the evidence as to whether the defendant refused to renew the lease as a result of plaintiff's failure to follow a pricing policy of the defendant. The court held that there was a triable issue as to whether the failure to renew the plaintiff's lease and sales agreement were occasioned by the plaintiff's refusal to comply with an agreement, combination, or conspiracy organized by the defendant to secure adherence to its prices in violation of section 1.

The court also found that there was evidence of a tying arrangement in linking the sale of gasoline to the sale of tires, batteries and accessories, and that there was a triable issue as to the unlawfulness of that tying arrangement. The defendant was held not to be entitled to judgment as a matter of law on the plaintiff's claim of a tying arrangement

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83. *Id.* at 573.

84. *Id.* at 574-75.

85. Compare *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967) with *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965).

86. *Osborn v. Sinclair Refining Co.*, 324 F.2d 566, 574 (4th Cir. 1963).

87. *E.g.*, *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

88. *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965).

which would be in violation of section 3. There appears to be little reason to attach significance to the fact that price fixing or tying arrangements were involved here rather than coerced exclusive dealing arrangements. The principle that termination of dealing for failure to comply with an unlawful arrangement is actionable would seem to be consistently applicable. The Sixth Circuit applied such an approach to exclusive dealing arrangement in *Alles Corporation v. Senco Products, Inc.*<sup>89</sup> by finding that an actionable claim under section 3 was presented by plaintiff's assertion that an implied term of a contract between the plaintiff and the defendant had been that the plaintiff would not deal in the goods of others and that the plaintiff had been terminated because of his sale of competitive goods.

B. *Suit for Refusal to Enter into an Unlawful Arrangement*

A suit for refusal to deal because of the dealer's refusal to enter into an unlawful agreement was brought in *Lessig v. Tidewater Oil Co.*<sup>90</sup> The plaintiff alleged that he was damaged as a result of his refusal to become a party to an illegal system of exclusive dealing and tying arrangements. The court held that the plaintiff could recover on this theory if he could prove the illegality of the arrangement. The court indicated further that it could see no problems in proof of proximate cause under either section 1 or section 3, because the injury to the plaintiff which occurs from the defendant's efforts to create such an illegal arrangement is injury "by reason of" conduct forbidden by the law and therefore is sufficient for a private action under section 4 of the Clayton Act.<sup>91</sup>

Support for this approach appears in *Osborn v. Sinclair Refining Co.* decided by the Fourth Circuit, in which the court stated:

In many, if not most, private antitrust actions, the principal element of damage is precisely what we are now considering—the loss of profits caused by a refusal to deal. If a seller, who is not a monopolist and who does not act in concert with co-conspirators, nevertheless is able to coerce buyers into a combination or arrangement whereby prices are fixed, or the sale of the one product is tied to the sale of another, or dealing is required to be exclusive, and if that seller could refuse to deal with buyers unwilling to adhere to the unlawful arrangement without answering for the resulting losses, the effectiveness of the section 4 treble-damage suit as an enforcement measure would be to a great extent nullified.

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89. 329 F.2d 567 (6th Cir. 1964).

90. 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).

91. See note 8 *supra*.

9. . . . Indeed, in many cases the only possible injury stems from an unlawful refusal to deal, where there has been no prior experience whatever of business transactions between the parties.<sup>92</sup>

The Supreme Court appears to have taken the same position in *Simpson v. Union Oil Co.*<sup>93</sup> The defendant had entered into a price fixing arrangement through a consignment and leasing system to its dealers but it was claimed that Simpson was refused renewal of his lease because he sold below the fixed price. The Court held that the consignment agreement was illegal.<sup>94</sup> It held that, though a supplier can refuse to deal, he does not get "immunity" if the arrangement is one of those schemes condemned by the antitrust laws.<sup>95</sup>

One clear difficulty with these holdings, which rely on a refusal and do not connect the refusal with some other arrangement, is that, by itself, a refusal is not a vertical arrangement, but is merely a unilateral attempt. Attempts are specifically prohibited by section 2 of the Sherman Act but are not prohibited by section 1 or section 3. To read attempt into section 1 and section 3 is an impressive bit of "interstitial legislation,"<sup>96</sup> but the wording of *Simpson* indicates that this is a step which the Court is willing to make.

### C. Causation From Contract or Combination with Other Dealers

Though a causal relationship from contracts or combinations with other dealers has appeared somewhat in the prior approaches, it deserves independent attention as a basis of an action because of differences in emphasis and occasional differences in application. The essential argument is that, when a dealer is terminated for dealing in the goods of a competitor so that the seller can maintain his entire arrangement for exclusive dealings in violation of section 3, the connection between the termination and the violation is clear. This final approach is less complete than the prior one in that it would require proof both that there was an existing arrangement and that the actionable wrong was in implementation of that arrangement; however, it has the advantage that the precedent for such a holding appears to be more clearly established.

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92. *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963).

93. 377 U.S. 13 (1964).

94. It is unclear why the agreement in *Simpson v. Union Oil* was unlawful. Because of the ambiguity in the opinion it may later be interpreted as resting on any of a number of possible grounds. Some of the problems which are thus raised appear for consideration in *Stanton v. Texaco, Inc.*, 289 F. Supp. 884 (D.R.I. 1968).

95. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

96. *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 275 (1st Cir. 1967), *cert. denied*, 389 U.S. 953 (1968).

This approach was suggested in the government's *amicus* brief in *Amplex*.<sup>97</sup> The Fourth Circuit was nearing the same position, by implication, in its *Amplex* decision; however, it added the requirement that the implementation of the arrangements with other dealers consist not merely of a termination but that termination must have been used as a threat or means of coercion of other dealers.<sup>98</sup> The lack of any need to prove any of these points, even as suggested by the government's brief, defines the precise difference between this and the prior approach.

The Supreme Court appeared to affirm this position in *Albrecht v. The Herald Co.*<sup>99</sup> There, Albrecht ran a newspaper delivery business in which he operated as an independent merchant. The Herald used various means of coercion, at least in dealings with the defendant, to induce a compliance with maximum resale prices. Albrecht sued for the damages which arose as a result of the defendant's harassment. The Court indicated that, although it was not pleaded, the plaintiff could successfully have asserted "that respondent had *combined* with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it."<sup>100</sup> This approach for the application of the rule against combinations is antithetical to the holding of *Nelson v. Motorola*, for there is no requirement that there be a contract or combination between The Herald and Albrecht.

### CONCLUSIONS

If private action is to supplement governmental action, the courts must provide a viable sanction for private enforcement against a dealer who is creating or attempting to create an unlawful exclusive dealing arrangement through termination of an unwilling dealer. A competi-

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97. Brief for Justice Department as *Amicus Curiae* at 12, *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 389 U.S. 1036 (1968) (denying *cert.*).

98. *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 380 F.2d 112, 114 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968).

99. 390 U.S. 145 (1968).

100. *Id.* at 150 n.6. *Albrecht v. The Herald Co.* gives new definition to the term "combination" which had until that time been interpreted as falling within the term "conspiracy." Arrangements which fall under either of these terms and are in restraint of trade are, of course, prohibited by section 1. Conspiracy and combination had, until *Albrecht v. The Herald Co.*, been based on willing and self-beneficial assent to the scheme. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). Combination was expanded in *Albrecht* to encompass antagonistic-coercive agreements. Some earlier writers, e.g., Kessler & Stern at 86-88, came quite close to suggesting the same approach as the text here presents but they found it necessary to rely on an interpretation of "conspiracy" in terms which are covered by the present definition of "combination."

tor of the restrictive seller will find evidentiary problems in proof of damages and quite likely will find difficulty in bringing forth evidence of the arrangement. Of course, the firm which remains subject to the arrangement is going to be reluctant to endanger its dealings in order to sue for damages from being forced to deal with no one but the defendant. On the other hand, the terminated dealer will quite likely have collected evidence of the arrangement during negotiations prior to the termination or refusal to deal.<sup>101</sup> He will also have clearly measurable damages flowing from the acts of the defendant.

A cause of action should be recognized for the terminated dealer. There is ample precedent for such a holding and a practical need for it as the only likely means of private enforcement. With such a change incorporated into a pattern including the rule of *Standard Stations* and abolition of the *Colgate* doctrine, small dealers could find a new freedom from the possible pressures of powerful sellers that may compel them to competitively unsound decisions which result in ultimate detriment to the public.

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101. Kessler & Stern at 82.