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# Monopolies—Restraint of Trade—Exclusive Automobile Dealerships

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impress the contracting parties with the solemnity and importance of their undertaking. This purpose is conceded. However, the theory remains that the statute is also aimed at preventing persons from being harassed by such oral agreements as in the present case. Avoidance of the statute should not be permitted by allowing the plaintiff a choice of action by mere selection of a particular legal theory.

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*Monopolies—Restraint of Trade—Exclusive Automobile Dealerships*

Appellant motor corporation appealed from a treble judgment in favor of a former Packard car dealer in Baltimore, Maryland, for alleged violation of the Sherman Anti-Trust Act. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§1, 2 (1952). The basis for the instant suit was an agreement between appellant and Zell Motor Car Company, a retail dealer in the same area, wherein the latter was granted an exclusive franchise to sell appellant's automobiles and the expiring agreement of Webster Motor Car Company, plaintiff below, was to be cancelled. Held (2-1): said agreement did not create an unreasonable restraint of trade or amount to an attempt or conspiracy to monopolize within the meaning of the Sherman Act. *Packard Motor Car Company v. Webster Motor Car Company,* 243 F.2d 418 (D.C. Cir. 1957).

Every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared illegal under Section 1 of the Sherman Act. 26 STAT. 209 (1890), as amended, 15 U.S.C. §1 (1952). Until 1911 all contracts, combinations and conspiracies were per se illegal. That year the Supreme Court in *Standard Oil Company of N.J. v. United States,* 221 U.S. 1 (1911), articulated the now famous rule of reason. Generally the test of reasonableness of an exclusive dealership agreement is its resultant effect on competition, to wit, competition at the seller and buyer level. *Fargo Glass and Paint Company v. Globe American Corporation* 201 F.2d 534 (7th Cir. 1953), *cert. denied,* 345 U.S. 942 (1953). The necessary corollary to this section and of equal importance is Section 2 of the Sherman Act which prohibits monopilies or the attempt to monopolize. 26 STAT. 209 (1890), as amended, 15 U.S.C. §2 (1952). It is well settled that the existence of a power to exclude competition when it is desired to do so, provided it is coupled with the purpose or intent to exercise that power, constitutes a violation of this section. *American Tobacco Company v. United States,* 328 U.S. 781, 809, 811, 814 (1946). In conjunction with this principle, it is recognized that if an exclusive dealership agreement be part and parcel of a scheme to monopize, that is, monopolization in the relevant market, it will fall within the orbit of this prohibition. *Fargo Glass and Paint Company v. Globe American Corporation, supra; United States v. E. I. duPont de*

*Nemours and Company,* 351 U.S. 377 (1956). See Turner, *Anti-trust Policy and The Cellophane Case,* 70 HARV. L. REV. 281 (1956).

The majority of the states have statutes prohibiting contracts, combinations, or conspiracies in restraint of trade. Several of these statutes also expressly prohibit monopolies. N.Y. GENERAL BUS. LAW §340.

It is evident then, that the fundamental purpose of the Sherman Act in light of voluminous legislative and judicial history is "to secure competition and preclude combinations which tend to defeat it." *International Harvester Company v. Missouri,* 234 U.S. 199, 209 (1914); *United States v. Reading Company,* 253 U.S. 26, 59 (1930). The individual's right of action for treble damages is incidental and subordinate to that main purpose. *Wilder Manufacturing Company v. Corn Products Refining Company,* 236 U.S. 165, 174 (1914). It follows that an essential requirement for a civil suit under the anti-trust laws is the showing of public injury which affects competition or which raises or fixes market prices. It is not enough merely to show injury to one's business or property although this is a necessary prerequisite to the statutory civil suit. *Apex Hosiery Company v. Leader,* 310 U.S. 469 (1940); Clayton Act, 38 STAT. 731 (1914), 15 U.S.C. §15 (1952).

Elements which the courts have examined and relied on in finding whether an agreement was an unreasonable restraint in trade or an illegal monopoly can be categorized as follows: (1) nature of the agreement. *Appalachin Coals, Inc. v. United States,* 288 U.S. 344 (1932); (2) facts peculiar to the business. *Spear Free Clinic and Hospital for Poor Children v. R. L. Clure,* 197 F.2d 125 (10th Cir. 1952); (3) condition of the business before and after. *Addyston Pipe and Steel Company v. United States,* 175 U.S. 211 (1899); (4) resultant effect on the market. *United States v. United States Machinery Corporation,* 110 F. Supp. 295 (D.C. Mass. 1953), *aff'd,* 347 U.S. 521 (1954).

In the principal case all four factors were utilized in determining whether the exclusive dealership agreement fell within the prohibitive area of the Sherman Act. The majority in upholding the agreement and reversing a heretofore novel decision of the district court, 135 F. Supp. 4 (D.C. D.C. 1953), first took cognizance of the market power and the ability to exclude competition in this market. Noting that appellant's cars were reasonably interchangeable with other cars for the same purpose and therefore in competition with Packard's, they felt there was a sufficient absence of market power to justify the agreement as not being a monopoly or an attempt to monopolize, 243 F.2d at 420. In this regard it is important to distinguish between a monopoly appraised in terms of the relevant market as postulated by the *Cellophane* case and a manufacturer's natural monopoly of his own product. The latter is a legal monopoly notwithstanding the fact that one dealer in a particular area may be the virtual and exclusive outlet for the manufacturer's product.

The court then observed the nature of the agreement to determine if it was a possible unreasonable restraint in trade. Exclusive selling agreements fall within two categories, horizontal or vertical. Horizontal agreements are those between manufacturers, between wholesalers, or between retailers of the same product. Such restraints by their nature run afoul of Section 1 since their mere existence tend to eliminate or stifle competition between the agreeing parties. On the other hand vertical agreements are those between parties at different economic levels. The instant case exemplifies this type of arrangement. Here we have an agreement between a small manufacturer and dealer and not between manufacturers themselves. This latter type is violative of Section 1 only when it establishes market dominance. *Schwing Motor Company v. Hudson Sales Corporation,* 239 F.2d 176 (4th Cir. 1956). The court here found no such power, justifying the arrangement on the fact that there was present, competition at the manufacturer and dealer level, 243 F.2d at 420, 421. See Handler, *Annual Antitrust Review,* 11 Record of the Ass'n. of the Bar of the City of N.Y., 367, 370 (1956).

Judge Bazelon writing the dissent adopted the District Court's interpretation given to the arrangement. He felt that the majority should not have taken into consideration the question of a conspiracy to monopolize in violation of Section 2 since there was sufficient evidence supporting the jury's finding of a restraint violative of Section 1, 243 F.2d at 421. By this rationale the dissent eliminated the thorny problem of defining what constituted the competitive market containing its opinion within the bounds of the agreement, peculiarity of the business, and the resultant condition of Webster's dealership. The dissent argued that even apart from monopolistic effect, a vertical agreement which excludes a competitor of one of the parties from a substantial market is an unreasonable restraint of trade, 243 F.2d at 422.

Much is to be said about the inherent abuses related to an exclusive selling agreement as in the instant case. The District Court below recognized the injurious results of such a compact by the elimination of competition among dealers selling automobiles of the same make. Such competition involves allowances on used cars for new vehicles, terms of sale, and efficiency of service, 135 F. Supp. at 9. But is this the type of public injury which the Sherman Act is concerned with? The *Cellophane* case, which had not been decided when the instant case was tried below, specifically rejected this concept and distinguished it from competition among dealers of interchangeable products. *United States v. E. I. duPont de Nemours and Company, supra.* The court below appears to place undue reliance on the effect of competition between the same dealers and the resultant public injury. If Packard Motor Car Company originally had but one dealer in the Baltimore area the same effect on competition and public injury would be present, but standing alone this would not constitute a violation of the anti-trust laws.

The majority decision is sound law and in conformity with our jurisprudential ideas on the subject. Before the instant case exclusive dealer agreements were one of per se legality absent a scheme to monopolize. This rule was consistent with the common law and considered a reasonable ancillary restraint under the Sherman Act. *Donovan v. Pennsylvania Company,* 199 U.S. 279 (1905); *Addyston Pipe and Steel Company v. United States, supra.* Historically a manufacturer had a natural right over his particular product and a refusal to deal with a buyer became illegal only when it produced an unreasonable restraint of trade or a monopoly forbidden by the anti-trust laws. *Arthur v. Kraft-Phenix Cheese Corporation,* 26 F. Supp. 824, 828 (D.C. Md. 1938).

Here the facts show no violation. There is effective competition resting at both ends of this vertical arrangement in the judicially adopted sense of competing manufacturers being able to reach the accessible market for their generic product and the dealer having free access to sundry sources of supply. The public was not injured by a lessening of competition in the local market on relevant commodities but rather diminution in terms of Packard cars. Admittedly this is a monopoly by definition but not all monopolies run afoul of the Sherman Act. See *Schwing Motor Company v. Hudson Sales Corporation, supra.*

It is submitted that the consequences of such a decision, although being sound in law, has a serious and detrimental effect to the injured dealer. In the instant case the injured party had the normal franchise in the auto industry. Such a contract runs from year to year but the usual practice is to renew it annually as long as the dealer's services are satisfactory. The very nature of the business requires a huge financial investment in the earlier years followed by a slowly increasing return in the subsequent years. Thus looking at the composite picture, one can readily see the economic and contractual handicap a dealer has in his relation with the manufacturer. Here, contractual termination was business death, for in a matter of months Webster Motor Car Company discontinued business altogether.

The Supreme Court so aptly characterized this by declaring that dealers are the "economic dependents of the company whose cars they sell." *Ford Motor Company v. United States,* 335 U.S. 303, 323 (1948). Accordingly the Senate Committee on the Judiciary introduced in June 1956 a bill, the primary purpose of which was to remedy the acknowledged contractual abuses between automobile manufacturers and their dealers. S. Rep. No. 2073, 84th Cong., 2d Sess. (1956). This bill provided that an automobile dealer might bring an action for double damages where the manufacturer did not use *good* faith in contractual negotiations. The House subsequently amended the amount of recovery limiting same to actual damages, and in this form it became law. H.R. Rep. No. 2850, 84th CONG., 2d Sess. (1956); 70 STAT. 1125 (1956), 15 U.S.C. §1222 (1952). For legislative history see 16 U.S. Cong. News 6720 (1956). New York has a similar act authorizing termination for cause only. N.Y. GENERAL BUS. LAW §197.

Two disadvantages are immediately gleaned from a reading of the federal act. Recovery is limited to actual damages sustained by the termination, cancellation, or refusal to renew, whereas under the Sherman and Clayton Acts, such damages are trebled. Clayton Act, 38 STAT. 731 (1914), 15 U.S.C. §15 (1952). Aside from this, is the more serious question of what constitutes bad faith, notwithstanding the apparent legislative effort to define the norm. See Section 1 (E) "... to act in a fair and equitable manner ...". 70 STAT. 1125 (1956), 15 U.S.C. §1221 (1952). In the instant case was the appellant motor corporation guilty of bad faith? Here the manufacturer was threatened with the loss of his largest dealer of the three in the Baltimore area. Cutting off all others for the obvious purpose of maintaining the competitive position of this more favorable outlet was sound business practice.

The writer believes that it is necessary to provide dealers with legislative relief from this type of economic strangulation. The Sherman Act is not the medium for such relief through judicial law making. However it is doubtful that this remedial legislation in light of its weaknesses will accomplish the purpose. Ultimate judicial interpretation of the federal act may result in leaving dealers in substantially the same position they were in prior to this legislative effort.

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