REFUSALS TO DEAL AS EXCLUSIVE DEALING

INTRODUCTION

A supplier, desiring a larger proportionate share of a market, may longingly contemplate exclusive arrangements with his dealers as an effective means of foreclosing his competitors from the market by depriving them of existing and potential outlets for their goods. There is an obvious appeal to a supplier to bind his dealers by a contract or agreement to handle only his product and not that of his competitors. The principal hurdle to the achievement of the supplier's ambitions is section 3 of the Clayton Act[1] which prohibits sales or contracts for the sale of goods on the condition, agreement or understanding that the lessee or purchaser shall not deal in the goods of a competitor, where the effect may be to substantially lessen competition or tend to create a monopoly.

In section 3, there are two requirements stated for a violation. First, there must be a sale or contract for the sale of goods imposing exclusive arrangements. Second, it must be shown that the effect of the agreement may be to substantially lessen competition or tend to create a monopoly. It is this qualifying clause which has caused the courts the most difficulty. The traditional approach of the courts to this requirement was to examine the relevant market and economic considerations. Under this approach, the courts openly considered arguments by the supplier which sought to justify the arrangements on grounds of business and economic considerations[2]. This method of resolving section 3 cases was largely scrapped in 1949 by the Supreme Court's decision in the *Standard Stations*[3] case. In this case, the court reinterpreted the qualifying clause to mean that exclusive arrangements were illegal where the volume of goods sold under such contracts was not insubstantial[4]. The effect of the adoption of this "quantitative substantiality" standard was widely viewed as imposing a refined test of illegality *per se* on exclusive dealing contracts.

The *Standard Stations* decision was hailed on one hand as opening the door to effective enforcement of the act by private litigation in that the decision sharply curtailed the necessity for an elaborate presentation of irrelevant economic evidence which was beyond the re-

1. 38 Stat. 731 (1914), 15 U.S.C. § 14.
2. See Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746 (1922) and Pick Manufacturing Co. v. General Motors Corp., 299 U.S. 3, 57 S.Ct. 1, 81 L.Ed. 4 (1936).
3. Standard Oil Company of California v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).
4. *Id.* at 314.

sources of many private suitors. On the other hand, the decision was criticized by some commentators on the ground that exclusive arrangements might, in some circumstances, be justifiable and that under the new standard, the defendant supplier was precluded from demonstrating this.[5]

The mere suggestion of *per se* illegality has induced suppliers to accomplish exclusive dealing by the more subtle means of refusing to deal with those dealers who handle competitor's products. Such a technique avoids the express agreement, yet screens an oral or tacit exclusive dealing arrangement behind refusals to deal. Antitrust enforcement cannot allow indirect accomplishment of exclusive dealing, but violation by refusals to deal is difficult to prove. Where the contract is expressly conditioned upon exclusive dealing, it is only necessary to prove that the effect may be to substantially lessen competition[6]. But where the exclusive arrangement is carried out by refusals to deal, it is necessary to prove that the refusal to sell to a dealer who handles competitive products indicates that continuing relations with other dealers are conditioned upon an oral or tacit agreement that they handle the supplier's product exclusively. This might be called circumstantial exclusive dealing. Only when this agreement is shown can the courts give consideration to the effect on competition.

A unilateral refusal to deal is not violative of any antitrust provision. However, the possibility of misusing this right of customer selection is no stranger to the federal courts. Refusals to deal first came under judicial scrutiny in resale price maintenance suits brought by the government under the Sherman Act[7]. The rule was first laid down by the Supreme Court in 1919, in *United States v. Colgate*[8]: "In the absence of any purpose to create or maintain a monopoly, the act

5. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 138 (1955); Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act,* 65 HARV. L. REV. 913, 915 (1952).

6. For discussions of exclusive dealing arrangements see: Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act,* 65 HARV. L. REV. 913 (1952); Schwartz, *Potential Impairment of Competition,* 98 U. PA. L. REV. 10 (1949); Seitz, *Exclusive Arrangement and Refusal to Deal Problems,* 11 VAND. L. REV. 85 (1957); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 132 (1955); Stewart and Turner, *The Significance of Oligopoly in Acquisition and Exclusive Dealing Situations Under the Clayton Act,* 75 U. CINC. L. REV. 427 (1956); Kintner, *Exclusive Dealing,* 3 PRAC. LAW. 69 (1957).

Kintner, general counsel for FTC, refers to exclusive dealing as " . . . one of the classic battlegrounds of antitrust—where per se theories of illegality clash heatedly with the rule of reason, and in the lulls, the lawyers mop up with a steady crossfire of learned commentaries." *Id.* at 71.

7. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1952).

8. 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919).

does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private enterprise, freely to exercise his own independent discretion as to parties with whom he will deal[9]." This was narrowed in the subsequent *Beech-Nut*[10] case in which the Supreme Court recognized the *Colgate* rule, then added: "He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations express or implied, unduly hinder or obstruct the free and natural flow of commerce . . . . "[11]

The delicate problem is to determine precisely whether a supplier is merely exercising his right to refuse to deal, or whether he has brought himself within the prohibitions of the Clayton Act[12]. The problem of refusals to deal is not confined to federal prosecutions, as section 4 of the Clayton Act[13] allows any person injured by anything forbidden in the antitrust laws to sue for treble damages. There is a series of actions by dealers cut off from supplies because of their failure to adhere to the seller's distribution policy. These actions, brought on the theory that the supplier's refusal to deal was a violation of section 3, have uniformly failed. It is necessary to separate refusal to deal actions into federal prosecutions and treble damage actions because the courts have assumed a different approach to each. It is the scope of this comment to examine the reasons for this divergence of approach and to determine the possible underlying policy implications.

FEDERAL PROSECUTIONS FOR VIOLATIONS OF SECTION 3 AS EVIDENCED BY REFUSALS TO DEAL

The *Carter Carburetor*[14] case, decided by the Eighth Circuit Court of Appeals nine years prior to *Standard Stations*, stands as a classic circumstantial exclusive dealing action. Carter had embarked on a policy of clearly informing all service station dealers that they would lose their preferential discount and their contract if they were to handle a competitive line. Not only was this threat made, but it was carried

9. *Id.* at 307.
10. Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307 (1922).
11. *Id.* at 453.
12. Refusals to deal may also fall within section 1 of the Sherman Act, Eastern States Lumber Dealers Ass'n v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914); or section 2 of the Sherman Act, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed 684 (1927); or section 2 of the Clayton Act, Great A & P Tea Co. v. U.S., 67 F.Supp. 626 (E.D. Ill. 1946), *aff'd,* 173 F.2d 79 (7th Cir. 1949); or section 5 of the Federal Trade Commission Act, Shakespeare Co. v. FTC, 50 F.2d 758 (6th Cir. 1931).
13. 38 Stat. 731 (1914), 15 U.S.C. §15 (1952).
14. Carter Carburetor Corporation v. Federal Trade Commission, 112 F.2d 722 (8th Cir. 1940).

out by cancellation of contracts and reduction of discounts to nineteen service station dealers who did not conform. This was held to be a violation of section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act[15]. The court found that under these circumstances the exclusive dealing condition was as effective as if written into the contracts. After a careful examination of Carter's actions in their market context, the lessening of competition was supplied by the finding that Carter occupied a dominating position in the market, therefore a station would have to stock Carter carburetors and parts in order to successfully carry on its business. The result, as seen by the court, was that this undoubtedly deterred many service stations from buying from competitors.

One similarity between the *Carter* decision and later cases is that where circumstantial exclusive dealing was found to exist, it was known by all dealers that they would have their contract canceled if they did not agree to exclusive dealing arrangements. In *United States v. Richfield Oil Corp.*,[16] there were two types of dealerships involved. The first type was for those dealers who leased their stations from Richfield. The oral understandings under which those leases were made demanded that the dealers handle Richfield products exclusively. The second type was for the independent dealer stations, with which quantity requirement contracts were signed. These latter contracts were combined with painting agreements whereby Richfield agreed to paint the stations under penalty of repayment if the requirements contracts were breached. The effect of the arrangements was to shut out all competition. It is clear that all of the dealers were aware of the penalty of cancellation or termination for handling the product of a competitor. Once again, the required agreement was found to be present. Similarly, in *United States v. Sun Oil Company,*[17] all dealers were informed that should they not handle Sun products exclusively, their contractual relation would cease as soon as possible under the contract. In these three successful prosecutions there was knowledge by the dealers of the supplier's policy for exclusive dealing.

On the other hand, in *United States v. J. I. Case Co.,*[18] the government was unable to prove that a few attempts by Case to coerce a dealer into handling Case farm equipment exclusively indicated a "pattern or policy" of exclusive dealing. The proof failed because there were so few instances of coercion and because the company's policy appeared to be limited to legitimate dealer selection.

15. 38 Stat. 719 (1914), 15 U.S.C. § 45 (1952).
16. 99 F. Supp. 280 (S.D. Cal. 1951).
17. 176 F. Supp. 715 (E.D. Pa. 1959).
18. 101 F. Supp. 856 (D. Minn. 1951).

Although these four are the only federal actions in the last twenty years directly in point,[19] it is elementary that dealers bound to a supposed oral or tacit agreement have knowledge of the agreement to which they are bound. This knowledge is necessarily a question of fact. It may be determined by announcement of a policy to the dealers as in the *Carter, Richfield* and *Sun* cases, or it might be found from a showing of a sufficient number of refusals to deal to indicate general knowledge among the dealers of a pattern of exclusivity established by the supplier.[20]

The fact that there is knowledge of a pattern or policy of exclusive dealing is not the sole basis for finding that an agreement exists between the supplier and his dealers. Consideration is appropriately given to the market context. However, the pattern or policy approach is important when contrasted with the approach by the courts in determining any such agreement in a private treble damage action. This contrast will be discussed in a later section.

Once the agreement is established, its illegality rests upon a finding that the effect "may be to substantially lessen competition." The *Standard Stations* rule of virtual *per se* illegality would seem to relieve the courts of this responsibility, but in actuality it has not. The three cases decided since *Standard Stations* indicate that the *per se* doctrine was accepted but not utilized, because the evidenciary standards to prove the tacit or oral agreement subvert any need for *per se* illegality. The District Court of California in the 1951 *Richfield*[21] case employed the quantitative substantiality doctrine naturally enough[22] in stating:

19. Prior to and including Standard Stations, every case before the Supreme Court for a violation of section 3 involved an express contract. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653 (1922); United Shoe Machinery Corp. v. U.S., 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708 (1922); Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568, 43 S.Ct. 210, 67 L.Ed 408 (1923); Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746 (1923); International Business Machine Corp. v. U.S., 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936); Pick Manufacturing Co. v. General Motors Corp., 299 U.S. 3, 57 S.Ct. 1, 81 L.Ed. 4 (1936); Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); International Salt Co. v. U.S., 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); Standard Oil Company of California v. U.S., 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). There have been no cases before the Supreme Court since Standard Stations for violations of section 3.

20. It was the inadequacy of such a showing that foiled the government's attempt to prove exclusive dealing arrangements in United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

21. United States v. Richfield Oil Corp. 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam,* 343 U.S. 922, 72 S.Ct. 756, 96 L.Ed. 1334 (1952).

22. This same court had previously written the District Court opinion of the Standard Stations case. United States v. Standard Oil Company, 78 F. Supp. 850 (D.C. Cal. 1948).

> The interstate nature of the commerce involved and its substantiality . . . becoming evident, the pattern of our inquiry becomes very narrow. It is reduced to the problem whether the agreements through which this commerce was handled are of the type condemned by the decision in the Standard Oil Case.[23]

This would seem to mean that if exclusive arrangements could be found, they would be illegal *per se* because of the substantial amount of commerce involved. But the court instead proceeded into a detailed analysis of the activities in their market context in order to find the existence of agreements and further that the effect was to actually deny access to competitors. *Standard Stations* was also relied upon by the District Court of Pennsylvania in the *Sun Oil*[24] case. After a lengthy finding of facts including a finding that there was circumstantial exclusive dealing as mentioned above, an injunction was granted to the government. Although *Standard Stations* was the sole case cited in the opinion, no mention was made of the quantitative substantiality doctrine. On the contrary, the court specifically found that Sun was one of the nation's major marketers and that there was a showing of actual lessening of competition.

It was only in the District Court of Minnesota's 1951 *J. I. Case*[25] decision that circumstantial exclusive dealing arrangements were differentiated from express arrangements. The court specifically removed this case from the rule of *Standard Stations* because Standard's exclusive arrangements were expressly incorporated in the contract. Contrary to the *Richfield* case, this opinion implied that the exclusive arrangement must be shown before there is inquiry whether a substantial amount of competition is affected or whether there is an actual or potential clog on competition.

These three cases indicate that the *Standard Stations* decision has not been heavily relied upon. Perhaps this was not necessary because of the market analysis and findings of fact required to establish circumstantial exclusive dealing arrangements. There is the suggestion from the cases that the circumstances which indicate circumstantial exclusive dealing arrangements are the same facts that would indicate a finding that the effect of the agreements may be to substantially lessen competition. If this premise is correct, any *per se* theory of illegality is completely inappropriate in the field of refusals to deal.

23. 99 F. Supp. 280, 286 (S.D. Cal. 1951).

24. United States v. Sun Oil Company, *supra*.

25. United States v. J. I. Case Co., *supra*.

TREBLE DAMAGE ACTIONS BY CURTAILED DEALERS

Section 4 of the Clayton Act provides that private parties injured by reason of anything forbidden in the antitrust laws may recover treble damages. This provision was included in the act for several purposes: It has the effect of multiplying the agencies which help to enforce the act,[26] thus acting as a deterrent to potential violators,[27] and it allows an injured party adequate compensation for his injury.[28] Despite these purported benefits, as yet, no recovery has been obtained in suits by curtailed dealers against the offending suppliers for a violation of section 3. The Attorney General's Report[29] suggests that the failure may be due to the recognition that section 3 is fundamentally designed to protect competitors, " . . . an objective which need not comprehend safeguarding an individual buyer incidentally prejudiced by a seller's refusal to deal." However, it has also been suggested as a reason for these failures:" . . . nor is there a sale-on-condition to invoke the prohibitions of Section 3 of the Clayton Act. The latter applies only to executed transactions. It outlaws certain sales-on-condition and not refusals to sell."[30] A better explanation is that the requirements imposed by the courts for a cause of action are so difficult as to be virtually impossible. The plaintiff must first prove a violation which produces a public injury. Under section 3 this is a condition, agreement or understanding for exclusive dealing with a resulting lessening of competition. He must further prove that as a result of such public injury he has suffered a private damage.[31] The public injury must first be established because the right of a private suit is incidental to the main object of preventing activities in interstate commerce which are prejudicial to the public.[32] In addition, the private injury is required to be "direct," not incidental.[33]

In the actions immediately after the *Standard Stations* decision, the courts tended toward the view expresstd in *Meyberg Co. v. Eureka Williams Corp.*,[34] that there can be no violation of section 3 of the act unless there is a contract, sale or lease. From this premise it was

26. Maltz v. Sax, 134 F.2d 2, 4 (7th Cir. 1943).
27. For a discussion of treble damage actions for antitrust violations see: *Antitrust Enforcement by Private Parties*, 61 YALE L.J. 1010 (1951).
28. 51 Cong. Rec. 9073 (1914).
29. *Supra* note 28, at 136.
30. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 860 (1955).
31. Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir. 1954).
32. Arthur v. Kraft Phenix Cheese Corporation, 26 F.Supp. 824 (D.Md. 1938).
33. Productive Inventions v. Trico Products Corp., 224 F.2d 678 (2nd Cir. 1955).
34. Leo J. Meyberg Co. v. Eureka Williams Corp., 215 F.2d 100 (9th Cir. 1954).

an easy step in *Allied Equipment Company v. Weber*[35] to declare that if there was no contract denying the plaintiff the right to handle competitive products, there was no violation of the antitrust laws. In *Nelson Radio & Supply Co. v. Motorola,*[36] the Fifth Circuit Court of Appeals stated this premise and then went further to state that even if there were exclusive arrangements between Motorola and the other dealers, any injury to the plaintiff's business was in no way the result of any agreements restricting distributors in other territories. The opinions in these cases immediately following the *Standard Stations* decision indicate that the courts did not consider a curtailed dealer as a proper party to bring an action. This is demonstrated by the courts' refusals to consider the existence of an agreement between the supplier and his other dealers. These actions failed due to the theory that the curtailed dealer was not a party to an exclusive dealing agreement, therefore the action could not be within section 3 which expressly requires a contract or agreement.

That there has been an abrupt change in approach is reflected in the recent treble damage actions. The suits continue to fail, but the courts examine all the circumstances to determine if there is evidence, in addition to the refusal to deal with the plaintiff, which may establish an illegal arrangement with the remaining dealers. The failure of the recent actions can be attributed to the plaintiff's inability to prove this tacit or oral exclusive arrangement.

In *McElhenney v. Western Auto Supply Co.*[37] the court specifically recognized that a non-exclusive contract could be supplemented by extrinsic evidence of a course of conduct from which the illegal condition or understanding might be found. Furthermore, the criteria used by the courts in determining the presence of exclusive dealing are remarkably similar to those used in determining exclusive dealing in federal actions involving refusals to deal[38] In *Technical Tape v.*

35. Allied Equipment Company v. Weber Engineering Products, 237 F.2d 879 (4th Cir. 1956). See also, Dublin Distributors v. Edward & John Burke, Ltd., 109 F. Supp. 125 (S.D. N.Y. 1952).
36. 200 F.2d 911 (5th Cir. 1952).
37. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959).
38. See Richfield Oil Corp. v. Karseal, 271 F.2d 709 (9th Cir. 1959). In a previous government action, Richfield had been found to be violating section 3 through circumstantial exclusive dealing practices. (See United States v. Richfield Oil Corp., *supra*.) Karseal, a competitor of Richfield, then brought this treble damage action to recover for damages resulting from Richfield's exclusive dealing. In allowing recovery the court said: "In view of the prima facie effect of the prior antitrust decree, all that plaintiff was required to do, as far as proving restraint is concerned, was to show that the general restraint applicable to waxes and polishes referred to in the prior decree was actually applied to the Karseal product . . . . " *Id.* at 713.

Minnesota Mining and Manufacturing Co.,[39] the policy of the supplier was examined to determine if his actions were based on honest business considerations. The way in which non-exclusive arrangements were used was also examined in *Osborn v. Sinclair Refining Co.*[40] to glean any intent to monopolize. The recent Sixth Circuit Court of Appeals decision in the *Englander Motors*[41] case went a step further in stating that a supplier's use of a short term cancellation provision for the purpose of violating the antitrust law is itself a violation of the antitrust law.

The approach of these later decisions indicates that the courts are beginning to recognize that a refusal to continue dealing with a dealer because of his not conforming to an exclusive arrangement may be actionable by the dealer.[42] Due to the fact that no private plaintiff has been able to prove the required agreement between the supplier and other dealers, there has been no necessity for the courts to attempt an application of the quantitative substantiality doctrine to determine if the effect may be to substantially lessen competition. It can only be theorized whether the courts would apply it as a rigid rule of *per se* illegality if a substantial amount of commerce was involved. More probably, it would be applied as it has been in the federal actions. This is to reject any concept of *per se* illegality and instead examine the refusals to deal in their market context. This suggests the possibility that the courts handling the private actions immediately following the *Standard Stations* decision were wary of the suggestion of *per se* illegality which it contained. The use of such an inflexible doctrine might severely restrict those suppliers who were legally exercising their right of customer selection. This is a possible explanation of the peremptory handling of the *Motorola, Eureka Williams* and *Allied Equipment* cases.

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39. Technical Tape Corp. v. Minnesota Mining and Manufacturing Co., 247 F.2d 343 (2nd Cir. 1957).
40. Osborn v. Sinclair Refining Company, 171 F. Supp. 37 (D.Md. 1959).
41. Englander Motors, Inc. v. Ford Motor Company, 267 F.2d 11 (6th Cir. 1959).
42. See Gaines W. Harrison & Sons, Inc. v. J. I. Case Company, 180 F. Supp. 243 (E.D.S.C. 1960). This was an action for breach of contract where Case had refused to renew plaintiff's contract unless he agreed, inter alia, to exclusive dealing. This was not a treble damage action under the antitrust laws, but the court looked to the fact that if the contract had been made, it would be illegal if competition was substantially affected. In allowing recovery, the court said " . . . if the defendant insisted upon conditions which would have been illegal if agreed to as a prerequisite to continuing the plaintiff's dealership and terminated the dealership because of the plaintiff's refusal to accept those illegal conditions, the jury was perfectly justified in considering that the resulting termination was . . . lacking in equity and good conscience." *Id.* at 255.

Conclusions

The apprehension that the *Standard Stations* decision might mean *per se* illegality for exclusive arrangements has remained unrealized. The courts have not measured the actions by the strict quantitative substantiality rule but instead have closely examined the market circumstances surrounding each situation. The necessity for this is plainly set out in refusal to deal cases. The reason is that in seeking out antitrust violations, great care must be taken so that the seller's legitimate interest in customer selection is not encroached upon by *per se* rigidity.

Curtailed dealers, cut off by a supplier for their refusal to conform to an exclusive dealing policy will continue to have difficulty in prosecuting an action for treble damages against the supplier. The impediment is the difficulty of proving that the refusal to deal indicates tacit or oral exclusive dealing arrangements with the remaining dealers. Private plaintiffs would enhance their chances for recovery if they were to accept the intimation of the government actions that the best evidence of such circumstantial exclusive dealing is a pattern or policy announced by the supplier or indicated by a number of refusals to deal. If such proof can be developed, there are indications that a recovery may be obtained. However, the more important implication to be derived from the market context approach in the recent private actions stems from a re-appraisal of the purposes for allowing private actions for antitrust violations. The primary purpose is to multiply the agencies to enforce antitrust laws. Because *Standard Stations* resulted in a shift by suppliers from express exclusive dealing contracts to exclusive dealing through refusals to deal, the problem of enforcement has become more complex. Under the strict reasoning of the early private actions which held that curtailed dealers were not the proper parties to bring the actions, no inquiry was made to determine whether exclusive dealing was actually practiced. The changed approach in the later cases which review the circumstances in the light of market considerations allows inquiry to determine if exclusive dealing actually exists. This allows private actions to function as enforcement agencies, rather than defeating this purpose as did the strict rule in the *Motorola, Eureka Williams* and *Allied Equipment* cases.

Clearly, one of the original designs of the *per se* rule was to reduce the evidenciary standards necessary to show substantial lessening of competition. However, these refusal to deal cases indicate that if the private litigant is to be successful he must carry a heavy evidenciary burden to prove the supplier's exclusionary policy, which evidence is often of the very sort that was required to show substantial lessening of competition prior to the *Standard Stations* decision. The result of these private damage cases is then to subvert one of the original designs of the *per se* rule. While this may suggest a judicial dissatisfaction with the *Standard Stations* approach, it may be justifiable in view of the competing policy of protecting the seller's interest in legitimate dealer selection.

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