

A Reply

Bradford C. Snell*

Mr. Selander's Comment purports to refute my contention that annual style change is an unlawful market weapon used by the Big Three automobile manufacturers to achieve unprecedented structural concentration and to erect insurmountable barriers to new entry.¹ On its face, the Comment is both inconsistent and superficial in its analysis of the rise of concentration in the industry. I argued in my earlier Note that the Big Three's use of annual style change was largely responsible for the elimination of nearly one hundred smaller automobile producers, the erection of insuperable barriers to newcomers, and the transformation of automobile manufacturing into a tight oligopoly.² In attempted rebuttal, Mr. Selander produces a laundry list of factors other than annual restyling which he conjectures may have contributed to the decline of competition in this industry: the Depression,³ a change in consumer demand from initial to replacement,⁴ the substitution of closed for open bodies,⁵ the inception of installment purchasing.⁶ Although these developments may well have hastened the trend towards concentration, only the Depression is arguably a causal element. Yet I examined and discounted that possibility in a passage which Mr. Selander either failed to read or chose to ignore. I cited Lanzillotti for the effect of the Depression on the early auto firms: "The attrition during the depressed thirties was only slightly greater than in the booming twenties."⁷ The Depression, therefore, could not explain the massive exit of producers from the industry during the four decade period 1923-1963.⁸

A closer reading reveals that Mr. Selander actually concedes, albeit

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1. Note, *Annual Style Change in the Automobile Industry as an Unfair Method of Competition*, 80 YALE L.J. 567 (1971) [hereinafter cited as Snell].

2. See Snell 577-92.

3. Selander, *Is Annual Style Change in the Automobile Industry an Unfair Method of Competition? A Rebuttal*, 82 YALE L.J. 691 (1973) [hereinafter cited as Selander].

4. *Id.* at 694.

5. *Id.*

6. *Id.*

7. Lanzillotti, *The Automobile Industry*, in W. ADAMS, *THE STRUCTURE OF AMERICAN INDUSTRY* 321 (1961), cited in Snell at 585.

8. The most recent exit of a domestic producer occurred in 1963 when Studebaker-Packard withdrew from automobile production. *AUTOMOTIVE NEWS, ALMANAC* ISSUE 58 (1971).

reluctantly, the concentration-increasing impact of annual style change on the automobile industry. I suggested in my piece that style change raised the capital costs of entry and survival in this industry considerably more than tenfold.⁹ In addition to prohibitively expensive yearly retooling, it required three other costly activities which small volume producers could ill-afford to undertake: in-house production at a 250,000 annual unit output of specialized body and engine components, extensive advertising campaigns to accompany new model introduction, and a nationwide network of franchised dealers with specialized maintenance capabilities. To enter and survive in the automobile industry in the 1970's, a firm would need at least \$780 million. By contrast, had the industry not been restructured by annual restyling, entry would cost about \$55 million, or less than one-tenth as much.¹⁰

Mr. Selander admits that annual restyling increased each of these four entry/survival costs. He accepts my conclusion that yearly retooling seriously disadvantages small volume producers by forcing them prematurely to scrap expensive tools, dies and jigs: "The Note correctly observes that other things being equal the premature scrapping will increase the average costs of any firm producing a volume of less than 250,000 cars a year."¹¹ And he concedes that style change required enormous investments in components production: "Annual style change . . . [was] one factor leading an automobile firm to recognize the efficiencies attained by the vertical integration of components production."¹² Mr. Selander also admits that "product differentiation" (*i.e.*, annual restyling) necessitated a nationwide network of dealers with specialized maintenance capabilities.¹³ Although, as he points out, Big Three dealers finance their own operations,¹⁴ a new entrant lacking an assured sales volume would be forced to assume the costs of financing a national distribution system.¹⁵ In addi-

9. Snell 589-90.

10. *Id.* at 587-90.

11. Selander 702. The 250,000 unit figure represents the minimum efficient level of output required for the production of annually restyled automobiles. J. BAIN, BARRIERS TO NEW COMPETITION 245 (1956).

12. Selander 697.

13. *Id.* at 698.

14. *Id.* at 699.

15. George Romney, the former American Motors President, estimated that integration forward into a nationwide distribution network in 1958 would cost a 250,000 unit entrant no less than \$326 million. SENATE SUBCOM. ON ANTITRUST AND MONOPOLY OF THE COMM. ON THE JUDICIARY, STUDY OF ADMINISTERED PRICES IN THE AUTOMOBILE INDUSTRY, 85th Cong., 2d Sess. 16 (1958). Subsequent studies place this figure at from \$1 to \$2 billion. See, e.g., Boyle, *Restructuring the Automobile Industry: "Exclusive Dealing" as an Unfair Method of Competition under the FTC Act*, 5 ANTIT. LAW & ECON. REV. 19, 28 (Fall 1971).

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tion, by choosing to dispute the amount rather than the existence of style change-generated advertising, Mr. Selander implicitly acknowledges this cost factor as well.¹⁶ In short, with only minor qualifications, his rebuttal affirms the concentration-increasing impact of annual style change on the automobile industry.

What then is really at issue? Apparently, it is not the causal relationship of annual restyling to industry concentration. Instead, the latent yet fundamental issue is whether a highly concentrated automobile industry serves consumers better than one which is competitively structured. In my Note I argued that this industry's strikingly anticompetitive structure (three firms account for ninety-seven percent of domestic production)¹⁷ resulted in anticompetitive conduct (*e.g.*, price fixing¹⁸ and product collusion¹⁹) and unsatisfactory market performance (*e.g.*, inflated selling costs, product imitation, higher-than-competitive-prices, collusive suppression of technological innovation, and persistently high rates of return²⁰). To restore competition, I suggested that divesting GM, Ford and Chrysler of all but one of their respective assembly facilities would provide plants well in excess of the efficiency threshold (60,000 non-restyled cars per year) for as many as forty-two new producers.²¹ Spin-off of the Big Three's parts and distribution facilities, moreover, would enable new competitors to assemble automobiles with improved performance capabilities from components supplied by a variety of independent parts manufacturers and sold through independent distributors.²²

Mr. Selander promotes a radically different view—one apparently supported by General Motors,²³ whose dominance of the automobile industry is widely-acknowledged. For example, he rejects any attempt to restore competition by restructuring the industry because the Big Three “will incur costs in learning how to cope with the new busi-

16. Selander 703.

17. Snell 570.

18. The most recent instances of concerted price-fixing among the Big Three appear in the government's 270 page bill of particulars filed on January 2, 1973 in the fleet buyers litigation. *United States v. General Motors Corp., et al.*, Cr. No. 47-140 (E.D. Mich). Therein are contained the government's documented allegations that the chairmen of GM, Ford and Chrysler participated in “summit meetings” whose purpose, *inter alia*, was to fix prices on fleet automobile sales.

19. *See, e.g.*, the government's complaint in 1969 charging the Big Three with collusive suppression of automotive emission control development. *United States v. Automobile Mfrs. Ass'n, Inc.* (D. Cal. January 10, 1969).

20. Snell 571.

21. *Id.* at 608-09.

22. *Id.*

23. Mr. Selander apparently developed his research as a summer law clerk of General Motors. Selander 691, n.*.

ness environment.”²⁴ In truth, GM would quite understandably fear that a “new business environment” based on competitive free enterprise would force a reduction in car prices and deprive it of the monopoly profits which it currently shares with Ford and Chrysler. Mr. Selander concludes with a warning which must warm the hearts of General Motors executives: a competitively structured industry “would provide less desirable transportation to consumers.”²⁵

This is not an incredible position for General Motors; but it is for a law student presumably familiar with the policy of competition underlying our federal antitrust laws. On the other hand, Mr. Selander’s failure to refer to a single antitrust case or relevant statute suggests a basic unfamiliarity with either precedent or policy. A brief passage from Mr. Justice Black’s opinion for the Supreme Court in *Northern Pacific Rwy.*, a leading antitrust decision, may be instructive:

The unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress²⁶

24. *Id.* at 709.

25. *Id.* at 710.

26. *Northern Pacific Rwy. Co. v. United States*, 356 U.S. 1, 4-5 (1958).

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