Denver Law Review

Volume 44 | Issue 4 Article 4

January 1967

# Antitrust and the Lay Lawyer

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Recommended Citation
Bruce Ducker, Antitrust and the Lay Lawyer, 44 Denv. L.J. 558 (1967).

# ANTITRUST AND THE LAY LAWYER

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*It is often said that the merit of a good attorney is his ability to spot the issues in a legal problem. Realizing that a substantial number of attorneys know very little about antitrust and trade regulation laws, Mr. Ducker discusses those problems which are most frequently encountered in counseling small business. The emphasis is on federal law, but Colorado regulations are discussed when applicable. After placing the regulation of business in its historical setting, Mr. Ducker discusses price controls: price fixing, sales below cost, price maintenance, and refusal to deal. Attention is then directed to the major problems involved in exclusivity, whether it be in market, sales, or purchases. The author first discusses exclusive dealing arrangements in the vertical chain of supply, followed by a consideration of the legal consequences of requirements contracts and tying arrangements. Exclusivity in the form of exclusive franchises is also examined. This is followed by a discussion of trade associations, their value, and the steps which must be taken to insure that they do not contravene applicable laws. Mr. Ducker concludes his article by discussing the civil remedies available to a client who has been wronged by the illegal actions of another. In particular, the treble damage action is analyzed, with special emphasis on the elements of proof.*

## INTRODUCTION

AS THE title of this article suggests, many lawyers view the body of antitrust and trade regulation laws as something both remote and esoteric. It is true that few general practitioners in Colorado are called upon to merge a soap company with a diversified food manufacturer, and even fewer are engaged to divest the two. Nevertheless, most businessmen come in frequent contact with antitrust problems. This article would attempt to make their lawyers aware of that contact.

The reader should be cautioned that this article will be of little interest or utility to those who practice regularly in the field. It will provide answers to only the simplest problems, and even those answers should be supported by independent research. For the more complex situations, this article may be of some help as a starting point for investigation. Of necessity, the attempt to cover a substantial body of law in one article has resulted in some oversimplification. The law of refusal to deal, tying agreements, and exclusive dealings are not nearly as settled as may appear. In other words, the sole strength of this type of survey — conciseness — also has the inherent weaknesses of superficiality and oversimplification.

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## I. The Historical Setting

Before inquiring into the laws themselves, some attention should be given to their historical and economic origins. What are the antitrust laws, and how did they come into being? It is fair to say that these controls were the result of dangerous abuses of the free enterprise system.

The Industrial Revolution produced both giant industrialists and a creed they held inviolable. Those who had risen to the top of the competitive heap in the first half of the nineteenth century owed their success to the resources of this country and to the climate of freedom it had afforded them. Between 1800 and 1850, great fortunes had been accumulated, fortunes which bestowed considerable power upon their holders. These men, inventive and aggressive, found in the structure of the contemporaneous economy an opportunity for even greater power: pools or agreements were formed within an industry to avoid the rigors of competition. For instance, several railroads would agree to divide the market area and thus eliminate rate wars.

The corporate extension of this scheme was the trust. By acquisition and merger, virtually an entire industry could be forged together under one directorship. The first great trust, Standard Oil Company of Ohio, emerged in 1882. Within five years similar combinations had been wrought in sugar, whisky and cotton-oil. The implications to the health of the national economy were dire and evident: free enterprise had produced an octopus which could strangle the parent by monopolistic control. To break the grip of the trusts, Congress in 1890 passed the Sherman Antitrust Act,[1] making illegal the monopolization of trade and combining or conspiring in restraint of trade. The law was not idle for long. Under Theodore Roosevelt, the "trust buster," and William Howard Taft, all major trusts were attacked; in their combined eleven years in the White House, the government instituted some 114 cases.[2] From this litigation the most significant development was the emergence of the "rule of reason,"[3] that is, that only *unreasonable* restraints of trade were illegal.

The Supreme Court's formulation of this rule of reason constituted, in the eyes of many, a threat to the efficacy of the Sherman Act itself. Would not the rule of reason permit continued abuses of monopolistic power, under the shibboleth of reasonable restraint? The nation's uncertainty about Sherman Act application was reflected in the election of 1912, in which remedial legislation became

[1] 15 U.S.C. §§ 1-7 (1964).
[2] E. Kintner, An Antitrust Primer 14 (1964).
[3] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

a part of both parties' platforms. In 1914, Congress passed the Clayton Act[4] and the Federal Trade Commission Act.[5] The former was directed against exclusive dealings and interlocking directorates; the latter outlawed unfair methods of competition. The Clayton Act was significantly amended in 1939 by the Robinson-Patman Act,[6] attempting to restrict discriminatory favors and pricing.

While various other statutes have been enacted, the Sherman Act, the Clayton Act, as amended, and the Federal Trade Commission Act constitute the heart of federal antitrust law. As exercises of the authority of Congress to regulate foreign and interstate commerce, these statutes do not apply to transactions affecting commerce within one state only.[7] When referring to federal laws, the following discussion assumes the requisite interstate contact.

If these contacts do not exist, a transaction must nevertheless conform to certain standards, since a second, independent body of *state* antitrust laws exists. In Colorado, for example, four desultory articles of our statutes relate to fair trade contracts,[8] unfair practices including sales below cost,[9] cigarette sales,[10] and restraints of trade and commerce.[11] Treatment is given below to fair trading and selling below cost; cigarette sales have been omitted entirely. Some mention should also be made of the remaining state provisions.

The Colorado Unfair Practices Act[12] prohibits price discrimi-

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[4] 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1964).

[5] *Id.* §§ 41-58.

[6] *Id.* §§ 13-13b, 21a.

[7] In Swift & Co. v. United States, 196 U.S. 375 (1905), the Supreme Court held that interstate commerce is affected by anything happening in the flow of commerce, even though the events are wholly within one state. As a result, there are few transactions indeed which do not come within the federal antitrust laws.

[8] COLO. REV. STAT. ANN. ch. 55, art. 1 (1963).

[9] *Id.* art. 2.

[10] *Id.* art. 3.

[11] *Id.* art. 4.

[12] *Id.* § 55-2-1(1):

> It shall be unlawful for any person, firm or corporation, doing business in the state of Colorado and engaged in the production, manufacture, distribution or sale of any commodity, or products, or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities, or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this article.

nation of the same bent outlawed by Robinson-Patman. The state law specifically prohibits secret rebates and refunds,[13] and sales below costs,[14] and provides criminal[15] and treble damage civil[16] remedies for its violation.

Colorado's "little Sherman Act" outlaws, with a bit more specificity than its prototype, the same areas of activity: contracts, combinations, trusts, pools and agreements restraining or intending to restrain trade,[17] as well as conspiracies to enter these alliances.[18] Authority is given the courts to enjoin formation of these combinations[19] and the contracts themselves are voided.[20] Although a civil remedy is provided, damages are restricted to those actually incurred.[21]

The state, then, has afforded an ersatz remedy for the competitor wronged by both discriminatory practices and restraints of trade. But, as is the case with most state antitrust laws, these statutes have gone largely unused. The discriminatory practices section of the Unfair Trade Act, enacted in 1937, has been cited in but eight reported decisions, both state and federal.[22] The "little Sherman Act" has received no mention whatsoever since its 1947 enactment.

The explanation for the atrophy of the latter is obvious: a plaintiff offering basically the same proof in federal court stands to gain thrice what he would in state court. But the Colorado price discrimination statute includes treble damages, and still it is not used. The preference for the federal remedy is, of course, the lawyers' rather than the clients'. It is suggested that the reasons for this preference are practical. Federal judges are more familiar with the statutory intricacies involved. The lawyer may borrow from the welter of existing precedent on Robinson-Patman, as contrasted with the scarcity of interpretation under state laws. Also, cases are

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[13] COLO. REV. STAT. ANN. § 55-2-7 (1963).

[14] *Id.* § 55-2-3.

[15] *Id.* § 55-2-14.

[16] *Id.* § 55-2-9.

[17] *Id.* § 55-4-1.

[18] *Id.* § 55-4-2.

[19] *Id.* § 55-4-5.

[20] *Id.* § 55-4-6.

[21] *Id.* § 55-4-8.

[22] United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); United States v. Maryland State Licensed Beverage Ass'n, 138 F. Supp. 685 (D. Md. 1956); Flank Oil Co. v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960); City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1959); Olin Mathieson Chemical Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950); Old Homestead Bread Co. v. Marx Baking Co., 108 Colo. 375, 117 P.2d 1007 (1941); Dikeou v. Food Distrib. Ass'n, 107 Colo. 38, 108 P.2d 529 (1940). In none of these decisions has an analysis been made of the Act as comprehensive protection against price discrimination.

generally heard more quickly in federal court, a prime consideration for a plaintiff who is facing a protracted fight. Finally, a defendant faced with a private action in federal court is aware that unlimited warfare, with its accompanying discovery, may pique the interest of federal forces, either the Department of Justice or the Federal Trade Commission. By joining battle in federal court, a plaintiff exposes his opponent to a possible rear-guard attack, which is conducive to out-of-court settlement.[23]

Plaintiffs' lawyers nevertheless might consider the state laws as tools for protection, since in certain circumstances they may either afford the only remedy or better suit a particular need. Despite the "flow of commerce" theory which has so expanded interstate commerce, industries still exist which are purely intrastate;[24] the state court, therefore, affords their only forum. Also, the state courts and state legislature would be more familiar with problems endemic, and perhaps peculiar, to the region. Finally, the alternative forum may better suit one whose situation has been precedented by adverse treatment under the federal laws.

So much for apology, history, and premise — what do the laws say? The problems selected for discussion are those most frequently encountered in counseling a small business, with one notable exception — price discrimination under the Robinson-Patman amendments.[25] Problems of pricing and exclusivity are considered, with emphasis on Colorado peculiarities. The section on trade associations reflects the increasing interest by small enterprises in this device for competing more effectively. Finally, some comment is given to the wronged client and his remedy of private action.

## II. PRICE CONTROL

### A. *Price Fixing*

Pricing, perhaps the most crucial of business decisions, frequently raises intricate antitrust problems. Price fixing is not among them, since the law's treatment of the practice is far from problematical — agreements between competitors which tend to fix prices

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[23] It may also help the plaintiff to satisfy his burden of proof. *See* text accompanying note 113 *infra*.

[24] These are more likely the businesses unaware of their rights under antitrust laws and thus vulnerable to predatory practices of others.

[25] Small business counseling in the Robinson-Patman area is the subject of an excellent article by Earl W. Kintner, former chairman of the Federal Trade Commission, appearing in 23 FED. B. J. 309 (1963).

Other less common problems involving the merger provisions of the Clayton Act, unfair methods of competition, the Federal Trade Commission Act, and such specialized legislation as the Automobile Dealers Act and the Bank Merger Act are not within the scope of this article.

are simply illegal.[26] The motives of the parties, the volume of business involved,[27] the effect on the price (whether depressant or stimulant), the reasonableness of the price,[28] the possible ameliorative effects upon competition[29] — all these have been held to be of no consequence. The prohibition applies equally to buyers and to sellers,[30] to the sale of services as well as products,[31] and to all participants in the chain of production and supply. This rule of forbidden activity is the clearest of the "per se" violations. Once price fixing is established, prosecutorial inquiry need proceed no further, and no defense will be effective.[32] The reason for this has been spelled out by the Supreme Court: "The power to fix prices, whether reasonably exercised or not involves power to control the market and to fix arbitrary and unreasonable prices."[33]

B. *Sales Below Cost*

Antitrust issues do not always hinge on the presence of concert among competitors. If the client seeks unilaterally to employ pricing techniques, his actions will be subject to antitrust legislation if anticompetitive in their effect. The Sherman Act does not specifically prohibit sales either at unreasonably low prices or below cost; rather, it proscribes general results — monopolization and restraint of trade.[34]

Whether sales below cost produce these results is a question of fact, turning, for the most part, upon two indices: first, the control of the market exercised by the seller; second, his intent in making the sale.[35] Although seemingly distinct, the two indices are often meshed, for, unfortunately, courts are prone to view the existence of market dominance as indicative of predatory intent. To illustrate, in one case,[36] the defendant managed some of its stores

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[26] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[27] United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

[28] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[29] Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir. 1950), *cert. denied,* 340 U.S. 906 (1950).

[30] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[31] United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950).

[32] *See, e.g.,* Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956).

[33] United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[34] 15 U.S.C. §§ 1-7 (1964).

[35] *See, e.g.,* United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Hershel California Fruit Products Co. v. Hunt Foods, Inc., 111 F. Supp. 732 (N.D. Cal. 1953). These cases indicate that, under federal law, sales below cost may have justifiable and salutary economic effects, and that it is the *effect* of these sales, not their mere existence, which may make them illegal.

[36] United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949).

at a gross profit so low as to be under the cost of operations. The scope of its operations was large enough to enable it to spread this apparent loss among its other stores. It could thus exert intense and localized pressure upon certain competitors, pressure so keen as to be adjudicated illegal. Although no specific proof of intent was proffered, the court held that the mere pattern of conduct clearly established an anticompetitive purpose.[37]

Another line of attack on sales below cost is Section 13 of the Robinson-Patman Act, which makes it unlawful for any person to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or of eliminating a competitor.[38] This statute has not been widely utilized because suits for its violations can more easily be sustained under the "monopolization" and "restraint of trade" language of the Sherman Act.

Aside from federal statutes, sales below cost are also subject to state regulation. In Colorado, for example, certain below-cost sales are outlawed by statute. Although the words of the act appear to establish these sales as per se violations,[39] interpretation by the state supreme court has emphasized that the *intent* to injure competitors is an essential element of the prohibited action.[40] The court has correctly noted that to be a constitutional exercise of the state's police power, only those sales which are *intended* to injure the public may be prohibited.[41]

New Jersey has attempted to outlaw the mere sale of goods below cost, regardless of motive, and has seen its law thrown out as unconstitutional in failing to define any public harm or damage to be averted.[42] Public interest, then, is threatened only when below-cost sales are used to prey upon a competitor.

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[37] *Id.* at 88.

[38] 15 U.S.C. § 13 (1964).

[39] COLO. REV. STAT. ANN. § 55-2-3 (1963):

> (1) It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 55-2-14 for any such act.

[40] Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950); Miller's Groceteria Co. v. Food Distrib. Ass'n, 107 Colo. 113, 109 P.2d 637 (1941); Dikeou v. Food Distrib. Ass'n, 107 Colo. 38, 108 P.2d 529 (1940).

[41] Perkins v. King Soopers, Inc., 122 Colo. 263, 267, 221 P.2d 343, 345 (1950) (emphasis added).

[42] State v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A.2d 291 (1939).

One last aspect of sales below cost is notable for the Colorado practitioner. The Colorado legislature has defined the illegal purpose involved as that of "injuring competitors *and* destroying competition."[43] Nevertheless, in an imposing line of decisions, the Colorado Supreme Court has treated these two requirements as alternatives.[44] The court has said:

> It is most apparent that proof of a sale of merchandise below cost is not "in and of itself, by virtue of its own force, conclusive" in support of the intent of the seller to thereby injure competitors *or* destroy competition. Such a sale might be made with an intent wholly unrelated to injuring competitors *or* destroying competition.[45]

The construction would substitute a judicial "or" for the legislative "and." The substitution would be logical. As it now reads, the statute is inaccurate and redundant — the destruction of competition necessarily includes the injury of competitors, or at the least, the preclusion of potential competitors. On the other hand, below-cost sales can be imagined which might temporarily injure competitors, by drawing individual product consumption from them, but which would not *destroy* competition in that product. Under the words of the act, these sales would be permissible; under the judicial construction, they would not. While the question thus remains technically open, the legal counselor might best proceed on the assumption that a purpose *either* to injure competitors or to destroy competition will be sufficient at trial.

Not all sales below cost are illegal, for both state and federal laws recognize the possible economic justification for setting a markedly low price. Every retailer would readily agree with this conclusion. A merchant may wish to introduce a new product or open a new store in a particular area and use a low price to offset the entrenchment of the competition. He may find that his competition has legally been able to beat him to the price-cut punch.[46] He may be seeking, by increasing his volume without a commensurate increase in profits, to avail himself of a cost-justified discount. Or perhaps he wishes to employ a loss leader — one product priced

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[43] COLO. REV. STAT. ANN. § 55-2-3(1) (1963) (emphasis added).

[44] Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950); Miller's Groceteria Co. v. Food Distrib. Ass'n 107 Colo. 113, 109 P.2d 637 (1941); Dikeou v. Food Distrib. Ass'n, 107 Colo. 38, 108 P.2d 529 (1940).

[45] Perkins v. King Soopers, Inc., 122 Colo. 263, 268, 221 P.2d 343, 345 (1950) (emphasis added).

[46] The Colorado statute recognizes the good-faith meeting of competition as one of the four exclusions from the act. The others are close-out or seasonal sales, the sale of damaged or deteriorated goods, and sale pursuant to a court order. COLO. REV. STAT. ANN. § 55-2-6 (1963).

low in an effort to attract purchasers for other products.[47] These practices should be, and apparently are, permitted so long as they invigorate the general market place.

C. *Price Maintenance*

Even the most unsophisticated manufacturer will, early in his business career, realize that his profit margin would be protected if he could set the resale price of his product. When he consults his lawyer, he wants to know, not whether, but how he can do this, and what "muscle" he can use to enforce obedience.

A manufacturer, whether in interstate or intrastate commerce, may establish the price at which his product is to be resold if he can place himself within his state's fair trade laws. This situation was made possible by the Miller-Tydings Act[48] and the McGuire Act,[49] federal laws which exempt from existing antitrust application contracts prescribing resale prices so long as those contracts are lawful under state law as applied to intrastate transactions. Thus, fair trade laws place a significant portion of commerce beyond the reach of the price-fixing interdiction of both local and federal antitrust laws. Generally, they establish the legality of a contract relating to the resale of a product whose producer can be identified by his mark, where that product is in open and free competition with similar products.[50] The degree of variance among the states in the substantive treatment of this exemption is remarkably slight, variations being, for example, whether the seller can establish a

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[47] The practice of "loss leaders" is common to retailers in every state. This area has been subject to more litigation in California than in any other state. Section 17044 of California's Business and Professions Code flatly prohibits their use, with no provision as to competitive injury. In another section, the Code declares that it is unlawful for any person to sell any product at less than cost for the purpose of injuring competitors or destroying competition. The California courts have found in this latter section a pervading legislative intent, and have therefore incorporated this purpose as a requirement of the "loss leader" prohibition. Wholesale Tobacco Dealers Bureau of Southern California v. National Candy and Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3 (1938); Northern California Food Dealers, Inc. v. Farmers Mkt. of Northern California, Inc., 1956 Trade Cas. ¶ 68,402, (Cal. Super. Ct.); Ellis v. Dallas, 11 Cal. App. 2d 234, 248 P.2d 63 (Dist. Ct. App. 1952).

[48] 50 Stat. 693 (1937), *amending* 15 U.S.C. § 1.

[49] 15 U.S.C. § 45(a) (1964).

[50] The Colorado Fair Trade Act is not atypical:

> (a) No contract relating to the sale or resale of a commodity which bears or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:
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> (b) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller;
>
> (c) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.
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> COLO. REV. STAT. ANN. § 55-1-1(1) (1963).

minimum or absolute price, or whether the owner of the identifying mark, rather than the producer, may set the price.

The important variation among the laws of these several jurisdictions concerns the "non-signer" clause — that provision of the Fair Trade Act which binds all persons so notified to the price set in the contract between manufacturer and retailer.[51] Of the forty-three states with fair trade legislation, all but two include non-signer provisions.[52] Only seventeen, however, have withstood the challenge of constitutionality.[53]

The Colorado non-signer clause was among the casualties. Having survived two lower court challenges,[54] it came under the scrutiny of the state supreme court in *Olin Mathieson Chemical Corporation v. Francis*.[55]

In that case, a manufacturer of guns and ammunition sought to enforce compliance to the non-signer clause by enjoining one not a party to the contract from undercutting the established price. The court reasoned that the state's police power was the only possible source of authority for the regulation of prices on the open market. Since there was no public interest inherent in the sale of firearms, the legislature may not affix prices to those sales, nor grant another, *i.e.*, the manufacturer, the right to do so. Following this reasoning, the court struck down the non-signer clause as unconstitutional.[56]

It might be mentioned in passing that this opinion fails to come to grips with antitrust and economic principles as we now conceive them. Our economy is not one of free competition, but rather one delicately controlled as to both buyer and seller. The decision of whether to permit, within this economy, transactions binding not only the parties thereto but their competitors as well must be made on the pragmatic needs and weaknesses of the economy itself.[57]

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[51] COLO. REV. STAT. ANN. § 55-1-4 (1963):

> Underselling unfair competition — Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

[52] Maine and North Dakota, 4 Trade Reg. Rep.

[53] Arizona, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Dakota, Tennessee, Virginia, and Wisconsin, 2 Trade Reg. Rep. ¶ 6021.

[54] Parker Pen Co. v. Zale, 1956 Trade Cas. ¶ 68,416 (Weld Dist. Ct.).

[55] 134 Colo. 160, 301 P.2d 139 (1956).

[56] *Id.* at 186.

[57] *See* Cooley, *Survey of Pennsylvania Law: Constitutional Law,* 26 U. PITT. L. REV. at 171-79 (1964), for an analysis of the constitutionality of non-signer provisions; Kellog, *Czar in Lambskin?* 1965 WIS. L. REV. 133, for comment on the problems besetting state regulation of economics; Comment, *Resale Price Maintenance,* 78 HARV. L. REV. 1277 (1965), for discussion of a recent British act attempting to eliminate minimum prices for resale.

Fair trading must be distinguished from price fixing. The Fair Trade Act does not authorize a conspiracy to fix prices to the detriment of competition. Rather, the Act concerns only those products in free and open competition with those of the same general class produced and distributed by others. With this in mind, the federal district court has held the Act to be no defense to a charge of concerted attempt to eliminate competition in certain trademarked brands.[58]

In summary, maintenance of resale prices is possible only if one can comply with his state's fair trade laws. Even then, in Colorado the manufacturer has no remedy against a price cutter with whom he has no privity of contract. The manufacturer may decide to refuse to deal with, or supply, the disobedient. If this occurs, various legal issues must be confronted.

D. *Refusal to Deal*

Any discussion of the individual's right to refuse to sell must begin with *United States v. Colgate & Co.*,[59] in which the Supreme Court first established that the Sherman Act does not of itself impinge upon one's freedom to deal with whom he wishes, absent monopolistic purposes. But to naively accept this as guidance is hazardous, for *Colgate* has been clarified and distinguished by nearly fifty years of court treatment in this area.

In reality, one with monopoly power who selectively refuses to deal does so at his peril. The greater his market dominance, the stronger will be the court's presumption of a covert, illegal purpose.[60] Behind the antitrust laws exists, of course, a legislative desire to maintain free access to any sector of commerce for those who seek it. The greater difficulty one has in obtaining supplies, the greater are the obligations of possible suppliers to him. The law will not be satisfied with merely a theoretical opportunity to "shift for oneself"; unless access is open in fact, a dangerous probability exists that an industry is coagulating into oligopoly, with the potential for evolving into a de facto monopoly.[61]

*Colgate* nominally allows a unilateral, well-intentioned refusal to deal. Here again, action permissive when done by one is pro-

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58 United States v. Colorado Wholesale Wine and Liquor Dealers Ass'n, 47 F. Supp. 160 (D. Colo. 1942).

59 250 U.S. 300 (1919).

60 Banana Distrib., Inc. v. United Fruit Co., 162 F. Supp. 32 (S.D.N.Y. 1958).

61 Lorain Journal Co. v. United States, 342 U.S. 143 (1951); National Screen Serv. Corp. v. Poster Exch. Inc., 305 F.2d 647 (5th Cir. 1962); Campbell Distrib. Co. v. Joseph Schlitz Brewing Co., 208 F. Supp. 523 (D. Md. 1962). In United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945), the court apologetically notes that, although the manufacturer had legitimately achieved its position as the only producer of linen rugs, its use of that position in refusing to sell was illegal.

hibited when done in coalition with others.[62] Collusive or concerted boycotts are per se violations of the Sherman Act.

Only last year, the Supreme Court examined and found a "classic conspiracy in restraint of trade."[63] In that case, testimony revealed that Chevrolet dealers were supplying cars for resale to Los Angeles discount houses, contrary to the wishes of General Motors. The defendant and three dealer associations, in an attempt to eliminate the practice, prohibited a dealer by contract from moving to or establishing "a new or different location, branch sales office, branch service station, or place of business including any used car lot or location without the prior written approval of Chevrolet."[64] While the argument on appeal centered around the validity of this clause, the Supreme Court saw beyond the explicit agreement to a

> joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. . . . Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.[65]

What, then, is left of the permissiveness once allowed by *Colgate?* Is it an invisible shield, or is it merely invisible? The current status of *Colgate* may be illustrated by examination of two recent cases involving the oil industry. In one, the Union Oil Company was enjoined from threatening non-renewal of the dealer's lease, where the threat had effectively coerced maintenance of established resale prices.[66] In a similar case, the court of appeals redefined the *Colgate* rule, saying that it

> means no more today than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. It allows each customer to decide independently to observe specified resale prices if induced to do so *solely* by a seller's announced policy. United States v. Parke, Davis & Co., 362 U.S. 29, 43-44. . . . On this summary judgment record, to hold that the defendant's actions do not establish a Sherman Act violation would serve to breathe new life into a doctrine we think fatally drugged by Parke, Davis & Co.[67]

Thus, while the core of *Colgate* still remains intact, all excess has been pared away. The ability to refuse to deal may be exercised freely, so long as it is not exercised in concert or with monopolistic motives. Courts are apparently more sensitive to motives im-

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62 United States v. Parke, Davis & Co., 362 U.S. 29 (1960).
63 United States v. General Motors Corp., 384 U.S. 127, 140 (1966).
64 *Id.* at 130.
65 *Id.* at 140-45.
66 Weingartner v. Union Oil Co. of Calif. 1966 Trade Cas. ¶ 71,757 (N.D. Cal. 1965).
67 Broussard v. Socony Mobil Oil Co., 350 F.2d 346, 350 n. 10 (5th Cir. 1965).

plemented through boycotts, and the combination of competitive zeal with a refusal to deal may be unlawful even though neither element would be so on its own.

## III. EXCLUSIVITY IN MARKET, SALES OR PURCHASES

### A. *Exclusive Dealings*

Wholesalers have historically been solicited by the manufacturers who supply them to handle certain products to the exclusion of competing products. They, in turn, may seek to require their retail outlets to do the same. On any level of the distributive chain — manufacturer, jobber, dealer — these transactions are subject to the application of Section 3 of the Clayton Act.[68] Under this statute, one cannot sell or lease goods on the condition that the recipient will not use or deal in the commodities of a competitor, if the effect of that sale or lease or the condition itself may substantially lessen competition or tend to create a monopoly. Further, one cannot fix a price for any commodity, or discount from or rebate upon that price, on the condition that the recipient refrain from dealing in the competitor's goods, if his action would tend to have the requisite effect.

Again, the oil companies have litigated the touchstone cases, providing the guidelines for the small businessman. In one case,[69] an integrated producer selling its own brand of gasoline, oils, and lubricants, and a full line of TBA (tires, batteries and accessories) purchased on consignment for resale, adopted the tactic of "full line forcing." The company required its dealers to handle its gasoline exclusively, and to discontinue the advertising of competitive oils and TBA, if they were to keep their dealerships. The dealers were bound by written, as well as tacit, agreements pertaining to the exclusive dealings with the supplying company. The Justice Department challenged this practice and the court had little difficulty in finding the requisite anti-competitive effect in this most vigorous of industries.

A more sophisticated situation was presented to the Supreme

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[68] 15 U.S.C. § 14 (1964):

> 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 the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

[69] United States v. Sun Oil Co., 176 F. Supp. 715 (E.D. Pa. 1959).

Court in *Atlantic Refining Company v. FTC.*[70] Again, the pernicious effect alleged was the defendant's method of TBA marketing. Atlantic Refining Company had agreed, in return for a commission, to assist Goodyear in promoting the sale of tires, batteries and accessories to the oil company's retail outlets. Noting the comparative strength of Atlantic, coupled with Atlantic's threats that dealerships depended upon the purchase of sufficient quantities of TBA and compliance with the Goodyear sales program, the Court found Atlantic in violation of the Clayton Act.

Two aspects of this case are particularly notable. The first is that, by dispensing with the usual economic analysis of percentages and market dominance, the Court did not establish a quantum of necessary strength. This omission is explicable by the fact that in the six-year period in question, sales of tires, batteries, and accessories totaled over fifty million dollars. The second noteworthy aspect of the case was Justice Stewart's dissent, in which he questioned the substantive conclusions of the majority opinion.[71] While coercive practices might violate the antitrust laws, he noted, the device of sales commissions in itself does not. This device had merely modified a previous Atlantic plan, under which Atlantic purchased the tires, batteries, and accessories, warehoused them, and sold them to its dealers. Under the refined plan Atlantic freed itself from the necessity for storage and distribution facilities. The old method had not enabled Atlantic any peculiar leverage over its dealers, said Justice Stewart, and neither did the new.

For the small businessman, the protection afforded, if any, is far from clear. His arm apparently may be bent, but not too far. The *Atlantic Refining* case indicates that the law is tending to offer him further insulation from economic bullying.

B. *Requirements Contracts and Tying Arrangements*

Closely related to exclusive dealings are the marketing devices of requirements contracts and tying arrangements. Although these devices are prevalent in most industries, their legal consequences are generally misunderstood. A requirements contract is an agreement by which a purchaser is required to buy all, or a specific portion, of its requirements of a product from the seller. It is a first cousin to an exclusive dealing arrangement and the courts have been but slightly more receptive to this member of the family.[72]

As with exclusive dealings, requirements contracts are subject to Section 3 of the Clayton Act with its "substantial lessening of

[70] 381 U.S. 357 (1965).

[71] 381 U.S. at 377.

[72] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Standard Oil Co. v. United States, 337 U.S. 293 (1949); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

competition" test.[73] On its face, this test leaves room for economic justification. In *Tampa Electric Co. v. Nashville Coal Co.*,[74] a public utility executed a twenty-year coal requirements contract, under which it would purchase most of its coal needs from the seller. After a thorough examination of the relevant market area, the Court found no substantial lessening of competition.[75]

*Tampa Electric* has become the prototypal Section 3 case, containing elements of both benefit and harm to the relevant market. Obviously, requirements contracts foreclose market access to some degree. Whether the market is being unduly restricted requires an inquiry into the strength of the parties, the line of commerce, and the effect of pre-emption of this one sector upon the general economy. Also to be weighed in the balance are those salutary effects — the efficiency in inventory and records, and the security for a small or new business — which may prove to be the redeeming virtues of the plan.

Tying arrangements, like requirements contracts, are subject to Section 3 of the Clayton Act. A tying arrangement requires the purchaser of one product to buy another product of the seller.[76] Section 3 prohibits tying arrangements when they have the proscribed effect on competition. The peril to our economy posed by these arrangements is clear. With sufficient leverage in the tying product, a company may strong-arm its way into monopolistic control of the tied product. If a person licenses his patented product on the condition that the licensee use other patented or unpatented products of the patentee, the patentee is, in effect, extending into other areas a monopoly by grace. A strong market position in the tying product would allow him to monopolize the tied product.[77]

These tying arrangements are illegal if they have the effect of substantially lessening competition. As should by now be apparent, this assessment often emanates not from the economic facts or the conduct of the individual, but from the hypothecation of their effect upon competition. When *has* competition substantially been lessened? And how can one assume that any abating was caused by the activities of one competitor?

Two rules of thumb help to answer these conundrums with respect to tie-ins. If either index is met, substantial competition has

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[73] 15 U.S.C. § 14 (1964).

[74] 365 U.S. 320 (1961).

[75] *Id.* at 333-35.

[76] D.E. Stearns Co. v. Tinker & Rasor, 252 F.2d 589 (9th Cir. 1957); Technical Tape Corp. v. Minnesota Mining and Mfg. Co., 247 F.2d 343 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958); United States v. J.I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

[77] Binks Mfg. Co. v. Ransburg Electro-Coating Corp., 281 F.2d 252 (7th Cir. 1960); Hunter Douglas Corp. v. Lando Products, Inc., 215 F.2d 372 (9th Cir. 1954).

been affected. In the first instance, the courts look to the economic power over the tying product. In an illustrative case,[78] the defendants' volume of business was only $325,000 in an industry with a total volume of $66,000,000, about one-half of one percent of the total sales. Nevertheless, the defendants' practices were held to be monopolistic because their control of a single product allowed them to force other products on buyers.[79]

The other indicator of substantially lessened competition is the existence of a substantial quantum or control of commerce in the tied product. For example, as the patentee of salt dispensing machines, the International Salt Company leased its machines only upon the condition that lessees purchase all salt to be used in the machines from the lessor, unless they could purchase the salt at a lower price. The tied product, salt, accounted for some $500,000 in sales in the year complained of. Holding these contracts illegal, the Court said:

> The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious.[80]

Of the three methods of product-line forcing, the courts have dealt most strictly with tying contracts. Counsel should react accordingly, and, assuming that they serve few legitimate purposes short of the suppression of competition, look upon tie-ins with a most critical eye.

### C. *Exclusive Territories, Rights, and Franchises*

With the increase in popularity of the francise, providing a man with a business of his own, comes an increasing demand upon the general practictioner to counsel the franchisee as to what he may ask from his corporate franchisor. The usual franchising arrangement includes some guaranty that the new business will receive a territory and perhaps products of its own for a certain time. These guarantees may raise antitrust problems. This discussion concerns only negotiations between those in vertical market relationships: manufacturer to distributor, distributor to jobber,

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[78] Oxford Varnish Corp. v. Ault and Wiborg Corp., 83 F.2d 764 (6th Cir. 1936).

[79] *Id.* at 766.

[80] International Salt, Inc. v. United States, 332 U.S. 392, 396 (1947). This case is also notable for the benchmark it set in quashing incipient monopolistic tendencies. The Supreme Court refused to void a summary judgment precluding the trial of issues as to whether the contracts substantially lessened competition, saying:

> Not only is price fixing unreasonable, *per se*, . . . but also it is unreasonable, *per se*, to foreclose competitors from any substantial market . . . . Under the law, agreements are forbidden which "tend to create a monopoly," and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.

Thus, the Court employed the "either-or" test of Clayton, while using Sherman Act language to nip the activity in the bud.

jobber to retailer. Market, territorial, or customer division among those of similar, or horizontal, function is not discussed, since it is a per se violation of Section 1 of the Sherman Act.[81]

The exclusive franchise system, under which one starts in business with the assurance of the franchisor that he will not franchise competition within a delineated area, remains a permissible and highly satisfactory method of commercial expansion.[82] The method, however, has its legal limitations and should be drafted with an eye to reasonableness in geographic scope and in duration.

Abuse of the franchise system can bring down upon the head of the franchisor a charge of restricting the free flow of goods in commerce and potentially blocking entry of competition. Illustrative of this situation is *Hathaway Motors, Inc. v. General Motors Corp.*,[83] in which the complaint stated a cause of action by alleging that automobile manufacturers maintained a system of exclusive dealer franchises which excluded from the sale of new cars the independents who would not yield to the system. The court felt that the alleged scheme, which included pressure on banks, finance companies, newspapers, and legislative bodies, as well as on those within the industry, would, if proved, constitute a real detriment to the consumer.[84]

Customer and territorial restrictions were both challenged in *White Motor Co. v. United States*,[85] where the Supreme Court held improper the conviction by summary judgment of a truck manufacturer's distribution system. Not atypically, the manufacturer had divided areas and accounts among its distributors, reserving for itself choice industrial, governmental and fleet customers. The Supreme Court rejected the situation as the test case for vertical territorial restrictions, because not enough appeared in the record as to the actual impact of the distribution system on competition.[86] The Court remanded the case for further proof, and a consent judgment[87] frustrated the potential enlightenment of the business community. Nevertheless, by way of dictum, the Court indicated that vertical territorial limitations and customer restrictions may be justifiable and that they could not be barred on the theory that resale price-fixing restrictions were an integral part of the whole distri-

[81] Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[82] *See, e.g.*, Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.D.C. 1957).

[83] 18 F.R.D. 283 (D. Conn. 1955).

[84] *Id.* at 284,285.

[85] 372 U.S. 253 (1963).

[86] *Id.* at 263.

[87] Reported at 1964 Trade Cas. ¶ 71,195, at 79,762 (N.D. Ohio Sept. 8, 1964).

bution system if the price restrictions involved an insubstantial amount of business.[88]

In the summer of this year, the United States Supreme Court added an interesting, if far from definitive, gloss to the law of territorial restriction. The Department of Justice challenged the marketing program of a leading bicycle producer. Distributors had been assigned territories and were instructed to sell only to franchised Schwinn accounts. Franchised retailers were not allowed to resell to non-franchise dealers. The actual distribution took three forms: assignment and agency sales to dealers through distributors, direct sales to distributors, and direct sales to dealers with the distributors handling orders on commission. The deleterious effect was asserted to be, not upon the bicycle market as a whole, but simply upon the intrabrand competition which constituted one-seventh of the total industry volume.[89] The Court held illegal, under Section 1 of the Sherman Act, the two requirements under which bicycles purchased by distributors had to go to franchised dealers, and those prohibiting franchised dealers from selling to non-franchised dealers. Upheld as reasonable restraints of trade were the territorial and customer restrictions applied to bicycles handled by distributors through agency or consignment arrangements.[90]

Influencing the Court strongly in its decision were the availability of competitive bicycles, the healthy, vigorous competitive arena justifying the marketing program, the ability of Schwinn distributors and retailers to handle other brands, and the failure of the government to prove the alleged intermixture of this distribution program with price fixing. The Court approved this restrictive distribution as an exercise of sound business reason, but warned that

> [t]he promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved.[91]

If this case establishes any definition of legality, then it is the fleeting one of sound business practice. For the lawyer and his client, however, flirting with an evanescent boundary is a precarious practice indeed. The following remarks of Donald S. Turner, the

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[88] 372 U.S. at 263.

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

[90] *Id.* at 381.

[91] *Id.* at 375. *See also* United States v. Sealy, Inc., 388 U.S. 350 (1967), holding illegal a horizontal conspiracy to allocate territories among trademarks.

head of the Antitrust Division of the Department of Justice, suggest no rule itself but a sound approach to rule-making:

> [I] am not convinced that territorial restrictions are reasonably necessary to any legitimate purpose save for one case, that involving the entry of new firms and/or the introduction of new products. These are commonly associated with relatively high degrees of risk and uncertainty, and it is not unreasonable to suppose that territorial restrictions may be necessary in many of such cases to induce dealers to make the investment necessary to get the manufacturer's new product effectively introduced. . . . It should be noted, however, that, even in this case, the justification for territorial restrictions is one limited in time.
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> . . . Territorial restrictions might be justifiable where they appear to be the only method by which a weak firm can obtain dealers. Nevertheless, while it is undoubtedly good antitrust policy, generally speaking, to foster new entry, I am not at all sure that it is good antitrust policy to attempt to preserve in this way companies that have run the competitive race and have been fairly beaten.
>
> To conclude, my tentative view is that territorial restrictions on dealers are more restricted than is necessary to obtain legitimate objectives in all but very limited circumstances. There are ample alternative devices, all less restrictive than territorial restraints, whereby a manufacturer can attempt to achieve an efficient, aggressive marketing system.[92]

The legality of an exclusive market, then, depends primarily on the reason for exclusivity in establishing, entering, or enlarging a given market. Must a new franchisee get an area to himself to survive? If he does, how large and for how long? Will the security promised put him on an equal competitive footing, or a more lofty position, beyond the reach of the existing competitors? Exclusivity, whether in dealing, market allocation, or requirements purchasing, is a tool easily abused. The conservative practitioner will insure its proper use by employing it purposefully.

## IV. Trade Associations

Competing business firms often meet with one another in an attempt to improve their industry, and in the process, to assist the individual firms themselves. To establish regular and proper procedures, they may decide to form a trade association. The antitrust problems attendant to trade associations are more likely to arise with the small businessman than with the large corporation, for the small independent enterprise would more likely find in association a mode of competing with the diversified giant.

Two patent facts of trade association life are notable. The antitrust laws hold many acts, legal if done individually, illegal if

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[92] Turner, *Some Reflections on Antitrust,* 1966 NEW YORK STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 4-6.

done in concert. Similarly, any activity illegal if done outside a trade association is more easily proved illegal if done within it, for by definition, a trade association involves competitors in concert. Therefore, where conspiracy or combination is an element of the offense, the existence of a trade association may tend to prove that conspiracy.

Without defense, trade associations are in contravention of the Sherman Act if they allocate territories or customers, restrict production, limit channels of distribution, or fix and maintain prices (assuming of course, the requisite effect on interstate commerce).[93] As recently as 1962, the Department of Justice proved a scheme among pharmacists to maintain a schedule of prices for prescription drugs.[94] This and other abuses of trade associations serve to confirm the suspicion that the Justice Department shares with Adam Smith:

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.[95]

Is this suspicion justified? Are there no legitimate purposes which a trade association can foster? The fact that they are growing faster than consent decrees quash them indicates the contrary.[96] Associations can, and indeed do, develop new merchandising, research, technical services and markets. They may conduct distribution studies, industry advertising campaigns, and trade shows. Tax research, apprentice education, employee relations, arbitration, and government-industry liason are all valid and fruitful areas of association concern, areas served particularly well by representatives of an entire industry.[97]

Between these two lines of permissiveness and per se illegality lie the troublesome situations in which one must look to the unique combination of factors involved. The collection and distribution of freight rate information was, when first challenged, found to be a

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[93] The crucial cases in the area, to which relatively little has since been added, are the following: Sugar Institute v. United States, 297 U.S. 553 (1936); Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

[94] United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29, 33 (D. Utah 1962):

> The mere circumstance that goods in commerce are treated or handled by, or otherwise connected with, a learned profession does not remove the goods themselves, nor transactions affecting them, from the applicability of the Sherman Act.

[95] A. SMITH, THE WEALTH OF NATIONS 128 (1st Modern Library ed. 1937).

[96] Indeed, they are growing at a rate faster than that of the natural population. JUDKINS, DIRECTORY OF NATIONAL ASSOCIATIONS OF BUSINESSMEN (1961).

[97] For a list of some eighty activities, see Judkins, Services of American Trade Associations in 1953 (U.S. Dep't of Commerce, mimeo. Aug. 1954).

lawful activity.[98] In a later case, however, the defendant afforded its members the use of a common freight rate book. The Supreme Court felt that such horizontal accessibility to a critical element in price compilation was an element of competitive restraint and evidence of illegal concert on pricing methods.[99]

In contrast to common rate schemes, efforts by associations to standardize products are, in themselves, innocent and valuable. Caution must be exercised to insure that this attempt to standardize is voluntary, and limited to the product itself;[100] any carry-over towards standardization of merchandising or pricing will taint the entire program.[101] In addition, there should be some tangible benefit of standardization, both to the public and to the industry itself.

Another device often attempted by associations is the pooling of statistical information for association members. These collections save members' time and can actually increase competition within a given industry. The exchange of statistical information, however, affords a perilous opportunity for competitors to evolve a price-fixing or production-limiting scheme.[102] For this reason, any statistical activities should meet the following criteria: (1) concern for the present, rather than the future; (2) reference to no individual company; (3) maintenance on a voluntary basis; and (4) distribution of statistics to any interested or appropriate parties including the government.

Cost and price reporting programs touch the most sensitive antitrust area and therefore should be conscientiously overseen. The pooling of price and cost information is permissible when giving rise to no conspiratorial inference,[103] but if concerted action is "contemplated and invited," and the competitors accept that invi-

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[98] Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925).

[99] FTC v. Cement Institute, 333 U.S. 683 (1948).

[100] Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948).

[101] An analysis of the way good intentions are often extended beyond the pale of the law is found in Bond, Crown, & Cork Co. v. FTC, 176 F.2d 974, 979 (4th Cir. 1959):

> The standardization of product, for example, would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere. The practice of freight equalization might be all right if used by the manufacturers individually, but not when used in connection with standardization of product, patent control, price publication and uniformity of discounts and trade practices in such way as to destroy price competition.

[102] *See* United States v. Hartford-Empire Co., 323 U.S. 386 (1945); United States v. American Linseed Oil Co., 262 U.S. 371 (1923).

[103] Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925).

tation, even though their acceptance may be mute and tacit, the Sherman Act is violated.[104]

Credit activities and services by trade associations suffer similarly low toleration. The mere reporting of delinquent accounts is a proper activity if devoted to a purpose not anti-competitive. Unfortunately, in all recent litigation the trade association has extrapolated from its credit reporting a blacklist system, which is illegal as a combination to boycott.[105]

Apart from the legality of devices employed by trade associations, the constitution of the association itself may encounter legal difficulties. While the exclusion of competitors from membership is illegal, that of persons not within the trade group is permissible.[106] Simply stated, membership may be restricted so long as the standards for restriction are not inhibitive of competition. If an association contemplates operating within the aegis of the antitrust laws, it should have no compunction about opening its membership rolls. Inclusion of the vertical components of an industry in a trade group, however, is dangerous since it might create a fraternal approach towards elements of the economy which, under the philosophy of the Sherman Act, are more properly thrashed out in competition.[107]

The association should certainly formalize a statement of purpose, specifying those worthwhile and legitimate ends it seeks to achieve. At least one association was so overzealous and particular in this attempt that it found its "Code of Fair Competition" struck down by a court which disagreed with its characterization of the

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[104] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939). This case is generally recognized as the genesis for the doctrine known as "conscious parallelism," under which a conspiracy and violation of the antitrust laws can be inferred simply from the conduct of businessmen, each of whom knows his competitors are behaving similarly. The doctrine enjoyed a dangerous growth in judicial popularity, at the peak of which a conspiracy could be proved by nothing more than uniform participation by competitors in a business practice injurious to trade, when the participators knew of the others' activity. Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), *cert. denied,* 343 U.S. 929 (1952); Bigalow v. RKO Radio Pictures, Inc., 150 F.2d 877 (7th Cir. 1945), *rev'd on other grounds,* 327 U.S. 251 (1946). Its limits were, however, eventually recognized by the Supreme Court, which avowed that it "has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." Theatre Enterprises, Inc. v. Paramount Film Distribution Corp., 346 U.S. 537, 540-41 (1954). The validity of conscious parallelism is aptly demonstrated by this analogy from the classroom of Professor Milton Handler: if his 100 students appear at law school with raincoats and umbrellas, whether a conspiracy could be inferred will depend largely upon whether it looks like rain.

[105] *See, e.g.,* Tag Mfrs.' Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).

[106] *Cf.* United States v. Insurance Bd., 188 F. Supp. 949 (N.D. Ohio 1960); United States v. Southern Wholesale Grocers' Ass'n, 207 F. 434 (N.D. Ala. 1913). *See also* United States v. New Orleans Exch., 148 F. Supp. 915 (E.D. La. 1957), *aff'd,* 355 U.S. 22 (1957); American Fed'n of Tobacco Growers, Inc. v. Neal, 183 F.2d 869 (4th Cir. 1950); Associated Press v. United States, 326 U.S. 1 (1945).

[107] Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656 (1961); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); Advertising Specialty Nat'l Ass'n v. FTC, 238 F.2d 108 (1st Cir. 1956).

code.[108] The punctiliousness with which minutes of meetings are kept, the presence of able counsel, and the constant supervision by trade association officers or employees will all contribute to maintaining a course between inefficacy on the one hand and illegality on the other.

## V. PRIVATE SUITS — THE TREBLE DAMAGE ACTION

Those who violate the antitrust laws may, like Lear, suffer doubly. There is first the threat of criminal prosecution, fine, and imprisonment. There is also the possibility of a treble damage action brought by those whom the violation has injured. In the remaining pages, attention will be focused on the popularity of this civil remedy and the possibility of injunctive relief. Also discussed are the elements of proof: an antitrust violation; injury to the plaintiff; and computation of damages. Finally, some attention is given to attorney's fees and other costs of the litigation.

The private civil action is peculiarly suited to enforcing the antitrust laws and to compensating the victim. Industry members are more likely to know when unfair competitive practices are being used against them, and the incentive of recovering three times their damages will encourage them to act on that knowledge. The increase in popularity of this remedy is evidenced by the following table:[109]

NUMBER OF ANTITRUST CASES COMMENCED IN
UNITED STATES DISTRICT COURTS BY FISCAL YEARS

| | 1941-1945 | 1946-1950 | 1951-1955 | 1956-1960 | 1961-1965 |
|---|---|---|---|---|---|
| Government Suits | 284 | 256 | 197 | 317 | 346 |
| Private Suits | 297 | 529 | 1054 | 1163 | 3598 |

The primary basis of the civil action is Section 4 of the Clayton Act.[110] In addition, Section 16 provides private litigants with injunctive relief from a violation which threatens direct and serious loss or damage to the plaintiff.[111] Injunctions, however, have not often been sought, for most defendants who have been sued successfully for treble damages will voluntarily eschew conduct that would similarly jeopardize them in the future.

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108 United States v. Abrasive Grain Ass'n, 1948 Trade Cas. ¶ 62,329, at 62,839 (S.D. N.Y. Nov. 16, 1948).

109 Note, 79 HARV. L. REV. 1475 (1966).

110 15 U.S.C. § 15 (1964):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

111 15 U.S.C. § 26 (1964).

Because injunctive relief is seldom demanded, the principal weapon of the private litigant is the treble damage action. The elements of this action are simply a violation of the antitrust laws, causing injury to the plaintiff's business or property.[112] As is apparent from the earlier discussion, comprehending when a violation has occurred is in itself no mean feat. Proving the violation without the investigative and prosecutorial staff available to the government would be even more difficult, and more expensive. In recognition of this burden, Congress has given the private litigant Section 5(a) of the Clayton Act, providing that a final judgment or decree in a government suit, either civil or criminal, is admissible as prima facie evidence "as to all matters respecting which said judgment or decree would be an estoppel . . . ."[113] Among other exclusions, if the government's suit ended in a consent judgment or one entered before the taking of testimony, this section has no application.[114]

A decree adduced through government litigation, then, provides the basis for anyone injured by the defendant to sue for treble damages, having as prima facie evidence "all matters of fact and law necessarily decided in the previous case."[115] Because the grant is an expansive one, the courts have rigorously upheld its stated exceptions. For example, even though the issues had received full hearing, if a judgment for the plaintiff was rendered but was reversed on appeal, the fact that a consent decree had been entered upon remand precluded use of the decree in a later suit.[116] A judgment entered on a plea of nolo contendere has also been excluded from the scope of this section.[117]

Therefore, if one's client seeks redress from a defendant whose nolo plea has been accepted, he must prove the antitrust violation by independent evidence. If, however, the transgressor has pleaded guilty in the government action, the plaintiff stands to benefit from Section 5. Contrary to former indications,[118] guilty pleas have generally not been treated as consent judgments. In the recent electrical equipment cases, three different circuits have held that guilty pleas are not within the consent judgment proviso.[119] This line of prece-

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[112] *Id.* § 15.

[113] *Id.* § 16(a).

[114] *Id.*

[115] Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[116] Barnsdall Refining Corp. v. Birnamwood Oil Corp., 32 F. Supp. 308, 311 (E.D. Wis. 1940).

[117] City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964).

[118] Barnsdall Refining Corp. v. Birnamwood Oil Corp., 32 F. Supp. 308 (E.D. Wis. 1940); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939).

[119] General Elec. Co. v. San Antonio, 334 F.2d 480 (5th Cir. 1964); City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied,* 375 U.S. 939 (1964).

dent establishes a direct, current trend permitting prior guilty pleas to establish a prima facie civil case.

While these cases facilitate the plaintiff's situation, his counsel should nevertheless be aware of the evidential limitations of Section 5(a). The prior adjudication sustains not his entire case but merely all matters adjudicated as between the government and the defendant. The general test is that of collateral estoppel: what matters have conclusively been established between the parties?[120] Another limitation lies in the fact that the statute gives to this evidence only a prima facie effect; the evidence is not conclusive and may be rebutted.[121]

After the violation is established, either by independent evidence or through use of a former judgment, the plaintiff must prove injury, causation, and a quantum of damage. The injury must, of course, be a direct result of the violation; incidental harm is not enough.[122] While damages cannot be conjectural, the courts will not require mathematical accuracy in proving the effects of abating competition.[123] Factors which can be proffered in making this proof include increased cost caused by the violation,[124] loss of profits on business either actually done or which was anticipated,[125] and the decreased price a seller obtained for his goods.[126]

Most important in computing damages is the "but for" test. Plaintiffs are entitled to recover three times the difference between what business they actually did and what they would have done "but for" the defendant's abuse.[127] Even though excess costs resulting from violation may have been passed on to the plaintiff's customers, they remain a part of recoverable damages.[128] One circuit court has acknowledged that this rule, in fact, allows a plaintiff

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[120] *See* RESTATEMENT OF JUDGMENTS § 68 (1942); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[121] Richfield Oil Corp. v. Karseal Corp. 271 F.2d 709 (9th Cir. 1959), *cert. denied,* 361 U.S. 961 (1960); Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, 90 (10th Cir. 1954), *cert. denied,* 347 U.S. 976 (1954).

[122] Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54 (9th Cir. 1951).

[123] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931); Momad v. Universal Film Exchanges, Inc., 172 F.2d 37, 42 (1st Cir. 1948).

[124] Chattanooga Foundry & Pipeworks Co. v. Atlanta, 203 U.S. 390 (1906).

[125] Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

[126] American Crystal Sugar v. Mandeville Island Farms, 195 F.2d 622 (9th Cir. 1952).

[127] *See, e.g.,* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-62 (1931).

[128] The defense of "passing on," while not new in the field, received particular attention in several of the recent electrical cases. *See* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203 (7th Cir. 1964); Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59 (S.D.N.Y. 1964); Public Util. Dist. No. 1 v. General Elec. Co., 230 F. Supp. 744 (W.D. Wash. 1964); and Notes at 64 COLUM. L.Rev. 570, 586 (1964), 70 YALE L.J. 469 (1961), and 79 HARV. L. REV. 1475 (1966).

to recover four times his damages — once from its customers and thrice from the defendants.[129]

Finally, some attention should be given to that most urgent of a client's concerns — cost. As we have seen, an antitrust action differs from others, less in substance than in size. The fees and costs involved are also commensurately larger. A prominent member of the plaintiff's bar estimates that the minimal cost for the smallest of cases is $5,000. For fees, he recommends a retainer of $5,000 to $25,000, a percentage on damage recovery, and an agreement as to the amount of attorneys' fees granted by the court.[130]

The treble damage provision of our present law is the atavistic remains of the English Statute of Monopolies of 1623. Vilified by defense counsel, attacked by legislation, it remains a real incentive for private industry to police itself. As the remedy gains more frequent use, specialist and general practitioner alike should educate themselves to its perils and its possibilities.

## CONCLUSION

There are indeed few areas of business endeavor beyond the application of the laws regulating trade. Pricing, discounts and allowances, distribution, franchising, territorial and customer restrictions, exclusive dealings, refusals to deal, advertising allowances and services, reciprocity — all may bring the businessman in contact with a variety of state and federal laws. His lawyer should be prepared to render preventative counsel, lest the client be subjected to the civil and criminal sanctions provided for antitrust violations.

In addition, the lawyer for the small businessman should inform his client of the competitive tools built into the antitrust laws. Trade associations have a wide range of permissible activities, each of which can enrich the individual by strengthening the industry. Unfair or predatory competition may be rooted out and punished, with a treble-damage bounty going to the injured plaintiff. Finally, the small businessman has in the antitrust laws both state and private protection from the anti-competitive demands of influential suppliers and customers.

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[129] Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 209 (7th Cir. 1964).

[130] Alioto, *The Economics of a Treble Damage Case,* 32 ANTITRUST L.J. 87, 93 (1966).