Boston College Law Review

Volume 17
Issue 5 *Number 5*

Article 5

6-1-1976

Vertical Integration as a Restraint on Intrabrand Competition: The Automobile Industry

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VERTICAL INTEGRATION AS A RESTRAINT ON INTRABRAND COMPETITION: THE AUTOMOBILE INDUSTRY

INTRODUCTION

In *Coleman Motor Co. v. Chrysler Corp.*,[1] plaintiff Coleman Motor Company, a former independently franchised dealer of Dodge automobiles and trucks, brought a treble damage action under section 4 of the Clayton Act[2] against Chrysler Corporation, alleging violations of section 1[3] and 2[4] of the Sherman Act.[5] Plaintiff alleged that as a result of various instances of preferential treatment by Chrysler towards its partially and wholly owned dealerships (hereinafter "factory dealers" or "factory dealerships") he was forced to surrender his franchise and to cease operations.[6] Plaintiff further alleged that such preferential treatment was the product of a conspiracy between Chrysler and its factory dealers which had the effect of destroying independent Dodge dealers.[7]

Prior to 1954, Chrysler marketed its vehicles through a traditional form of franchise agreement, the independent franchise dealership.[8] In 1955, plaintiff became an independent franchise Dodge dealer in Allegheny County, Pennsylvania.[9] Under the franchise agreement, plaintiff bought Dodge vehicles directly from Chrysler and agreed to sell a minimum quantity of those vehicles. The agreement also provided that the franchise could be terminated by Coleman on 30 days notice and by Chrysler upon breach by Coleman.[10]

At about the same time that Coleman became a dealer, Chrysler began to franchise dealers under a new plan whereby Chrysler would supply up to 75 percent of the capital necessary for a franchisee to open a new dealership.[11] Under the plan, the 25 percent private owner could ultimately purchase Chrysler's 75 percent interest in the dealership. Until the private owner did so, however, Chrysler retained majority control as a shareholder and as a member of the board of directors.[12] In 1961, the first factory dealership in Allegheny County,

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[1] 525 F.2d 1338 (3d Cir. 1975).

[2] 15 U.S.C. § 15 (1970).

[3] 15 U.S.C. § 1 (1970). Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

[4] 15 U.S.C. § 2 (1970). Section 2 provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor . . . ."

[5] 525 F.2d at 1340.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 1341.

[9] *Id.*

[10] *Id.* Plaintiff stipulated at trial that the manner in which Chrysler calculated the annual minimum quantity was fair and reasonable. *Id.*

[11] *Id.*

[12] *Id.* Before the first dealership opened under the new plan, Chrysler's total national market penetration dropped from approximately 20% to 10.8%. *Id.*

Boulevard Dodge, opened.[13] Before the establishment of Boulevard, Coleman had suffered a total loss of approximately $74,000 and had operated at a profit in only one year from 1955 to 1961.[14] After Boulevard's first year, Coleman lost $16,799[15] and its share of Dodge sales in Allegheny County dropped from 14.2 percent to 7.4 percent.[16] However, during the period from 1963 to 1965, Coleman made a $12,380 profit.[17]

By 1966, when another factory dealership, Monroeville Dodge, opened, there were six factory dealers in Allegheny County.[18] When the factory dealer programs began to operate, Chrysler sales in Allegheny County increased from 11.28 percent to 18.01 percent of the total automobile market and actual Dodge sales in the county increased from 3117 to 6033.[19] However, after Monroeville opened, plaintiff's share of sales decreased from approximately 5 percent to 3.8 percent.[20] By 1967, the factory dealers had cornered 54.2 percent of the Dodge market in Allegheny County.[21] Coleman lost $4,070 during the first year of the Monroeville dealership and continued to lose money until it closed in 1969.[22] During the period from 1961 to 1968, the number of independent dealers decreased from 15 to 11. From 1961 to 1966, the number of factory dealerships grew to six. By 1968, however, that number had declined to four.[23]

The gist of plaintiff's complaint was that Chrysler operated its factory dealerships without regard for profit at the retail level in a manner designed to increase overall Dodge sales at the manufacturer level.[24] The precise question, as the court of appeals viewed it, is whether a "reduction in intrabrand competition by a tendency toward a vertically integrated distribution system"[25] is "sufficient to establish an unreasonable restraint of trade under section one of the Sherman Act."[26]

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[13] *Id.* at 1342. Despite Chrysler's institution of the new franchising plan, it continued to experience a declining trend in market penetration. To counter this trend, Chrysler inaugurated another new program to encourage new franchises in 1964. Under the 1964 program, Chrysler would lend a potential franchisee up to one-half of the capital needed to purchase a 25% interest in a Dodge dealership. *Id.* at 1341.

[14] *Id.* at 1343.

[15] *Id.*

[16] *Id.* at 1342.

[17] *Id.* at 1343.

[18] *Id.* at 1342.

[19] *Id.* Chrysler's national market penetration also improved, and by 1968 Chrysler's national market penetration had increased to 16.25%, with Dodge sales increasing from 3.43% to 6.18%. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1343.

[23] *Id.* at 1342.

[24] *Id.* at 1343.

[25] *Id.* at 1346. A vertically integrated distribution system is one in which a firm acquires control of its own distributive outlets.

[26] *Id.*

The *Coleman* court's finding that an unreasonable restraint of trade followed from Chrysler's alleged attempt to control the retail distribution of Dodge vehicles in Allegheny County provides a possible precedent through which more effective competition in the automobile industry can be promoted. Such a result can be reached by focusing on the effect of eliminating independent dealers such as Coleman on the competition in the *intrabrand* market rather than on the competitive situation which exists in the *interbrand* market.[27] Thus, the case can be viewed as establishing a precedent that may be utilized for the purpose of preserving the only effective competition—that of intrabrand competition—which can exist in the relatively anticompetitive oligopolistic automobile industry.[28]

Plaintiff specifically complained of three practices undertaken by Chrysler. First, Chrysler provided its factory dealers with the initial capital required to open a dealership. Second, Chrysler provided substantial operating loss subsidies which enabled the factory dealers to have bigger and more attractive showrooms, and to spend more money on advertising than the independent dealers. Third, Chrysler provided its factory dealers with the services of managerial employees at no expense to the dealers.[29] In addition, plaintiff averred that Chrysler intended to accomplish its design by squeezing independent dealers out of the market and by establishing a sales structure consisting of several large Chrysler owned dealerships.[30]

After trial in federal district court, the jury returned a verdict in which it found that "the defendants engage[d] in [a] combination or conspiracy . . . which unreasonably restrained interstate trade or commerce in Dodge vehicles at the retail level in Allegheny County."[31] In addition, the jury determined that by reason of such combination or conspiracy, plaintiff had suffered $300,000 in damages. The dis-

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[27] The intrabrand market is the market comprised of sales of the same manufacturer's goods, whereas the interbrand market encompasses the sales of the goods of different manufacturers.

[28] See text at notes 43-68 *infra*.

[29] *Id.* at 1341-42.

[30] *Id.* at 1343. The complaint in *Coleman* alleged that the illegal restraint of trade occurred in the Dodge market in Allegheny County, thereby raising the issue of what constituted the relevant product market for the facts presented in the case. *Id.* at 1340. The issue is important to a finding of a § 2 violation since whether monopolization has occurred or been attempted depends on what segment of the market is being considered. The defendant contended that all automobiles reasonably interchangeable with Dodges constituted the relevant product market. The district court judge originally instructed the jury that the relevant product market was Dodge vehicles. However, upon Chrysler's objection, the judge submitted the relevant product market issue to the jury. The jury did not return a special interrogatory on the issue, but did phrase the interrogatories on the issue of liability in terms of a market consisting only of Dodges. *Id.* at 1343 n.8. The court of appeals considered the absence of a specific finding important to the § 2 claim and thus, remanded for a new trial. *Id.* at 1349. However, with respect to intrabrand competition, only the effects on the Dodge market itself are pertinent.

[31] *Id.* at 1340.

trict court entered judgment against Chrysler and awarded plaintiff treble damages in the amount of $900,000. The court also denied Chrysler's motions for judgment notwithstanding the verdict and a new trial.[32]

Chrysler appealed both the factual and legal issues to the United States Court of Appeals for the Third Circuit, asserting that the record contained insufficient evidence to sustain the jury's verdict,[33] that certain evidence should have been excluded,[34] and that the jury was improperly instructed.[35] The court of appeals vacated the judgment and remanded to the district court for a new trial[36] on the grounds that (1) the evidence of a prior verdict against Chrysler in a similar case was erroneously admitted;[37] (2) the critical product market issue relevant to the section 2 claim had been presented to the jury in a confusing manner;[38] and (3) the testimony offered on the issue of damages was too speculative to sustain the award of treble damages.[39] More importantly, however, with respect to the merits of plaintiff's section 1 claim, the court of appeals concluded that on the evidence presented, the jury could reasonably have concluded that defendant combined and conspired with factory dealers.[40] As a matter of law, the court HELD: A manufacturer who subsidizes its partially and wholly owned dealers in a manner that places independent dealers at a substantial competitive disadvantage can be found to have unreasonably restrained trade[41] in contravention of section 1 of the Sherman Act.[42]

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[32] *Id.* at 1340-41.

[33] *Id.* at 1341.

[34] *Id.* Defendant asserted that while it was proper to introduce into evidence another case against Chrysler in which the allegations were identical to those in *Coleman*, Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969), in order to show bias on the part of a witness for Coleman who had been the plaintiff in *Mt. Lebanon*, plaintiff's reference to the verdict against Chrysler in that case on redirect, in examination of a second witness, and in closing argument was improper and unduly prejudicial. 525 F.2d at 1350-51.

[35] 525 F.2d at 1341.

[36] *Id.* at 1354.

[37] *Id.* at 1351.

[38] *Id.* at 1349.

[39] *Id.* at 1353.

[40] *Id.* at 1345.

[41] Although in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), the Supreme Court originally construed the "restraint of trade" language of § 1 to mean every restraint of trade, *id.* at 312, the Court later developed the "rule of reason" in Standard Oil Co. v. United States, 221 U.S. 1, 60-65 (1911). By adopting the "rule of reason," the Court reinterpreted § 1 to mean that only those restraints which were unreasonable were prohibited. It should be noted that the "rule of reason" need not be specifically applied in each case as there are some types of restraints which the Court has determined to be unreasonable as a matter of law and which, therefore, are illegal *per se*. *See, e.g.*, Northern Pac. Ry. Co. v. United States, 365 U.S. 1, 5 (1958).

[42] 525 F.2d at 1345-46. Although plaintiff also alleged that defendant had attempted to monopolize trade in Dodge vehicles at the retail level in Allegheny County and the jury had found for plaintiffs on this § 2 claim as well as on the § 1 claim, *id.* at 1340, this comment will not discuss the § 2 finding. The court of appeals found that with respect to the relevant product market for the § 2 claim the record was confused.

This comment will generally consider the validity of the conclusion that a tendency towards vertical integration in distribution can be an unreasonable restraint of trade under section 1 of the Sherman Act. More particularly, the comment will first examine the anticompetitive nature of the oligopolistic automobile industry and the inability of the antitrust laws as presently interpreted to counter the effects of anticompetitive behavior at the manufacturer level. Next, the possibility of insuring the existence of some competition in the industry by protecting competition at the retail level will be examined. In this context, the developing case law with regard to franchise terminations and vertical boycotts will be evaluated. The comment will then examine recent cases to determine what factors are relevant to a finding of a restraint of trade at the retail level. Finally, the relevance of an allegation of increased competition in the interbrand market to a finding of restraint of trade in the intrabrand market will be evaluated.

I. THE OLIGOPOLISTIC NATURE OF THE AUTOMOBILE INDUSTRY

The adverse effect on competition resulting from the elimination of independent franchise dealers like Coleman can be exemplified by an analysis of the present structure of the automobile industry. Three automobile manufacturers—the Big Three—account for approximately 97 percent of the sales of domestic automobiles.[43] It has been suggested that the only long-term justification for such high concen-

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Id. at 1349. Therefore, the Third Circuit declined to enter judgment notwithstanding the verdict and remanded for a new trial the issue of liability under § 2. *Id.*

[43] STANDARD & POOR, INDUSTRY SURVEYS: AUTOS—BASIC ANALYSIS A139 (August 7, 1975). The market shares in 1974 were General Motors—49.8%; Ford—29.6%; Chrysler—16.1%. American Motors accounted for 4.5% with Checker Motors taking up the remaining 0.1%.

Between 1962 and 1968, the Big Three's share of the new car market in Allegheny County ranged from a high of 89.54% in 1966 to a low of 86.94% in 1968. 525 F.2d at 1342. The actual breakdown of the new passenger automobile registrations in Allegheny County was as follows:

NEW PASSENGER AUTOMOBILE REGISTRATIONS

Year	Gen. Motors	Ford	Total Chrysler	Only Dodge	A.M.C.	Other
1962	53.01	23.39	11.28	4.94	6.71	5.61
1963	51.42	22.07	13.96	6.47	6.84	5.71
1964	49.49	24.22	14.25	6.63	5.88	6.16
1965	51.86	22.15	15.26	6.56	4.32	6.41
1966	49.01	24.01	16.52	7.28	3.45	7.01
1967	50.50	20.73	17.60	7.51	2.87	8.30
1968	47.56	21.37	18.01	7.19	2.98	10.08

Id. The average aggregate share during the seven year period was 88.24%. In 1962, the year after the first factory dealership opened, Chrysler's share of the Allegheny market was 11.28%, and in 1968, the year before the Coleman dealership closed, Chrysler's share was 18.01%.

tration is scale economies.[44] A scale economy focuses on the smallest share of the total market which a firm can have and still realize the lowest possible per-unit costs. Thus, if a single firm must have a relatively large share of a market in order to realize the lowest per-unit costs and thereby sell at a lower consumer price, there is justification for concentration.[45] Therefore, while a certain amount of concentration may be necessary to foster economic efficiency and progress, it has become increasingly clear that the Big Three have reached a level of concentration exceeding that which is required for optimum efficiency.[46] Such excessive concentration is increasingly being regarded as harmful, rather than helpful, to competition. The Supreme Court,[47] Congress,[48] and commentators[49] have each indicated an awareness of the anticompetitive effects of high concentration. Although a high degree of concentration may represent the entirely fortuitous position of firms that have survived in a declining industry,[50] it is more likely to result from deliberate business conduct designed for that purpose.[51] An example of a situation in which high concentration may be the result of such deliberate business conduct is an oligopoly.

An oligopoly, which is broadly defined as a market controlled by a few manufacturers who impose high barriers to the entry of new competitors,[52] is generally the result of intentional business conduct rather than purely fortuitous events.[53] While it is assumed that a pure

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[44] Sherman & Tollison, *Public Policy Toward Oligopoly: Dissolution and Scale Economies*, 4 ANTITRUST LAW & ECON. REV. 77, 78 (Summer, 1971).

[45] *See* J. BAIN, BARRIERS TO NEW COMPETITION (1956).

[46] Scale economy data with respect to the automobile industry indicates that all economies of scale in production are exhausted in a plant producing 7.5% of the total United States market. However, the four largest firms have on the average a market share of 22.55%. The implication is that concentration in the automobile industry is 3 times as large as it needs to be to achieve optimum efficiency. *See* J. BAIN, *supra* note 45, at 84.

[47] *See, e.g.*, United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 554-55 (1971); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 366 (1970); FTC v. Procter & Gamble Co., 386 U.S. 568, 577-80 (1967); FTC v. Consolidated Foods Corp., 380 U.S. 592, 597-99 (1965); United States v. Aluminum Co. of America, 377 U.S. 271, 277-81 (1964).

[48] *See, e.g.*, *Hearings on Investigation of Conglomerate Corporations Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 23, pt. 1-7 (1969-70); *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 7 (1968).

[49] *See, e.g.*, Kozik, *Oligopoly and the Concept of Workable or Effective Competition: An Economic Analysis of Recent Antitrust Cases*, 21 U. PITT. L. REV. 621, 622-26 (1960); Mueller, *The New Antitrust: A "Structural" Approach*, 1 ANTITRUST LAW & ECON. REV. 87, 89-91, 98 (Winter, 1967).

[50] *See* R. NELSON, CONCENTRATION IN THE MANUFACTURING INDUSTRIES OF THE UNITED STATES 3 (1963).

[51] *Id.*

[52] *See, e.g.*, Rea v. Ford Motor Co., 355 F. Supp. 842, 865 n.6 (W.D. Pa. 1972), *rev'd on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974).

[53] *Glossary*, 1 ANTITRUST LAW & ECON. REV. 129, 138 (July-August, 1967). For a background of oligopoly theory see, *e.g.*, J. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968); R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE (2d ed. 1967).

oligopoly does not exist, a distinction has been drawn between "tight" and "loose" oligopolies which, although not pure, behave in an oligopolistic fashion. "Tight" oligopolies (concentration of more than 50 percent of sales in four or fewer firms[54]) are defined as conforming to the model,[55] while "loose" oligopolies contain an unconcentrated segment which may or may not impose a competitive restraint on the concentrated firms.[56] The automobile industry is a classic illustration of a "tight" oligopoly. As noted above, three firms supply approximately 97 percent of the industry's domestic production.[57] Furthermore, barriers to entry into the industry are extremely high. The scale economy required to survive in the automobile industry creates one of the most formidable disadvantages for new entrants of any industry in the United States.[58] In fact, not one new domestic automobile manufacturer has entered the industry since 1923.[59]

The high degree of concentration that characterizes an oligopoly such as the automobile industry serves to destroy any actual competition among the few firms which comprise the oligopoly. High market concentration and entry barriers foster price fixing and other types of interdependent behavior.[60] Specifically, high concentration undermines independent decisions by the firms with respect to prices and levels of production, thereby engendering a disregard for price and product competition in favor of restricting production and inflated prices.[61] In order to retain such a controlled situation, the firms in the oligopoly must maintain high entry barriers to effectively forestall the possibility that the availability of new entrants' products will institute competitive conditions.[62]

Measured by reference to the factors of concentration and barriers to entry, the automobile industry is one of the most anticompetitive industries in America; concentration is maintained at a level which is twice that considered repugnant to competition.[63] However, while the interdependent conduct of the Big Three has the same anticompetitive effect as a conspiracy or combination, such conduct is

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[54] *See* Mueller, *supra* note 49, at 116-17. There is some disagreement as to precisely what the level of concentration must be in order to constitute a "tight" oligopoly. *Compare* C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 27 (1959), *with Glossary,* 1 ANTITRUST LAW & ECON. REV. 129, 138 (July-August, 1967). However, in neither instance would a concentration of 50% in four or fewer firms not be deemed a "tight" oligopoly.

[55] *See* J. BAIN, *supra* note 53, at 117-18, 122-23.

[56] *See id.*

[57] See note 43 *supra.*

[58] *See* J. BAIN, *supra* note 45, at 81, 127-29, 158-59.

[59] Snell, *Annual Style Change in the Automobile Industry as an Unfair Method of Competition,* 4 ANTITRUST LAW & ECON. REV. 67, 73 n.22 (Fall, 1970).

[60] *See, e.g.,* Erickson, *The Economics of Price Fixing,* 2 ANTITRUST LAW & ECON. REV. 94, 101-09 (Spring, 1969); Mueller, *supra* note 49, at 90-91.

[61] *See* C. KAYSEN & D. TURNER, *supra* note 54, at 104-05; Mueller, *supra* note 49, at 114-16.

[62] *See* R. CAVES, *supra* note 53, at 22-23; Mueller, *supra* note 49, at 89 n.7.

[63] *See* Mueller, *supra* note 49, at 115-16.

effectively outside the scope of the antitrust laws. Those laws prohibit only concerted behavior in "restraint of trade"[64] and behavior that tends to "monopolize" trade.[65] The Big Three's behavior generally does not involve concerted action.[66] Nor could it be viewed as monopolizing trade since there is not a single monopoly firm but three firms "collectively monopolizing."[67] Therefore, since there is no evidence of a multi-firm conspiracy or a single-firm monopoly, the anticompetitive activities of the Big Three fall into a gap in the statutory scheme and cannot be reached directly by the antitrust laws as presently interpreted.[68]

A number of proposals have been advanced with respect to the manner in which the anticompetitive characteristics of the interbrand automobile market could be reached and regulated.[69] It has been suggested that the Sherman Act "agreement" requirement be reinterpreted to include interdependent action.[70] However, no antitrust decision has yet adopted the suggestion that the Sherman Act agreement language be construed to include interdependent conscious parallelism.[71] Another proposal involves considering the Big Three as a multi-firm or "shared monopoly," bringing suit under section 2 of the Sherman Act, and seeking an order requiring the manufacturers to spin off a number of their divisions into independent manufacturers.[72] A third proposal which has particular significance for purposes of this discussion is that suit be brought under the Sherman Act to force the manufacturers to surrender their vertical control of the automobile distribution system.[73] The theory underlying this third proposal is that an increase in the number of independent dealers selling a particular brand of automobiles in a given geographical area will increase competition at the intrabrand retail level.[74] This third proposal involves direct affirmative action against the manufacturers, insofar as it may force them to divest even though no

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[64] See note 3 *supra*.

[65] See note 4 *supra*.

[66] *See* J. BAIN, *supra* note 45, at 216; Mueller, *supra* note 49, at 112-16. *Cf.* United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964).

[67] *See* Mueller, *supra* note 49, at 114-15.

[68] *See, e.g.*, R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION 110-11 (1970); C. KAYSEN & D. TURNER, *supra* note 54, at 44.

[69] *See Oligopoly in the Automobile Industry*, 4 ANTITRUST LAW & ECON. REV. 53, 53-56 (Fall, 1960).

[70] *See* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal*, 75 HARV. L. REV. 655, 677-84 (1962).

[71] Turner raised the possibility of such a construction by referring to the Supreme Court's language in Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939). Turner, *supra* note 70, at 683. *See* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 80-82 (1960).

[72] *Oligopoly in the Automobile Industry*, 4 ANTITRUST LAW & ECON. REV. 53 (Fall, 1970).

[73] *Id.*

[74] *Id.* at 55.

predatory practices by the manufacturers against their dealers have been established. Although the advisability of such affirmative action is beyond the scope of this discussion, the theoretical justification for such action would also justify a policy of forbidding a manufacturer from utilizing predatory practices in order to achieve vertical integration of its distribution system *before* such integration exists. While these three proposals have been offered as a means of increasing competition in the automobile industry, to date, none have been adopted by the courts. Therefore, at the moment, the possibility of enforcing one of these proposals under the antitrust laws in order to promote competition in the automobile industry is remote.

II. A Proposal for Insuring Competition in the Automobile Industry: *Coleman* and Other Recent Developments

Despite the courts' reluctance to adopt the proposed remedial theories, recent developments in two areas of antitrust law—the erosion of the manufacturer's absolute right to structure his distribution system in any manner he pleases,[75] and the precedent possibly set by *Coleman* and a few other decisions; namely, that a violation of the Sherman Act may occur when there is a restraint of trade in the intrabrand market[76]—suggest the possibility of preserving such competition as does exist in the automobile industry by insuring the presence of workable competition at the retail level. This end could be accomplished by limiting a manufacturer's ability to vertically integrate.

A. *The Erosion of the Manufacturer's Absolute Right to Refuse to Deal*

Section 3 of the Clayton Act makes "exclusive dealing" illegal.[77] Nevertheless, manufacturers have been able to accomplish the same result by refusing to deal with some of their dealers even when an agreement exists between the manufacturer and one of his other dealers.[78] Although the Supreme Court has never addressed the pre-

[75] See text at notes 77-108 *infra*.

[76] *See* Rea v. Ford Motor Co., 355 F. Supp. 842, 869-70 (W.D. Pa. 1973), *rev'd on other grounds*, 497 F.2d 597 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 457-59 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 623 (3d Cir. 1969).

[77] 15 U.S.C. § 14 (1970). Section 3 provides in pertinent part:

> It shall be unlawful for any person . . . to lease or make a sale or contract for sale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the lessor or seller . . . where the effect may be to substantially lessen competition or tend to create a monopoly . . . .

[78] *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376-78 (1967); United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Bushie v. Stenocord Corp., 460 F.2d 116, 119-20 (9th Cir. 1972); Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214 (9th Cir. 1970); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Schwing Motor Co.

cise issue of whether a manufacturer has an absolute right to refuse to supply and thereby terminate a dealer, numerous lower courts have found such a right.[79] One early decision, *Schwing Motor Co. v. Hudson Sales Corp.*,[80] is illustrative of the reasoning advanced by the lower courts on this issue. Schwing and another dealer of Hudson automobiles alleged that defendant Hudson had conspired with a third dealer and, by failing to renew plaintiffs' dealership contracts, had attempted to eliminate them as competitors of Hudson's co-conspirator-dealer.[81] Schwing further alleged that Hudson and its remaining dealer held a monopoly over the sale of Hudson automobiles in the relevant geographical market which resulted in higher prices to the consuming public.[82] Without considering the possibility that an anticompetitive effect might exist, the court rejected Schwing's arguments.[83] The court concluded that (1) "[e]very manufacturer has a natural and complete monopoly of his particular product;"[84] (2) "he is free to exploit this monopoly by selling his product directly to the ultimate consumer or through one or more distributors or dealers;"[85] and (3) his right to "exercise his own independent discretion as to the parties with whom he will deal" has not been destroyed by the antitrust laws.[86] The court recognized that the establishment of an exclusive dealership necessarily gives a dealer a monopoly of the manufacturer's products in a particular area thereby permitting the dealer to dictate prices subject only to competition with

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v. Hudson Sales Corp., 138 F. Supp. 899, 902-03 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

The origins of the concept that a manufacturer has a "right to refuse to deal" in order to structure his distribution network, even to the point where the manufacturer is in complete control of the entire distributive chain, can be found in the common law freedom of contract doctrine. *See* Standard Oil Co. v. United States, 221 U.S. 1, 54 (1911). Thus, the concept precedes the enactment of the antitrust laws. *Id.* at 49-62. The manufacturer's unfettered right to structure his distribution system as he wishes was firmly established as a defense to liability under the antitrust laws in 1919 in United States v. Colgate & Co., 250 U.S. 300 (1919), where the Supreme Court concluded that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 307.

[79] *See, e.g.*, Fedderson Motors, Inc. v. Ward, 180 F.2d 519, 522 (10th Cir. 1950); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, 902-03 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957); Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 828-29 (D. Md. 1937). The principle upon which such decisions rests is that the protection of a dealer's business opportunity is not properly within the scope of antitrust protection rather than upon whether the termination will have an anticompetitive effect.

[80] 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

[81] *Id.* at 901.

[82] *Id.*

[83] *Id.* at 902-04.

[84] *Id.* at 902.

[85] *Id.*

[86] *Id.*

other manufacturers' products. However, the court concluded that those results in themselves did not make the exclusive dealership arrangement condemnable.[87] The court emphasized that the antitrust laws did not protect the intrabrand competition between dealers but rather protected only: the availability of the supply to the public of a particular type of product; the existence of interbrand competitive prices; and other competitive conditions in the interbrand market generally.[88] Therefore, under *Schwing*, the existence of an agreement between a manufacturer and one dealer which destroys the business of another dealer and thereby decreases intrabrand competition is not violative of section 1.

By emphasizing form over substance, the courts have submitted to the utilization by manufacturers of the "right to refuse to deal" so as to permit manufacturers to structure their distribution networks in such a manner that the anticompetitive effects of the automobile manufacturing oligopoly can reach the retail level.[89] A method of insuring some competition in the prices and services offered to the consumer in the automobile industry, if not in the interbrand market, is to protect competition in the intrabrand market. To so insure competition at the retail level there must be a number of dealers who can effectively compete with one another. Such a result will not be obtained, however, if there is only one retail dealer who is owned or controlled by the manufacturer. Therefore, so long as a manufacturer can support his decision to limit or eliminate independent dealers by reference to his "right to refuse to deal," viable competition in the automobile industry will be effectively foreclosed. Notwithstanding the fact that the manufacturer's right to deal as he chooses has traditionally received strong judicial support[90] and has been favored by commentators,[91] an erosion of the almost automatic protection of that right to deal is indicated by recent decisions.[92] Such an erosion, and a corresponding promotion of intrabrand competition, can best be illustrated by the expanding judicial awareness of the antitrust implications of vertical boycotts.[93]

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[87] *Id.* at 903.

[88] *Id.* at 904.

[89] *See id.* at 903. See text at notes 79-88 *supra.*

[90] See cases cited at note 78 *supra.*

[91] *See, e.g.,* Handler, *Statement Before the Small Business Administration,* 11 ANTITRUST BULL. 417, 420-21, 428-29, 437 (1966).

[92] See text at notes 94-108 *infra.*

[93] A vertical boycott exists when some members of a vertically structured distribution chain refuse or fail to deal with other members of the same chain, thereby enhancing the possibility that the members who continue to trade will do so in a controlled and potentially anticompetitive manner. Discussion of the cases involving vertical boycotts is relevant to an analysis of the lawfulness of the activities in *Coleman* which allegedly resulted in Coleman's elimination as a dealer in Chrysler automobiles. Vertical boycotts, like the arrangement between Chrysler and its factory dealers, typically involve an agreement between a franchisor and a franchisee that is based on a manufacturer's decision with respect to his method of distribution. Furthermore, discussion of vertical

For quite some time, horizontal boycotts established for the purpose of eliminating competitors have been considered *per se* violations of the antitrust laws.[94] However, vertical boycotts with the same purpose or effect have escaped liability.[95] Two boycott arrangements which have been condemned by the Supreme Court, while not purely vertical, had vertical as well as horizontal elements.[96] Therefore, while these cases do not explicitly forbid anticompetitive vertical arrangements, they can be read to imply such a prohibition. Such an implication can be viewed as indicating that while vertical boycotts have escaped liability in the past, they are not absolutely immune from the sanctions of the antitrust laws.

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[97] a retailer dealing in the same product as Klor's induced the manufacturers of the product to agree among themselves not sell to Klor's.[98] While the Klor's boycott was horizontal, it did have a vertical aspect insofar as a retailer, through his inducement, was a party to the manufacturers' agreement. Moreover, the retailer presumably still had access to the product while Klor's did not; thus presenting another vertical aspect at the level at which Klor's competed. Similarly, in *United States v. General Motors Corp.*,[99] certain of Chevrolet's dealers were, to the dissatisfaction of other Chevrolet dealers, selling cars to discount houses which disrupted the sales price of Chevrolets on the market.[100] The dissatisfied dealers convinced General Motors to prevent such sales to the discount houses.[101] Had General Motors been successful in preventing the sales, the discount houses would have been excluded from the market.[102]

In both *Klor's* and *General Motors*, the Court focused on the "exclusion of traders" as the illegal conduct[103] and not on the vertical or horizontal character of the boycott.[104] Therefore, the Court implied that the vertical-horizontal distinction is not as relevant to an assess-

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boycotts is also relevant because they exemplify a practice and result, like the practices in *Coleman* which resulted in the elimination of the Coleman dealership, which preclude a dealer from being an effective competitor.

[94] *See, e.g.*, United States v. Topco Associates, 405 U.S. 596, 608-09 (1972); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959).

[95] *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 261-64 (1963).

[96] United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[97] 359 U.S. 207 (1959).

[98] *Id.* at 213-16.

[99] 384 U.S. 127 (1966).

[100] *Id.* at 130-34.

[101] *Id.* at 133-36.

[102] *Id.* at 138.

[103] *General Motors*, 384 U.S. at 146 ("Exclusion of traders from the market by means of combination or conspiracy is . . . inconsistent with the free-market principles embodied in the Sherman Act . . . ."); *Klor's*, 359 U.S. at 213.

[104] *But see Klor's*, 359 U.S. at 212; United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372-73 (1967).

ment of the competitive effects of certain conduct as the repercussions on competition of the elimination of competing traders. Such a shift in emphasis suggests that the focus should not be on whether the manufacturer has merely exercised his absolute right to deal as he pleases in a vertical arrangement, but on whether such an exercise has had an anticompetitive effect.

Lower court decisions more explicitly reflect an extension of liability to situations which although minimally horizontal have more substantial vertical elements than were present in the Supreme Court cases.[105] For example, in *Ford Motor Co. v. Webster's Auto Sales, Inc.*,[106] the First Circuit, relying on *General Motors*, condemned a purely vertical agreement between Ford and one of its dealers to keep competing Ford dealers from engaging in certain practices.[107] The court refused to distinguish *Ford* from *General Motors* on the ground asserted by the defendant that the latter case involved a horizontal rather than vertical arrangement, stating "we find no controlling significance in the fact that such a boycott takes its shape and strength from a series of vertical agreements rather than from a single vertical-horizontal agreement."[108] Notwithstanding the fact that these lower court cases, of which *Ford* is typical, involve in most instances at least a nominal horizontal element, it is clear that that element is no longer as substantial a factor as it was in earlier cases. As the horizontal-vertical distinction becomes less important as a determinative factor, the doctrine that a manfuacturer can deal as he pleases in a vertical context is weakened. A logical corollary to this weakening is an increased concern not for the form of the arrangement or a manufacturer's "right," but rather for the effects which such an arrangement might have on competition in the marketplace. This concern can arguably be promoted by placing restraints on a manufacturer's freedom to vertically integrate. Such integration has the potential for vesting complete control in the manufacturer, thereby precluding competition between the various entities established to distribute the manufacturer's goods.

The Third Circuit in *Coleman* made a further departure from *Schwing*. The court acknowledged that a potential defense to a claim that vertical integration violates section 1 could be grounded in the theory that a manufacturer has a right to structure the method of distribution of his own product as he sees fit.[109] In fact, the defendant in

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[105] *See* Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 7 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966); Hub Auto Supply, Inc. v. Automatic Radio Mfg. Co., 173 F. Supp. 396, 397 (D. Mass. 1959).

[106] 361 F.2d 874 (1st Cir. 1966).

[107] *Id.* at 877-78.

[108] *Id.* at 882-83.

[109] 525 F.2d at 1347. The defendant also had raised this defense in the district court, 376 F. Supp. 546, 554-55 (W.D. Pa. 1974). The district court rejected the defense by stating, "[w]hile Chrysler *may* have an absolute right to terminate Coleman's Dealership, and not having done so, it then becomes a question of whether or not Coleman can be driven out of business by an obvious predatory intent to maximize profits at the

Coleman argued under the *Schwing* doctrine, that since Chrysler could have terminated Coleman's franchise directly without violating section 1, it could do so indirectly by opening competing dealerships. It was asserted that such dealerships could increase interbrand trade even though an individual competitor might be injured.[110] Chrysler could have argued convincingly that evidence of an injury to a single competitor under *Schwing* is not enough to find liability under section 1 since all competition affects the trade of individual competitors but does not necessarily restrain trade.[111] However, the district court in *Coleman* countered defendant's argument that the focus of the injury to competition test should be upon injury to interbrand competition by indicating that such argument did not take into account the doctrine advanced in later cases that restraints of intrabrand as well as interbrand competition could serve as the basis for a section 1 claim.[112] Furthermore, beyond a bare assertion that interbrand competition would prosper under its factory dealership programs, Chrysler did not produce any evidence which would support that claim.[113] Assuming that the automobile manufacturers' oligopolistic structure barred effective price competition in the interbrand market,[114] it is unlikely that Chrysler could have produced enough evidence to counterbalance the reduction in intrabrand competition.[115] While Chrysler's own share of the market increased somewhat after the opening of factory dealerships,[116] the aggregate share of the market controlled by the Big Three remained relatively unchanged.[117] There was no evidence that Chrysler's increased market penetration had any noticeable benefits for the consumer, such as a decrease in prices due to competition between Chrysler, General Motors, and Ford.[118] Furthermore, in response to a defense based on a manufacturer's "right to deal," the court reasoned that the proposition was "open to question"[119] and at the very least was qualified by the condition "that a lawful end achieved by unlawful means is not

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manufacturing level by minimizing losses at the retail level." *Id.* at 555 (emphasis added). Thus, the district court also chose to subject Chrysler's potential "absolute right" to a qualification that the right be exercised in a lawful manner.

[110] *Coleman*, 376 F. Supp. 546, 554-55 (W.D. Pa. 1974).

[111] *See* Checker Motors Corp. v. Chrysler Corp., 283 F. Supp. 876, 885 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969).

[112] 376 F. Supp. 546, 555 (W.D. Pa. 1974).

[113] 525 F.2d at 1347-48.

[114] See text at notes 59-63 *supra*.

[115] It would also appear likely, in light of the manner in which the oligopoly operates, that no firm in any "tight" oligopoly could ever produce such evidence.

[116] See note 43 *supra*.

[117] *Id.*

[118] While Chrysler's increase in market penetration may have increased Ford's and General Motors' concern and competitive response to the situation for a short time, eventually prices would even out due to a continuation of interdependent decision making. *See* Mueller, *supra* note 49, at 112-16.

[119] 525 F.2d at 1347.

protected by the antitrust laws."[120]

Support for the circuit court's reasoning can be found both in the growing trend toward limiting the scope of a manufacturer's discretion,[121] and in the qualification to which such discretion has uniformly been subject; namely, that the exercise of a manufacturer's freedom is not protected if it has the effect of either creating a monopoly or otherwise violating the antitrust laws.[122] Furthermore, in light of the theory postulated above[123] that there is little, if any, competition at the factory level in the automobile industry, it can be argued that cases restricting the manufacturer's right in some circumstances will provide the legal tools necessary to protect one of the remaining possibilities for actual competition in that industry—competition at the retail level.[124]

In *Coleman*, the elimination of independent dealers would lessen competition since as the number of independent dealers decreased the consumer would be left with fewer Dodge dealers to choose from, thereby reducing the incentive of the remaining Dodge dealers to offer better prices or services.[125] Furthermore, if the elimination of independent dealers proceeded until all such dealers were gone, the consumer would be left with only manufacturer-owned dealerships. The anticompetitive nature of a market in which the manufacturer is the only trader is obvious; if there are no intrabrand competitors, clearly there will be no intrabrand competition.

The *Coleman* court noted two areas in which competition would result from the existence of a number of independent traders.[126] The first area was that of competitive pricing. The court noted that each manufacturer has a range of "price jurisdiction" within which he can raise prices slightly above the prices set by a competitor and remain competitive.[127] Testimony was offered to show that the "price jurisdiction" in *Coleman* was approximately $200 to $300 per vehicle and was the result of various non-price factors—such as styling, engine performance, transmission quality, dealer convenience and servicing—which influence a consumer's decision to buy an automobile.[128] The court reasoned that as long as there were several dealerships with different owners, they could compete within the range of "price jurisdiction" for the business of the consumers who wished to purchase a certain brand of automobile.[129] The court went on to state that "the elimination of an independent dealer diminishes that competition,"

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[120] *Id.*
[121] See text at notes 77-108 *supra.*
[122] See note 78 *supra.*
[123] See text at notes 43-63 *supra.*
[124] See text at notes 77-108 *supra.*
[125] See text at notes 126-135 *infra.*
[126] 525 F.2d at 1347.
[127] *Id.*
[128] *Id.*
[129] *Id.*

and that if "all independent dealerships were eliminated, Chrysler could eliminate price competition within the full range of price jurisdiction."[130] Therefore, the court concluded that the elimination of the Coleman dealership had an anticompetitive effect.[131]

The second area in which the *Coleman* court found a lessening of competition was in the service provided by automobile dealers. Noting the existence of competition in the price of both parts and service and in the quality of service which existed between dealers, the court reasoned that if all independent dealers were eliminated such competition would be eliminated as well.[132] The court conceded that Coleman's testimony to the effect that he was proud of his dealership's service was the only evidence concerning service.[133] However, it concluded that it was "common knowledge that quality of service is vital to a successful automobile dealership."[134] The court, therefore, implied that the motivation of making a profit and succeeding as an automobile dealer would foster competition between dealers in servicing.[135] If all independent dealers were eliminated, the incentive for service competition would also be eliminated since the consumer would have no choice but to go to the remaining dealer.

As a result of the erosion of a manufacturer's right to structure his distributive system as he sees fit, particularly in a vertical arrangement, the courts have begun to exhibit a greater concern for substance rather than form. In this context, the possible anticompetitive effects of the alleged conduct are deemed to be more significant than the issue of whether the manufacturer was merely exercising his "right to refuse to deal" in a vertical form. As has been noted above, effective competition does not exist at the manufacturer level in the automobile industry,[136] but the absence thereof is not presently a violation of the antitrust laws.[137] Therefore, concern for substance must be directed towards any conduct which might have an anticompetitive effect in the only market in which actual competition can be found and protected by the antitrust laws—the retail intrabrand market.

B. *The Factors Relevant to Finding a Restraint of Trade in a Tendency Towards Vertical Integration*

1. Intracorporate Conspiracy

The plaintiff in *Coleman* maintained that Chrysler and its factory

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[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] Thus, whether Coleman was successful in his efforts to compete was not as relevant as the issue of whether there were various dealerships owned by different parties who would find it necessary to compete in servicing in order to succeed in the market.
[136] See text at notes 43-63 *supra*.
[137] See text at notes 64-68 *supra*.

dealers combined and conspired to eliminate him as a competing dealer.[138] That two affiliated entities, such as Chrysler and a factory dealership, can constitute discrete entities capable of combining in an intracorporate conspiracy within the meaning of section 1 has been firmly established by the Supreme Court.[139] The *Coleman* court concluded that the evidence was such that the jury could reasonably have found that Chrysler combined and conspired with the managers of its factory dealerships.[140] The court based its conclusion on the following evidence: (1) Chrysler provided loss and advertising subsidies to factory dealers; (2) Chrysler discriminated in favor of factory dealers in the release of new automobiles; (3) Chrysler paid the salaries of key managerial employees of factory dealers; and (4) the president of Boulevard Dodge testified to the effect that Chrysler's regional manager, after being informed of the president's concern for the losses which his company was sustaining, had told him not to worry because Chrysler was satisfied by making its profit at the factory level and intended to "reduce the number of Dodge dealers in Allegheny County from 16 to 11, under their new marketing program."[141] Although such evidence could not serve as the basis for a showing of an explicit agreement, this deficiency in the evidence was not fatal to a finding of a Sherman Act conspiracy.[142] The conspiracy or agreement to restrain trade required under the Sherman Act may be shown by circumstantial evidence, such as the conduct of the parties, as well as by direct evidence.[143]

2. Evidence Necessary to Show an Implied Agreement

While finding sufficient evidence to support the jury's verdict, the court in *Coleman* did not provide any practical indicia for deter-

[138] 525 F.2d at 1340.

[139] *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) (conspiracy between an American company and its English and French subsidiaries); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 215 (1951) (conspiracy between two subsidiaries of the same company); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116 (1948) (conspiracy between parent company and its wholly owned subsidiaries). In fact, in two cases involving § 1 claims against a manufacturer and his distributors, the Supreme Court specifically affirmed its position that an intracorporate conspiracy was a conspiracy within the meaning of § 1. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), where the Supreme Court in finding a conspiracy between a corporation, its parent corporation, and agents and officers of the corporations stated that since the defendants had "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Id.* at 141-42. *See also* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 215 (1951).

[140] 525 F.2d at 1345.

[141] *Id.* at 1344-45. The regional manager denied making the statements. *Id.* at 1345 n.9.

[142] *See* Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1343 (9th Cir. 1970); Flintkote Co. v. Lysfjord, 246 F.2d 368, 374 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

[143] *Coleman*, 525 F.2d at 1345.

mining whether an agreement to restrain trade exists in a particular case. However, in *England v. Chrysler Corp.,*[144] a case similar to *Coleman,* the Ninth Circuit did provide some guidance on the issue. The plaintiff in *England,* an independent dealer, alleged that Chrysler's deliberate over-emphasis on sales at the factory level, through the unreasonable operation of its factory dealerships, created intense pressure on plaintiff to compete at a level which could not be profitable, leading to plaintiff's eventual demise.[145]

The *England* court assumed the possibility of restraint without finding liability. A finding of actual restraint was not made since the evidence was not sufficient to support a conclusion that the manner in which Chrysler operated the factory dealerships resulted from intentional and unreasonable management rather than unintentional mismanagement.[146] Since the court reasoned that unintentional mismanagement was not condemnable, plaintiff would have to show that the conduct was deliberate.[147] The court went on, however, to state that "deliberate" did not mean that there must be a specific intent to produce the economic effect. Rather, deliberate was construed to mean that the alleged conspirators agreed on the *course* of conduct which created the result, as opposed to agreeing on the *result* itself.[148]

With regard to such a definition of "deliberate," the *England* court reasoned that if it could be inferred that Chrysler determined to operate its factory dealerships irrespective of retail profit, the conduct could be construed to be "deliberate."[149] In this context, it was not unreasonable for the *Coleman* jury to conclude that Chrysler's conduct was deliberate and therefore constituted an agreement. The jury had before it a statement, allegedly made by Chrysler's regional manager, which indicated that Chrysler was not concerned with retail profits because it would be satisfied with making profits at the factory level. The evidence also tended to show that Chrysler discriminated in favor of factory dealers in the release of new automobiles. Furthermore, there was evidence to the effect that when plaintiff went out of business Chrysler reduced its advertising expenditures for one of Coleman's closest geographical factory dealer competitors.[150] Therefore, the jury could reasonably conclude that the alleged conspirators agreed on the course of conduct and that Chrylser operated the factory dealerships without regard for profit at the retail level. Thus, the necessary agreement could be found from these facts.

However, while it is possible to conclude that the requisite com-

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[144] 493 F.2d 269 (9th Cir.), *cert. denied,* 419 U.S. 869 (1974).

[145] *Id.* at 273.

[146] *Id.*

[147] *Id.*

[148] *Id.* The *Coleman* court also distinguished between intent and effect by stating that "[i]f the defendant's conduct has anticompetitive effects, unimpeachable motives will not save it from condemnation." 525 F.2d at 1345 n.10.

[149] 493 F.2d 269, 273-74 (9th Cir.), *cert. denied,* 419 U.S. 869 (1974).

[150] 525 F.2d at 1344.

bination or conspiracy in fact existed and that the only workable competition[151] in the automobile industry as it is presently organized can occur in retail sales, there is little additional authority, beyond that contained in the *England* dicta, enunciating the other factors relevant to a determination of whether there has been a restraint of trade in the intrabrand market. Since the *England* court only assumed the possibility of the existence of an illegal restraint in the intrabrand market of the type alleged by plaintiff, the court did not determine the issue of whether such a restraint had actually occurred in that case. Consequently, the *England* opinion does not demonstrate the manner in which the facts in a particular case ought to be viewed in order to resolve the question of whether a violative restraint has taken place. Reference must therefore be made to other decisions for such a demonstration.

3. The Factor of Restraint in the Intrabrand Market

Some appellate courts have addressed the issue of restraints in an intrabrand context.[152] However, to date, no federal appellate court other than the Court of Appeals for the Third Circuit has considered the possible restraint in the intrabrand market fostered by the elimination of independent dealers and a corresponding tendency towards a vertically integrated distribution system.[153] There are, however, two district court opinions which shed light on the question.[154] In *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*,[155] plaintiff was a Dodge dealer whose franchise was terminated by Chrysler.[156] The structure of the market in which plaintiff competed was like that in *Coleman* insofar as Chrysler had instituted the same kind of factory dealership plans. Plaintiff offered evidence to show that the factory dealerships engaged in price-cutting and massive advertising to the detriment of in-

[151] Initially, it should be noted that when Chrysler in *Coleman* entered the market through its factory dealers, it became a competitor of its independent dealers. *Id.* at 1346. On a theory of workable competition, a reduction in the number of competitors would effect a reduction in the amount of competition. *See* G. STOCKING, WORKABLE COMPETITION AND ANTITRUST POLICY 243-45 (1961); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1302-04 (1948); *Oligopoly in the Automobile Industry*, 4 ANTITRUST LAW & ECON. REV. 53, 55 (Fall, 1970).

[152] *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (territorial restrictions); Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975) (territorial restrictions); Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972) (refusal to deal); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (refusal to deal).

[153] *Coleman*, 525 F.2d at 1346.

[154] *See* Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1972), *rev'd on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 623 (3d Cir. 1969).

[155] 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 623 (3d Cir. 1969).

[156] *Id.* at 455.

dependent dealerships which could neither profitably advertise on such a large scale nor accept profits as small as those of factory dealers.[157] Furthermore, plaintiff's evidence tended to show that Chrysler provided loss subsidies and personnel to the factory dealers.[158] In holding Chrysler's practices to be unlawful, the court reasoned that "whatever evils may be shown to exist arise simply from the fact that the factory is engaging in direct competition with its customers."[159] The evil to which the court referred was the restraint of trade engendered by the elimination of "competition by putting out of business one dealer after another individually, [that is] by excluding competitors from any substantial market."[160] The court concluded that Chrysler's activities, which allowed its factory dealers to operate at a less profitable level than independent dealers, were the result of predatory practices[161] and were a classical example of restraint of trade.[162] Mt. Lebanon's unfavorable competitive position, the court held, was unrelated to the competitive merits of plaintiff and the factory dealers. Rather, such unfavorable position was the result of an adventitious advantage which resulted from Chrysler's ability to sustain losses as a dealer at the retail level due to the profits it was able to make at the factory level.[163] Thus, the gist of the violation in the *Mt. Lebanon* court's view was the elimination of intrabrand competitors for reasons other than the natural play of consumer choice based upon the relative competitive merits of the respective contestants in the market.

Another case involving a situation similar to that in *Coleman* is *Rea v. Ford Motor Co.*[164] While the district court in that case based much of its decision with respect to the section 1 claim on extensive quotations from *Mt. Lebanon*,[165] it did illuminate some additional factors pertinent to the present inquiry.[166] The situation in *Rea* was strikingly similar to that in *Coleman*. Ford, like Chrysler, had developed a factory dealership plan.[167] The evidence in *Rea* showed that factory dealers, backed by the resources of Ford, spent two to three times as

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[157] *Id.* at 457.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 459.
[161] *Id.* at 458-59.
[162] *Id.* at 459.
[163] *Id.*
[164] 355 F. Supp. 842 (W.D. Pa. 1972), *rev'd on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974).
[165] *Id.* at 869-71.
[166] Significantly, *Rea* is more similar to *Coleman* than *Mt. Lebanon* insofar as *Mt. Lebanon* contained a price-cutting element, 283 F. Supp. at 457, which was not present in *Rea* and *Coleman*. Consequently, since the *Rea* court relied heavily on the *Mt. Lebanon* opinion in reaching its conclusion, *see* 355 F. Supp. at 869-71, the absence or presence of price-cutting in *Coleman* need not be determinative in finding a restraint of trade under the theory advanced in *Mt. Lebanon*.
[167] 355 F. Supp. at 867.

much on advertising as independent dealers.[168] Furthermore, Ford infused large sums of money into its factory dealerships enabling them to secure better facilities than independent dealerships.[169] When the manager of a factory dealership showed concern for the losses his dealership was sustaining, he was informed that Ford did not care how much he lost or spent as long as he moved a large number of automobiles.[170] Thus, Ford, like Chrysler, displayed a lack of concern for profits at the retail level due to its ability to make a profit at the factory level.

The court noted that such an attitude on the part of Ford was a classic example of maximizing profits by subsidizing losses at the retail level.[171] Ford was still able to make a profit on each car sold and to receive a tax deduction for any losses sustained by a subsidiary. The court reasoned that Ford, by opening factory dealerships, was in competition with its own independent dealers and that any course of conduct Ford entered upon in combination with its factory dealers to drive independent dealers out of business or to dominate the market would constitute a restraint of trade under the Sherman Act.[172] Since plaintiff, an independent dealer, could not afford to spend as much on advertising or operate at such an unprofitable level as the factory dealers, the court concluded that the jury was justified in finding an illegal restraint of trade insofar as Ford's practices placed plaintiff at a substantial competitive disadvantage. Thus, the *Rea* court, like the *Mt. Lebanon* court, established the gravamen of the offense as the utilization of unfair competitive practices which resulted in the elimination of a competitor from the market. That a similar restraint of trade occurred in *Coleman* due to the elimination of a competitor as a result of predatory practices rather than the interaction of natural competitive conditions is obvious. Through factory dealerships, Chrysler, like the manufacturer in both *Mt. Lebanon* and *Rea,* entered the market as a competitor of one of its independent dealers.

Both *Mt. Lebanon* and *Rea,* as well as other cases, make it clear that the existence of a competitive relationship affects the manner in which a manufacturer can operate his business without incurring antitrust liability.[173] That such a relationship can impose limitations on a manufacturer is apparent in the reasoning employed in *Industrial Building Materials, Inc. v. Interchemical Corp.*[174] In that case, a manufacturer of sealants decided to no longer use the plaintiff as a dealer but to distribute his own products. To accomplish this end, the manufac-

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[168] *Id.* at 868.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 867.
[173] *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967); Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1342-43 (9th Cir. 1970).
[174] 437 F.2d 1336 (9th Cir. 1970).

turer created a situation in which the plaintiff could not effectively and economically compete in the sale of *any* line of sealants.[175] The Ninth Circuit adopted plaintiff's contention that defendant manufacturer could not choose to become a competitor in distributing and then employ unfair or unlawful means of competition with immunity.[176] The court reasoned that

> when the manufacturer enters the field and then removes a distributor, the public is left with only the manufacturer instead of the manufacturer and the independent distributor. Accomplishment of this anticompetitive objective by a manufacturer in a dominant market position by means of conspiracy and unfair tactics must surely be proscribed by the antitrust laws.[177]

Where, as in *Coleman*, the public is left with only an anticompetitive oligopolistic manufacturer, the anticompetitive objective achieved by the manufacturer has an even greater effect on the competitive options available to the consumer in the marketplace than the situation in *Industrial Building*, where the possibility of effective interbrand competition still existed.[178]

Plaintiff in *Coleman* did not contend, nor did the court hold, that Chrysler could not open factory dealerships in competition with Coleman. Rather, plaintiff's contention was directed at the particular method by which Chrysler established and maintained factory dealerships and at the anticompetitive effect which would necessarily flow from the continuation of that method. Chrysler supplied its factory dealerships with loss subsidies and advertising funds, enabling factory dealers to operate out of bigger, more attractive showrooms and to conduct more extensive advertising campaigns. Therefore, Coleman was put at a competitive disadvantage since in order for him to have such showrooms and advertising campaigns, the capital needed would have to come from his own resources, thereby reducing the amount of profits he could expect to make. That Coleman could be put at such a competitive disadvantage would not in itself be a sufficient basis for a section 1 claim.[179] However, since the factory dealers' competitive advantage was not the result of functional competitive superiority but of an adventitious advantage, the plaintiff's claim could be supported.[180] Since Chrysler would make a profit on the sales of automobiles irrespective of profits at the retail level, it could afford to sustain losses at the retail level which independent dealers could not afford. Thus, through the use of a predatory practice—an

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[175] *Id.* at 1342.
[176] *Id.* at 1342-43.
[177] *Id.*
[178] *Id.* at 1337, 1343.
[179] See text at notes 144-151, 155-178 *supra*.
[180] See text at notes 155-178.

adventitious advantage—Chrysler could impair independent dealerships to the point where they could no longer operate profitably. Such a situation would increase the likelihood of the elimination of competitors and correspondingly decrease competition. Although the *Coleman* court did not set forth the ensuing effect of Chrysler's conduct in detail, it did conclude that "Chrysler's actions were unfairly competitive and that their effect was to force plaintiff out of business."[181]

Therefore, practices such as those employed by Chrysler in *Coleman* which restrain trade in the intrabrand market can legitimately be subjected to Sherman Act liability. That such practices can be so subjected is particularly justifiable and commendable since the only free competition which the consumer can hope for in the purchase of an automobile is that which exists in the intrabrand retail market. Furthermore, suits such as *Coleman* have the potential to limit the Big Three automobile manufacturers' ability to vertically integrate to the extent that the anticompetitive atmosphere of the interbrand market is recreated in the intrabrand market.[182]

CONCLUSION

Due to high concentration and entry barriers, the automobile industry displays the characteristics of an oligopoly which leads to anticompetitive behavior at the manufacturer level. However, since this behavior is the result of interdependent rather than collusive decisions or a single firm monopoly, the anticompetitive effects of such behavior are outside the present scope of the antitrust laws. Consequently, the only competition which can be protected by the antitrust laws in the industry occurs at the retail level.

Recent developments in antitrust law increase the potential for insuring competitive conditions in the automobile industry as they exist in the intrabrand market. A developing trend away from a manufacturer's "right to refuse to deal," particularly in a vertical arrangement, displays an increasing judicial awareness of the anticompetitive effects of certain types of manufacturer conduct rather than the form which such conduct takes. For instance, if the anticompetitive effects are manifest in the intra rather than interbrand market,

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[181] 525 F.2d at 1345.

[182] Since the result in *Coleman* is laudable because it can deter this tendency toward reduced competition in the intrabrand market, it rests in part on the assumption that competition in the interbrand market is negligible or nonexistent. Therefore, any specific allegation that Chrysler's conduct in *Coleman* had the effect of promoting competition in the interbrand market must be investigated. As noted above, the evidence failed to show any such procompetitive effect of Chrysler's conduct. See text at notes 113-118 *supra*. Since the automobile industry displays anticompetitive oligopolistic behavior in general, it is likely that when a manufacturer begins to trade at the retail level its anticompetitive nature will follow it. Consequently, the manufacturer should have the burden of proving that a reduction in intrabrand competition was offset by an increase in interbrand competition.

the manufacturer is no longer automatically protected from liability pursuant to his "right to refuse to deal." Rather, cases show that the substantive effect of certain manufacturer decisions, including the decision to vertically integrate his distribution system, ought to be examined to determine the anticompetitive effects.

As long as a number of independent retail dealers survive, competition can continue in the absence of anticompetitive agreements between the dealers themselves. However, as the number of dealers is reduced, competition will most likely be reduced as well. And if all independent dealers are eliminated, leaving only the manufacturer at the retail level, the anticompetitive behavior of the interbrand automobile market can be transferred to the intrabrand market. Cases like *Coleman,* however, which recognize the existence and importance of intrabrand competition can deter this transfer by prohibiting predatory practices which restrain trade in that market. Therefore, a tendency towards vertical integration in the distribution of automobiles ought to be carefully scrutinized to determine the effect which such integration might have upon trade and the manner in which such integration was accomplished. Otherwise the antitrust laws may be powerless to deter any "acceleration of the trend towards vertical integration of the distribution process"[183] in an industry in which competition would certainly suffer from such an acceleration.

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[183] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380 (1967).