

# JOHN WON'T SELL—BILL WON'T BUY. DOES IT MATTER WHAT THE REASON WHY? ANTITRUST REFUSALS TO DEAL

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## INTRODUCTION

In the many years since the passage of the Sherman Anti-Trust Act<sup>1</sup> its substantive provisions have gone unamended.<sup>2</sup> The Act proscribes *concerted action*<sup>3</sup> resulting in restraints of trade, or directed toward achieving monopoly power and *single-enterprise action*<sup>4</sup> directed toward achieving monopoly power or the exercise of existent monopoly power already achieved. This is not to say that there has not been considerable legislation enacted subsequent to the Sherman Act proscribing both general and specific business enterprise activity some of which might well have been read into the Sherman Act by judicial interpretation.<sup>5</sup> Particularly notable are the Federal Trade Commission Act<sup>6</sup> and the Clayton Act.<sup>7</sup>

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<sup>1</sup> 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1964).

<sup>2</sup> The Miller-Tydings amendment, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1964), provided for special exemption for resale price maintenance contracts pursuant to valid state laws. The maximum penalties for violation were increased from \$5,000 to \$50,000, 69 Stat. 282 (1955). By indirection the McGuire Act, 66 Stat. 632 (1952), 15 U.S.C. § 45 (1964), which became necessary to effectuate a complete exemption of resale price maintenance remedies following the limitation read into the Miller-Tydings amendment by Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951), modified the Sherman Act though it literally was an amendment to the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. § 41 (1964). Hereinafter, the statute will be referred to as the Sherman Act or as section 1 Sherman or section 2 Sherman when referring to particular sections.

<sup>3</sup> Both section 1 and section 2 of the Sherman Act proscribe concerted action. Section 1 proscribes restraints of trade effected by "contract, combination in the form of trust or otherwise, or conspiracy" and section 2 proscribes actions that "combine or conspire . . . to monopolize."

<sup>4</sup> Section 1 proscribes *no* action that is single or unilateral. Section 2, on the other hand, in addition to proscribing group or concerted action, also proscribes single action—"Every person who shall monopolize, or attempt to monopolize." (Emphasis added.)

<sup>5</sup> Some statutes of a substantive nature proscribing specialized business activity include Automobile Dealer Franchise Act, 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-1225, (1964); Bank Holding Co. Act, 70 Stat. 133 (1956), 12 U.S.C. §§ 1841-1844 (1964); Connally Hot Oil Act, 49 Stat. 30 (1935), 15 U.S.C. §§ 715-715m (1964); Packers and Stockyards Act, 42 Stat. 159 (1921), 7 U.S.C. §§ 181-229 (1964); Commodity Exchange Act, 42 Stat. 998 (1922), 7 U.S.C. § 1 (1964). For a full list of legislation affecting antitrust related trade-regulatory enactments see 4 TRADE REG. REPT. at 30002-003.

<sup>6</sup> 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1964).

<sup>7</sup> 38 Stat. 738 (1914), 29 U.S.C. § 52 (1964).

Although this writer has not researched the problem sufficiently enough to enable an authoritative explanation, it would seem that the phenomenon of enacting new legislation to curb alleged evils in any area, rather than re-drafting the basic legislation concerned with the problem area, is not limited to antitrust.<sup>8</sup> Persons only minimally acquainted with antitrust law will recognize that, absent *attempts to monopolize*, or *achieving* monopoly, a restraint of trade effected by single-enterprise action is not proscribed by the Sherman Act. What comprises single-enterprise action, as contrasted with concerted (group) action, is an area of dispute that has, as yet, not been satisfactorily resolved.<sup>9</sup> Settlement of the dispute by employing a legal fiction which presumes that certain single-enterprise action is concerted (group) action when it produces a restraint of trade, flies so in the face of fact that it is unacceptable to some courts.<sup>10</sup> Short of accepting this legal fiction, the reported decisions fail to produce any consistent guide for determining what factual patterns of business activity can properly be labeled the result of contract, combination, or conspiracy.<sup>11</sup>

<sup>8</sup> Familiar illustrations include the Negotiable Instruments Act followed by the Bank Collection Code; National Labor Relations Act followed by the Labor-Management Relations Act; Interstate Transportation of Goods Act followed by the Lindberg Law; and more closely connected to the subject at hand, the Federal Trade Commission Act followed by the Truth in Packaging Act. *Contra*, amendment of the Clayton Act by expanding section 2 to 2a, 2b, 2c, 2d, 2e to obtain the result desired though the change is more popularly known as the Robinson-Patman Act, and the amendment of the Sherman Anti-Trust Act to include the exceptions of the resale price maintenance concepts more popularly known as the Miller-Tydings Act. A recent commentator writing on the subject of reciprocity purchasing, and recognizing that this restraint to competitive activity can likewise be effected through the tactic of refusal to deal, suggests new specialized legislation to prohibit the activity. See Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873, 883-84 (1964).

<sup>9</sup> For some significant contributions toward a solution of the dispute see Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963); Symposium, *Problems of Conspiracy—Problems of Combination*, 1958 ANTITRUST LAW SYMPOSIUM 3; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

<sup>10</sup> See, e.g., *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (where the alleged concert was between officers of the Motorola Co.); *Johnny Maddox Motor Co. v. Ford Motor Co.*, 202 F. Supp. 103 (W.D. Tex. 1960); *Herren Candy Co. v. Curtis Candy Co.*, 153 F. Supp. 751 (N.D. Ga. 1957) (where the alleged concert was between the company, its sales manager and route salesmen). For a conceptual discussion see Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?* 11 FED. B.J. 130 (1951). Cf. *United States v. Timken Roller Bearing Co.*, 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

<sup>11</sup> See TRADE REG. REPT. under "Intra-Company or Organization Conspiracy." ¶ 1435, 2534-39 for a long list of irreconcilable cases.

Before proceeding further, the writer acknowledges the economic doctrine presently supported by some, that no single-enterprise action, absent monopoly, can effect a restraint of trade.<sup>12</sup> For those who accept this doctrine as realistic, the balance of this article will have little or no meaning since a major premise for the following remarks is that *single-enterprise actions can and sometimes do effect restraints of trade*. Further, when measured by the rule of reason or the per se doctrine applicable to *concerted* (group-produced) restraints, it can be argued that *single-enterprise* actions deserve to be sanctioned in a similar manner.

The doctrine that single-enterprise action cannot (absent monopoly) effect a restraint of trade presumes a structured economy of the classical variety where buyers and sellers are so numerous and each controls so little of the total market for the product, that individual decisions produce no restraint on the economy; such decisions are, in fact, the very life blood of the economy. The writer submits that this doctrine is valuable primarily for discussions in classroom economics, to contrast what *could be* with *what is*. When conclusions based on a classical structured economy are used to attempt to rationalize complete freedom of choice for the businessman to determine his method of operation, the rationalization fails because of the unrealistic foundation upon which it is based. No one will suggest that a man can do business in any manner he pleases, since legislation has long been in effect which proscribes, in general terms, any *concerted* action by businessmen which restrains trade.<sup>13</sup> The time is appropriate to consider whether additional legislation should be passed which proscribes in general terms individual (non-concerted) action if a restraint of trade results therefrom.

The word "generalize" is meaningful in relation to the problems mentioned earlier—that specific new legislation often serves as a

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<sup>12</sup> Those adhering to this doctrine presuppose that the economy is of the "pure competition" variety where single traders have no effect on price or market supply or aggregate demand. Such assumptions are held by so few today, in view of the obvious evidence of contrary conditions, as to be of negligible importance. All too often, however, conclusions drawn by those far too economically sophisticated to be classified as belonging to the above described group can be traced to these false presuppositions. The very lack of any proscribing language in the Sherman Act against individual non-concerted activity, except where connected with monopoly activity, may be indicative of conclusions of this nature.

<sup>13</sup> See statute cited note 1 *supra* (Section 1) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal . . .").

substitute for amendment to more generalized legislation. Conceding the fact that Section 5 of the Federal Trade Commission Act does in fact provide an extremely general proscription against "unfair competition" or "unfair or deceptive practices in commerce,"<sup>14</sup> nevertheless the boundary of such proscription has most often been described as encompassing only those restraints that are proscribed by sections 1 and 2 of the Sherman Act.<sup>15</sup> Restraints, short of attempts to monopolize or monopoly, by single-enterprise action are not within such provisions. Conceivably, any single-enterprise action resulting in unreasonable restraints could be interdicted by Federal Trade Commission action. To reach this conclusion, one must first accept the premise that all unreasonable restraints constitute "unfair competition" regardless of the type of action—concerted or single-enterprise—used to effect the unreasonable restraint. For those who are satisfied that the Federal Trade Commission can and will exert sufficient control over such restraints through issuance of cease and desist orders and that such orders will be sustained when reviewed by the courts, a complete answer to the problem is indicated. However, the treble damage remedy, criminal complaints, and Justice Department civil injunctive action should, in the writer's opinion, also be available to provide the necessary deterrents to such undesirable business activity. Furthermore, prohibition of certain specific business activity, whether concerted or not, unfortunately seems to stimulate business to modify its activity so as to achieve immunity while still producing the undesirable restraints.

This writer suggests that a generalized prohibition of single-enterprise-created restraints of trade, despite the uncertainty that would necessarily result from judicial interpretation, would prove a greater

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<sup>14</sup> 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1) (1964) ("Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."). In 1938 the Wheeler-Lea Act added the language relating to unfair and deceptive acts or practices in commerce. Such substantive additions were made necessary by the holding of the United States Supreme Court in *FTC v. Raladam Co.*, 283 U.S. 643 (1931) when false claims made for an obesity cure were found immune from the proscriptive language "unfair competition" for the reason that no competitors of the product were harmed.

<sup>15</sup> The Federal Trade Commission has no direct enforcement power over the provisions of the Sherman Act. However, to the extent that any actions by those who are subject to the proscriptions of the Sherman Act are violative of section 5 of the Federal Trade Commission Act, the Commission is authorized to issue cease and desist orders prohibiting such activity. If the outer boundaries of section 5 do not include single-enterprise action which effects a restraint of trade, then section 5 would have little value in excess of the existing Sherman sections. See *ATT'Y. GEN. NAT'L COMM. ANTI-TRUST REPT.* 374 (1955). The present state of the law is exhibited in the Supreme Court's refusal to agree with the FTC that *unilateral* action, expressed as refusal to buy, violated section 5 of the act. *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924).

deterrent to undesirable business activity than any legislative attempt to particularize what is and what is not permissible. This approach might well meet with some degree of general acceptance, since businessmen and their legal advisers have not been particularly pleased with the alleged certainty of particular prohibitions;<sup>16</sup> and moreover, economists have seriously doubted the economic validity of some attempts in this area.<sup>17</sup>

The most serious problem in a general prohibition of single-enterprise restraints, as seen by the writer, would be the determination of a measuring device by which single-enterprise activity could be judged. This is so since it is necessary to preserve some semblance of the freedom of choice which has been so necessary to our traditional concepts of a free business economy, and at the same time protect the economy from undesirable restraints resulting from such freedom of choice.

This article will endeavor to point up the particular areas where existing trade legislation fails to prevent undesirable restraints. It will also indicate where inconsistent reasoning becomes necessary to reach the desired results, and suggest possible solutions with or without legislative changes.

#### GENERAL ECONOMIC SETTING

Current economic structure includes manufacturers who sell directly to consumers, and retailers who manufacture their retail inventory; however, such a vertically integrated characterization is properly applicable only to a very limited portion of the economy. In contrast, most goods reach consumers after having been manufactured by one business enterprise, and having passed through numerous other

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<sup>16</sup> The famous or infamous amendment to the Clayton Act most popularly called the Robinson-Patman Act, 38 Stat. 730 (1914), 15 U.S.C. § 13 (1964), is an example of an attempt to particularize an activity that allegedly was anticompetitive in nature (price discrimination). A wealth of critical comment exists. For those interested, a bibliography of comments both critical and commendatory can be found in ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962). See also the Automobile Dealer Franchise Act, 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-1225 (1964). Special attempts to exempt particular activity which would otherwise clearly be anticompetitive activity has also resulted in legislation that can be criticized. See, e.g., Small Business Act, 72 Stat. 384 (1958), 15 U.S.C. § 631 (1964); Bank Merger Act Amendment of 1966, Pub. L. No. 356 89th Cong., 2d Sess. (Feb. 21, 1966); Insurance Anti-Trust Moratorium Act, 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-1015 (1964); ("Professional Sports Telecasting, Football Merger," 75 Stat. 732 (1961), as amended, 15 U.S.C. § 1291 (1964)).

<sup>17</sup> Among those whose comments are most incisive concerning the Robinson-Patman Act's deficiencies are M. A. Adelman, Thomas H. Austern, Cyrus Austin, Corwin D. Edwards, and Frederick Rowe.

businesses during the process of distribution. Classification of the levels of distribution as manufacturer, jobber, wholesaler, retailer, etc., is today arbitrary; only an empirical study of the distribution process within the industry being investigated will enable one to understand the place in the distribution structure that is occupied by a particular "wholesaler" or "distributor."<sup>18</sup> Many manufactured items do not reach the consumer in the form in which they leave the manufacturing enterprise; instead they often reach the consumer as a component or sub-assembly of an entirely different product.<sup>19</sup>

The phrase "line of commerce" in the antitrust vernacular is a way of describing the functional area within the economic structure in which businesses operate.<sup>20</sup> The retailer's line of commerce includes both selling to consumers and buying from suppliers. The manufacturer's line of commerce includes selling to the enterprise next in line in the distribution process or to another manufacturer who will use the items as component parts; it also includes buying raw materials and labor, and obtaining capital.

When the impact of single-enterprise restraints on competitors is felt only in the line of commerce in which the one effecting the restraint operates, economic theory has traditionally postulated that the restraint is not serious, because the competitive disadvantages suffered by the restrainer are normally sufficient to attenuate any serious restraint. That is, a seller's sale to any buyer restrains another seller from making a sale of that item to the buyer to the extent the buyer wants but one of the item. This restraint on his fellow competitor is permissible, thus sellers normally can set prices for products they sell. A seller who fails to make the proposed sale attractive to the buyer by demanding too high a price is always faced with the possibility that other sellers competing for the same demand will obtain the sale by offering a more attractive price or product. However, this oversimplified explanation of competition as a built-in

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<sup>18</sup> Cf. Teele, *Logics and Emotions in Marketing*, in MCNAIR & HANSEN, READINGS IN MARKETING 314, 316.

<sup>19</sup> A few examples of such consumer products are: the tires, paint and glass in automobiles; small gasoline motors in lawn mowers; television tubes in receiving sets; and electric motors in motorized small tools.

<sup>20</sup> Establishing the boundaries of lines of commerce becomes an important part of every antitrust suit charging harm to competition, tendency to create a monopoly, or monopoly. The term "relevant market" is used to describe the content of the line of commerce. The process necessarily involves including or excluding particular geographical and product areas. Often the most significant issue before the court is delineating exactly what line of commerce is being affected anticompetitively by the defendant's activity.

deterrent to a seller's arbitrary determination of the price of his goods is much less effective in deterring unreasonable restraints when conditions of sale other than price are agreed upon by sellers and buyers. Recognizing this, conditions in a sales agreement (1) that the purchaser refrain from purchasing from a competitor of the seller, (2) that the purchaser buy all his needs from the seller, and/or (3) that the buyer purchase an unwanted item along with the desired item, are specifically prohibited by Section 3 of the Clayton Act.<sup>21</sup>

In reality, conditions of a sale of the variety stated above produce restraints on other firms competing with the seller as well as restraints on the buyer. Thus, the seller's conditions of sale produce a restraint of trade in both the seller's line of commerce and the buyer's line of commerce. Most business enterprises can thus effect restraints in two lines of commerce by means of the conditions under which they are willing to sell. It should be pointed out that where buyer purchasing power is sufficient to control the provisions of the sales agreement, conditions requested by the buyer can similarly effect restraints in both buyer's and seller's lines of commerce.<sup>22</sup> Here again the buyer's simple condition of purchase, that the price be agreeable, is admittedly his own arbitrary choice. Despite the fact that such buyer-produced restraints are possible, these restraints are not specifically prohibited under Section 3 of the Clayton Act.<sup>23</sup> Furthermore, a simple refusal to buy and a simple refusal to sell are apparently not

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<sup>21</sup> The specific language of Section 3 of the Clayton Act prohibits only the condition that the buyer "shall not use or deal in the goods . . . of a competitor . . . of the seller . . ." when such condition accompanies, or is a part of the sales transaction between seller and buyer. In addition, the effect of the sales transaction accompanied by the specified condition must be "to substantially lessen competition or tend to create a monopoly in any line of commerce" before the activity becomes unlawful. However, court interpretation has resulted in determinations that agreements by buyers to purchase their *requirements* for operation of their businesses, as well as agreements that they will purchase an item (usually not desired by them) along with the item desired, also has the effect of denying them the freedom to use or deal with competitors of the seller, thus, such conditions are equally proscribed. *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam* 343 U.S. 922 (1952) (requirements contracts); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (tying agreements).

<sup>22</sup> When buyers are sufficiently strong to induce sellers to agree to refrain from selling to competitors of the buyer, such an agreement forecloses the buyer's competitors from competing with the buyer because of their inability to obtain the product of the seller, and also eliminates the seller as a competitor of other sellers in the seller's line of commerce.

<sup>23</sup> The Clayton Act language applies only where the obligation to cease dealing with another is an obligation of the buyer or lessee, and makes no mention of the factual pattern where the seller or lessor is restrained in his future sales or leases.

violations of the specific prohibitions of section 3 Clayton or section 1 Sherman.<sup>24</sup>

An argument can be made that the loss of the sale or purchase accompanying the seller's refusal to sell or the buyer's refusal to buy provides the necessary deterrent to exercise of this tactic as a means of effecting unreasonable restraints of trade. The refusal to sell allows the sale to be made by the seller's competitors, and the refusal to buy allows the buyers' competitor to obtain the product. A brief illustration reveals the weakness of the argument. A retailer of multi-brand merchandise of competing manufacturers finds it essential, for maximization of his competitive potential as a retailer, to be able to carry in his inventory all or many competitive brands. To the extent that the retailer is prohibited from marketing a given brand (by seller refusal to sell to him), consumers are forced to rely solely on interproduct competition rather than intraproduct competition among several retailers carrying the same manufacturer's brand.<sup>25</sup> If a manufacturer or distributor (M) determines for reasons

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<sup>24</sup> This conclusion is stated at this point in the article as a proposition. Whether a simple refusal to sell or buy results from the factual patterns of the cases becomes an intricate problem with which much of this paper is concerned.

<sup>25</sup> One writer categorically states that the statement of the issue in terms of intra-brand versus interbrand competition is a fallacious way of posing the problem. Cf. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 375, 472 (1966). His conclusion is that all vertical restraints are non-productive of anticompetitive effect, and the measuring device for determining the need for proscription of business activity is whether such activity restricts output. He further concludes that contract restraints similar to integration restraints should be measured by the same formula—degree of market power. His analysis is that a producer-distributor system bound together through contract restraints that preclude intra-brand competition is a unit that must face interproduct competition or fail to survive as an economic unit. Therefore, the traditional laws of economics will preclude the unit from ever seeking inefficient methods of production or distribution. The net effect will never result in a restriction of output. He also points out that correction of inefficiencies resulting from mistakes of the producer-distributor unit are not the inefficiencies the antitrust laws are designed to prevent.

This writer is impressed with, but not convinced by, the theoretical position of Professor Bork. Mistakes of producers in judging the efficiencies of their distributors, and distributors of their retailers etc., which can occur despite the resultant competitive harm which will ultimately reflect on the producer's capability to remain in business should not be encouraged. When a producer has received his reward for his part in the economic process by sale of his product to a reseller, his function should be ended. At this point the next purchaser should be able to pit one reseller against another to obtain the advantages of competition in this line of commerce. Rivalry among resellers should continue until the product reaches the end user. Rapidly changing conditions cause consumer demand to differ widely from wholesaler or distributor demand for a product. Resale price maintenance or other vertical restraints which prohibit the free interplay of competitive forces on all levels of distribution can produce rigid price structures in the short-run effect to the disadvantage of the consumer. The producer's sensitivity to the consumer-demand changes is far less likely to produce output changes or price changes if the producer has already received his reward. Should a producer



unto himself that Retailer 1 should not be allowed to sell M's product, then the consumer must look to Retailer 2 to whom M is willing to sell. Conceivably Retailer 2 has no incentive or need to price the product of M competitively since Retailer 2 is immunized from the competition of Retailer 1. What conceivable reasons would motivate M'S refusal to sell to Retailer 1? Many have been offered: Bad merchandising of "our" product; pricing the product below that which the seller prefers it to be resold; failure to service the product satisfactorily; degrading the product; the low public image of the retailer; and oversaturation of the available sales outlets.<sup>26</sup>

Some sellers, unwilling to suffer the ultimate disadvantage of loss of sales resulting from a refusal to sell when buyers are unwilling to accept the desired conditions, or, on the other hand, unwilling to chance the antitrust risks of contracting with buyers under conditions prohibited by section 3 Clayton, have used other devices to accomplish the same results. The consignment device allows the seller to retain title until the goods pass from the retailer to the consumer. This has the effect of subjecting the retailer to the control of the seller and enables the conditions of the resale to be controlled, including the price. This device has been held both valid<sup>27</sup> and invalid<sup>28</sup> as a method of determining ultimate conditions of resale.

Hopefully, the reader will at this point discern that the writer is suggesting that in order to avoid serious restraints of trade effected by single-enterprise activity, the economic structure of our distribution system requires that all distributors have equal nondiscriminatory access to competing products. This will enable each distributor to perform at his maximum competitive potential. How to balance the need for such access with the interest the manufacturer or distributor has in choosing who is to handle the product constitutes the problem, as yet unsolved.

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integrate and operate multiple retailer distribution outlets, it is suggested that he then will be close to consumer demand. Where he faces interbrand competition, he will undoubtedly find himself selling his own product at different prices in different locations, or at different times, or having to adopt other competitive tactics to meet a changing price structure, or the competitive tactics of his competitor. This does not occur when sellers are far removed from the retail market, as they must be in nationally-distributed products. Thus, contract vertical restraints can result in far more rigid price structures over longer periods of time than complete integration.

<sup>26</sup> See the long list of business-offered reasons listed in Lockard & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 921-22 (1952).

<sup>27</sup> *United States v. General Electric Co.*, 272 U.S. 476 (1926).

<sup>28</sup> *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

The reciprocal problem of how to achieve for the manufacturer or distributor a market for his product where single-enterprise refusal to buy is motivated by a desire to effect some restraint on some line of commerce must not be overlooked. Whether there are here considerations of a different nature requiring different solutions will be discussed later in the article.

It is now appropriate to discuss specific factual situations where serious restraints of trade, in the writer's opinion, were effected; some of these restraints remained unprohibited by existing antitrust legislation as interpreted by the court decisions.

#### SINGLE-ENTERPRISE DECISIONS—WHAT IS INCLUDED?

In all probability, most business activity results from single-enterprise decisions. Clear-cut examples include decisions to hire and fire personnel, to expand or restrict plants, to regulate production schedules and to make announcements of price or product quality changes. So long as such decisions are not made in concert with competitors, any ensuing restraints on competition are acceptable, despite the fact that some of these decisions might not have been made if the requisites of pure competition have been assumed.<sup>29</sup> Pressures from competitors in the form of competitive action which motivate single-enterprise decisions do not thereby make such single-enterprise decisions concerted. If X lowers the price of his product and the action motivates Y to lower the price of his product, Y's decision should still be properly classified as a single-enterprise decision.<sup>30</sup>

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<sup>29</sup> For instance, a price announcement that exceeded "market price" or which was below "market price" would never be made according to classical economic theory if the requisites of pure competition existed. No seller can sell above the price which the market has determined, nor would he be prevented from selling all he could produce at the existing market price; so, no inducement to reduce his price below market would exist. Businesses are thus relegated to adjusting their output to the point where their marginal costs equal marginal revenue. Businessmen and all others having any sophistication realize that, instead, decisions to raise or lower prices irrespective of what may be the "market price" (if there is such a thing) are made every day. Nonbelievers should consult BAIN, *PRICING DISTRIBUTION AND EMPLOYMENT* (1948); STIGLER, *THE THEORY OF PRICE* (rev. ed. 1952).

<sup>30</sup> Price reductions made by X to enable him to obtain a greater share of a limited market (which existed at the fictional "market price") has the economic effect of inducing X's competitor (Y) to reduce his price in order to maintain Y's existing share of the limited market. Even an announcement by one to the other that certain activity by one will produce a corresponding action by the other is not in most cases the agreed exchange for the announcement. Since there is no obligation to take the action, there is no basis for a charge that the action was concerted. Assume that two businessmen are engaged in a conversation. X says, "If I lower my price will you lower yours?" Y replies, "I certainly will." Or X says, "If I increase my price will you increase yours?" and Y replies, "I certainly will." Do either of these conversations necessarily

So long as Y is free to react to X's action as Y chooses, then Y's decision should be classified as nonconcerted.

This article is concerned with a special type of business decision (that of refusal to deal or threat of refusal) having a direct impact on the bargaining relationship between seller and buyer which results in a possible unreasonable restraint of trade. Proper classification of this type of decision as either a single-enterprise or a concerted decision is essential in order to determine whether the decision is proscribed by existing legislation, which prohibits only concerted activity.<sup>31</sup>

Performance of any obligation resulting from agreement is concerted action. More particularly, any decision made by a seller resulting from agreement with other competitor-sellers or with buyers, which agreement obligates the decision, compels us to properly classify the decision as concerted. Moreover, the business decision to refuse to deal could be the result of such an agreement. An agreement between one or more competing sellers obligating one or more to refuse to sell to a particular buyer upon the happening of a

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result in contract, conspiracy or concert? Not necessarily. If all Y means, when he states affirmatively that he will lower or raise his price respectively when X does, is that he will need to lower it in the first case to preserve his share of the market and will need to raise it in the second case to maximize his profit, his statement of his intended future action is in no way the agreed exchange for X's action and simply represents an announcement of his intention which he may or may not exercise when X actually raises or lowers his price. It is not promissory in nature and thus is not of a concerted nature. Businessmen are not necessarily in concert simply because they inform each other that future actions will follow. Naturally, the converse of the conclusions herein stated would result from a characterization of the conversation that Y was promising X in exchange for X's action that he, Y, would take similar action. That two characterizations can be drawn from the conversation is all that the writer is saying. Identical activity by competitors, which activity would not normally be possible without concert, or activity that normal economic theories would contraindicate, certainly are suspect; but, concert is *more* than identity of action. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950).

<sup>31</sup> When refusal to deal is a tactic chosen by a monopolist or one attempting to become a monopolist, single-enterprise action is involved and can be prohibited under existing legislation without concerted action. However, in these instances it is the activity of a monopolist or the activity of someone attempting to become one that is proscribed, and any activity, not limited to refusal to deal, in such a context is illegal. Where the refusal to deal is unaccompanied by monopoly overtones, single-enterprise use of the tactic under either section 1 Sherman or section 3 Clayton must arise in a context of agreement. Section 5 of the Federal Trade Commission Act provides the cease and desist sanction for unfair competition or unfair and deceptive practices in commerce, and thus could be used to proscribe single-enterprise refusals to the extent one is willing to admit the tactic meets the test of unfair competition or an unfair or deceptive practice. The FTC has not made use of this argument.

predetermined condition forces us to characterize the performance of the agreement as concerted.<sup>32</sup>

If the agreement were between the seller and competitors of the seller's customer, performance of the obligation of the agreement would still be a concerted decision.<sup>33</sup> The concerted nature of the decision stems from the obligation in the agreement and not from the relation of the parties to it. Therefore, where the agreement does not obligate the decision the decision is optional and nonconcerted. Thus, the conclusion follows that a seller's decision to refuse to deal can be properly classified as nonconcerted despite the fact that an agreement exists between the seller and the buyer indicating to the buyer that a refusal to deal may result should the buyer be unwilling to abide by certain conditions. Failure of the buyer to meet the conditions for continued dealing permits, rather than compels, the seller to refuse further sales. In addition, where the sales agreement obligates the seller to make future sales, the buyer's failure to meet the conditions provides the seller who refuses to deal with a defense to a buyer's action for breach of contract.<sup>34</sup> The refusal to deal still remains an optional nonconcerted single-enterprise decision.

The business decision to refuse dealing, like any other decision, requires motivation for its execution. However, supplying that motivation cannot in and of itself be the controlling factor in the process of characterizing the decision as concerted or nonconcerted. If such were true, then the buyer's failure to meet conditions set by the seller as conditions precedent to further dealing would characterize the execution of the decision to refuse to deal as concerted action. Instead we logically conclude that the seller's refusal is simply carrying out an announced threat—a nonconcerted decision. If we

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<sup>32</sup> For example, if X and Y are competing sellers, both selling his respective product to Z, and an agreement between X and Y exists obligating both or one of them to cease selling to Z if either learns that Z is purchasing products from A (a competitor seller of X's and Y's), then X's and/or Y's refusal to sell to Z would be a concerted refusal. Similarly, even though there had been no preexisting agreement to refuse dealing if X and Y, on learning that Z was purchasing from A, which neither X nor Y approved, and X and Y in consideration of each other's promise or act likewise promise or act to refuse, such a refusal would be concerted. *Klor's, Inc., v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *cf.* *United Shoppers Exclusive v. Broadway-Hale Stores, Inc.*, TRADE REG. REP. (1966 Trade Case.) ¶ 71727 (N.D. Cal. Nov. 24, 1965).

<sup>33</sup> *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, *supra* note 32.

<sup>34</sup> Where the sales agreement in no way obligates the seller to any future sales (the normal open-account sales agreement), the seller needs no defense to his refusals to make further sales. He is simply refusing offers to purchase, and absent any specialized situation requiring forced sales as might exist in a public utilities context, the seller's power to refuse sales is the equivalent of his *right* to do so.

assume a seller who is willing to continue dealing, but whose decision to eliminate further sales to a buyer is induced or motivated by economic pressure brought to bear on him by competitors of the buyer—will such a refusal to sell be deemed concerted? Suppose a seller, with an announced policy of not selling to buyers who resell below an announced price, solicits and receives information from certain buyers which indicates to the seller that other buyers are violating the pricing policy. If he thereafter uses such information in reaching his decision to refuse to sell to the violators, will such refusal, when executed, constitute a concerted refusal?<sup>35</sup> This writer suggests that refusals should not be classified as concerted unless the refusal to deal results from a concurrent or preexisting obligation, derived from an express or implied agreement calling for the refusal. The essence of illegality of *concerted* action is that the parties have obligated themselves to future action which leaves them no longer independent decision makers. Such fettering can be accomplished in any form—contract, combination, or conspiracy—but whatever the form, the essence of the arrangement must be one leaving the parties obligated rather than free to decide their future course of action. We can readily see that the essence of concerted action is missing when we have only (1) economic pressure on a seller who succumbs to the pressure by refusing to deal, or (2) refusing to deal after receiving aid from others who have a community of interest in goals to be accomplished by refusing to deal. The writer realizes that the act of refusing to deal, in the right circumstances could be proved to be the acceptance of an offer for a unilateral contract made by those buyers who exert pressure on the seller to refuse to deal with the nonconforming buyer. Where those circumstances can be proved the refusal becomes concerted within the writer's definition.<sup>36</sup> Likewise, a promise express or implied to refuse to deal, made to anyone either pressuring him or aiding him (made as a means of relieving the

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<sup>35</sup> These very facts have unfortunately been regarded as sufficient to be characterized as concert. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

<sup>36</sup> If a seller has *not* promised his buyers to refuse dealing with a price cutter in return for their cooperation in reporting price cutting to him, it is highly unlikely that his refusing to deal is both the act of performance and the acceptance of their promise to him to perform some kind of future action such as continued purchases from him provided he will refuse dealing to the disclosed price cutter. Only where his refusal is both the performance of his obligation and the acceptance of their offer for a unilateral contract, wherein they are promising something to be performed in the future in return for his willingness to refuse dealing, would the refusal ever be properly classified as the acceptance of an offer for a unilateral contract and thus become concerted. Otherwise, in most cases, it is nothing but his optional unobligated carrying out of an announced plan.

pressure or rewarding the aider) would make the refusal which followed concerted, since the refusal would be merely the performance of an obligation.

Despite some court holdings to the contrary,<sup>37</sup> it is also a thesis of this article that single-enterprise decisions result whenever the decisions are controlled by a single enterprise, regardless of whether divisions, subsidiaries, or combinations of employees were originally involved in reaching the decision. For example, the decision to refuse to deal arrived at after a joint discussion between the Vice President of sales and the Regional Sales Manager is not a concerted refusal. Neither would a conspiratorial refusal be effected if the President of General Motors Corporation together with Pontiac and Chevrolet Division Heads jointly decided that the Chevrolet Division will cease sales to dealer X.

The writer will now attempt to show, by use of selected case examples, that some judges, in their desire to prohibit vertical restraints of trade (traditionally recognized as per se unreasonable), have irrationally classified refusals to deal as concerted in order to bring them within the proscription of section 1 Sherman.

#### REFUSALS TO DEAL USED AS A TACTIC TO SUPPORT RESALE PRICE MAINTENANCE

The principle, first enunciated in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>38</sup> that vertical resale price agreements between sellers and buyers constitute per se unreasonable restraints of trade prohibited by section 1 Sherman was well entrenched by the time *United States v. Colgate & Co.*<sup>39</sup> was decided. However, the Supreme Court in *Colgate*, adhering to correct doctrine (that nonconcerted action is outside the prohibitory effect of section 1 Sherman), characterized Colgate's refusal to deal as individual and nonconcerted and thus immune from the section. Thus, immunity from section 1 depended on the nonconcerted nature of the refusal to deal rather than the lack of unreasonable restraint of trade resulting therefrom. The facts in *Colgate* clearly showed that prior to the decision not to deal, the

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<sup>37</sup> *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956); *Schoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 1964 Trade Cas. 79745 (D. Colo.); *Deterjet Corp. v. United Aircraft Corp.*, 1962 Trade Cas. 77276 (D. Del.); *United States v. Arkansas Fuel Oil Corp.*, 1960 Trade Cas. 76493 (N.D. Okla.).

<sup>38</sup> 220 U.S. 373 (1911).

<sup>39</sup> 250 U.S. 300 (1919).

threat of refusal to deal had caused buyer conformance to resale price maintenance, an admittedly unreasonable restraint of trade. Certainly, after the decision which strengthened the threat by making its execution permissible, the unreasonable restraint would continue.

One should not conclude too quickly that sellers desiring resale price maintenance as a condition of selling were in the same economic position following *Colgate* as they would have been under a valid state resale price maintenance statute. Sales made with the hope of buyer conformance to minimum resale prices might not produce conformance. Threats to refuse to deal might not produce conformance, and ultimate refusal would result in loss of sales. Under resale price maintenance statutes, nonconforming buyers (price cutters) can be made defendants in a suit to recover damages while sales continue. In extreme cases, buyers who are unwilling to accept resale price maintenance could refuse to buy. Such a result is more likely in theory than practice, for multiproduct buyers find it necessary to stock nationally advertised brands to insure customer loyalty, whether restricted by a resale price maintenance policy or not.

By the time it became necessary to decide *Federal Trade Commission v. Beech-Nut Packing Co.*<sup>40</sup> and *United States v. Parke, Davis & Co.*,<sup>41</sup> the Supreme Court, firmly committed to the proposition that vertical price fixing produced unreasonable restraints of trade, and presumably chafing under the *Colgate* principle which when properly used was an effective means of continuing the restraint, was predisposed to find the prerequisite conspiracy or concert in factual patterns that in no way obligated Beech-Nut or Parke, Davis, as sellers, to refuse to deal. The refusals in both cases were nonconcerted decisions made by the sellers as single-enterprise decisions. Even in *Parke, Davis* there was no showing that the intermediate wholesalers were obligated by agreements to terminate sales to price-cutting retailers, though economic motivation to do so certainly existed due to the threat of being cut off by Parke, Davis. Apparently, the Court's desire to prohibit resale price maintenance was strong enough to cause the Court to seriously undermine basic prerequisites for concerted action that were previously required to effect a prohibition of activity under section 1 Sherman.

After these two cases, the *Colgate* principle was left practically an empty shell, devoid of protective value when sellers sought shelter

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<sup>40</sup> 257 U.S. 441 (1922).

<sup>41</sup> 362 U.S. 29 (1960).

beneath it. A finding of cooperation from competitors of the price cutters in informing the sellers of conditions which would afford them facts from which to decide unilaterally whether they would refuse future sales was all the Court needed to satisfy the requirement of concert. In fact, *Parke, Davis* dropped the concept of concert and chose to make the test of illegality the use of "other means which effect adherence to his resale prices,"<sup>42</sup> *i.e.*, means other than simple refusal to deal. The words "*other means*" simply reflected (1) effective use by seller of information sources to conclude that buyers were not conforming to conditions of resale, plus (2) economic pressure against intermediate sellers who continued selling to price cutters. In the writer's opinion, the accepted doctrine that resale price maintenance as a vertical restraint is unreasonable<sup>43</sup> should not be tolerated as a sufficient reason to emasculate principles of proper classification of concerted versus single-enterprise activity.

Close analysis of *Parke, Davis* reveals that the Court was not concerned with the restraint of trade caused by the actual refusal to deal with the buyer, but instead was concerned that *Parke, Davis* by its threats to refuse to deal with price cutters, could maintain an effective resale price maintenance system.<sup>44</sup> Because the threats of *Parke, Davis* were accompanied by a factual situation which made the threat real rather than impotent, the likelihood of buyer conformance to suggested resale price maintenance became strong. Unwilling to accept any effective method of compelling resale price maintenance outside of the statutory exemption found in State resale-price-maintenance-protection laws,<sup>45</sup> the Court struck down a uni-

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<sup>42</sup> *Id.* at 44.

<sup>43</sup> Most commentators, economic and legal, have agreed that resale price maintenance is anticompetitive. See, *e.g.*, EDWARDS, MAINTAINING COMPETITION 72 (1949); GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939); MUND, GOVERNMENT AND BUSINESS 461-85 (1955); Bowman, *Resale Price Maintenance—A Monopoly Problem*, 25 U. CHI. J. BUS. 141 (1952); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954); Rahl, *Resale Price Maintenance, State Action, and the Antitrust Laws*, 46 ILL. L. REV. 349 (1951). *Contra*, Adams, *Fair Trade and the Art of Prestidigitiation*, 65 YALE L.J. 196 (1955); Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967 (1955); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 397 (1966).

<sup>44</sup> Nowhere in the opinion is there any emphasis or consideration placed on the harmful anticompetitive effect of the price cutter's (*Dart*) inability to receive *Parke-Davis* drugs for resale. Instead the court was solely concerned with the ability of *Parke-Davis*, by its threats of refusal to deal, to maintain a program of resale price maintenance.

<sup>45</sup> Other methods such as agency, consignment, or vertical integration were, of course, not before the court. The Sherman Act by amendment has exempted vertical price fixing where administered through state so-called "Fair Trade" statutes. The consensus of present opinion that such statutes are anticompetitive has led in recent years



lateral refusal to deal as a permissible business tactic when that tactic was effectively used to produce a restraint traditionally accepted as per se unreasonable.

The loss of the sale when a seller actually carries out a threat to refuse to deal constitutes the built in competitive disadvantage which may act as a deterrent to the seller's action. This inherent deterrent may possibly be the underlying but unarticulated reason why many courts find some refusals to deal "justifiable business activity."<sup>46</sup> However, when sellers use the threat of refusal to deal to maintain a vertical resale price program and enforce the threat with actual refusals, then unrealistically, a shift in thinking results and the refusals themselves become illegal.

Sellers possessed of the naked power to refuse sales to buyers can make effective use of the power to require buyer conformity to any seller-desired condition. Enough litigation has occurred where the seller-desired-condition has been resale price maintenance to enable us to observe whether the results of the litigation conform to the principles of *Parke, Davis*.

If consistency is a proper measure of satisfaction, the results of this litigation are far from satisfactory. For example, in *Dart Drug Corp. v. Parke, Davis & Co.*,<sup>47</sup> a private suit seeking treble damages, the plaintiff was the same price cutter involved earlier in the action by the Government in *Parke, Davis*, and the suit concerned a refusal by defendant to deal with plaintiff which occurred subsequent to the refusal to deal which formed the basis for the suit in *Parke, Davis*. Plaintiff lost this suit when the summary judgment awarded *Parke, Davis* by the lower court was affirmed in the court of appeals.

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to a reexamination of them in many contested cases. A significant number of state courts have found their statutes unenforceable or unconstitutional. See 2 TRADE REG. REP. ¶ 6041.

<sup>46</sup> The fact that clear unilateral refusal to deal is unproscribed does not bother the courts at all when they conclude that the reason given by the businessman for his refusal is one that any businessman would be "justified" in using as the motivation for his refusal. In fact, when the reason given for the refusal falls within the area of "justifiable reasons" some courts are uninterested in factual patterns that clearly show the refusal may have been concerted. *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, 906 (D. Md.) *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957). Concentration on the reasons given for the refusal can result in those courts' failure to concentrate on the effect the refusal has on competition. See discussion of the court in *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743, 747 (E.D. Pa. 1964), where the court, though holding the refusal of the defendant conspiratorial, distinguished individual nonconcerted refusals based on "sound business reasons."

<sup>47</sup> 221 F. Supp. 948 (D.D.C. 1963), *aff'd*, 344 F.2d 173 (D.C. Cir. 1965).

Plaintiff failed to allege any new conspiracy connected with the refusal to deal, and the court, relying on *Colgate*, characterized Parke, Davis' refusal to deal as a permissible single-enterprise tactic despite its obvious effect of inducing other buyers to conform to resale price maintenance conditions. In an action for treble damages, a buyer who fails to allege conspiracy or concert (thus technically failing to bring the defendant's activity within the proscriptions of section 1 Sherman) has only himself to blame. This is especially true where proof of the "concert" according to the *Parke, Davis* doctrine can be so easily proved by showing that "other means" have been utilized to maintain the resale price policy.

Allegations of conspiracy were made in the complaint in *Klein v. American Luggage Works*,<sup>48</sup> a treble damage action brought by Klein (the price cutter) against American Luggage Works (the seller who refused to deal). Klein based the conspiracy charge on the fact that information had been supplied by competitors of Klein to a sales representative of American Luggage Works that "someone" was price cutting. An independent and unrelated investigation by American Luggage Works revealed Klein's price cutting, and the refusal to deal followed soon thereafter. The trial court found sufficient evidence of "other means," invoked the *Parke, Davis* doctrine, and awarded judgment to the plaintiff. Reversing, the circuit court of appeals<sup>49</sup> was apparently unconvinced that American Luggage Works' refusal to deal was anything more than nonconcerted action. Because information about Klein's price-cutting activities did not motivate in any way the seller's refusal to sell, the seller and the informers were not held to have conspired. The only "other means" used by American Luggage Works was extensive literature distributed to buyers indicating the company's established policy that the product was to be sold at preticketed prices. The appellate court treated this as a mere announcement by American Luggage Works that failure to follow preticketed prices on resale would result in refusal to deal. The holding is consistent with the writer's thesis with respect to nonconcerted refusals to deal. However, the implications derived from the reasoning of the appellate court are not consistent. Clearly, if the information conveyed to the sales representative of American Luggage Works had been communicated to his superiors and had formed the basis for the refusal to deal, the court's rationale would have required a finding that the refusal was

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<sup>48</sup> 206 F. Supp. 924 (D. Del. 1962).

<sup>49</sup> 323 F.2d 787 (3rd Cir. 1963).

concerted.<sup>50</sup> Such a conclusion is contrary to the writer's thesis, which would not find concerted action so long as the seller's refusal to deal was exercised optionally.

Contrasted with *Klein* and *Dart*, wherein refusals to deal were not construed to be violative of section 1 Sherman, refusals to deal were held to be violations in the following three cases. In *Geo. Warner v. Black and Decker Mfg. Co.*,<sup>51</sup> Warner (a wholesale distributor) was told by Black and Decker (his supplier) to maintain certain resale prices in bidding for Government purchases of the product. No agreement restricting Warner's bidding practices was ever reached. Warner bid for Government purchases at prices below those Black and Decker suggested. He was warned, and Black and Decker eventually refused further sales to him. Warner sued for treble damages alleging a violation of section 1 Sherman charging conspiracy in his complaint (claiming that agreements for vertical price fixing existed between Black and Decker and other distributors). In reversing the district court's dismissal of the complaint, the circuit court made it clear that it was only deciding that an allegation of conspiracy by Warner should allow him his day in court to prove the charge.<sup>52</sup> The decision certainly can be read as approving the principle that refusal to deal, unaccompanied by "much else," is illegal when used to perpetuate a resale price maintenance policy.

A much clearer case which supports the proposition that non-concerted refusals to deal are illegal under section 1 Sherman is *A. C. Becken v. Gemex Corp.*<sup>53</sup> Though this case was decided shortly before *Parke, Davis*, the *Gemex* court recognized the existence of *Colgate* and *Beech-Nut* and attempted to reach a decision consistent with both. Plaintiff Becken was a wholesaler supplied by Gemex, a manufacturer of watchbands. The evidence clearly showed that Gemex had attempted to persuade Becken to resell the watchbands and other products which he stocked at prices set by the respective manufacturers. Becken steadfastly refused to comply, and eventually Gemex refused to make further sales of watchbands. The lower court found a unilateral refusal to deal and also found no proof of damage.<sup>54</sup> Reversing, the circuit court of appeals found not only the existence of a cause of action for treble damages due to viola-

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<sup>50</sup> *Id.* at 791.

<sup>51</sup> 172 F. Supp. 221 (E.D.N.Y. 1959).

<sup>52</sup> 277 F.2d 787 (2d Cir. 1960).

<sup>53</sup> 272 F.2d 1 (7th Cir. 1959).

<sup>54</sup> 1959 Trade Cas. 75224 (N.D. Ill.).

tion of section 1 Sherman, but also found damages in excess of \$50,000.00<sup>55</sup> The judge, after reviewing the cases including *Beech-Nut*, concluded: "A wrench can be used to turn nuts and bolts but it can also be used to assault persons. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it may not be used to accomplish an unlawful purpose."<sup>56</sup> Following this question-begging analogy, he continued by showing that Gemex clearly had a plan to sell only to those who maintained manufacturer-established prices. Designating the plan an agreement, and concluding that the agreement obligated the refusal to deal, the judge found the refusal to be concerted and in violation of section 1 Sherman. In reference to the wrench-assault analogy, it is clear that an assault alone is illegal and that the weapon used is not a requisite of illegality. On the other hand, an unreasonable restraint of trade in and of itself is *not* illegal under section 1 Sherman.<sup>57</sup> The "weapon" used to effect it must be a "concerted" weapon. The refusal to deal by Gemex was only the execution of a predetermined plan and the plan *was not* an agreement obligating Gemex in any way. Thus it could be argued that the case was decided erroneously.<sup>58</sup>

The third case where refusal to deal resulted in a holding that section 1 Sherman had been violated involved a much more complex factual pattern.<sup>59</sup> The Union Oil Company, selling its products through a consignment sales plan to retailer Simpson on leased land, failed to renew Simpson's lease, admitting that its refusal was based solely on Simpson's unwillingness to maintain retail prices set by

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<sup>55</sup> *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d at 5.

<sup>56</sup> *Id.* at 4.

<sup>57</sup> *Ibid.*

<sup>58</sup> The case has an interesting history besides the question of substantive violation of the Sherman Act. Appealed twice to the circuit court, 314 F.2d 839 (7th Cir. 1963), and 272 F.2d 1 (7th Cir. 1959), and treated three times at the trial court level, 204 F. Supp. 28 (N.D. Ill. 1962), 199 F. Supp. 544 (N.D. Ill. 1961), and 1959 Trade Cas. 75224 (N.D. Ill.), the Supreme Court also denied certiorari, 375 U.S. 816 (1963), from the latest circuit court opinion. As a result of all this litigation it was determined that (1) there was no conspiracy (and of course there was no combination or contract), *but* there was a violation of section 1 Sherman, 314 F.2d at 843; and (2) lost profits occurring after commencement of the suit but proximately caused by reason of refusals to sell occurring before commencement of the suit are admissible as evidence of damages recoverable. *Id.* at 842-43. When such profits would again resume, absent proof of a willingness to resume unconditional sales by Gemex, is problematical. Apparently, the court was unwilling to agree that a salesman's attempt to get Becken to resume purchases terminated the time for measuring the damages resulting from the first refusal. This conclusion was reached because the court found that the salesman did not make it clear that the sales would be made without any conditions of resale pricing. *Id.* at 840.

<sup>59</sup> *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

Union Oil. After unsuccessful attempts to obtain possession of the leased land using state property law concepts relating to landlord-tenant law, Simpson brought a treble damage action against Union Oil, alleging violation of section 1 Sherman. Though Union Oil offered as a defense to the action that retailer price control was permissible through the device of consignment, it also alleged as a defense that it had unilaterally refused to deal—permissible conduct under *Colgate*. Reaching the United States Supreme Court on appeal from the decision that no damages were provable,<sup>60</sup> the Supreme Court, with one Justice dissenting and two others filing a memorandum relative only to the issue of consignment as a resale pricing device, concluded that neither defense was supportable. The majority decision appeared unconcerned with the need for proof of any agreement that obligated the seller to refuse to deal or at least did not articulate any need for concert in the decision of Union Oil to refuse further sales.

Clearly, there was an agreement to maintain resale prices through the consignment device, but *Simpson* is not the case of a seller suing the buyer for violation of the resale price maintenance agreement and being met with a defense that the agreement is a violation of section 1 Sherman. Nor is it the case of a party to an illegal price fixing agreement suing another party to the agreement charging illegality of the agreement and resultant damage. Instead, it is our familiar fact pattern—a seller exercising his power of refusal to sell as the means of coercing buyers to live up to the resale price maintenance conditions of their agreements and then<sup>61</sup> being sued by his customer for refusal to sell.

One student writer seriously attempts to breathe new life into the words "combination in the form of trust or otherwise" appearing in section 1 Sherman as a way of explaining *Simpson's* lack of need for contract or conspiracy to bring the fact pattern within the prescriptions of the Act.<sup>62</sup> If it were not more logical to explain *Simpson*

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<sup>60</sup> 311 F.2d 764 (9th Cir. 1963).

<sup>61</sup> The theory of *Simpson's* case was that he had been injured by reason of Union Oil Co.'s refusal to renew his lease. Since failure to renew the lease had the same effect as refusal to sell gasoline to *Simpson*, the case is a clear refusal-to-sell situation. The final chapter in this litigation has not been written. At the date of this writing *Simpson* has most recently been rebuffed by the United States Supreme Court in his attempts to prevent the trial court from carrying out a pre-trial order allowing the defendant to show "equities" warranting only a prospective application of the *Simpson* doctrine. *Simpson v. District Court*, TRADE REG. REP. (1966 Trade Cas.) ¶ 67100, at 75097 (U.S. Oct. 10, 1966).

<sup>62</sup> Comment, "Combination" in *Restraint of Trade: A New Approach to Section 1*

as simply further evidence of inconsistency concerning the need for the element of concert in cases where the court is committed to the proposition that the restraint must be prohibited, this writer might be willing to accept a portion of that thesis.<sup>63</sup>

The first premise of the student's thesis appears to be that the existence of two or more firms related to each other, either horizontally as competitors or vertically as seller-buyer, meets the prerequisite of a "combination" as that word is used in section 1 Sherman. The second premise states that when one of the firms acts, or makes a business decision, this is in fact the decision of the combination; if the action results in restraint of trade, section 1 Sherman is violated. Such a thesis appears to be a pure fiction to enable section 1 Sherman, without the necessity for amendment, to encompass single-enterprise activity which restrains trade. If one is committed to the theory that single-enterprise activity can produce unreasonable restraints of trade, as is this writer, then the student's thesis accomplishes that result, and to that extent is approved. However, the fiction that the mere existence of two firms constitutes a

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of the Sherman Act, 1966 UTAH L. REV. 75. Mr. McDonald's conclusions are that, after eliminating all other possible agreements or conspiracies that the court could have relied on in *Simpson* the court was left with but one solution. Treat the "combination" consisting of the mere existence of two firms (Union Oil Co. and Simpson) as meeting the language of section 1 Sherman "combinations in the form of trust or otherwise." (Emphasis added.) Then, any activity of either firm restraining trade is "a combination restraining trade." No language in the opinion uses this analysis and the analysis seems to this writer a strained, but possible, approach to all refusals to deal that are essentially unilateral. If, used as explanatory of *Simpson*, the "combination" seems to this writer to be more apparent as a description of the multiple-party arrangement existing between all the other Union Oil lessees and the Union Oil Company. There was no evidence, however, of an obligation on Union Oil Co. in the terms of the common lease provisions obligating Union Oil Co. to cancel leases of lessees who failed to abide by the directed resale prices. Thus within the thesis of this article, the action was single-business-enterprise activity. Lessees bound by consignment pricing would, however, clearly benefit only to the extent that Union Oil Co. would enforce the pricing system, and could naturally expect Union to choose the tactic of refusal to deal as its sanction to coerce enforcement. This writer agrees wholeheartedly with McDonald that "an inspection of the refusal-to-deal cases as a whole will reveal that there is no correlation between evidence of agreement and the result of the cases; any attempt to reconcile these cases on the basis of agreement is impossible. However, there is some correlation between the gravity of the restraint and the finding of illegality." *Id.* at 83.

<sup>63</sup> His conclusion that when a price fixing results from "combination" rather than from contract or conspiracy such result can be considered subject to the rule of reason standard rather than the per se rule seems illogical. *Id.* at 89. If, as McDonald suggests in his explanation of *Simpson*, the "combination" consists of the mere existence of the Union Oil Co. plus Simpson, and that Union Oil is the entity in the combination that sets the price, then such a "combination" setting the price should be per se a violation of section 1 Sherman. Grammatically, the restraint of trade proscribed by section 1 Sherman is one caused by contract, combination, or conspiracy and it is the nature of the restraint, not the form of the organization which caused the restraint, that determines the per se characterization.

combination, and action by one supplies the concert requirement of Sherman, is unacceptable. The action of one of two competitors is not the concerted action of both, nor is the action of a seller in a seller-buyer combination the action of both. It is submitted that the word "combination" in section 1 Sherman, especially as modified by "in the form of trust or otherwise" was merely Congress' method for attempting to prohibit group or concerted action regardless of the form that the group takes.<sup>64</sup>

Threats to refuse dealing to coerce resale price maintenance against recalcitrant customers are effective only if the threat can be carried out without legal liability. Where refusals to deal in such cases are nonconcerted they are not proscribed by section 1 Sherman. If resale price maintenance is an unreasonable restraint of trade it should be prohibited regardless of the method used to maintain it. Perhaps courts, desirous of reaching a rational solution to the problem of preventing unreasonable restraints, should not be blamed for expanding the concept of concerted action beyond its proper limits. An examination of refusals to deal when used as a business tactic to coerce other kinds of anticompetitive activity on customers may aid in clarifying the need for a better solution.

REFUSALS TO DEAL USED AS A TACTIC TO SUPPORT ANTI-  
COMPETITIVE CONDITIONS OTHER THAN RESALE  
PRICE MAINTENANCE

1. *Refusals Used to Coerce Conditions Which Would Be a Violation of Section 3 Clayton if Incorporated in an Agreement Between Seller and Buyer*

Sellers who desire as a condition of sales or leases to customers that the customers refrain from dealing with competitors of the

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<sup>64</sup> Another explanation for the choice of "combination" as a form by which a restraint could be effected that should be prohibited was suggested by Mr. Justice Holmes in his dissenting opinion in *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904). There, he forecast the problem presently covered by Section 7 of the Clayton Act which disallows mergers by acquisition of stock of another corporation or consolidation of two or more companies by a holding company's purchase of sufficient stock to control the two companies. He felt that when the action consisted of a consolidation of the stock control of two or more companies it was clear that competition between them would cease. He thus forecast the problems of the first version of Section 7 of the Clayton Act which had for its proscriptive test that competition between the acquired and acquiring company should not be substantially lessened. This was, of course, always the result of the combination. If the relevant market in the *Northern Securities* case was the transportation in the geographic area where the Great Northern and Northern Pacific railroads had formerly operated as competitors, the merger through consolidation of their stock into holding company control would clearly violate both section 1 and section 2 Sherman.

seller, or purchase additional goods along with the desired product, have sometimes incorporated these conditions in the lease or sale, either in the form of promises by buyers to comply, or as conditions precedent to future sales to the customers. Remedies available to these sellers in the event the buyers fail to comply with the terms of the agreement would appear to be (1) a suit for breach of contract and (2) refusal to continue selling. However, where agreements accompanying the sales or leases contain promises or conditions, and where the effect of the sales or leases so accompanied tends to substantially lessen competition, or tends to create a monopoly, the agreements violate section 3 Clayton. Sellers who attempt to enforce the agreements would be met with the defense of an illegal contract. If the seller attempts to enforce compliance by a refusal to sell, he will undoubtedly be met with a treble damage action filed by the buyer who feels the brunt of the refusal; whether or not the seller refuses to sell, the mere existence of the agreement could subject such sellers to Government suit by the Justice Department seeking to enjoin the agreement. In addition, the seller would be exposed to the possibility of a cease and desist order by the Federal Trade Commission, which, if disobeyed, would subject the seller to a fine.

Many sellers, unwilling to risk the above outlined undesirable consequences without any real advantages to be derived from the presence of the agreement, have preferred to make their sales and leases unconditional and to exercise their right to refuse future dealing upon a determination that the buyers have engaged in purchases from competitors or have not purchased the products desired by the seller to be sold along with the primary product. In the latter situation, sellers simply refuse offers to purchase, unless the offers include offers to buy the products which consist of the "tied" combination. Justification for the refusals to sell stem from the *Colgate* doctrine. Choice of one's customer is a decision to be made by the seller, and his choice is immune from antitrust illegality provided he is neither a monopolist nor attempting to become one, and provided his choice is not the result of a concerted decision. Is consistency in the application of the "concert prerequisite" any more evident in this type of case than in the refusal-type case where the condition sought to be imposed on the buyers was resale price maintenance? There may be a bit more consistency; however, viewing the whole situation, the cases appear to have completely ignored the concert prerequisite.



An analysis of some selected cases will show that refusals to deal have been described as evidencing an understanding of a preexisting sales policy which in itself is a violation of section 3 Clayton.<sup>65</sup> More specifically, when buyers fail to comply with desired conditions, which conditions form no part of an *agreement* between the seller and buyer, and the seller refuses future sales, the courts have found that the conditions *were* in fact a part of an understanding. It is only natural for businessmen whose primary objective is to continue selling to indicate to buyers the conditions under which they will continue to deal. Such an announcement is the businessman's way of coercing compliance with the conditions. To call it coercion, which it clearly is, is not also to call it concert, which it clearly is not. Nor is properly calling it coercion the same thing as labeling it the result of agreement between seller and buyer, when buyers refuse to promise to abide by the conditions and are not asked for any promises. Most of the cases under this classification involve threats to refuse dealing which have effectively coerced the buyer into compliance for fear of having his source of supply cut off. Threats to refuse dealing are just as effective a means of obtaining compliance as the use of conditions which would have been illegal under section 3 Clayton had they appeared in the form of an agreement.

Frustrated in their attempts to prevent unreasonable restraints of trade by the limited scope of section 3 Clayton (which requires an agreement), the courts have tended to find an agreement where

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<sup>65</sup> Section 3 Clayton is a legislative attempt to prevent powerful sellers from exerting their superior bargaining power to induce buyers into agreeing that the buyers will not purchase their needs from competitors of the seller. Under familiar contract principles sellers who are bound by no obligations to continue selling to any buyers would apparently be unaffected by the act. It should be applicable only to those business transactions (lease sale or contract of sale) which carry with the transaction some sort of continuing obligation on the part of the seller. It is only in this context that "conditions, agreements or understandings" have meaning. Otherwise, each sale or contract for sale is complete in and of itself at the time of the transaction. The words "condition" and "agreement" are familiar, reasonably well-settled terms of contract law. "Understanding," to the extent that it partakes of the nature of agreement would be nothing but a synonym. It could also mean, however, *simple knowledge* on the buyer's part that the seller will refuse future sales to the buyer (should the buyer not conform to certain conditions), such knowledge having been acquired from an announcement to this effect made to the buyer by the seller. When sellers are obligated to future sales and their obligations are conditioned on "understandings" that they may refuse future sales if buyers fail to meet the "understood" conditions, such understandings do form a part of the seller's obligations and clearly seem covered by section 3 Clayton. However, where no obligations to continue dealing exist, a seller's announced policy of his intended future refusal to sell, provided buyers fail to observe seller-desired conditions, would appear outside section 3 Clayton coverage. The text will show that the courts do not all agree.

it doesn't exist. Or, the courts may find concert between the seller and some other party, thus bringing the refusal to deal under section 1 Sherman as a concerted refusal resulting in an unreasonable restraint of trade.

In Governmental actions against sellers who choose this method of controlling the activities of their buyers, the refusal to deal is only the trigger to the suit. The threat to refuse dealing, which is ever present while sales continue with buyers complying with the coerced conditions, is the practice at which the Government action is aimed. One can but speculate as to how many Government suits against sellers would be successful if the facts proved showed no exercise of the threat to refuse dealing, but did show the existence of the threat and compliance with the required conditions by all buyers. It is a bit ironic that the very freedom which *Colgate* appears to allow a seller to exercise is the identical thing he must be very cautious not to exercise lest he be made a defendant under section 3 Clayton and be adjudged a party to an agreement he never made!

Relief from the existence of such threats can also be obtained by private action. Treble damage actions brought by buyers probably will not arise where the buyer has made no agreement with the seller conditioning the buyer's activity, until the buyer is disadvantaged by actual exercise of the seller's threat to refuse dealing. When cut off from his supply, the buyer retaliates by filing suit against the seller, and it is then to the buyer's advantage to furnish the court any "evidence" that an agreement existed in which the conditions constituting a violation of section 3 Clayton were present. Once the court is satisfied that this agreement exists, the court will merge the refusal to deal into the illegality of the agreement and find the refusal to deal to be the proximate cause of the buyer's damage; the buyer will then be allowed to recover three times the loss of profit he would have realized had his supply not been cut off.

A case illustrative of this point is *Osborne v. Sinclair Refining Co.*<sup>66</sup> This case had the dubious advantage of being discussed twice by the same judge. *Osborne* represents the present state of the law regarding refusals to deal motivated by unwillingness of a buyer to meet certain conditions satisfactory to the seller. The conditions, had they been a part of an agreement between buyer and seller, would have made the agreement illegal under section 3 Clayton.

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<sup>66</sup> 286 F.2d 832 (4th Cir. 1960); 324 F.2d 566 (4th Cir. 1963).

Osborne, a retailer of Sinclair gasoline under a lease arrangement which made no mention of any obligation by Osborne to purchase Goodyear tires and accessories, was induced to purchase Goodyear products under threat of cancellation of his lease. Upon Osborne's failure to purchase a sufficient amount to satisfy Sinclair (who was receiving a commission from Goodyear on amounts purchased by Sinclair's lessees), the lease was summarily cancelled. During negotiations for resumption of the lease, Osborne showed "good faith" by ordering over \$1000.00 worth of Goodyear products. Then the lease was renewed. The new lease contained no agreement to purchase any amounts of Goodyear products, but Osborne was well aware that failure to make satisfactory quantity purchases would result in cancellation of the new lease. Osborne ignored the threatened cancellation, and purchased only those amounts of Goodyear products which he himself desired. When Sinclair again cancelled the lease, Osborne retaliated with a treble damage suit charging Sinclair with refusal to deal.

Judge Sobeloff reversed the district court which had found Sinclair's cancellation of the lease the simple exercise of a right to refuse to deal within the purview of *Colgate*.<sup>67</sup> Instead, he found Sinclair's cancellation to be the "result of an arrangement" calculated to pressure customers to accept tie-ins of other products, and thus a violation of section 3 Clayton. On remand to the district court for determination of damages, the lower court found that the refusal to deal was not the proximate cause of Osborne's damages, and only damages actually resulting from the "arrangement" could be recovered by Osborne.<sup>68</sup> On the second appeal, Judge Sobeloff again reversed and with respect to the substantive issue of violation said ". . . to the contrary, irrespective of monopoly or conspiracy, if the seller pressures his customers or dealers into adhering to resale price maintenance, or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by *Colgate*."<sup>69</sup> On the damage issue he concluded that the cancellation of the lease was the proximate cause of the damage and that the cancellation was the illegal act; consequently, the loss of profits suffered by Osborne as a result of being cut off from his source of supply was the proper measure of damages.

A few months earlier, this same judge had decided *McElhenney*

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<sup>67</sup> 171 F. Supp. 37 (D. Md. 1959).

<sup>68</sup> 207 F. Supp. 856 (D. Md. 1962).

<sup>69</sup> 324 F.2d at 573.

*Co. v. Western Auto Supply Co.*,<sup>70</sup> wherein the seller had refused dealing with five buyers who failed to stop marketing television sets obtained from a competitor of the seller. The judge found no agreement by the buyers to restrict their retail purchases to Western Auto products. Yet the facts were plainly apparent that Western Auto's policy was to "full line force"<sup>71</sup> its retailers and refuse to deal with those buyers who failed to comply. One commentator, somehow conveniently ignoring *Osborne, McElhenney* as authority for the proposition that "... [the seller] has the right to select dealers who will devote their time and energies to selling his products."<sup>72</sup>

An array of decisions exist wherein the basic pattern of refusing to deal resulting from buyer failure to meet conditions of exclusive dealing required by the seller as a condition of future sales produced no liability on the seller's part for the use of this business tactic. Frequently cited are *Nelson Radio and Supply v. Motorola Inc.*,<sup>73</sup> *Leo J. Meyberg Co. v. Eureka Williams Corp.*,<sup>74</sup> *United States v. J. I. Case Co.*,<sup>75</sup> *Allied Equipment Co. v. Weber Engineering Prod.*,<sup>76</sup> and *Brosious v. Pepsi Cola Co.*<sup>77</sup> The dual requirements for a violation of section 3 Clayton, (1) agreement ("... lease, sale, contract for sale... on condition") and (2) harm to competition ("... effect of which is to substantially lessen competition...") are not always discussed in the cases. When the "agreement" element is lacking, there is no need to discuss the "harm to competition" element.

Since the courts found no violations in six of the seven above-cited cases, whether the required harm to competition would have been found had the courts first found an agreement is not known. Only the *J. I. Case* decision discussed the second requirement and found it not present. Where requirement (1) is found to have existed either

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<sup>70</sup> 287 F.2d 524 (4th Cir. 1960).

<sup>71</sup> Full line forcing is no more than a seller's adoption of a policy of not selling to buyers for resale unless they are willing to take all the variety of products which the seller is offering for resale. If a buyer is unwilling to agree to such a policy the seller refuses to accept him as a purchaser. Acceptance of the conditions will naturally induce the buyer not to purchase from competitors of the seller to the extent that his needs for inventory are adequately supplied by taking the full line offered by the original seller.

<sup>72</sup> Fulda, *Individual Refusal to Deal: When Does Single-Firm Conduct Become, Vertical Restraint?* 30 L. & CONTEMP. PROB. 590, 601 (1965).

<sup>73</sup> 200 F.2d 911, (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

<sup>74</sup> 215 F.2d 100 (9th Cir.), *cert. denied*, 348 U.S. 875 (1954).

<sup>75</sup> 101 F. Supp. 856 (D. Minn. 1951).

<sup>76</sup> 237 F.2d 879 (4th Cir. 1956).

<sup>77</sup> 155 F.2d 99 (3rd Cir. 1946).

plainly or is manufactured by the court, the case must then be discussed in terms of meeting requirement (2).

In six of the seven cases cited above, the courts felt that the existence of a threat was not sufficient to meet the "agreement" requirement of Clayton. Yet, there exists another line of cases with substantially similar facts where violations of Clayton were found. These cases include *Carter Carburetor Corp. v. FTC*,<sup>78</sup> *United States v. Richfield Oil Corp.*,<sup>79</sup> *Englander Motors Inc. v. Ford Motor Co.*,<sup>80</sup> and *United States v. Sun Oil Co.*<sup>81</sup>

Apparently, the theory of the four cases above would provide immunity to the seller only when the buyer is not informed by the seller of the conditions which, if breached, will result in the seller's refusal to continue dealing. Is it reasonable to think that business would be operated this way? In the absence of a threat (or at least an announcement of an intention to refuse dealing upon failure of the buyer to abide by certain conditions) the refusal comes as a complete surprise to the buyer and does little good to the seller. To accomplish his goal, the seller needs to inform the buyer in advance of contemplated action in order to induce the buyer to comply, so that refusal to deal will not become necessary. The fact that the seller, with immunity, can refuse dealing for exactly the same motive, *i.e.*, he doesn't want to sell to buyers who purchase from competitors) so long as he doesn't pressure his buyers by announced intentions of future action makes a mockery of the decisions holding that the seller loses his immunity whenever he refuses to deal after clearly indicating to the buyers that refusal to deal will follow unacceptable action by them.

The irrational nature of decisions holding sellers liable for treble damages in cases where a violation of section 3 Clayton is alleged due to refusal to deal after a buyer had been earlier threatened with such refusal is further heightened by the reasoning in a recent United States Supreme Court decision. In *Tampa Electric Co. v. Nashville Coal Co.*,<sup>82</sup> the seller was unwilling to continue sales though obligated to do so by the existence of a contract to supply coal for twenty years. The buyer was similarly obligated to purchase requirements and thus inferentially was precluded from purchases from competitors of the

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<sup>78</sup> 112 F.2d 722 (8th Cir. 1940).

<sup>79</sup> 343 U.S. 922 (1951).

<sup>80</sup> 293 F.2d 802 (6th Cir. 1961).

<sup>81</sup> 176 F. Supp. 715 (E.D. Pa. 1959).

<sup>82</sup> 365 U.S. 320 (1961).

seller. In defense to the buyer's action for specific performance, the seller claimed that his obligation to make future deliveries under the contract was excused since the contract was illegal as a violation of section 3 Clayton. The Court found the contract not to be illegal because the contract failed to produce a substantial lessening of competition. It is apparent from the Court's reasoning that had the conclusion on this issue been to the contrary, the defense of refusal to sell would have been upheld.

Why don't sellers defending treble damage suits resulting from exercise of a threat to refuse to deal with customers who violate stated conditions requiring that no purchases be made from the seller's competitors simply admit that the threat was in reality an "agreement," and defend the failure to sell on the grounds that no obligation to sell arises out of an illegal contract? Perhaps the reason is obvious—the buyer's suit *does not seek specific performance of the agreement to sell*, but *seeks treble damages for the seller's failure to sell*.

No clear cut cases exist wherein courts have required that sales to customers must continue so long as customers make offers to purchase.<sup>83</sup> Thus, buyers cannot obtain specific performance relief in the form of a mandatory injunction to force continued selling for so long as the buyer desires to make purchases. However, they can collect for damages that have resulted from past refusals to sell, but, as in the *Osborne* decision, the damages for such refusal to deal will not extend beyond the date when normal termination of the buyer-seller relationship would have occurred.<sup>84</sup> In open-account sales where the seller is not obligated to furnish products to buyers for any prescribed period of time, measuring the cut off date for damages caused by *illegal* refusals to sell seems an impossible task.

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<sup>83</sup> A number of consent decrees exist wherein the defendants have been enjoined from refusing to sell to buyers where the refusal was based on buyer noncompliance with an understood policy that they were not to purchase from competitors of the seller. See, e.g., *United States v. Bendix Aviation Corp.*, 1952-1953 Trade Cas. 68769 (S.D. N.Y. 1953) (braking systems); *United States v. Mansfield Journal*, 1952-1953 Trade Cas. 67258 (N.D. Ohio 1952) (newspaper advertisements). Determining whether future refusals to sell were motivated by noncompliance by buyers with seller-desired anticompetitive conditions or were motivated by other permissible reasons would, at best, be very difficult to prove.

<sup>84</sup> This would seem to place the outer limit of damages recoverable in a refusal-to-sell case as being only those damages from losses proximately caused by refusals that preceded that point of time when the seller's normal obligation under the sales agreement would have otherwise terminated. Absent long leases or long-term sales contracts, such a limited deterrent may prove to be of slight value if the goal is to provide buyers with assured sources of supply.

Would a subsequent refusal which the seller could have exercised be within the *Colgate* protection, as the seller's unlimited choice? Is it significant that prior to the refusal the buyer had been a regular customer? An offer to purchase made by a potential new buyer can be refused by the potential seller, whether the refusal is based on the belief that the buyer will not perform seller-desired conditions or any other reason. This conclusion follows categorically from the fact that a refusal to accept an offer to purchase is not concerted action within section 1 Sherman, and a refusal to sell is not a "lease, contract of sale, or a sale" within section 3 Clayton. Following a successful Governmental injunctive action against a seller who has refused to sell to a buyer who was unwilling to abide by conditions which required refraining from making purchases from competitors of the seller, will continued refusals give rise to liability for treble damages? Can the Government then bring another action claiming continued refusal? If the past refusal was illegal, why aren't the continued refusals similarly illegal? The continued refusal to deal could be considered as much an arrangement pressuring customers into unacceptable conditions<sup>85</sup> as was the past refusal for which the seller was found in violation of law.

When, if ever, will continued or future refusals to deal be immune under the *Colgate* doctrine—when the courts can conclude that the subsequent refusals are individual, nonconcerted actions by the seller? The difficulty lies in the fact that the continued refusals or future refusals are no more concerted than were the past ones. Despite the fact that the present state of antitrust legislation does not proscribe either type of refusal, some courts have held to the contrary. It is a dilemma of their own creation, motivated by an admittedly admirable desire to prohibit unreasonable restraints of trade brought about by coercive threats, even though the restraint is effected by single-enterprise action.

Sellers who sell a variety of products, one or more of which is not as acceptable to their buyers as a competitive product, can force acceptance of the less-desirable product by requiring it to be purchased as a tie-in along with the more-desirable one. However, when the required harmful effects on competition are present, contracts between buyers and sellers in which buyers promise to purchase two or more items as a package, when, but for the contract, the items could normally have been purchased separately, are in violation of

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<sup>85</sup> *Osborne v. Sinclair Refining Co.*, 324 F.2d at 573.

section 3 Clayton.<sup>86</sup> In an effort to circumvent the Act, some sellers have attempted package sales (tie-ins) by means of accepting offers to purchase only when such offers express a willingness to purchase both items. The same detrimental effect on competition can result, but simple refusal to sell the items separately becomes the means to achieve the desired result, rather than through language in a contract or agreement. Note that as early as 1920, the Federal Trade Commission was rebuffed by the United States Supreme Court when the Commission attempted to outlaw tie-ins, forced by seller refusal to sell the items separately, as unfair competition.<sup>87</sup> The presence of a contract or agreement containing the limitations that the sale can be made only on condition of the buyer buying both items is easily avoided. Refusal to sell unless the buyer is willing to purchase both items is simply inherent in the offer to sell. No agreement or understanding is required for an announcement of "what" one is willing to sell.

Nevertheless legal actions have been brought on the theory that such single-enterprise action could be found to be in violation of section 1 Sherman.<sup>88</sup> Frequently, allegations of violations of section 2 Sherman<sup>89</sup> accompany complaints charging violations of section 1, since individual action can clearly violate section 2. Then, attention quite frequently is turned to whether unreasonable restraints have occurred, with little attention given to the need for the concerted action requirement of section 1. The option that any seller has, to offer for sale two or more items as a package rather than sell the items separately, is clearly an individual decision, not a concerted one. If the offer is accepted and a sale results, the acceptance of the packaged items does not arise from a contractual obligation; at the time of purchase, the buyer was no more prevented by obligation

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<sup>86</sup> Though literally the condition that a buyer not purchase from the seller's competitors is the impermissible condition of section 3 Clayton, the courts have concluded that when a buyer agrees to purchase an item which he does not particularly desire along with another item, the pressure of the combination will in effect prevent him from purchasing the same item from the seller's competitor. Thus, tie-ins have become one of the impermissible conditions that sellers may not include in the sales agreements with their buyers.

<sup>87</sup> *FTC v. Gratz*, 253 U.S. 421 (1920). Admittedly, a complete judicial review of the Commission's conclusions that particular tactics adopted by businesses constitute "unfair competition" has been overruled by *FTC v. Brown Shoe Co.*, 370 U.S. 294 (1966). It remains to be seen whether the Commission will now assume jurisdiction over all refusals to deal that it finds anticompetitive although not in themselves violative of section 3 Clayton.

<sup>88</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

<sup>89</sup> *Ibid.* (Monopoly charges were also brought by the Government against the newspaper. The section 1 charges were later dropped.)



from purchasing either the packaged or separate items from competitors of the seller than he would have had the items been sold separately. The refusal to sell except as a package is distinguishable from a contract, the provisions of which require the buyer to purchase in the future *and* obligate him to purchase "the package." Only in this latter situation would there be a literal violation of section 3 Clayton.<sup>90</sup> Whether or not tie-ins tend to have the requisite harmful effects on competition to make out a violation of the Sherman Act, courts have uniformly agreed that the requisite harmful effect regularly results.<sup>91</sup> This virtually unanimous acceptance of the principle that the harmful effect to competition automatically results from tie-ins, as it does from resale price maintenance, induces courts to overlook the prerequisite of concert and find a violation of section 1 Sherman and section 3 Clayton without any serious attempt to distinguish concerted action from single-enterprise action.<sup>92</sup>

## 2. Refusals Used to Coerce Conditions Which May or May Not Have the Effect of Producing Unreasonable Restraints of Trade

Geographic monopolies<sup>93</sup> are created when sellers voluntarily restrict their sales to designated buyers within defined geographic boundaries. Such buyers enjoy a franchise status, and marketing specialists agree that benefits to both buyer and seller result. The restriction is accomplished by simply refusing to sell to other than the designated buyers. If the agreement not to sell is formalized in a

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<sup>90</sup> But see note 86, *supra*.

<sup>91</sup> *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949), "Tying agreements serve hardly any purpose beyond suppression of competition." *Standard Oil Co. of California v. United States*, *supra* at 305.

<sup>92</sup> In private treble damage suits where proof of damage follows the conclusion that a violation of section 1 Sherman or section 3 Clayton has occurred, a money judgment is the form of relief. *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960). Where the Government seeks to enjoin the continuance of the seller's alleged practice of selling only on the understanding that the buyer will continue to purchase the tied item, relief takes the form of an injunction which orders the seller to refrain from *requiring any agreement or understanding that the items must be purchased as a package*. *United States v. Loew's Inc.*, 371 U.S. 38 (1962). Neither form of relief goes so far as to insist that the sale of the single item be made. Consent decrees exist where defendants are required to sell single items—forced sales. Where such defendants are not monopolies or attempting to become so, their refusals to sell single items are, of course, nonconcerted activity, and any mandatory injunction requiring single-item sales appears to be based solely on a court's dislike of the *reason* for the refusal.

<sup>93</sup> This term is used to mean that prospective repurchasers have fewer alternative sources of supply for the seller's product than they would if the seller would allow multiple distributors to resell the product within the defined geographic boundaries. If retailing is to be considered a line of commerce, and thus should operate competitively, then sufficient retailers must exist within limited geographic boundaries to give consumers alternative sources of supply for the *same* product.

contract, the refusal to sell to a subsequent buyer clearly is obligated by contract and hence is concerted action. There remains only the further requirement—that the refusal to sell produce an unreasonable restraint of trade—to effect a violation of section 1 Sherman. But, attacks on franchising have been uniformly unsuccessful, the courts refusing to find an unreasonable restraint of trade.<sup>94</sup> Of course, the inability of the potential buyer to obtain the product from the seller completely eliminates the potential buyer as a competitor in the franchisee's line of commerce. If the seller, instead of completely eliminating a franchisee's competitor by refusal to sell, had sold to him under threats to refuse further sales if certain noncompetitive conditions of resale were not observed (such as resale price maintenance), all courts would conclude that a per se unreasonable restraint is produced. What seems clearly inconsistent is that eliminating a potential competitor completely from a line of commerce universally is held not to be an unreasonable restraint of trade, whereas allowing one or more competitors to exist, but only under the threat that the competitor must conform to certain noncompetitive behavior, is per se unreasonable. Whether foreclosing resellers from competing by refusing to sell to them produces an unreasonable restraint of trade is a controversial and difficult matter which remains today and will forever remain essentially an economic, not a legal dispute. Holdings, however, that restraints effected by franchising (which result almost universally from agreement), cannot possibly be unreasonable because such actions are "justifiable business activity." may be predicated on the unsure premise that franchising activity is individual action rather than concerted action. If this is true, such holdings preclude investigations into the very area with which economic policy, as expressed in the antitrust laws, is concerned.

Section 3 Clayton is not available as a proscriptive device to prohibit franchising, since the particular provisions of the statute are limited to situations where the buyer rather than the seller is the

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<sup>94</sup> That is, refusal to sell to one who has never been a purchaser, which refusal was obligated action by the seller because of a preexisting franchise contract with another buyer, or the reduction of distribution outlets by a seller whose decision is unilateral or results from an agreement with the distribution outlet he decides to retain, results in no violation of section 1 Sherman. *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957). *But cf.*, *Hub Auto Supply, Inc. v. Automatic Radio Mfg. Co.*, 173 F. Supp. 396 (D. Mass. 1959). See also *McKesson and Robbins, Inc. v. Charles Pfizer & Co.*, 1964 Trade Cas. 80193 (E.D. Pa.); *United States v. Stamps-Conhaim-Whitehead, Inc.*, 1963 Trade Cas. 78472 (N.D. Iowa) (consent decree).

restrained party.<sup>95</sup> Ironically, a franchise granted by a seller to one buyer, though literally only prohibiting the seller from making sales to competitors of the franchisee-buyer, also operates as a restrictive device on other potential buyers from the seller. Thus, a franchise is a substitute for buyer coercion of the seller not to sell to competitors of the buyer.

Whether the seller by voluntary agreement restricts himself from making sales to others or whether the inducement for refusals to sell to others comes from customer coercion makes little difference with respect to the presence or absence of an unreasonable restraint of trade. The restraint effected is the same—the competition among potential resellers of the product is inhibited.

Many sales agreements accompanying franchises contain reciprocal promises by buyers that they will restrict their resales to certain geographic areas or to specialized customer classifications. In recent cases where such limitations on the freedom of the resellers to compete were incorporated in the contract, the courts have refused to condemn the restrictions as per se unreasonable; however, they recognize that this restraint could be unreasonable and should be determined by applying the rule of reason.<sup>96</sup> Sellers who fear investigation of the restrictions they place on their resellers can exercise their refusal to deal selectively, and can make sales only to those who comply. In this manner, sellers could avoid any determination that the vertical restraint was unreasonable, since the method of effecting the restraint would be nonconcerted action.

Many other reasons for refusal to sell to potential resellers have been advanced by sellers, ranging in the spectrum from simple dissatisfaction with the methods the buyer was using to promote or advertise the product, to refusals exercised to retain goodwill of other customers of the seller.<sup>97</sup>

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<sup>95</sup> The specific provisions of section 3 Clayton are directed at seller-desired restrictions on buyers to which buyers agree, and not to buyer-desired restrictions on sellers to which sellers agree.

<sup>96</sup> *White Motor Co. v. United States* 372 U.S. 253 (1963); *Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964).

<sup>97</sup> Though undoubtedly sellers have come up with many new reasons for refusing to sell to potential or existing customers for resale, a long list of reasons given for such refusal, where litigation developed as a result of the refusal, can be found in Barber, *Refusals to Deal Under the Federal Antitrust Laws* 103 U. PA. L. REV. 847, 857-58 (1955).

The case of *Klors, Inc. v. Broadway-Hale Stores, Inc.*,<sup>98</sup> where the retention of the goodwill of other customers was the motivation for refusal to deal, provides an interesting comparison to a hypothetical case of individual refusal to deal. In that case, *two or more* sellers combined and conspired with *two or more* competitors of Klors, resulting in a termination of sales to Klors. Here we clearly have a barrel full of conspirators and no problem with the concert requirement. If we assume that all features of *Klors* are present except that: (1) only one seller existed, (2) and that this seller had conversations with Klors' competitors at the request of the competitors, (3) but promised the competitors nothing as a result of the meetings, (4) and then later cut off sales to Klors—what then? Is such a cutting off of sales to Klors an unreasonable restraint? Is it not apparent that the effect on competition which the court felt met the test of unreasonableness in *Klors* is equally produced in our hypothetical?

The fact situation in the hypothetical appears to differ very little from the case of *Packard Motor Car Co. v. Webster Motor Car Co.*<sup>99</sup> There, the seller (Packard), after consultation with one of its Baltimore resellers, decided to discontinue sales to the two other resellers in that city. The circuit court of appeals held that this decision to refuse to deal created no unreasonable restraint of trade.

Whether the test for proscribing undesirable economic activity is a probability of "substantially lessen[ing] competition," or the presence of an "unreasonable restraint of trade," the inability to obtain inventory of a product which a buyer-reseller desires to sell, caused by a seller's refusal to deal, calls for an application of either one test or the other. Since section 1 Sherman and section 3 Clayton presently require concert or agreement, one is left with great doubts in reading the opinions of courts whether the immunity enjoyed by businesses who refuse to deal with customers stems from the form of the refusal, or the failure of that refusal to produce economic situations that meet the requisite harm to competition.

#### UNCONDITIONAL REFUSALS TO DEAL<sup>100</sup>

Whether there has been prior dealing, or whether the seller refuses the first attempt by a buyer to purchase, unconditional refusals

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<sup>98</sup> 359 U.S. 207 (1959).

<sup>99</sup> 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

<sup>100</sup> A former writer classifies these refusals as "arbitrary refusals." Barber writes that an arbitrary refusal is not reached by the Sherman Act. They are not purposeful he says and cannot be conspiratorial for a conspiracy must have an object. Barber,

to deal have always enjoyed immunity from the proscriptions of section 1 Sherman and section 3 Clayton. Where the seller has never been obligated by contract to make sales, or where such obligation did exist but is at an end through natural termination, the seller's decision not to sell to the prospective buyer, which decision is not dependent on any performable conditions by the buyer, simply results in no sales, despite the desire of the buyer to make purchases. A seller, who is not attempting to whip into line a reseller who is breaching understood conditions of remaining a reseller, can decide instead to simply limit his distribution outlets. He apparently can be motivated to make this decision by the urgings of his customer's competitors. Such urgings might well have arisen from cozy conversations with those competitors, thus leading one to believe that the seller had actually promised that he would limit his resellers to the ones so promised.<sup>101</sup>

The economic restraint of trade resulting from an *unconditional refusal to deal* is the unavailability of the goods of one seller for purchase (and subsequent resale) by one buyer. The restraint of trade resulting from the *exercise of a threat to refuse to deal* (where the threat is used to condition resales by the buyer under anticompetitive conditions) also results in unavailability of the goods of one seller for purchase (and subsequent resale) by one buyer. If the courts were concerned in both cases with the effect of the actual refusal, the economic restraints would be the same. It is clear that in the case where the refusal would not have occurred if the buyers had been willing to abide by the conditions desired by the seller, the courts have concentrated on the noncompetitive conditions that the *threat* of refusal to deal *sustains*, rather than the *restraint* that the exercise of the threat *creates*. The only weapon of the courts in such cases is to take the sting out of the threat by removing its potency, *i.e.*, making it illegal. This they have done, and it is the only rational explanation for the different attitude they have expressed between unconditional and conditional refusals to deal.

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*supra* note 97, at 849. An obvious purpose exists with an "unconditional" (arbitrary) refusal. It is to preclude the potential buyer from obtaining the goods for resale. To eliminate consideration of whether such a purpose, accomplished by refusal to deal, unreasonably restrains trade is to beg the question. The fact that such a refusal may not have as its purpose the maintenance of other anticompetitive conditions of resale is not sufficient to preclude consideration of the effect it does have.

<sup>101</sup> If obliged as a result of the conversations to cut off any buyers, the refusals which followed were clearly concerted and not unilateral. Section 1 Sherman's first requisite is present. All emphasis should then be placed on whether an unreasonable restraint was effected. Discussions as to justifiable business reasons for limiting distributors or the right of sellers to individually pick and choose to whom they will sell becomes out of place.

Emotions may sometimes provide a stronger motivation than a desire for profit maximization and induce a businessman to refuse dealing. Illustrative of this point are two cases in which sellers who were sued by their buyers on charges of having violated sections of the Robinson-Patman Act and section 2 Sherman reacted to the suits by ceasing further sales to the buyers-plaintiffs. Whether one could properly classify these refusals to deal as unconditional is doubtful, because presumably, the dropping of the suits against the sellers might have been sufficient to cause resumption of sales. The cases are included here primarily to indicate the difference of opinion which exists, as yet unresolved, as to whether refusals so motivated can be enjoined. At the district court level, opposite results were reached in the two cases. In *House of Materials Inc. v. Simplicity Pattern Co.*,<sup>102</sup> decided in the southern district of New York, the seller was enjoined, pending the determination of buyer's suit, from refusing to sell to the buyer. Refusing to sell, used coercively to induce a buyer to drop a legitimate antitrust claim against the seller, was thought to be a sufficient reason to enjoin such a coercive tactic. Reversing, the circuit court of appeals found the refusal to sell to be nothing more than the exercise by the seller of his unilateral power to choose to whom he would sell. Accordingly, the court held that this choice was within the protection of *Colgate*.<sup>103</sup>

On the other hand, in *Bergen Drug Co. v. Parke-Davis & Co.*<sup>104</sup> the district court for New Jersey, well aware of the earlier New York district court opinion that granted an injunction, disagreed with that result and held that a seller should not be enjoined from selling to a buyer who is suing the seller for violation of the Robinson-Patman Act and section 2 Sherman.<sup>105</sup> On appeal, rather ironically, this decision was also reversed, the Third Circuit Court of Appeals holding that a seller could be enjoined *pendente lite* from refusing to sell to the buyer.<sup>106</sup> The court of appeals emphasized that the charge of monopoly in the main suit might result in a permanent injunction against the defendant-seller requiring his continued sales to the buyer, and that until this determination was reached an equity court could restore the selling relationship to the *status quo* that had existed before the buyer had

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<sup>102</sup> 191 F. Supp. 55 (S.D.N.Y. 1961) (*P. W. Husserl, Inc. v. Simplicity Pattern Co.*).

<sup>103</sup> 298 F. 2d 867 (2d Cir. 1962).

<sup>104</sup> 1961 Trade Cas. 78583 (D.N.J.).

<sup>105</sup> Charges of monopolization were a part of the plaintiff's complaint.

<sup>106</sup> 307 F.2d 725 (1962).

brought his suit against the seller. Absent a monopoly charge, it is of course the writer's thesis that both refusals resulted from single-enterprise action and therefore were not proscribed by section 1 Sherman or section 3 Clayton; thus, a temporary or permanent injunction would be inappropriate. It certainly is open to serious doubt whether any monopoly charge against Parke-Davis & Co. could be proved.<sup>107</sup> As mentioned earlier in the text, private plaintiffs as well as government prosecutors have a tendency to draft their complaints on a "throw the book at them" manner in hopes of stirring up enough antipathy to obtain a favorable decision. Unfortunate as it may be that a buyer possessed of a good cause of action in antitrust against his seller is coerced into dropping it by the seller's unwillingness to continue sales to him unless he will drop the suit, such coercion is nowhere proscribed in section 1 Sherman or section 3 Clayton. It should be recognized that the reason a seller gives for his refusal to sell should not be examined by the courts to determine whether the seller's conduct is proscribed. The seller's reasons notwithstanding, present legislation *does not* proscribe single-enterprise action, even if harm to competition results therefrom. Thus, the need for a change in the present legislation is apparent if courts are to protect against harm to competition resulting from unilateral action.

#### BUYER REFUSAL TO DEAL AS A POTENTIAL VIOLATION OF EXISTING ANTITRUST LEGISLATION

Buyers who possess sufficient economic power to coerce their suppliers into compliance with buyer-desired conditions have used, less frequently than sellers, refusal to buy as their coercive tactic. As early as 1924, the United States Supreme Court disagreed with the Federal Trade Commission and concluded that a buyer's refusal to buy was unproscribed by Section 5 of the Federal Trade Commission Act which prohibited "unfair competition."<sup>108</sup> Refusals to buy were considered actionable under section 1 Sherman only when buyers acted in concert with others.<sup>109</sup> However, the dearth of reported cases

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<sup>107</sup> Too many competitive drug companies exist, and the uniqueness which any patented drug may enjoy as a result of the patent is a legalized monopoly.

<sup>108</sup> *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924) (The buyer's refusal here was an attempt to coerce the seller to refuse to sell to the buyer's competitor). *Quaere*: If the seller had succumbed to the coercion and refused to sell to the buyer's competitor, would his refusal be actionable under Section 5 of the Federal Trade Commission Act or section 1 Sherman?

<sup>109</sup> *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (concert); *Whitely v. Foremost Dairies, Inc.*, 151 F. Supp. 914 (W.D. Ark. 1957) (no violation for lack of concert); *Greenspun v. McCarran*, 105 F. Supp.

involving individual refusals of buyers to buy may indicate the relative lack of buyer bargaining power. In one case where the buyer possessed a strong market position, and where the tactic of refusal to buy was used as a method to coerce sellers, the tactic was held illegal.<sup>110</sup> The decision is weakened as representing a pure case of unilateral refusal to buy in that the defendants were characterized as in concert with each other, though all were subsidiaries of a single company. Absent monopoly charges, or an expanded definition of concert, unilateral refusals to buy have not resulted in violation of section 1 Sherman, and basing a prosecution on the strict language of section 3 Clayton appears particularly inappropriate.<sup>111</sup> If one admits that unilateral refusals to buy can be equally as restraint-producing when used coercively by a strong buyer against weak sellers, as when used by a strong seller against weak buyers, the need for proscription of this business tactic is equally great.

#### CONCLUSIONS AND RECOMMENDATIONS

The implementation of any legislative policy which permits murder while prohibiting assault will produce doctrinal inconsistency. The present language of section 1 Sherman and section 3 Clayton permits single-enterprise refusal to deal, while prohibiting agreement<sup>112</sup> having as its objective the maintenance of noncompetitive conditions. Although deterred by the sanctions provided by statute where the maintenance of noncompetitive conditions is effected through agreement, the seller-or-buyer-desired conditions may be achieved with immunity through exercise of the unprohibited power of refusing to deal. When the policy goals of preventing noncompetitive activity outweigh the limitations of the proscriptive legislation, courts will be inclined to distort the limitations. The willingness to distort and the degree of distortion varies. This produces the array of irreconcilable decisions.

Enlarging the proscriptive provisions of section 1 Sherman and section 3 Clayton to encompass single-enterprise activity which results

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662 (D. Nev. 1952) (concert existed and the relief granted was forced-purchasing); *United States v. Minneapolis Electrical Contractors Ass'n*, 1954 Trade Cas. 69379 (D. Minn.) (no violation due to lack of concert).

<sup>110</sup> *United States v. The New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

<sup>111</sup> No possible interpretation of the section would prohibit a buyer from exercising a right to refuse purchases from a seller.

<sup>112</sup> The actual words used in the statutes are: Sherman (contract, combination, conspiracy); Clayton (condition, agreement, understanding).



in the creation of an unreasonable restraint of trade or the tendency to substantially lessen competition will allow the courts to concentrate on the real reason for the existence of antitrust laws. Preservation of competitive conditions where no countervailing social policies compete demands that substance take precedence over form. The only countervailing social policy seems to be the combined reluctance of businessmen to willingly accept restrictions on their individual decision-making power. It hardly seems necessary to point out that this is political power, not economic good sense.

Amendment of section 1 Sherman to include the prohibition of single-enterprise activity is not technically difficult. The addition of the italicized words in the following suggested wording would accomplish the desired results:

Every contract, combination in the form of trust or otherwise, conspiracy, or *single-enterprise activity* in restraint of trade or commerce . . . is hereby declared to be illegal. . . . Every person who shall make any contract, engage in any combination or conspiracy, or *engage in any single-enterprise activity* hereby declared to be illegal shall be guilty of a misdemeanor . . . .

Current economic policy, as reflected in legislation, has already recognized the need to prohibit special anticompetitive conditions when the probability of a substantial lessening of competition is present, or a tendency towards monopoly is present. However, amendment of section 3 Clayton is also necessary so that single-enterprise activity which produces the special anticompetitive conditions can also be proscribed. A suggestion for amendatory language is illustrated by the italicized words in the version below:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on condition, agreement, or understanding that the lessee or purchaser thereof shall not deal in the goods, wares, merchandise, machinery, supplies, or other commodity of a competitor or competitors of the lessor or seller, or to *refuse to lease or sell or contract for sale because an intended or existing lessee or buyer either, refuses to agree to, or fails to comply with, an announced or unannounced condition requiring that he not use or deal in the goods, wares,*

*merchandise, machinery, supplies, or other commodity of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale on<sup>113</sup> such condition, agreement, or understanding, or the refusal to lease or sell or contract for sale because of failure to agree to, or comply with the announced or unannounced condition may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*

The two amendments suggested above would retain the test of unreasonable restraint of trade for all single-enterprise activity, as section 1 Sherman presently does with respect to concerted activity. To the extent that the restraint effected by the single-enterprise activity was identical to that formerly held per se unreasonable when concertedly produced, a similar per se characterization would result from single-enterprise restraint. Where, however, the stricter tests of probability of substantial lessening of competition or tendency to create a monopoly have been used in section 3 Clayton, the single-enterprise activity consisting of refusal to deal has been singled out as being the most comparable method of effecting the restraint presently prohibited by the section. Single-enterprise activity which produced restraints of the variety not presently proscribed by section 3 Clayton would still remain immune unless they met the more severe test of unreasonable restraint.

Whether or not the treble damage remedy presently available to private plaintiffs would be a sufficient deterrent to the tactic of refusal to deal is debatable. As indicated earlier in the text, measuring damages for refusal to deal presents serious difficulties where open-account selling exists. Should buyers be able to obtain injunctive relief which requires sellers to sell when the refusal to deal was based on buyer noncompliance with the anticompetitive conditions? Is it not enough that the buyer is willing to pay the seller's demanded price? If buyers stand ready to pay the demanded price, sellers should be able to avoid forced sales only on proof that their refusals are not based on maintenance of noncompetitive conditions that amount to

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<sup>113</sup> The writer's substitution of "on" for the word "or" at this point is unconnected with the theme of this article. It is intended to correct what is felt to be an error in the original intention of the drafters of section 3. From a reading of the section it would appear that the legislation is designed to make unlawful only *certain* leases, sales, or contract for sales, *i.e.*, only those that contain conditions, agreements, or understandings which restrict the buyer from buying from the seller's competitors and furthermore only those leases, sales, and contracts for sales which have such conditions as a part of the transaction *and* which produce the necessary harmful effects to the economy. Therefore it seems grammatically more correct to prohibit the transaction (lease, sale, or contract for sale) only when the transaction *contains the undesired condition*. The use of "on" will effect this result.

unreasonable restraints. Sellers would still be able to refuse sales where the desired buyer conduct was unconnected with unreasonable restraints. All refusals would be subject to the properly applied economic tests, depending on the conditions which such refusals were attempting to induce. Even where the refusal was unconditional, it could still be examined to determine whether a line of commerce had been unreasonably restrained.

Should refusals to buy be similarly treated? The normal exchange a buyer offers is money. A seller, on the other hand, offers a product and a buyer's refusal to buy involves a complicated evaluation of the worth of the seller's product as compared with alternatives. Policing buyer refusal to buy, with the attendant problems of determining whether the refusal was based on attempts to coerce sellers to accept noncompetitive conditions rather than the simple conclusion that the buyer had better alternatives, would be difficult at best. Perhaps the treble damage remedy available to sellers who could show a causal relationship between the buyer's refusal to buy and the creation of anticompetitive conditions would be a sufficient deterrent.

Alternative solutions to the general problem considered in this article have been offered by other writers. At one extreme some conclude that vertical restraints are not sufficiently unreasonable as anticompetitive devices to require proscription.<sup>114</sup> That solution, of course, is directed primarily at what its supporters feel is a long-continued economic misconception of the effects of vertical restraints held by legislators, economists, courts and commentators.<sup>115</sup> Long-standing conceptions deserve constant reexamination to prevent them from becoming immutable postulates. To date, the writer is unconvinced that vertical restraints are harmless. However, he is in greater disagreement with those whose solutions admit, as he does, that such restraints are harmful, but who refuse to acknowledge that this feature should be the only prerequisite to proscription. When there already exist well-recognized, though admittedly complex tests for proscription ("unreasonable restraint of trade"—"to substantially lessen competition or tend to create a monopoly in any line of commerce"), introducing phrases like "business justification,"<sup>116</sup> "of-

<sup>114</sup> Bork, *supra* note 25; Adams, *supra* note 43.

<sup>115</sup> Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954).

<sup>116</sup> Fulda, *supra* note 72, at 605. ("The cases sanctioning refusals to deal for reasons not connected with resale price maintenance concern less sensitive areas where it is much easier to find *business justification* for the refusal.") (Emphasis added.)

fensive,"<sup>117</sup> "normal incidents of the enjoyment of that trade freedom which has been a unique characteristic of our economic system"<sup>118</sup> as substitute tests simply because the restraint-producing activity is single-enterprise action rather than concerted action, falls wide of the mark. Those who are willing to recognize that our present well-accepted tests for proscribing anticompetitive activity should be equally applied whether the activity is single-enterprise or concerted, but who are content with the irreconcilable attempts of our courts to characterize single-enterprise activity as concerted, seem unaware that in this process economically desired policy goals are lost in the confusion.

The simple amendments suggested above would eliminate the need for the hypocritical mischaracterization appearing in the court decisions and would provide the Government with the power to prohibit anticompetitive activity consistent with our overall antitrust goals. If an additional deterrent to such activity is thought necessary, it could be provided by legislation which authorizes private plaintiffs to obtain forced sales or purchases from defendants.

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<sup>117</sup> Alexander, *Private Antitrust Actions for Refusal to Deal*, 6 ST. LOUIS U.L.J. 489, 505 (1961), ("Absent an *offensive condition* on continued dealing, a supplier should feel safe in choosing his customers.") (Emphasis added.)

<sup>118</sup> Barber, *supra* note 97, at 885 ("Unilateral refusals to deal where considerations of monopoly are not involved *are normal incidents of the enjoyment of that trade freedom which has been a unique characteristic of our economic system.*") (Emphasis added.) Also he states, "If the conspiracy requirement should be read out of Section 1, [Sherman] any firm which refused to sell to any person would do so at the peril that the effect of the refusal would on suit by such person be found unreasonably to have restrained trade." This writer adds—and why shouldn't he be *if that is the effect of his activity.*