



1973

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Recommended Citation

Richard C. McCarthy, *Resale Price Maintenance, Refusals to Deal, and the Gasoline Retailer - A Search for Alternative Remedial Deterrents*, 18 Vill. L. Rev. 648 (1973).

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COMMENTS

RESALE PRICE MAINTENANCE, REFUSALS TO DEAL, AND THE GASOLINE RETAILER — A SEARCH FOR ALTERNATIVE REMEDIAL DETERRENTS

*"The whole logic of private enterprise rests on the fundamental assumption of active competition in free markets. If such a system is to be preserved, it is essential that competition be kept active and markets free."*¹

I. INTRODUCTION

The tremendous economic power enjoyed by the oil refiner in its relations with gasoline retailers is amply documented.² Merely to state that there is an inequality in bargaining position grossly understates the true nature of the relationship. For it is the pervasiveness of this power which enables the oil refiner to control the retail distribution of gasoline, even in the absence of vertical integration,³ and despite a strong governmental policy to frustrate anticompetitive forces at all stages of the marketing complex.⁴

Various economic arguments have been advanced in support of the control exercised by the oil refiners.⁵ The period when the major refiners operated the retailing function through salaried employees is not so far removed as to eliminate the disquieting possibility that the refiners might

1. P. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 488 (6th ed. 1964), quoting TWENTIETH CENTURY FUND, COMMITTEE ON CARTELS AND MONOPOLY.

2. *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 368 (1965); *Simpson v. Union Oil Co.*, 377 U.S. 13, 21 (1964); *Shell Oil Co. v. FTC*, 360 F.2d 470, 476-78 (5th Cir. 1966), cert. denied, 385 U.S. 1002 (1967); *Atlantic Ref. Co. v. FTC*, 344 F.2d 599, 606 (6th Cir. 1965); *Goodyear Tire & Rubber Co. v. FTC*, 331 F.2d 394, 400 (7th Cir. 1964). See C. KAYSER & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 90-91 (1955); Howtey, *Interplay of Unfair Competition and Antitrust Doctrines Under Section 5 of the Federal Trade Commission Act*, 13 ANTITRUST BULL. 1313, 1321-25 (1968); Prewitt, *Reply to Professor Dixon's Comment on the Federal Trade Commission's Report on Gasoline Marketing*, 13 ANTITRUST BULL. 1383, 1422 (1968); 63 MICH. L. REV. 713, 719 (1965).

3. A manufacturer or refiner and a retailer would normally not be in direct competition with each other, nor would they generally be operating at the same functional level. But where a manufacturer or refiner moves into distribution by forward expansion so that it markets its products at the same functional level as the retailer, it is said to have vertically integrated.

4. FTC, *REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE* (1967) [hereinafter cited as *FTC REPORT ON GASOLINE MARKETING*]. See Dixon, *The FTC Report on Gasoline Marketing: A Comment*, 13 ANTITRUST BULL. 105 (1968); Gregory, *A Survey of the Price Discrimination Aspects of the Federal Trade Commission's Report on Gasoline Marketing*, 13 ANTITRUST BULL. 767 (1968); Jones, *Marketing Strategy and Government Regulation in Dual Distribution Practices*, 34 GEO. WASH. L. REV. 456 (1966); Prewitt, *supra* note 2.

5. Borowitz, *Pricing Problems in Distributor and Franchise Systems*, 38 U. CIN. L. REV. 258 (1969); Dixon, *supra* note 4, at 125-26; Wade, *Some Antitrust Problems in Terminating Franchises*, 44 ST. JOHN'S L. REV. 23, 30-31, 34-35 (1969).

revert to this marketing approach, especially if judicial construction of the antitrust laws prevents the exercise of any control.⁶ Furthermore, the gasoline wars of past years were largely responsible for the initiation of fair trade laws in the gasoline industry. The memory of those wars continues to influence scholarly commentators today,⁷ despite recent executive and judicial pronouncements that have seriously questioned the wisdom of such legislation.⁸

What is significant, however, is that the Government, with fair trade legislation and the aforementioned considerations in view, is nevertheless committed to a strong antitrust policy of deterrence of the oil refiners' price setting practices which are designed to restrict substantially the entrepreneurial pricing efforts of the retailers, and prevent intrabrand competition.⁹ The judiciary is charged with the responsibility of construing the antitrust laws in the light of this policy without being unduly solicitous of personal economic theories of market stabilization.

Within this framework this Comment will examine:

- (1) the recent decisions in the areas of resale price maintenance and refusals to deal in order to determine the remaining vitality of the *Colgate*¹⁰ doctrine and to illuminate what paths remain open for manufacturer control of retail pricing;
- (2) the impact and current status of fair trade legislation in the states and the efficacy of its application to the gasoline industry;
- (3) the private antitrust enforcement procedures with a view to determining their viability as a deterrent to anticompetitive retail pricing; and finally
- (4) state and federal franchise legislation and the feasibility of utilizing antitrust policy in the formulation of equitable defenses to non-antitrust actions.¹¹

At the outset, it should be noted that recent Supreme Court decisions have demonstrated a marked tendency toward elimination of manufacturer control over the independent retailer's business discretion.¹² Whether these

6. M. DE CHAZAU & A. KAHN, *INTEGRATION AND COMPETITION IN THE PETROLEUM INDUSTRY* 407 (1959).

7. See Dixon, *Oligopoly and Price Wars: A Case Study in Gasoline*, 1 *ANTI-TRUST L. & ECON. REV.* 52 (1967).

8. See text accompanying notes 63, 86-87 & 97-104 *infra*.

9. FTC REPORT ON GASOLINE MARKETING, *supra* note 4, at 28-34. See *Hearings on Distribution Problems Before Subcomm. No. 4 of the House Select Committee on Small Business*, 89th Cong., 1st Sess. 58-68 (1965).

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

11. Although this analysis will be primarily directed toward resale price maintenance, the alternative remedial deterrents suggested may have equal application to tying arrangements and exclusive dealing, where the manufacturer's refusal to deal is the basis of his enforcement program.

12. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. Parke, Davis*

Court decisions are grounded on the government's economic policy of eliminating anticompetitive influences in the channels of distribution, or whether they are grounded on a broader concept of social injustice, fostered by the abuse of economic power, is not clear from a reading of these opinions.¹³ What is evident, however, is that the Court's intervention has served to place all on notice that the coercive use of economic power to control the distribution of commodities in the marketplace will be subject to close judicial scrutiny.

II. CONTRACTS, COMBINATIONS AND CONSPIRACIES, AND THE CONCEPT OF UNILATERAL REFUSAL TO DEAL — ECHOES OF *Colgate*

[L]ike Hamlet's father, the ghost of *Colgate* continues to haunt a part of the antitrust bar . . . and maybe it would be worth the effort to invite the Court to expressly dispatch it.¹⁴

Since the enactment of the Sherman Antitrust Act in 1890 condemning, *inter alia*, contracts, combinations, and conspiracies in restraint of trade,¹⁵ the judiciary has charted a less than precise doctrinal course in the development of the law of resale price maintenance and refusals to deal. Early in the Act's history, the Supreme Court decided *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*,¹⁶ which held resale price maintenance contracts between a manufacturer and his distributors to be an unlawful restraint of trade under section 1 of the Sherman Act. Eight years later, however, the Court, in *United States v. Colgate & Co.*,¹⁷ held that a manufacturer,

& Co., 362 U.S. 29 (1960). See Baker, *Combinations and Conspiracies — Is There a Difference?*, 14 ANTITRUST BULL. 71 (1969); Borowitz, *supra* note 5, at 260-61; Groenke, *What's New in the Antitrust Aspects of Selecting and Terminating Distributors*, 13 ANTITRUST BULL. 131, 146 (1968); McLaren, *Marketing Limitations on Independent Distributors and Dealers — Prices, Territories, Customers, and Handling of Competitive Products*, 13 ANTITRUST BULL. 161, 162-66 (1968).

13. Wade, *supra* note 5, at 40-41.

14. Panel Discussion — *Marketing and Franchising: Antitrust Prognosis for the 70's*, 39 ANTITRUST L.J. 502, 508 (1970) (remarks of Mr. Greenberg).

15. 15 U.S.C. §§ 1 *et seq.* (1970).

16. 220 U.S. 373 (1911). The decision may be read to have left open the question whether a strictly vertical price-fixing agreement might be lawful as being a reasonable restraint of trade since the Court reasoned that the series of vertical contracts in the case produced the same effect as if the dealers had horizontally combined to fix prices. *Id.* at 406-08. Later decisions of the Court, however, have clearly laid this issue to rest. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

17. 250 U.S. 300, 307 (1919). The Court distinguished *Dr. Miles* on the ground that the unlawful combination created there was effected through contracts which undertook to prevent dealers from freely exercising the right to sell. *Id.* at 306. Many commentators felt that *Colgate* had effectively undermined *Dr. Miles* because a manufacturer could secure distributor acquiescence in suggested prices by simply refusing to deal, and thus accomplish the same result which, if reached by contract, *Dr. Miles* would have proscribed. See Dunn, *Resale Price Maintenance*, 32 YALE L.J. 676, 691-93 (1923); Comment, *Refusal to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1127 (1949). But see Barber, *Refusal to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 852-53 (1955).

in the absence of an intent to create or maintain a monopoly, had the right to announce unilaterally in advance the prices at which it demanded that its products be resold and to refuse to deal with those distributors who failed to conform to this policy. Colgate had implemented an elaborate program of distribution of price schedules, notification of suspensions of offending dealers, investigation and discovery of offenders, and requests for assurances from dealers selling below suggested prices that they would conform if reinstated.¹⁸ It appeared that the Court in *Colgate* had retreated from its position in *Dr. Miles*.

In an attempt to clarify the apparent inconsistency of the two decisions, the Court in *United States v. Schrader's Son, Inc.*,¹⁹ stated that *Colgate* did not overrule or modify the doctrine of *Dr. Miles*, but rather that the decision rested on the absence of an allegation of an unlawful agreement. The majority in *Schrader's* purported to distinguish the situation where an express or implied agreement exists from the situation where a manufacturer merely indicates his wishes concerning prices and declines further dealings with those who fail to observe them. However, the Court noted that an agreement between a manufacturer and retailer need not be formal to violate the Sherman Act, but may be implied from a *course of dealing* or *other circumstances*.²⁰

In the light of the Court's extension of *Dr. Miles* to implied agreements and with a view to the reinstatement procedure employed in *Colgate*, it could hardly be doubted that the doctrine announced in *Colgate* had been narrowed, and in fact, divorced from the case's factual setting. What remained of the doctrine's theoretical basis was left for future decisions to further delimit.

In 1944, the Court, in *United States v. Bausch & Lomb Optical Co.*,²¹ stated that a simple refusal to deal with those who fail to maintain the seller's fixed resale prices is lawful, but the seller may not go beyond the exercise of this right; where he enters contracts or combinations, express or implied, which unduly hinder the free flow of commerce, he is then beyond the scope of the *Colgate* doctrine. When the above language is read in the context of the facts of the case, the initial reading, which

18. 250 U.S. at 303. Similarly, under the Federal Trade Commission Act, 15 U.S.C. 45 (1970), the Supreme Court has held that a trader may withhold his products from those who will not sell them at the prices fixed for their resale. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

19. 252 U.S. 85 (1920).

20. *Id.* at 99. But see *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921), where the Court held that the mere fact that a manufacturer indicates to wholesalers a sales plan fixing prices below which they were not to sell to retailers, and calls this plan repeatedly to their attention, did not suffice to establish an agreement or combination, even though many conformed to the program.

21. 321 U.S. 707, 722 (1944). See *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 452-53 (1922), where the Court adopted the principles developed under the Sherman Act to determine what are "unfair methods of competition" within the Federal Trade Commission Act. The Beech-Nut Company was found to suppress the freedom of competition by coercion of its customers through special agents of the company, by reports of competition about customers who violated resale prices, and by boycotts of price cutters.

would inspire a belief that *Colgate* had been substantially undermined, if not laid to rest, is qualified. The Court had found a conspiracy based on the wholesalers' cooperative efforts in pricing, sales and approval of retail licenses. Additionally, an intricate plan of discovery and reinstatement of violators was in effect. When an offender was cut off he would be reinstated upon the giving of assurances that he would maintain prices in the future.²²

The Court's decision in *Bausch & Lomb* represents the point of departure between Justices Brennan and Harlan in *United States v. Parke, Davis & Co.*²³ Mr. Justice Harlan, in his dissent, read the Court's language in *Bausch & Lomb* in the context of the particular factual setting therein and reasoned that the indicia of conspiracy, concerted action, must be present if the Court is unable to find a contract, either express or implied.²⁴ Mr. Justice Brennan and the majority, on the other hand, read *Bausch & Lomb* as establishing that the term "combination" in sections 1 and 3 of the Sherman Act has a meaning independent of the terms "contract" or "conspiracy" and reasoned that:

An unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer *secures adherence* to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.²⁵

Mr. Justice Harlan warned that the majority had done no less than to send the *Colgate* doctrine to its demise.²⁶

Mr. Justice White, in a footnote in *Albrecht v. Herald Co.*,²⁷ added substance to the vague contours of the standard announced in *Parke, Davis*. A combination, within the meaning of sections 1 and 3 of the Sherman Act, may be formed (1) *between a single retailer and his supplier from the time the retailer unwillingly acquiesces in the suggested pricing policies of his supplier, or* (2) *between the supplier and other retailers who have acquiesced in a pricing program induced by the communicated danger of termination.*²⁸

22. 321 U.S. at 720.

23. 362 U.S. 29 (1960).

24. *Id.* at 52.

25. *Id.* at 43 (emphasis added).

26. *Id.* at 49 (dissenting opinion).

27. 390 U.S. 145, 150 n.6 (1968). To indicate that the Court's language in *Albrecht* is not to be taken lightly, Mr. Justice Black restated these two theories of combination in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968). *Accord*, *Sahm v. V-1 Oil Co.*, 402 F.2d 69 (10th Cir. 1968); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965); *Stanton v. Texaco, Inc.*, 289 F. Supp. 884, 891 (D.R.I. 1968). See Baker, *supra* note 12; Panel Discussion — *Marketing and Franchising: Antitrust Prognosis for the 70's*, 39 ANTITRUST L.J. 502, 508 (1970) (remarks of Mr. Greenberg); Note, "Combinations" in *Restraint of Trade: A New Approach to Section 1 of the Sherman Act*, 1966 UTAH L. REV. 75.

28. 390 U.S. at 150 n.6.

The thrust of the Court's recent decisions demonstrates deep concern with the abuse of economic power in the market complex. With the elimination of the requirement of concerted action, the Court has focused on the element of coercion and has extended it beyond its traditional meaning to include not only coercion resulting from overt action, but also that coercion inherent in a status relationship. A prime example of the latter is the relationship that exists between the oil refiner and gasoline retailer. The inequality in the bargaining positions is so pronounced that it is often unnecessary for the supplier to resort to overt coercive tactics in order to enforce its pricing policies.²⁹

Simpson v. Union Oil Co.,³⁰ decided in the interim between *Parke, Davis* and *Albrecht*, underscores the nature of this relationship. There, the Court invalidated the consignment agreement as a method by which a supplier could enforce a program of resale price maintenance. The Court focused on the element of coercion and reasoned that it matters not what the coercive device is; if its effect is to enforce a scheme of resale price maintenance on the supplier's retail outlets, a Sherman Act violation exists. Alluding to the economic power of the oil refiners, Mr. Justice Douglas stated:

By reason of the lease and "consignment" agreement dealers are coercively laced into an agreement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive.³¹

Although the record indicated some evidence of overt coercive tactics employed by Union Oil, the ultimate decision turned more on the Court's recognition of the fact that the dealer-tenants were in no position to bargain with their landlord when the only alternative was economic extinction.³²

While the Supreme Court proceeded slowly along its unpredictable course of doctrinal development, the lower courts for the most part were left in uncharted waters. The vagueness of the standard announced in *Parke, Davis* resulted, not surprisingly, in a large number of decisions expressing divergent views, notwithstanding the seeming clarification in *Albrecht*.³³ One controversy of particular interest was the First Cir-

29. See note 2 and accompanying text *supra*.

30. 377 U.S. 13 (1964).

31. *Id.* at 21.

32. *Cf. id.* at 20-21. See note 2 *supra*.

33. See *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir. 1971) (preliminary injunction granted against termination of franchise agreement based on reasonable likelihood of success); *Sahm v. V-1 Oil Co.*, 402 F.2d 69 (10th Cir. 1968) (attempted enforcement of price-fixing agreement held illegal); *Shell Oil Co. v. FTC*, 360 F.2d 470 (5th Cir. 1966); (tying arrangement may be found in course of dealings between parties); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965) (refusal to deal in order to fix prices presented genuine issue of fact); *Guidry v. Continental Oil Co.*, 350 F.2d 342 (5th Cir. 1965) (evidence of consignment agreement in order to fix prices made summary judgment inappropriate); *LeBlanc v. Continental Oil Co.*, 350 F.2d 832 (5th Cir. 1965) (refusal to deal in order to fix prices held illegal); *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir. 1965) (tying arrangement may be found from course of conduct); *Goodyear Tire & Rubber Co. v. FTC*,

cuit's decision in *Quinn v. Mobil Oil Co.*³⁴ *Mobil Oil* involved a single gasoline retailer who had brought suit against the refiner for violation of section 1 of the Sherman Act. The dealer alleged that Mobil had restrained trade by cancelling his lease for failing to set maximum resale prices. However, he had neither contracted nor unwillingly acquiesced in Mobil's pricing policies, and no allegation was made that Mobil had enforced its prices with any other dealers. In other words, it was a refusal to deal in its most pristine form, save for Mobil's illicit motive to set maximum resale prices. The court of appeals, with one judge dissenting, dismissed the complaint for failing to allege a contract, combination, or conspiracy in restraint of trade.³⁵

The interest generated by the *Mobil Oil* decision is not due to the opinion of the court, but rather results from the concurring and dissenting opinions of Judge Coffin and Chief Judge Aldrich. Judge Coffin, in concurrence, argued that the anticompetitive effects of maximum price fixing differ markedly from the anticompetitive effects of minimum price fixing, and reasoned that the former should not constitute a violation of the Sherman Act.³⁶ He distinguished *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,³⁷ in which the Supreme Court had held a maximum price-fixing agreement violative of section 1 of the Sherman Act, on the ground that the *Kiefer-Stewart* decision involved a horizontal maximum price-fixing scheme.³⁸ He based his distinction on the different economic effects generated by the two distinct forms of pricing. Admittedly, had he had

331 F.2d 394 (7th Cir. 1964) (tying arrangement found); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) (refusal to deal in order to fix prices illegal); *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566 (4th Cir. 1963) (refusal to deal in order to enforce tying arrangement held illegal); *Osborn v. Sinclair Ref. Co.*, 286 F.2d 832 (4th Cir. 1960) (tying arrangement had substantial effect on interstate commerce where lessor leased about 10 per cent of all filling stations in the state); *Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11, 15 (6th Cir. 1959) (use of short-term cancellation provision for purpose of violating the law is itself a violation of the antitrust law); *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958) (conspiracy to fix prices found). *But see* *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967) (no cause of action exists where plaintiff failed to allege unwilling compliance with pricing scheme of supplier); *Sun Oil Co. v. FTC*, 294 F.2d 465 (5th Cir. 1961) (no contract, combination, or conspiracy found); *Peter v. Union Oil Co.*, 1971 Trade Cas. ¶ 73,650 (C.D. Cal. 1971) (no evidence of coercion found); *Hollander v. American Oil Co.*, 1971 Trade Cas. ¶ 73,738 (W.D. Pa. 1971) (refusal to deal found to be based on declining gasoline sales and failure to keep station clean); *South End Oil Co. v. Texaco, Inc.*, 237 F. Supp. 650 (N.D. Ill. 1965) (court found no systematic policing or other coercive action from which a combination might be inferred); *Hutchinson v. American Oil Co.*, 221 F. Supp. 728 (E.D. Pa. 1963) (no conspiracy to violate antitrust laws found); *Fiumara v. Texaco, Inc.*, 204 F. Supp. 544 (E.D. Pa. 1962) (no conspiracy to fix prices found).

34. 375 F.2d 273 (1st Cir. 1967), *noted in* 43 NOTRE DAME LAW. 253 (1967).

35. *Id.* at 276.

36. *Id.* at 276-77.

37. 340 U.S. 211 (1951).

38. 375 F.2d at 277. Although the Fifth Circuit in *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965), had reversed a district court's granting of summary judgment to an oil refiner where the issue had been whether the refiner had terminated its lessee-dealer for failing to reinstate a maximum price-fixing contract, Judge Coffin was not impressed by the court's reasoning.

the benefit of the Supreme Court's decision in *Albrecht v. Herald Co.*,³⁹ he might have silently acquiesced on this issue.

The second issue in *Mobil Oil*, and of far greater significance in terms of the doctrine of refusal to deal, involved the fact that the dealer had never agreed to the pricing policies of his supplier. While Judge Coffin was unable to perceive a contract or combination,⁴⁰ Chief Judge Aldrich, in his dissent, was unmoved by the absence of initial compliance.⁴¹ He refused to distinguish the *Mobil Oil* factual setting from the situations where a dealer enters into a contract to maintain prices and thereafter declines to act in accordance with its terms,⁴² or where a dealer initially unwillingly acquiesces in his supplier's pricing policies and thereafter refuses to comply.⁴³

[I] see no difference in substance between pressure to induce the making of an unlawful agreement and pressure to reinstate one that has been broken. To the extent that it be suggested that the rejected agreement in *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965)] is what brought the case within the act, this would not only be an unfortunate distinction, since any future "Quinn" [the gasoline retailer] could establish rights for himself simply by making the requested agreement one day and breaking it the next, but also, it seems to be, an illogical one.⁴⁴

This substance-over-form rationale, when considered in conjunction with the underlying policy of the antitrust laws, presents a formidable argument for extension of antitrust protection. It becomes even more persuasive when one views the nature of the economic relationship between the oil refiner and gasoline retailer.⁴⁵ Chief Judge Aldrich posited that the power implications of the landlord-tenant relationship, present in *Mobil Oil*, served to illuminate the absolute economic dominance of the oil refiner. This status alone supplied the requisite element of coercion. The overt harassment tactics employed by Mobil only served to aggravate an already untenable situation. Proceeding further with this social injustice theory, Chief Judge Aldrich would have held that Mobil violated the Sherman Act when it cancelled the lease in retaliation for its tenant's failure to acquiesce in its pricing scheme.⁴⁶

Although persuasive pragmatically, there exists a fundamental conceptual flaw in this analysis; that is, unless the judiciary is willing to

39. 390 U.S. 145 (1968). But see *id.* at 156 (Harlan, J., dissenting). For additional criticism of the *Albrecht* holding, see Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 254-60 (1968).

40. 375 F.2d at 278.

41. *Id.* at 280.

42. *Id.* at 279. See *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965).

43. 375 F.2d at 279. See text accompanying note 28 *supra*.

44. 375 F.2d at 279 (Aldrich, C.J., dissenting).

45. See text accompanying notes 2-4 *supra*.

46. 375 F.2d at 279-80.

entertain a fiction, no contract, combination or conspiracy, as expressly required by the Sherman Act, has been formed. Mobil's actions constitute merely an *attempt* to contract, combine, or conspire. No amount of discourse on the power implications in the short-term lease consistently used in the gasoline industry can supply this missing element. It only serves to focus on the need for judicial alternatives or remedial legislation.

The trilogy of recent Supreme Court decisions — *Parke, Davis, Simpson*, and *Albrecht* — shed some light on this problem. These cases may be said to have developed a "purpose and effect" test for combinations under the Sherman Act. A supplier's unlawful motive to fix prices, coupled with a refusal to deal, is not sufficient, by itself, to constitute a violation of the Act because the "effect" portion of the test requires that at least a single dealer acquiesce, albeit unwillingly, in the pricing scheme.⁴⁷ Until this occurs, no prices have been fixed and no combination has been formed. While it may be argued that this distinction is artificial, the Court's only alternative would have been to open Pandora's box by reading into the statute a proscription against *attempts* to contract, combine, or conspire. Clearly, this would have gone beyond the realm of sound statutory construction and would have run counter to congressional intent. It is important to note that this analysis is not premised on the continuing vitality of the *Colgate* doctrine, because construction of the statutory language alone indicates that a refusal to deal under the circumstances present in *Mobil Oil* is not proscribed by the Sherman Act.⁴⁸

Arguably, some deterrence is provided by the fact that a manufacturer or supplier must attempt to enforce his pricing policies with more than one retailer in order to implement an effective resale price-fixing program. The likelihood that at least one dealer's unwilling acquiescence will be secured is significantly enhanced. However, this neither alleviates the fears of, nor provides a remedy for, the individual retailer who has had his source of income extinguished. For even though he can adequately demonstrate to the court that he was terminated for failing to fix prices, this does not lighten his burden of finding another retailer willing to testify and proving his unwilling compliance.

While one can only sympathize with the views expressed by Chief Judge Aldrich in his dissent, any attempt to extend antitrust coverage to the *Mobil Oil* situation violates sound rules of judicial construction. Conceptual integrity requires that either the legislature provide the remedy or the state judiciary permit equitable defenses grounded on federal or

47. See text accompanying note 28 *supra*; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal*, 75 HARV. L. REV. 655, 690 (1962). See also McLaren, *supra* note 12, at 163.

48. In fact, the *Colgate* doctrine only adds confusion to what are the plain implications of the statutory language. Some commentators are misinterpreting the Supreme Court's continuous undermining of the doctrine to suggest antitrust proscription for all refusals to deal where the only additional element that exists is the illicit motive to fix prices. See text accompanying notes 40-44 *supra*; 43 NOTRE DAME LAW. 253 (1967).

state antitrust policy in summary eviction proceedings.⁴⁹ In the absence of legislative or judicial action, the oil refiner will continue to exercise significant control over the retailing function.

At this point it is necessary to consider another device used by the oil refiners to control prices at the retailing functional level, and to determine whether it provides the supplier with a viable alternative should the former avenue be foreclosed to them.

III. THE IMPACT OF FAIR TRADE

A. Federal Enabling Legislation and the Status of Fair Trade in the States

Fair trade had its inauspicious beginning in 1931 with the passage of legislation in California permitting the establishment by contract of a resale price maintenance system for trademarked commodities.⁵⁰ Because of the requirement of a contract between the vendor and any retailer he sought to restrict, it proved unworkable in practice. This led, two years later, to the enactment of a nonsigner provision, which permitted a vendor to enforce fair trade legislation against any retailer who, with knowledge of an existing contract, sold the trademarked item below its fair trade price.⁵¹ After its initial success in California, similar legislation was enacted in 44 additional states.⁵²

The Supreme Court, in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*,⁵³ upheld the validity of such legislation, as it applied to intrastate transactions, against a constitutional challenge that the nonsigner provision violated due process. But the Supreme Court's decisions proscribing vertical price-fixing agreements in or affecting interstate commerce indicated that fair trade could not withstand the strictures of the Sherman and Federal Trade Commission⁵⁴ Acts without exempting legislation.⁵⁵ As a result, the Miller-Tydings Amendment⁵⁶ to the Sherman

49. See text accompanying notes 128-50 *infra*.

50. Diamond, *Antitrust Problems of Fair Trading*, 1 ANTITRUST BULL. 97, 98 (1955). Mr. Justice Harlan explained the rise of fair trade legislation:

The purpose of the state fair-trade laws is to allow the manufacturer of a brand-named product to protect the goodwill his name enjoys by controlling the prices at which his branded products are resold.

United States v. McKesson & Robbins, Inc., 351 U.S. 305, 317 (1956) (Harlan, J., dissenting).

51. Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 CALIF. L. REV. 640, 644 (1936).

52. See TRADE REG. REP. ¶ 6041, at 9087-88 (1972). In Vermont, resale price maintenance is valid at common law, but nonsigners are not bound. Diamond, *supra* note 50, at 98 n.6.

53. 299 U.S. 183 (1936). See Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses*, 109 U. PA. L. REV. 539 (1961).

54. 15 U.S.C. § 45 (1970).

55. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

56. 15 U.S.C. § 1 (1970).

Act and the McGuire Amendment⁵⁷ to the Federal Trade Commission Act were passed to create an exemption from the federal antitrust laws for vertical price-fixing agreements where authorized under state fair trade laws. Since the validity of the agreement depends on the existence of state fair trade legislation, the federal statutes are appropriately characterized as enabling legislation, and as such, do not imply congressional approval of resale price maintenance.⁵⁸

The McGuire Act, which largely supersedes the Miller-Tydings Act — due to the Supreme Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*⁵⁹ — provides, in Section 2, an exemption for "contracts or agreements" prescribing stipulated prices as well as minimum prices.⁶⁰ Thus, both minimum and maximum resale pricing can be effectuated in those states which authorize stipulated prices.⁶¹ Section 3 of the McGuire Act provides an exemption for enforcement against nonsigners in those states which have nonsigner provisions.⁶²

Of the 45 states that initially enacted fair trade legislation, 9 have subsequently either repealed such legislation or their courts have held it unconstitutional under the state constitution. Of the 36 states that presently have some form of fair trade legislation, 19 have had the nonsigner provision held unconstitutional under the state constitution. Thus, in only 17 states is fair trade legislation applicable to noncontracting parties with knowledge of an existing fair trade agreement. Of these 17 states, only 8 permit stipulated prices in the fair trade agreement.⁶³

A cursory analysis indicates that there are two fundamental drawbacks to fair trading. The first is that it can only cover a portion of the country, as indicated above. The second is that, even in fair trade states, the failure to enforce in a vigorous and diligent fashion will result in the

57. 15 U.S.C. § 45 (1970).

58. Lurie, *Fair Trade: How Formal Must It Be?*, 3 *RUTGERS CAMDEN L.J.* 1 (1971). Professor Lurie described the nature and scope of the McGuire Act exemption as follows:

[T]he Act should not be viewed as an enabling act in the sense that it is a grant of power to the states to do what they might not otherwise do, but rather the Act should be viewed as stating that federal law will not prohibit what state law, within limits, permits. So viewed, the federal act incorporates the terms of the state act in each state, and conditions the legality of a price fixing scheme under federal law upon the legality of the scheme under state law.

Id. at 5. Of course, the state may not exceed the limits prescribed by the federal exemption. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951).

59. 341 U.S. 384 (1951). The Court held that enforcement of resale price maintenance against nonsigners was not within the exemption due to the failure of the Miller-Tydings Act to exempt explicitly such enforcement. The effect of this decision was to make all efforts to enforce resale prices against nonsigners violative of the antitrust laws. In response to this decision, Congress passed the McGuire Act in 1952 for the purpose of reinstating enforcement against nonsigners by exempting such enforcement from the federal antitrust laws when state legislation authorizes such enforcement.

60. 15 U.S.C. § 45(2) (1970).

61. See *TRADE REG. REP.* ¶ 6041, at 9087-88 (1972).

62. 15 U.S.C. § 45(3) (1970).

63. See *TRADE REG. REP.* ¶ 6041, at 9087-88 (1970).

loss of enforcement rights.⁶⁴ A more detailed analysis will uncover additional obstacles to the use of fair trade in the gasoline industry.

B. Nature and Scope of the Exemption

"[S]ince resale price maintenance is a privilege restrictive of a free economy,"⁶⁵ the Supreme Court has adopted a principle of strict construction of the Miller-Tydings and McGuire Act exemption.⁶⁶ To come within the scope of the exemption, several conditions or limitations are imposed: (1) there must exist a "statute, law or public policy" making resale price maintenance agreements lawful in the state where the resale takes place,⁶⁷ (2) the agreements must comply with the conditions or limitations prescribed by the state law,⁶⁸ (3) the commodity to be fair traded must be in "free and open competition with commodities of the same general class produced or distributed by others,"⁶⁹ and (4) there is an absolute prohibition against horizontal agreements.⁷⁰

1. Degree of Formality Required

Two issues concerning fair trade have never been authoritatively resolved: (1) whether a producer who achieves resale price maintenance by oral agreements or assurances without entering into formal fair trade contracts can claim the benefit of the exemption; and (2) whether a producer who achieves resale price maintenance by overstepping the bounds of the *Colgate* doctrine and entering into nonconsensual oral or written agreements can claim the benefit of the exemption. The essential nature of the problem presented by these two issues may be better understood by juxtaposing two passages taken from the majority and dissenting opinions of the Supreme Court in *Schwegmann*.

After examining the Miller-Tydings Act, Mr. Justice Douglas, in writing for the *Schwegmann* majority, stated:

The Act sanctions only "contracts or agreements." If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. *Their contract, combination, or conspiracy — hitherto illegal — is made lawful . . .* When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement;

64. *Shulton v. Hogue & Knott*, 364 F.2d 765, 768-69 (6th Cir. 1966); *Borowitz*, *supra* note 5, at 259. Another drawback for some is that a dual distribution concern cannot fair trade as to distributors with which it competes. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956). For a more detailed discussion of this problem, see text accompanying notes 88-96 *infra*.

65. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

66. *Id.*

67. 15 U.S.C. §§ 1, 45 (1970).

68. See *Lurie*, *supra* note 58, at 5-6.

69. 15 U.S.C. §§ 1, 45(1) (1970).

70. *Id.* §§ 1, 45(5).

that is price fixing by *compulsion*. That is not following the path of *consensual agreement*; that is resort to *coercion*.⁷¹

Mr. Justice Frankfurter, in dissent, reasoned:

"Contracts or agreements" immunized by the Miller-Tydings Amendment surely *cannot have a narrower scope than "contract, combination . . . or conspiracy" in the Sherman Law*. The Miller-Tydings Amendment is an amendment to § 1 of the Sherman Law. The category of contract cannot be given different content in the very same section of the same act, and *every combination or conspiracy implies an agreement*.⁷²

Both the majority and dissent in *Schwegmann* appear to be in full accord with the view that *consensual* arrangements in the form of oral agreements or assurances are properly immunized by the federal fair trade exemption.⁷³ In reference to the second issue raised above, Mr. Justice Frankfurter's dissent may be read to have adopted an approach which would permit extension of fair trade immunity coextensive with the Court's expanded concepts of contract, combination, or conspiracy under the Sherman Act. The majority, on the other hand, made it abundantly clear that immunity only extended to consensual agreements. Recent Supreme Court decisions have broadened the concept of "combination" under the Sherman Act to include not only consensual agreements, but also nonconsensual arrangements fathered through the use of economic coercion.⁷⁴ If the analysis of the majority in *Schwegmann* has vitality today, the scope of the immunity provided by the federal exemption would not protect these nonconsensual combinations.⁷⁵ Nor does the enactment of the McGuire Act compel a different conclusion. The McGuire Act was enacted in response to the Supreme Court's holding in *Schwegmann* that the states' nonsigner provisions did not fall within the scope of the exemption provided by the Miller-Tydings Act. There is no evidence to suggest that Congress intended to expand the meaning of the phrase "contracts or agreements," as found within the Miller-Tydings and McGuire Acts, to include nonconsensual combinations. The McGuire Act "merely provided that once a contract or agreement existed the federal act would not prohibit the

71. 341 U.S. at 388 (emphasis added).

72. *Id.* at 397 (emphasis added).

73. *Accord*, *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 83 (S.D. Cal. 1961); *United States v. Socony Mobil Oil Co.*, 150 F. Supp. 202 (D. Mass. 1957). However, numerous state and lower federal court decisions have construed particular state fair trade acts as requiring a contract with adequate consideration. *Mead Johnson & Co. v. Westchester Discount Health & Vitamin Center*, 212 F. Supp. 310 (E.D. Pa. 1962); *Allan B. Dumont Laboratories, Inc. v. H.R. Macy & Co.*, 1948-49 Trade Cas. ¶ 62,481 (Sup. Ct. N.Y. 1949); *General Electric Co. v. Wahle*, 1955 Trade Cas. ¶ 68,039 (County Ct. Ore. 1955); *Seagram Distillers Co. v. Corensweet*, 198 Tenn. 644, 281 S.W.2d 657 (1955). If the state courts construe the state's fair trade act or public policy to require a formal contract and this requirement is not met, there is considerable doubt whether the federal exemption can be claimed. *See Diamond*, *supra* note 50, at 103; *Lurie*, *supra* note 58, at 7-11.

74. *See* text accompanying notes 27-32 *supra*.

75. *See Lurie*, *supra* note 58, at 7.

enforcement of any state-created right against a non-party to that contract or agreement."⁷⁶

Although this analysis is not significant in those states which have nonsigner provisions, since an oil refiner undoubtedly would have no difficulty in securing one consensual agreement, it is extremely important in those states which do not afford nonsigner protection.⁷⁷ In these latter states, it would be necessary for the refiner to secure consensual agreements or assurances from all of its retailers to implement a fair trade program of resale price maintenance. Furthermore, if coercive methods are employed, the resulting nonconsensual combinations would be beyond the protection of the *Colgate* doctrine and outside the scope of immunity provided by the McGuire Act.

2. *Free and Open Competition*

Section 5(a)(4) of the McGuire Act provides that fair trade commodities must be in "free and open competition with commodities of the same general class produced or distributed by others."⁷⁸ The Supreme Court has never construed this section of the Act, and due to the paucity of any judicial construction as to this section, its meaning and effect remains obscure.⁷⁹

*Eastman Kodak Co. v. FTC*⁸⁰ is the leading federal case on the question as to what are commodities in the same general class. The Second Circuit held that Kodak's color film was not in the same general class with ordinary black and white film produced by others. Since Kodak was the only producer of color film, its product was held not to be in free and open competition.⁸¹ However, the Federal Trade Commission, without giving reasons, subsequently modified the order when Ansco color film was placed on the market, apparently regarding one active competitor as constituting "free and open competition."⁸²

The free and open competition requirement was designed to insure that fair trading was limited to those commodities which must face sufficient interbrand competition to prevent monopolization pricing.⁸³ Since this is the policy underlying the provision, serious doubt arises as

76. *Id.* at 14.

77. See TRADE REG. REP. ¶ 6041, at 9087-88 (1972).

78. 15 U.S.C. § 45(a)(2) (1970).

79. REPORT OF THE ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 152 (1955) [hereinafter cited as ATT'Y GEN. REPORT]. For a general discussion of the requirement, see Herman, *Free and Open Competition*, 9 STAN. L. REV. 323 (1957).

80. 158 F.2d 592 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947).

81. *Id.* at 594.

82. *Eastman Kodak Co. v. FTC*, 44 F.T.C. 14, 16 (1947). But one economist has questioned whether a choice between only two products is sufficient to constitute "free and open competition." Bowman, *Resale Price Maintenance — A Monopoly Problem*, 25 U. CHI. J. BUS. 141, 146 (1952).

83. Some economists doubt the efficacy of this requirement. See, e.g., Corey, *Fair Trade Pricing: A Reappraisal*, 30 HARV. BUS. REV. 47, 55 (1952).

to whether competing manufacturers who practice conscious parallelism⁸⁴ in pricing or compete in an oligopoly market structure should be permitted to fair trade. Although the Supreme Court has held that conscious parallelism, in and of itself, is not a violation of the Sherman Act,⁸⁵ it nevertheless should be relevant to the question whether the fair trade commodity is in free and open competition.

This was the approach adopted by the Pennsylvania Supreme Court in *Gulf Oil Corp. v. Mays*.⁸⁶ The Pennsylvania court expressed doubt that Gulf gasoline was in free and open competition with other brands because all the major brands of gasoline were sold at virtually the same price in that geographical area.⁸⁷ This position is consistent with the underlying purpose of the anti-trust laws. If the "free and open competition" requirement is to have meaning, it should have application to the oligopoly market structure. Competition is already restricted in such a market. To permit fair trading only serves to restrict it further and undermines all efforts to insure that the economy remains freely competitive.

3. Vertical Integration

Section 5(a)(5) of the McGuire Act provides that it does not "make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices . . . between manufacturers, or between producers . . . or between retailers, or between persons, firms, or corporations *in competition with each other*."⁸⁸ The Supreme Court, in *United States v. McKesson & Robbins, Inc.*,⁸⁹ interpreted this section as preventing partially integrated brand owners from entering into fair trade agreements with their own dealers with whom they were competing.⁹⁰ However, several questions remained unsettled after the Court's decision in *McKesson*.⁹¹

One such question is whether a partially integrated brand owner can enter into fair trade contracts with noncompeting dealers and then enforce the established price against nonsigning competing dealers where permitted under the state statute. The weight of authority supports the view that the fair trade exemption is inappropriate under these circumstances.⁹² To hold otherwise would allow the brand owner to circumvent

84. ATT'Y GEN. REPORT, *supra* note 79, at 36-42.

85. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

86. 401 Pa. 413, 164 A.2d 656 (1960).

87. *Id.* at 420, 164 A.2d at 660.

88. 15 U.S.C. § 45(a)(5) (1970) (emphasis added).

89. 351 U.S. 305 (1956).

90. *Id.* at 311-13 & n.14. McKesson's ownership of wholesale outlets precluded it from making fair trade agreements with its competing wholesalers.

91. See Weston, *Fair Trade, Alias "Quality Stabilization:" Status, Problems and Prospects*, 22 A.B.A. ANTITRUST SECTION 76, 83-87 (1963).

92. *Eso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17 (1st Cir.), *cert. denied*, 355 U.S. 834 (1957); *Texas Co. v. Di Gaetano*, 39 N.J. 120, 187 A.2d 721 (1963);

the Supreme Court's holding in *McKesson* and render it of little practical significance.

Another question on which there has been disagreement is whether a limited amount of competition, such as direct selling to commercial accounts, comes within the *McKesson* prohibition. Here again, the better authority suggests that the exemption is not available.⁹³ But the courts are not clear as to how substantial the competition must be.

In the gasoline industry, dual marketing techniques are a common practice.⁹⁴ One method employed is where the oil refiner sells directly to commercial accounts, placing it in direct competition with its retailers. As indicated above, *McKesson's* principles are applicable, even though the refiner is competing at a different functional level. A second method employed is where the oil refiner sells through a combination of company-run service stations and independent stations, self-owned and leased. Due to the paucity of judicial decisions, there has been no definitive statement as to whether *McKesson's* principles are applicable in this latter situation.⁹⁵ However, since the anticompetitive effects generated by the latter marketing device are similar to those generated by direct sales to commercial accounts, the fair trade exemption should not be available. In fact, the Federal Trade Commission has indicated that this marketing device has been employed by oil refiners to discipline independent retailers for selling gasoline at prices variant from those suggested by the refiner.⁹⁶

C. Summary

Although economic arguments have been advanced justifying the fair trade exemption on the ground that it helps to stabilize the economy, protect the goodwill of the trademark owners, and preserve small businesses from destructive competitive pricing,⁹⁷ the Federal Trade Com-

Gulf Oil Corp. v. Mays, 401 Pa. 413, 164 A.2d 656 (1960). For a case holding that only competition with contracting dealers precludes fair trade, see *Johnson & Johnson v. Janel Sales Corp.*, 192 F. Supp. 780 (S.D.N.Y. 1961).

93. *Esso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17 (1st Cir.), cert. denied, 355 U.S. 834 (1957); *Sinclair Ref. Co. v. Blight Bros.*, 1960 Trade Cas. ¶ 69,765 (C.P. Pa. 1959). But see *Johnson & Johnson v. Apollo Sales, Inc.*, 192 F. Supp. 779 (S.D.N.Y. 1961); *Helena Rubinstein, Inc. v. Janel Sales Corp.*, 1962 Trade Cas. ¶ 70,210 (Sup. Ct. N.Y. 1962).

In addition, courts have divided on the question whether *McKesson's* principles may be avoided by expressly excluding these direct sales in the fair trade agreement. *Texas Co. v. Di Gaetano*, 39 N.J. 120, 187 A.2d 721 (1963) and *Gulf Oil Corp. v. Kostek*, 1960 Trade Cas. ¶ 69,788 (C.P. Pa. 1960), refused to give effect to contracts exempting certain classes of sales. But see *Johnson & Johnson v. Apollo Sales, Inc.*, 192 F. Supp. 779 (S.D.N.Y. 1961); *General Electric Co. v. Hess Bros., Inc.*, 155 F. Supp. 57 (E.D. Pa. 1957).

94. FTC REPORT ON GASOLINE MARKETING, *supra* note 4, at 25-26.

95. It has been suggested that a price-setting contract may be a fraud on the statute if the manufacturer owned the retail firm with whom the contract was made. *California Oil Co. v. Reingold*, 1948-49 Trade Cas. ¶ 62,475 (Super. Ct. N.J. 1949).

96. FTC REPORT ON GASOLINE MARKETING, *supra* note 4, at 26.

97. See *Adams, Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967 (1955); *Van Mell, The Case for Fair Trade*, 44 ILL. B.J. 755 (1956). For views

mission and the Department of Justice have continuously advocated repeal of the federal exemption, reasoning that it goes beyond the controls necessary to eliminate these problems.⁹⁸ Furthermore, the anti-competitive controls that are left in its wake help to foster horizontal price stabilization.⁹⁹ The gasoline industry has been especially prone to this dilemma, so much so that consent decrees suspending the use of fair trade by oil refiners are commonplace,¹⁰⁰ and that commentary suggests that fair trade is dead.¹⁰¹ Nevertheless, economic justification still lingers.¹⁰² Furthermore, there is serious doubt that the federal exemption will be repealed, even though some states have demonstrated a growing disenchantment with fair trade legislation.¹⁰³ One can only hope that the judiciary, consonant with the principles laid down in *Schwegmann*,¹⁰⁴ will continue to limit its application to volitional agreements and not permit immunity to extend to nonconsensual arrangements fattered by the dominant economic power of the brand owner. To protect the small independent businessman from the rigors of competitive pricing by eliminating his business discretion is to cure the disease by killing the patient.

IV. PRIVATE ANTITRUST LITIGATION — THE BULWARK OF ANTITRUST ENFORCEMENT?

The private treble damage action has been praised as the most effective deterrent to violation of the antitrust laws.¹⁰⁵ Mr. Justice Black characterized this remedy as "a vital means for enforcing the antitrust policy of the United States" and as a "bulwark of antitrust enforcement."¹⁰⁶ Despite these laudations, it is interesting to note that of the 1,696 private antitrust suits that have culminated in decisions from 1890 to 1963, only 71 have been successful, and of these, almost all fol-

critical of fair trade, see Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954); Herman, *A Note on Fair Trade*, 65 YALE L.J. 23 (1955); Rahl, *The Case Against Fair Trade*, 44 ILL. B.J. 754 (1956).

98. See FTC, REPORT ON RESALE PRICE MAINTENANCE (1945); ATT'Y GEN. REPORT, *supra* note 79, at 153-54.

99. ATT'Y GEN. REPORT, *supra* note 79, at 154.

100. *United States v. American Oil Co.*, 1971 Trade Cas. ¶ 73,616 (D.N.J. 1971); *United States v. Quaker State Oil Ref. Corp.*, 1969 Trade Cas. ¶ 72,833 (W.D. Pa. 1969); *United States v. Standard Oil Co. of Cal.*, 1959 Trade Cas. ¶ 69,399 (S.D. Cal. 1959).

101. See, e.g., Burke, "Fair trade" died . . . now officially buried!, *Service Station Dealer*, Sept. 1971, at 2, col. 1.

102. See Dixon, *supra* note 7.

103. See H.R. REP. NO. 2683, 83d Cong., 2d Sess. 67-70 (1945); TRADE REG. REP. ¶ 6041, at 9087-88 (1972).

104. See text accompanying notes 71-75 *supra*.

105. Alioto, *The Economics of a Treble Damage Case*, 32 ANTITRUST L.J. 87, 96 (1966); *Hearings on S. 2512 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 14 (1967) [hereinafter cited as *Hearings*].

106. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139. (1968).

lowed favorable government prosecutions.¹⁰⁷ These figures, of course, do not include the number of cases that were settled before a complaint was issued, or the number of lawsuits avoided because of a change in business practices, but they are a sound indicator of how willing a private party may be to attempt court enforcement¹⁰⁸ where the cost of suit is substantial and the chance for success marginal.¹⁰⁹

A. Economics of Private Enforcement

It has been estimated that the smallest private antitrust action will cost a minimum of five thousand dollars to prosecute to a favorable conclusion.¹¹⁰ And if there is any doubt raised as to the financial ability of the plaintiff to prosecute the suit, a war of attrition can be expected as an acceptable method of defense by the large corporate defendant and its attorneys. Pretrial procedures will be delayed and procurement of evidence will be difficult, even after discovery orders have been signed and executed. Protracted appeals and delays could cause the suit to extend over a period of five years, with initial hope of success continually waning.¹¹¹

This prospect of protracted litigation, coupled with only a marginal chance of success, acts as a deterrent to the institution of a suit, in spite of the fact that treble damages and costs of litigation, including reasonable attorney's fees, are recoverable.¹¹² In the case of a single gasoline retailer whose livelihood depends on the continued operation of his service station, there is no feasible economic reason to institute suit where five years of protracted litigation is in the offing. In fact, in terms of a treble damage action, he will not have incurred damages until he has been terminated; by then, it is too late, for at that point he would, in most instances, lack the financial ability to prosecute a suit to a fruitful conclusion.

Oil refiners are not oblivious to these economic realities, and can well afford to chance the occasion when a single retailer attempts to enforce his rights through the courts because there are other obstacles he must overcome before success is assured.

107. See *Hearings*, *supra* note 105, at 180-324.

108. Section 4 of the Clayton Act affords the treble damage remedy to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." 15 U.S.C. § 15 (1970). Section 16 of the Clayton Act, the corollary on the equitable side, provides that "[a]ny person, firm, corporation, or association shall . . . have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . ." *Id.* § 26.

109. Alioto, *supra* note 105, at 92; Comment, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965).

110. See Alioto, *supra* note 105, at 93.

111. *Id.* at 92.

112. An allowance for attorney's fees may cover the appeal of an action as well as the original trial of the action. However, such an allowance can be made only as an incident to the successful prosecution of the antitrust damage action. *Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222 (1970); *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566 (4th Cir. 1963).

B. Other Problems in Private Enforcement

Additional obstacles confronting the potential plaintiff include: (1) establishing that the restraint occurred in interstate commerce, or, if the restraint arose in intrastate commerce, that it had a substantial adverse effect on interstate commerce;¹¹³ (2) establishing standing to sue by alleging a violation of the antitrust laws,¹¹⁴ an injury to business or property,¹¹⁵ and a causal relationship between the violation and the

113. *Cf. Savon Gas Stations No. 6, Inc. v. Shell Oil Co.*, 203 F. Supp. 529, 533 (D. Md. 1962), *aff'd*, 309 F.2d 306 (4th Cir.), *cert. denied*, 372 U.S. 911 (1963).

Although the commerce requirement can be succinctly stated, its application has caused substantial difficulty. Some courts have held that the retailer's operation must be in or affect interstate commerce, notwithstanding the fact that his supplier's business is intrastate in scope. *Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968); *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal. 1951). Other courts have found that the commerce requirement is satisfied when the products to be purchased by the retailer came from or were perfected out of state. *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961); *Burkhead v. Phillips Petroleum Co.*, 308 F. Supp. 120 (N.D. Cal. 1970). Where both gasoline production and marketing is intrastate, the courts have uniformly characterized the operation as purely intrastate and as not substantially affecting interstate commerce. *See, e.g., Brenner v. Texas Co.*, 140 F. Supp. 240 (N.D. Cal. 1956). But divergent authority exists as to whether a gasoline retailer's consumer credit card business, or gasoline sales to interstate travelers constitutes sufficient interstate activity so that a restraint will substantially burden commerce. *Compare Uniform Oil Co. v. Phillips Petroleum Co.*, *supra* (commerce requirement not met by a showing that dealer honored all major credit cards), *with Ryan v. California Co.*, 1957 Trade Cas. ¶ 68,651 (D. Mont. 1957) (commerce requirement met when dealer alleged use of consumer credit cards). *Compare also Munson v. Richfield Oil Corp.*, 91 F. Supp. 171 (S.D. Cal. 1950) (commerce requirement met where retailer sold gasoline and oil to interstate travelers), *with Dunkel Oil Corp. v. Anich*, 1944-45 Trade Cas. ¶ 57,306 (D. Ill. 1944) (commerce requirement not met where retailer sold gasoline and oil to interstate travelers).

114. 15 U.S.C. § 12 (1970). Section 12 defines "antitrust laws" as including the Sherman Act, the Clayton Act, and sections 73-77 of the Wilson Tariff Act of 1894. Therefore, private actions for damages or injunctive relief must be based upon violations of these three laws. The Federal Trade Commission Act is not defined as an antitrust law, and thus, suits based upon a violation of this law are not authorized.

115. *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

The phrase "injury to business or property" has been construed in terms of (1) the difference between amounts actually realized from sales and what would have been realized but for the antitrust violation, and (2) the extent to which the value of the plaintiff's property was diminished as a result of the antitrust violation. *Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959). Thus, the loss of profits, *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959), and the loss of goodwill, *Banana Distribs., Inc. v. United Fruit Co.*, 162 F. Supp. 32 (S.D.N.Y. 1958), have been recognized as injuries to business or property within the meaning of the statute. However, a person prevented from engaging in a business by reason of an antitrust violation is not injured in his business or property, unless he can show that he intended to engage in the business and was prepared to do so. *Martin v. Phillips Petroleum Co.*, *supra*; *Triangle Conduit & Cable Co. v. National Elec. Prod. Corp.*, 152 F.2d 398 (3d Cir. 1945); *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289 (D. Colo. 1969). But recovery has been allowed where there was a conspiratorial breach of a contract, the performance of which would have enabled the plaintiff to engage in a business. *North Texas Producers Ass'n v. Young*, 308 F.2d 235 (5th Cir. 1962).

In contrast with an action for damages, a person seeking injunctive relief under section 16 of the Clayton Act need not show actual injury; a showing of a dangerous probability of injury is sufficient. 15 U.S.C. § 26 (1970); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927).

injury claimed;¹¹⁶ and (3) proving recognizable damages,¹¹⁷ including reduced profits on actual sales,¹¹⁸ lost profits on lost sales,¹¹⁹ overcharges on purchases actually made by the plaintiff,¹²⁰ and injury to capital or goodwill.¹²¹

It is evident from the foregoing survey of the multifaceted requirements in private enforcement that for the average gasoline retailer, who has the temerity to challenge the pricing policies of his supplier, the treble damage action normally is not a viable remedy for or deterrent against antitrust violations. The economic realities and the onerous bur-

116. *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966).

The third requirement of standing, causal relationship, has been defined in such terms as direct or proximate damages. Remote, indirect, or derivative injuries are not recoverable under the Clayton Act. *Bank of Utah v. Commercial Security Bank*, 369 F.2d 19, 25-26 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, *supra*. But, to illustrate how far some courts have gone in finding damages proximately resulting from an antitrust violation, the Ninth Circuit granted a landlord of a gasoline dealer standing to sue Union Oil for violation of the Sherman Act where the refiner had attempted to exclude all but its products from the station, including those of the plaintiff. The court held that the station owner was within the "target area" of the defendant's alleged conduct. *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967). But the weight of authority suggests that a much stricter standard of causation is the general rule rather than the exception. *See, e.g.*, *Alexander v. Texas Co.*, 165 F. Supp. 53 (W.D. La. 1958); *Libman v. Sun Oil Co.*, 127 F. Supp. 52 (D. Conn. 1954); *Farmers Co-operative Oil Co. v. Socony-Vacuum Oil Co.*, 51 F. Supp. 440 (N.D. Iowa 1943); *Miller Oil Co. v. Socony-Vacuum Oil Co.*, 37 F. Supp. 831 (E.D. Mo. 1941).

117. *See generally* Greenwald, *The Measurement of Damages in Private Antitrust Suits*, 5 ANTITRUST BULL. 293 (1960); McConnell, *Proof of Damages in an Antitrust Case*, 7 ANTITRUST BULL. 39 (1962); Rowley, *Proof of Damages in Antitrust Cases*, 32 ANTITRUST L.J. 75 (1966).

118. E. TIMBERLAKE, *FEDERAL TREBLE DAMAGES ANTITRUST ACTIONS* 309 (1965). This category includes the situation where a purchaser for resale establishes that he was a party to a maximum resale price maintenance agreement with his supplier.

119. *Id.* This category encompasses the situation where a retailer lost sales because he was unable to obtain merchandise because of an unlawful refusal to deal or an exclusive dealing arrangement. Lost profits may be established by evidence showing the general state of the industry involved, *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), past earnings of the injured party, *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), anticipated sales, *Kobe, Inc. v. Demsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952), or the profits of other comparable businesses, *North Texas Producers Ass'n v. Young*, 308 F.2d 235 (5th Cir. 1962).

120. E. TIMBERLAKE, *supra* note 118, at 312. This category includes the situation where the retailer is paying a higher price than other customers of a common supplier. In the gasoline industry this category may encompass the zone-pricing technique employed by oil refiners whereby price allowances are granted to certain dealers on the condition that they drop their prices to a level competitive with neighboring dealers in rival brands of gasoline. The Supreme Court has indicated that recovery may be based on the difference between the higher price paid by the plaintiff and the lower price paid by other retailers of the common supplier. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). The traditional rule had been to limit damages to the lost profits resulting from the discrimination. *See, e.g.*, *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir. 1957); *Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959).

121. E. TIMBERLAKE, *supra* note 118, at 342. This category includes the situations where the plaintiff is driven entirely out of business by the defendant's antitrust violation or where the plaintiff continues though his business is impaired. In these situations, it is possible that injury to capital or goodwill may overlap damages in the form of lost profits. *See Osborn v. Sinclair Ref. Co.*, 324 F.2d 566 (4th Cir. 1963). *But see Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188 (9th Cir. 1957).

dens of proving the elements necessary to the basic cause of action indicate that few retailers can embark upon the course of private enforcement as presently designed. Faced with this dilemma, the retailer will in all likelihood acquiesce in his termination and seek another location with a different refiner in the hope that his new supplier will not adopt the pricing policies of his former supplier.

V. ALTERNATIVE REMEDIAL DETERRENTS

A. Introduction

As has been previously noted, the current trend in Supreme Court decisions indicates that the judiciary is striving to reinforce the Government's policy of eliminating anticompetitive influences in the channels of distribution to insure that competition remains active and markets free. The Court has assumed an active role in strengthening the private enforcement action by broadening the concept of "combination" under the Sherman Act,¹²² by restricting the federal fair trade exemption,¹²³ and by limiting the defenses available to the antitrust violator.¹²⁴ But the two factors discussed earlier, the nature of the private enforcement action¹²⁵ and the inherent limitation of the Sherman Act¹²⁶ have partially obstructed the Court's efforts.

At present, the burden more often than not falls upon the small businessman to institute suit to vindicate a contract right already lost, or to recover damages to a business relationship already terminated. As already indicated, the cumbersome nature of the judicial machinery, and the delaying tactics employed by the large corporate defendant have resulted in protracted litigation which has often frustrated private enforcement. In addition, expansion of conceptual principles under the Sherman Act may have reached its limit.¹²⁷ To deter further violations it has become necessary to furnish alternative remedial deterrents to supplement the remedies presently available, and to shift the burden to the violator.

B. Federal Antitrust Policy as a Basis for Equitable Defenses in Non-Antitrust Actions

While there is no question that the states lack jurisdiction to entertain an affirmative claim for relief under the federal antitrust laws,¹²⁸

122. See text accompanying notes 23-28 *supra*.

123. See text accompanying notes 73-77 & 88-96 *supra*.

124. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (rejected the *in pari delicto* defense); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (rejected the passing-on defense).

125. See notes 105-21 and accompanying text *supra*.

126. See text accompanying notes 15-49 *supra*.

127. See text accompanying notes 33-49 *supra*.

128. *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261 (1922); *Loew's, Inc. v. Don George, Inc.*, 237 La. 132, 110 So. 2d 553 (1959); *Gold Fuel Serv., Inc. v. Esso Standard Oil Co.*, 32 N.J. 459, 161 A.2d 246 (1960).

a significant number of state courts have held that they have jurisdiction to entertain defenses based on federal antitrust policy.¹²⁹ Thus, a contract¹³⁰ and a lease¹³¹ were held unenforceable in the New York courts because they violated the Clayton Act.¹³² Likewise, an agreement to arbitrate was held unenforceable where the relief sought from arbitration would have constituted a violation of the Clayton Act.¹³³ An oil company was denied the right to exercise an option to purchase a gas station where the contract also contained an exclusive dealing provision, and the option was being used to enforce this unlawful provision.¹³⁴ These decisions indicate that there is a growing public policy that state courts should not grant relief in a non-antitrust action where the effect of the decision would be to give impetus to a violation of the federal antitrust laws.

A recurring problem that exists in the gasoline industry is the oil refiner's termination of the gasoline retailer's lease in retaliation for the latter's refusal to fix gasoline prices.¹³⁵ A summary eviction proceeding usually follows with the oil refiner seeking to eject its dealer-tenant for holding over beyond the lease term. In response to the refiner's claim for relief, the dealer asserts the equitable defense that its supplier is refusing to deal because of the dealer's failure to implement a resale price maintenance scheme in violation of the Sherman Act. The few courts that have dealt with this precise issue have refused to entertain the defense on the ground that the retailer has an adequate remedy at law.¹³⁶ But this rationale is of questionable validity since, as has been noted, there is serious doubt that the treble damage action is an effective remedy under these circumstances.¹³⁷ To provide both an attainable remedy and an effective deterrent, it would seem more appropriate for the state court to allow the aforementioned defense,

129. *Alpha Beta Food Mkts., Inc. v. Amalgamated Meat Cutters*, 147 Cal. App. 2d 343, 305 P.2d 163 (1956); *Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd.*, 1970 Trade Cas. ¶ 73,379 (Sup. Ct. N.Y. 1970); *Standardbred Owners Ass'n v. Yonkers Raceway, Inc.*, 1964 Trade Cas. ¶ 70,980 (Sup. Ct. N.Y. 1963); *F.W. Stock & Sons, Inc. v. Jacobson*, 173 Misc. 621, 18 N.Y.S.2d 200 (Sup. Ct. 1939); *Remington Rand, Inc. v. IBM*, 167 Misc. 108, 3 N.Y.S.2d 515 (Sup. Ct. 1937); *Ainsworth v. Cooper Underwear Co.*, 227 App. Div. 837, 237 N.Y.S. 301 (1929); *Revlon, Inc. v. Capitol Beauty Supply Co.*, 1962 Trade Cas. ¶ 70,464 (C.P. Pa. 1962). *Contra*, *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 110 N.W.2d 348 (1961); *Loew's, Inc. v. Somerville Drive-In Theatre Corp.*, 54 N.J. Super. 224, 148 A.2d 599 (1959).

130. *F.W. Stock & Sons, Inc. v. Jacobson*, 173 Misc. 621, 18 N.Y.S.2d 200 (Sup. Ct. 1939).

131. *Ainsworth v. Cooper Underwear Co.*, 227 App. Div. 837, 237 N.Y.S. 301 (1929).

132. 15 U.S.C. §§ 14 *et seq.* (1970).

133. *City Trade & Indus., Ltd. v. New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 250 N.E.2d 52, 302 N.Y.S.2d 557 (1969).

134. *Texaco Puerto Rico, Inc. v. Armaiz*, 1962 Trade Cas. ¶ 70,247 (Sup. Ct. P.R. 1961).

135. FTC REPORT ON GASOLINE MARKETING, *supra* note 4, at 31.

136. *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970); *Providence Fruit & Produce Bldg., Inc. v. Gamco, Inc.*, 76 R.I. 54, 68 A.2d 20 (1949).

137. See text accompanying notes 105-21 *supra*.

thus placing the legal and financial burden on the large corporate entity to defend its actions.

The development of the law with respect to the residential lease provides compelling support for this view. While it is the general rule that a landlord may refuse to renew a lease for any legal reason or for no reason at all, it has been held that he may not evict in retaliation for the tenant's reporting of housing code violations to the authorities. This principle of retaliatory intent, first announced by the District of Columbia Circuit, in *Edwards v. Habib*,¹³⁸ has had increasing application in the residential setting, and has been adopted by several courts¹³⁹ and legislatures¹⁴⁰ throughout the country. Some jurisdictions have thought the rule so fundamental as to reach constitutional dimension. Thus, the United States District Court for the Southern District of New York found:

The effect that a rule of law permitting retaliatory evictions would have on tenants cannot be discounted. There would be no point in a tenant trying to improve conditions in a building that he would not be allowed to continue to live in. Permitting retaliatory evictions would thus inhibit him in the exercise of his constitutional rights or, in the words of the Supreme Court, have a chilling effect.

We accordingly hold that the 14th amendment prohibits a state court from evicting a tenant when the overriding reason the landlord is seeking the eviction is to retaliate against the tenant for an exercise of his constitutional rights.¹⁴¹

Whether the doctrine is viewed as being constitutionally grounded or simply based on a strong social policy, its foundation rests on the existence of an inequality in the bargaining positions of the respective parties.¹⁴² Thus, in a commercial setting where a similar foundation exists, the doctrine should have equal application. Inequality in bargaining positions, coupled with the strong economic and social policy underlying the Sherman Act, provides compelling support for the application and development of the doctrine that a supplier-lessor has the right to refuse to deal for any legal reason or for no reason at all, provided his refusal is not designed to implement a program to violate state or

138. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

139. *See, e.g.*, *Hosey v. Club Van Cortland*, 299 F. Supp. 501 (S.D.N.Y. 1969); *Alexander Hamilton Sav. & Loan Ass'n v. Whaley*, 107 N.J. Super. 89, 257 A.2d 7 (1969); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

140. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-540a (Supp. 1973); ILL. REV. STAT. ch. 80, § 71 (1971); MASS. GEN. LAWS ANN. ch. 186, § 18 (Supp. 1972); N.J. STAT. ANN. §§ 2A: 42-10.10, 42-10.12 (Supp. 1972); PA. STAT. tit. 35, § 1700-1 (Supp. 1973).

141. *Hosey v. Club Van Cortland*, 299 F. Supp. 501, 506 (S.D.N.Y. 1969). *Cf. McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971); *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962). *But cf. Lindsey v. Normet*, 405 U.S. 56 (1972); *Hill v. Miller*, 64 Cal. 2d 757, 415 P.2d 33, 51 Cal. Rptr. 689 (1966).

142. *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968).

federal antitrust laws.¹⁴³ This doctrine avoids the technical requirement of establishing a contract, combination, or conspiracy in restraint of trade in that it reaches conduct antecedent to that stage. At the same time, the principle is limited to those situations where the supplier and purchaser have greater commercial ties than a simple buy and sell arrangement. The joint venture aspects of the refiner-retailer relationship¹⁴⁴ strongly suggest that there is a need to afford legal protection antecedent to the existence of a Sherman Act violation. With this supplemental protection a more effective deterrent to antitrust violations is supplied.

However, this alone is not sufficient to redress the balance of power, because the burden of proof still rests on the lessee-dealer to prove the elements of coercion and retaliatory intent.¹⁴⁵ The difficulty in proving a supplier's motive or design in terminating a dealer renders the above rule of limited practical significance without the adoption of a second principle developed in the residential setting.

The District of Columbia Circuit, in *Robinson v. Diamond Housing Corp.*,¹⁴⁶ recently had occasion to consider another aspect of the problem first raised in the *Edwards* case.¹⁴⁷ In *Robinson*, a tenant had withheld rent pursuant to decisional law in the District of Columbia which permitted such action when a unit is rendered unsafe and unsanitary by substantial housing code violations. The landlord brought suit to challenge the tenant's action, but it was upheld. Thereafter, the landlord served the tenant with a 30-day notice to quit the premises, indicating that it was unwilling to make the repairs and that it intended to take the property off the housing market. In the court action that followed, the tenant asserted the defense of retaliatory intent. The District of Columbia Court of Appeals held that the defense was not applicable on the facts of the case.¹⁴⁸ In reversing the federal district court which had affirmed, the District of Columbia Circuit not only held that the defense was available, but additionally stated that where an unexplained eviction follows a tenant's successful assertion of protected rights, a rebuttable presumption of retaliation is established, at which point it is incumbent upon the landlord to demonstrate "that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed."¹⁴⁹ The court went on to emphasize

143. At least one state, Hawaii, has dealt directly with this problem through legislation:

No person shall refuse to sell any commodity to, or to buy any commodity from, any other person or persons, when the refusal is for the purpose of compelling or inducing the other person or persons to agree to or engage in acts which, if acceded to, are prohibited by the state's antitrust law.

HAWAII REV. STAT. § 480-6 (1968).

144. Gasoline Retailer, May 1971, at 1, col. 4.

145. *Edwards v. Habib*, 397 F.2d 687, 702 (D.C. Cir. 1968).

146. 463 F.2d 853 (D.C. Cir. 1972).

147. See text accompanying note 138 *supra*.

148. *Robinson v. Diamond Housing Corp.*, 267 A.2d 833, 835 (D.C. App. 1970).

149. 463 F.2d at 865.

that a landlord's desire to remove a tenant because he is not paying rent is not a legitimate purpose, in that he does so pursuant to his right guaranteed by the housing code.

Projecting this principle to the commercial setting thus far envisioned, the doctrine would become operative in the situation where the landlord-refiner employs coercive tactics in an attempt to implement a scheme violative of the antitrust laws, the tenant-dealer refuses to accede to its policies, and within a reasonable time thereafter an unexplained eviction results. In this setting a rebuttable presumption should be established that the refiner's action is in retaliation for the dealer's refusal to comply with its anticompetitive policies. The result of establishing such a rule would be that the dealer, in order to establish his equitable defense in a summary eviction proceeding, need only demonstrate the coercion employed by his supplier and his refusal to acquiesce. At this point, the burden of proof would shift to the supplier to demonstrate that it is motivated by a legitimate business purpose. If the supplier fails to demonstrate a legitimate business purpose, the lease term would continue and he must continue to supply the dealer.¹⁵⁰

This approach has the distinct advantage of avoiding recourse to the private antitrust action and the problems associated with it. But, to maintain that this solution is replete with virtue and devoid of vice is to overlook the true nature of the problem. What must be remembered is that the court would be forcefully continuing a business relationship without alleviating the animosity that has been engendered by the actions of the respective parties. This may, of course, only indicate that the fundamental soundness of this approach lies not in its effectiveness as a *remedy* for antitrust violations, but rather in its resultant effectiveness as a *deterrent* against such violations.

C. State and Federal Franchise Legislation

1. Introduction

Franchising as a method of distribution has been lauded as harnessing the best features of small independent entrepreneurship with the best features of large corporate enterprise. The franchisor is provided with the ingenuity and incentive of the small businessman, and the franchisee is provided with the security, experience, and capitalization of the corporate establishment.¹⁵¹ In addition, the franchise system is said to provide a

150. This does not mean that the dealer is entitled to remain in possession in perpetuity. If the illegal purpose is dissipated, the landlord-refiner can, in the absence of legislation or a binding contract, evict the dealer. But, as was noted in *Edwards*, the landlord-refiner may not be able to disprove an illicit motive unless he can show a legitimate affirmative reason for eviction. 397 F.2d at 702 n.53.

151. See Axelrad, *Practising Law Institute — Franchising and Dual Distribution*, 11 ANTITRUST BULL. 533 (1966); Handler, *Statement Before the Small Business Administration*, 11 ANTITRUST BULL. 417 (1966); Rudnick & Rudnick, *Some Solutions to the Problems of Maintaining Quality Standards, Eliminating Unethical*

counterweight to industrial concentration, both by encouraging manufacturers to forego vertical integration and by creating viable interbrand competition for large integrated concerns.¹⁵² Franchising's hybrid nature has prompted some commentators to suggest that new antitrust principles should be developed which would permit a modicum of control by the franchisor as the quid pro quo for its promises under the franchise agreement and to protect the goodwill of its branded commodity.¹⁵³ However, the antitrust laws as yet do not recognize franchising as a special form of marketing.¹⁵⁴ The Supreme Court, in reviewing the validity of two of the arrangements commonly utilized in franchising, stated that sufficient knowledge concerning the economic and social ramifications of this marketing technique was not then available in order to determine intelligently whether it should be tested under the rule of reason or treated as perniciously anticompetitive and thus per se unlawful.¹⁵⁵ What can be predicted, however, with some degree of certainty, is that while new principles may be developed which will sanction some of the restraints of trade found in the modern franchise agreement, the tying and resale price maintenance arrangements attacked in *Atlantic Refining Co. v. FTC*,¹⁵⁶ and *Simpson v. Union Oil Co.*¹⁵⁷ will not be benevolently viewed by the Supreme Court, for these serve little purpose beyond the suppression of competition.¹⁵⁸

It is in the above context that we turn to an examination of the Automobile Dealer Franchise Act¹⁵⁹ and New Jersey's Franchise Practices Act.¹⁶⁰ Each respectively represents the first major federal and state legislation in franchise regulation.

2. *The Automobile Dealer Franchise Act and New Jersey's Franchise Practices Act — A Study in Contrast*

In an effort to realign the balance of economic power in the automobile dealer-manufacturer relationship, Congress afforded the dealer

Practices, Supervising Promotions and Ensuring Successful Management of Franchised and Non-Franchised Retail Outlets, 11 ANTITRUST BULL. 509, 511 (1966); Slater, *Franchising and Dual Distribution*, 11 ANTITRUST BULL. 517 (1966); Zeidman, *Remarks of Philip F. Zeidman*, 11 ANTITRUST BULL. 455 (1966); *Hearings Before the Subcomm. No. 4 of the House Select Comm. on Small Business*, 88th Cong., 1st Sess. 1728-40 (1963).

152. Handler, *supra* note 151, at 419.

153. See note 151 *supra*.

154. Cf. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966). See Wilson, *An Emerging Enforcement Policy for Franchising*, 15 N.Y.L.F. 1 (1969).

155. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

156. 381 U.S. 357 (1965).

157. 377 U.S. 13 (1964).

158. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (tying prefabricated houses to loans); *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968) (tying leases and gasoline contracts to tires, batteries, and accessories); *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd except on damage issue*, 448 F.2d 43 (9th Cir.), *cert. denied*, 405 U.S. 955 (1971) (tying trademarks to supplies). See Wilson, *Some Problems Relative to Franchise Arrangements*, 11 ANTITRUST BULL. 473 (1966).

159. 15 U.S.C. §§ 1221-25 (1970).

160. N.J. STAT. ANN. §§ 56:10-1 *et seq.* (Supp. 1972).

supplemental relief by enacting the Automobile Dealer Franchise Act.¹⁶¹ Adoption of the statute followed an extensive investigation of automobile marketing practices by congressional committees and the Federal Trade Commission. On the basis of such investigation, it was concluded that concentration of economic power in automobile manufacturing had developed to the point where new legislative methods and changes in established concepts were required.¹⁶²

As initially designed, the Act would have protected the franchise distributor from the arbitrary actions of his supplier.¹⁶³ However, the House Judiciary Committee modified the Senate's version of the bill, deleting the term "nonarbitrary" and the provision which required each party to the franchise to preserve all the equities of the other party that are inherent in the franchise relationship.¹⁶⁴ In its final form, the Act's purpose was to supplement the federal antitrust laws by granting the dealer a cause of action for damages when the automobile manufacturer failed to act in "good faith" in performing or complying with any of the provisions in the franchise agreement, or in terminating, cancelling, or failing to renew a dealer's franchise.¹⁶⁵

Section 1221(e) of the Act states:

[T]he term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.¹⁶⁶

Consonant with the legislative history, this statutory requirement of "good faith" has been interpreted narrowly so as to require an element of coercion or intimidation on the part of the manufacturer.¹⁶⁷ One court stated that an indispensable element of the cause of action is not lack of good faith in the ordinary sense, but lack of good faith in which coercion, intimidation or threats thereof are at least implicit.¹⁶⁸ In other words, the automobile dealer is not protected against the manufacturer's arbitrary refusal to renew

161. 15 U.S.C. §§ 1221-25 (1970). The policy underlying the Act was to establish a balance of power between manufacturers and dealers in the automotive industry by curtailing the economic advantages of the manufacturer and increasing those of the dealers. *Woodard v. General Motors Corp.*, 298 F.2d 121, 127 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962).

162. H.R. REP. NO. 2850, 84th Cong., 2d Sess. 1 (1956).

163. *Id.* at 8; S. REP. NO. 2073, 84th Cong., 2d Sess. 4 (1956).

164. H.R. REP. NO. 2850, 84th Cong., 2d Sess. 8 (1956).

165. *Id.* at 2.

166. 15 U.S.C. § 1221(e) (1970).

167. *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir. 1970); *accord*, *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir.), *cert. denied*, 389 U.S. 832 (1967); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964).

168. *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645, 646 (3d Cir. 1964); *accord*, *R.A.C. Motors, Inc. v. World-Wide Volkswagen Corp.*, 314 F. Supp. 681 (D.N.J. 1970).

the franchise unless he can demonstrate some element of coercion.¹⁶⁹ Consequently, while the Automobile Dealer Franchise Act reaches manufacturer controls which may be antecedent to the formation of a contract, combination, or conspiracy in restraint of trade, the narrow construction of "good faith" has limited the Act's effectiveness.¹⁷⁰

The wide disparity in the relative bargaining positions of the parties in the automotive industry is similar to that which exists in the oil refiner-gasoline retailer relationship. Because of this fact, New Jersey has taken the initiative to enact similar franchise legislation to realign the balance of power in the latter relationship.¹⁷¹

Section 10-5 of the New Jersey Franchise Practices Act provides:

It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.¹⁷²

It is clear from this statutory language that the concept of "good cause" differs fundamentally from the "good faith" requirement of the Automobile Dealer Franchise Act in that the former places the burden on the supplier to justify the termination of its dealer-franchisee. In effect, the New Jersey legislature has provided the dealer-franchisee with a remedy for the arbitrary actions of his supplier, even absent a showing of overt coercion. Support for this interpretation is found in *Shell Oil Co. v. Marinello*.¹⁷³ Here a dealer-franchisee sought injunctive relief against eviction

169. Automobile dealers, for example, absent coercion and wrongful demands, are not protected against "arbitrary" business decisions with respect to relocation or termination of dealership. *Unionvale Sales Ltd. v. World-Wide Volkswagen Corp.*, 299 F. Supp. 1365 (S.D.N.Y. 1969); *accord*, *R.A.C. Motors, Inc. v. World-Wide Volkswagen Corp.*, 314 F. Supp. 681 (D.N.J. 1970). However, an automobile manufacturer was held liable to a dealer for wrongful termination of the franchise, where the dealer proved coercion and subsequent termination of the automobile distributorship for failure to adhere to the manufacturer's resale price. *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970).

170. *See, e.g.*, *Berry Bros. Buick, Inc. v. General Motors Corp.*, 257 F. Supp. 542 (E.D. Pa. 1966), *aff'd*, 377 F.2d 552 (3d Cir. 1967), in which the court held that an automobile manufacturer who simply did not renew a dealer's franchise after fulfilling its part of the agreement was not liable for failing to act in good faith.

Although the Act has no provision for injunctive relief, and section 16 of the Clayton Act has been held not to be available to provide this relief, *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962), the judiciary has granted injunctive relief under its general equitable powers. *Autowest, Inc. v. Peugeot, Inc.*, 237 F. Supp. 718 (E.D.N.Y. 1968), *aff'd*, 434 F.2d 556 (2d Cir. 1970); *Madsen v. Chrysler Corp.*, 261 F. Supp. 488 (N.D. Ill. 1966); *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 137 N.W.2d 314 (1965).

Many courts have held that defendants who are or may be guilty of anti-competitive practices should not be permitted to terminate franchises, leases, or sales contracts when such termination would effectuate those practices. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *Sahm v. V-1 Oil Co.*, 402 F.2d 69 (10th Cir. 1968); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965); *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962).

171. N.J. STAT. ANN. §§ 56:10-1 *et seq.* (Supp. 1972).

172. *Id.* § 56:10-5.

173. 120 N.J. Super. 257, 294 A.2d 253 (1972).

by Shell after the lease term had expired. The court stated that there was no question that the lease and franchise agreements involved in the case were intended by the legislature to be subject to the Act, but it noted that they did not come within the purview of the statute, because they had been executed prior to its effective date.¹⁷⁴ Nevertheless, the court implied a covenant in the agreements which required Shell to renew the franchise as long as Marinello substantially performed his obligations under the franchise agreement. It reasoned that the Franchise Practices Act had, in effect, incorporated this covenant in every agreement executed after the effective date of the Act.¹⁷⁵ In reaching its decision to imply a similar covenant in the the Marinello agreements, the court focused on the nature of the relationship and the reasonable expectations of the parties, and noted that the joint venture aspects of the Shell-Marinello relationship indicated that the respective interests of the parties transcended those of the classic landlord-tenant relationship.¹⁷⁶

Another factor that influenced the court was the coercive element that permeated the relationship. This element was derived not from the overt actions of Shell or its representatives, but from the inherent nature of the refiner-dealer relationship. Quoting with approval a passage taken from the Fifth Circuit opinion of Judge Wisdom in *Shell Oil Co. v. FTC*,¹⁷⁷ the court accurately assessed the status-oriented nature of the coercion:

A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord. When he hears that Shell will benefit from his patronage . . . the velvet glove of request has within it the mailed fist of command.¹⁷⁸

Thus, as interpreted by the superior court, the New Jersey Franchise Practices Act differs markedly from the Automobile Dealer Franchise Act in two important respects. First, it is a product of the more recent Supreme Court rhetoric which has emphasized the status-oriented nature of the coercion inherent in the relationship.¹⁷⁹ Second, in recognition of this fact, the New Jersey legislature has placed the burden on the franchisor to justify the termination or nonrenewal of a franchise by a showing of good cause, thus prohibiting arbitrary conduct by the franchisor and removing from the franchisee the burden of establishing overt coercive conduct. In addition, to safeguard further the dealer's newly acquired rights, the statute prohibits the imposition of unreasonable standards of performance upon the franchisee¹⁸⁰ and prevents the dealer-franchisee

174. *Id.* at 259-60. See N.J. STAT. ANN. § 56:10-8 (Supp. 1972).

175. 120 N.J. Super. at 375, 294 A.2d at 263.

176. *Id.* at 372, 294 A.2d at 261.

177. 360 F.2d 470 (5th Cir. 1966).

178. 120 N.J. Super. at 373, 294 A.2d at 261.

179. See text accompanying notes 27-32 *supra*.

180. N.J. STAT. ANN. § 56:10-7(e) (Supp. 1972).

from waiving any of the protective safeguards afforded by the Act.¹⁸¹ As a result, the Act provides a comprehensive scheme of enforcement to redress the balance of power in the relationship and to insure the free exercise of the dealer's business discretion.

By reason of its comprehensiveness and the direction of its approach, the New Jersey Franchise Practices Act goes further in safeguarding the business discretion of the small businessman than any of the other remedial deterrents suggested or presently in effect. This may account for the scramble by some major oil refiners to avoid its effects by forward integration.¹⁸² While the exact contours of the protections afforded by the Act must be left for future judicial delineation, there is little doubt that the Act, to date, is the most far-reaching legislation in the area.

VI. CONCLUSION

This Comment has explored the nature of the relationship that exists between the oil refiner and gasoline retailer to illuminate the avenues of price control presently open to the corporate trademark owner. Analysis has focused on the Supreme Court's efforts to provide more effective remedial deterrents within the framework of the Sherman Act in order to demonstrate the ultimate limitation of this doctrinal course. The limitations inherent in the private antitrust enforcement action were discussed to demonstrate that present antitrust protection is inadequate to afford a comprehensive and effective deterrent to violations of the antitrust laws, wherever one party to an intimate business relationship holds a dominant economic position. Finally, alternative remedial deterrents were analyzed to illustrate what methods could be implemented by the state judiciaries or the legislatures in order to assure adequate deterrence of anticompetitive controls.

Although the prospect exists that the development of effective regulation of large corporate controls could eventually lead to vertical integration and the elimination of a segment of small business enterprise, the focus of recent judicial and legislative pronouncements suggest that this risk must ultimately be assumed in order to preserve the independence of the small businessman.¹⁸³

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181. *Id.* § 56:10-7(a).

182. Record (Hackensack, N.J.), Oct. 29, 1972, at c-14, col. 3.
See Wilson, *supra* note 158, at 488.

183. FTC REPORT ON GASOLINE MARKETING, *supra* note 4, at 40.