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Unilateral Refusals to Deal as a Method of Deterring Private Antitrust Litigants: A Legitimate Method of Economic Coercion?

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UNILATERAL REFUSALS TO DEAL AS A METHOD OF DETERRING PRIVATE ANTITRUST LITIGANTS: A LEGITIMATE METHOD OF ECONOMIC COERCION?

I. INTRODUCTION

The role which the private litigant plays in the enforcement of the antitrust laws, either by an action to recover treble damages[1] or to enjoin antitrust violations,[2] is of increasing importance.[3] As these actions become more frequent, additional problems are raised. One such problem is the use of a unilateral refusal to deal as a deterrent to the effective use of the treble damage suit by the private litigant. Two recent parallel cases have dealt with the question of allowing temporary injunctive relief where the defendant has refused to deal with a plaintiff asking for treble damages. In *House of Materials, Inc. v. Simplicity Pattern Co.*,[4] the Second Circuit denied injunctive relief in the above situation, whereas in *Bergen Drug Co. v. Parke, Davis & Co.*,[5] the Third Circuit granted the injunction pendente lite.

The purpose of this comment is to examine these recent cases in the light of the interest protected and the propriety of injunctive relief. Since the two cases involve similar situations but reach different results, a close examination and comparison of their facts and a discussion of the possible implications of their holdings is

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[1] Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district court in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 STAT. 731 (1914), 15 U.S.C. § 15 (1958).

[2] Injunctive relief is provided for in § 16 of the Clayton Act. "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity . . . ." 38 STAT. 737 (1914), as amended, 15 U.S.C. § 26 (1958).

[3] The number of private suits has only recently become of significant proportions. This has resulted in more successful treble damage recoveries of substantial amounts. See Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959); MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113, 116-17 (1962); Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L. J. 1010 (1952).

[4] 298 F.2d 867 (2d Cir. 1962).

[5] 307 F.2d 725 (3d Cir. 1962).

required. Before analyzing the narrow question involved, it is first necessary to examine the existing law in the general area of refusals to deal, and in the particular area of the simple unilateral refusal to deal.[6]

II. THE LAW GOVERNING REFUSALS TO DEAL

The area in which most of the law concerning refusals to deal has arisen is that of resale price maintenance.[7] Even before the classic case of *United States v. Colgate & Co.*,[8] a price maintenance agreement by contract was construed as a violation of the Sherman Act,[9] and a right to refuse to deal was recognized.[10] The *Colgate* case has been the basis for most decisions in the area of refusals to deal, and an examination of the law from *Colgate* to the present is necessary to an understanding of the field even though it has been suggested that *Colgate* is no longer controlling.[11] The indictment in *Colgate* was interpreted by the trial court as failing to charge a violation of the Sherman Act.[12] The same view of the indictment was taken by the Supreme Court which regarded the indictment as failing to charge agreement between Colgate and its dealers with whom the company had refused to deal if the dealer

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[6] An extensive discussion of the law in this area can be found in Barber, *Refusals to Deal Under the Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

[7] For a thorough discussion of the history and the law in the resale price maintenance area see Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, THE SUPREME COURT REVIEW 258 (Kurland ed. 1960).

[8] 250 U.S. 300 (1919).

[9] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). A resale price agreement or contract is allowed in the situation where a state has a "fair trade" law authorized by the McGuire Act, 66 STAT. 631 (1952), 15 U.S.C. § 45(a) (1958). It is only in the area where such a "fair trade" law does not exist that this prohibition against the price maintenance agreement is relevant. This exemption from the antitrust laws has been condemned as "an unwarranted compromise of the basic tenets of National antitrust policy." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 154 (1955) (hereinafter cited as ATT'Y GEN. REP.).

[10] Great Atlantic & Pacific Tea Co. v. Cream of Wheat, 227 Fed. 46 (2d Cir. 1915); Union Pacific Coal Co. v. United States, 173 Fed. 737 (8th Cir. 1909); Baran v. Goodyear Tire & Rubber Co., 256 Fed. 571 (S.D.N.Y. 1919).

[11] United States v. Parke, Davis & Co., 362 U.S. 29, 49 (1960) (Mr. Justice Harlan dissenting).

[12] 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1 (1959).

failed to follow the specified resale.[13] The Court, in taking this approach, stated:[14]

> In the absence of any purpose to create or maintain a monopoly, the Act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

The holding in *Colgate* was not nearly as broad as it might appear. The only stated exception to the right to refuse to deal was the existence of a purpose to create or maintain a monopoly, but it was readily apparent that there were limits upon the right. Earlier, in the *Dr. Miles* case[15] the Court had held that a contract for the purpose of resale price maintenance was illegal. *United States v. A. Schrader's Son., Inc.*,[16] extended this rule to implied agreements, making clear the difference between the simple unilateral refusal to deal and the situation where there was agreement —express or implied, thus making it clear that *Dr. Miles* had not been overruled. In a subsequent case[17] it was stipulated that resale prices had not been contractually agreed upon, but the Court found unlawful conduct where the methods used were such that competition was suppressed and the essential agreement could be found from the methods used.[18]

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[13] The view that *Colgate* may be regarded as simply a matter of the Court's interpretation of the indictment has been effectively criticized as too simple and inaccurate. See Levi, *supra* note 7, at 284-94.

[14] 250 U.S. 300, 307.

[15] 200 U.S. 373 (1911).

[16] 252 U.S. 85 (1920).

[17] FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

[18] In similar cases where the methods used so involve the customer that agreement can be found there is an unlawful refusal to sell. See cases cited in Barber, *supra* note 6, at n.31. As Barber points out, the Court in *Beech-Nut* prohibited the refusal to sell only when pursuant to "cooperative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it." *Id.* at 854. See also United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), in which the Court stated: "In a business . . . which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny Soft-Lite this privilege of selection." *Id.* at 728-29. The government had requested that the distributor Soft-Lite be required to sell its product without discrimination to any person offering to pay cash for it.

The latest consideration of the *Colgate* doctrine and its limits is *United States v. Parke, Davis & Co.*,[19] where the government alleged a combination and conspiracy in violation of the Sherman Act. Parke-Davis, the defendant, refused to deal with wholesalers who sold products to retailers merchandising at minimum prices. Simple refusals to deal were used, along with inducements to dealers who helped promote compliance with the scheme. In the district court it was expressly found that "Parke, Davis did not combine, conspire, or enter into agreement, understanding or concert of action,"[20] and the case was dismissed on the ground that the action taken by Parke, Davis came within the *Colgate* doctrine. The Supreme Court, however, regarded this scheme as going beyond the limits of *Colgate*. Mr. Justice Brennan, noting that the earlier cases meant "no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act,"[21] wrote:[22]

> [T]here results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as Colgate is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell. . . . When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal and he employs other means which effect adherence to his resale prices, the countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act.

The manufacturer who goes beyond an announcement of policy and a mere refusal to sell may well fall within *Parke, Davis*, but the exact limits of the case and the place of *Colgate* are difficult to ascertain.[23] The area left within which a refusal to deal can be

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[19] 362 U.S. 29 (1960). Prior to *Parke, Davis* private litigants suing for damages resulting from a unilateral refusal to sell for failure to maintain resale prices have been unsuccessful. See Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 367 (1960) and cases therein cited.

[20] 164 F. Supp. 827, 835-36 (D.D.C. 1958).

[21] 362 U.S. 29, 43 (1960).

[22] *Id.* at 44.

[23] Mr. Justice Harlan in his dissent pronounced *Colgate* as a dead doctrine and charged that the Court while professing respect for *Colgate* had eviscerated it in application. *Id.* at 49, 57. Mr. Justice Stewart concurred and refused to question the vitality of *Colgate* since an illegal combination to maintain resale prices had been shown. *Id.* at 49. See Levi, *supra* note 7, at 319-26. See the discussion in Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 686-91 (1962), which concludes that *Colgate*

utilized has been characterized as one of "such Doric simplicity as to be somewhat rare in this day of complex business enterprise."[24]

The right to refuse to deal was limited in *Colgate* to the situation where there was an "absence of a purpose to create or maintain a monopoly."[25] Section 2 of the Sherman Act[26] will prohibit the refusal to deal when such action is part of a scheme either to monopolize or extend an otherwise lawful monopoly. In *Eastern Kodak Co. v. Southern Photo Materials Co.*,[27] a refusal to sell to the Kodak dealer was unlawful since the refusal was part of an attempt to monopolize. In the absence of the application of section 2 this case would be no different from other cases where a dealer who has been cut off has had no recourse against the supplier's refusal to sell.[28] In *Lorain Journal Co. v. United States*[29] a refusal to sell was also brought within section 2 in an unlawful attempt to monopolize. Here the newspaper had refused to sell advertising to persons who had advertised on a radio station in another community. Even though the Journal could refuse to sell in many situations, it could not use its position as a "substantial monopoly in

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insofar as it may protect such policies from condemnation on the ground that no agreements are involved should be sent to a "long-overdue repose."

[24] Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960).

[25] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[26] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." 26 STAT. 209 (1890), as amended, 15 U.S.C. § 2 (1959).

[27] 273 U.S. 359 (1927). See United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945), in which the refusal to sell to a distributor who had underbid the supplier on a contract was held a violation where the supplier was the only one but where there were many close substitutes. See also Banana Distribs., Inc. v. United Fruit Co., 162 F. Supp. 32 (S.D.N.Y. 1958). For a discussion of this area see NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 135-39 (1960).

[28] See cases cited in Barber, *supra* note 6, at nn.1 & 45.

[29] 342 U.S. 143 (1951). A similar case is Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), in which a contract requiring an advertiser to advertise in both the morning and evening papers was found to be lawful. The difference between *Lorain Journal* and this case may lie in the lack of specific intent in the latter and the lack of a dominant market position. See Barber, *supra* note 6, at 865-66. In § 2 cases it is necessary to establish the necessary market power; for the difference between this and § 1 cases see United States v. Socony Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

its area"[30] and extend itself through a refusal to sell. A very useful case in this particular area is *United States v. Griffith*,[31] holding that specific intent is not required, and applying section 2 to the use of a monopoly position when the power is used to foreclose competition or to attempt to gain a competitive advantage. Thus, finding an unlawful refusal to deal in a case involving the requisite market power is made easier. Also, it has been held that, in a section 2 case, the seller who discontinues merchandising to a customer is in a position of having to justify the refusal to sell.[32]

While a mere refusal to deal may still be lawful, a refusal to deal when there is concerted action by more than one party is unlawful. When the party joins with others to do what he can lawfully do by himself, the result may be a group boycott which has long been unlawful.[33] The group boycott and combined refusals to deal are now per se illegal.[34] Beyond the above, the doctrines of conspiracy, intra-corporate conspiracy, and conscious parallelism are important in controlling the unilateral refusal to deal.[35] In *Nelson Radio & Supply Co. v. Motorola*,[36] a cut-off dealer alleged

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[30] Lorain Journal Co. v. United States, 342 U.S. 143, 154 (1951).

[31] 334 U.S. 100 (1948). For a discussion of this area of abuse of monoply position see Levi, *A Two Level Anti-Monopoly Law*, 47 Nw. U.L. REV. 567, 580-85 (1952).

[32] Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952). Justification of the unilateral refusal to deal may be found for a variety of reasons. See Draper, *Unilateral Refusals to Deal Under the Sherman Anti-Trust Act*, 4 ANTITRUST BULL. 785, 791-94 (1959), and cases therein cited.

[33] Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914).

[34] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), commented on in 1961 DUKE L.J. 302 (1961); Klors, Inc. v. Broad-Hale Stores, Inc., 359 U.S. 207 (1959). For discussion of the per se status of the boycott see Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 91-98 (1959); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959). Failure to plead public injury as an essential part of the action is no longer required since *Klors* established the per se status in this type of case.

[35] See generally ATT'Y GEN. REP. 30; Barber, *supra* note 6, at 882; Kessler & Stern, *supra* note 34, at 86; Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?*, 11 FED. B.J. 130 (1951); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); Turner, *supra* note 23, at 655; Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372 (1954).

[36] 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U. S. 925 (1953).

a combination or conspiracy between Motorola and its officials. The court rejected such a concept of a combination or conspiracy and dismissed the complaint.[37] Thus, it is clear that conscious parallel action by itself is not enough,[38] and that the courts require more than mere inferences drawn from parallel refusals to deal.[39]

Section 3 of the Clayton Act,[40] which prohibits certain sales-on-conditions such as a tie-in arrangement, has not been interpreted to allow suits by buyers cut off from their suppliers.[41] This view of the application of section 3 to the dealer who is cut off has not remained unchallenged,[42] and it would seem that a refusal to sell singly a particular item could be regarded as a prohibited tying arrangement.[43] Even if the Clayton Act is not involved, actions brought by cut off dealers have uniformly failed.[44] It has been sug-

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[37] This decision has been considered correct by the Attorney General's Committee. ATT'Y GEN. REP. 31. It is to be noted that a group of corporate employees could be guilty of violating §§ 1 and 2; White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600 (8th Cir. 1942); Patterson v. United States, 222 Fed. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915). But no case has found a conspiracy in the situation where there is no charge of violating § 2 also. Where a parent-subsidiary relationship, or a similar relationship, exists, agreements may violate § 1. See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). Kessler & Stern, *supra* note 34, at 90, approve the application of intra-corporate conspiracy but would limit it to the refusal to deal area.

[38] Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954). The Court stated that " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." See Turner, *supra* note 23, at 706: "Consciously parallel decisions by competitors which are induced by the demand of a buyer from or seller to the group, and which are not interdependent, should not be held to constitute a horizontal agreement or participation in a vertical-horizontal conspiracy."

[39] See Barber, *supra* note 6, at 883.

[40] 38 STAT. 731 (1914), 15 U.S.C. § 14 (1958). Conditioning the sale or lease of one commodity on the sale or lease of another is commonly described as a tying arrangement which falls within § 3.

[41] ATT'Y GEN. REP. 136 n.28; Barber, *supra* note 6, at 860 n.52; Kessler & Stern, *supra* note 34, at 85. The rationale of this interpretation is that the dealer is injured by the absence of a sale rather than an unlawful sale on condition.

[42] Turner, *supra* note 23, at 694 n.54.

[43] ATT'Y GEN. REP. 136.

[44] See cases cited in Barber, *supra* note 6, at nn.42 & 45. For detailed treatment of other areas concerning exclusive dealing and refusals to deal, see Day, *Exclusive Territorial Arrangements Under the Antitrust Laws—A Reappraisal*, 40 N.C.L. REV. 223 (1962); Paley, *Antitrust Pitfalls in Exclusive Dealing: Recent Developments Under the Sherman, Clayton and FTC Acts*, 37 NOTRE DAME LAW. 499 (1962).

gested that unilateral refusals to sell should come within the unwarranted price discrimination provisions of the Robinson-Patman Act,[45] but such a view has not been accepted by the courts.[46]

Injunctive relief, when granted, does not usually go to the extent of forcing sales. For example, in *United States v. Bausch & Lomb Optical Co.*,[47] the Court refused to require the defendant to "sell its products, without discrimination, to any person offering to pay cash therefor."[48] In another case the court refused to issue a preliminary injunction enjoining a refusal to sell under section 2 of the Clayton Act.[49] However, compulsory sales provisions in a contested decree have been regarded as a "recognized remedy" by the Supreme Court in a patent case.[50] The use of such a remedy in the patent area is not unusual,[51] but the duty to deal has thus far been limited to this area.

III. *SIMPLICITY* AND *BERGEN*—THE REFUSAL TO DEAL IN ANOTHER CONTEXT

It is clear that refusals to deal to enforce resale prices are unlawful if they go beyond a "mere announcement" and the simple refusal to deal. Outside of the resale price maintenance area, the refusal to deal for any purpose, in the absence of conspiracy or monopoly, is not necessarily unlawful. It is not the refusal itself, but rather the object to be accomplished thereby, which is unlaw-

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[45] The Robinson-Patman Act is § 2 of the Clayton Act, 38 STAT. 730 (1914), as amended, 15 U.S.C. § 13(a) (1958). This approach is suggested by Comment, *Refusal to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1132-34 (1949).

[46] See Barber, *supra* note 6, at 848-51. *But see* ATT'Y GEN. REP. 135, regarding § 2(e) of the Act.

[47] 321 U.S. 707 (1944).

[48] *Id.* at 728. See note 18 *supra* for the Court's statement regarding the defendant's right to select its own customers.

[49] Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 224 Fed. 566 (S.D.N.Y.), *aff'd*, 227 Fed. 46 (2d Cir. 1915). See the discussion regarding refusals to sell as being within the Robinson-Patman Act at notes 45 and 46 *supra*.

[50] Besser Mfg. Co. v. United States, 343 U.S. 444, 447 (1952).

[51] Similar provisions to that in *Besser* can be found in United States v. United States Gypsum Co., 340 U.S. 76, 94 (1950); United States v. National Lead, 332 U.S. 319, 338 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Vehicular Parking, Ltd., 61 F. Supp. 656 (D. Del. 1945). See ATT'Y GEN. REP. 255-59; Seegert, *Compulsory Licensing by Judicial Action: A Remedy for Misuse of Patents*, 47 MICH. L REV. 613 (1949); Comment, 56 YALE L.J. 77 (1946).

ful. Two recent cases, *Simplicity Pattern*[52] and *Bergen Drug*,[53] involving the question of enjoining a refusal to sell to a buyer who has brought an antitrust suit, deserve examination to see if such conduct is an antitrust violation and can be fitted within the antitrust prohibitions. If such a method of deterring antitrust suits is a violation so that the court may issue an injunction under section 16 of the Clayton Act,[54] is this conduct to be enjoined on the basis of the court's equity power to deal with conduct which obstructs effective enforcement of the laws?

1. THE CASES IN THE DISTRICT COURT

a. *Husserl-Simplicity in the district court*

The action against Simplicity in the district court, *P. W. Husserl, Inc. v. Simplicity Pattern Co.*,[55] came as a result of the successful Federal Trade Commission suit[56] against the company for violations of section 2(e) of the Robinson-Patman Act.[57] The pattern company had discriminated between small retail stores and large customers by favoring the latter in methods of payment and in transportation costs. In so doing, Simplicity had violated the Act, but apparently did so in good faith.[58] In accordance with Section 4 of the Clayton Act,[59] a treble damage suit was commenced by forty-three retail store owners,[60] who relied upon the previous

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[52] House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962), *reversing* P. W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55 (S.D.N.Y. 1961), noted in 62 COLUM. L. REV. 18 (1962).

[53] Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962), *reversing* 1961 Trade Cas. ¶ 70151 (D.N.J. Nov. 18, 1961) (oral opinion).

[54] This statute is set out in note 2 *supra*. It is to be noted that § 16 requires "threatened loss or damage *by a violation of the antitrust laws*" before injunctive relief may be had. (Emphasis added.)

[55] P. W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55 (S.D.N.Y. 1961).

[56] FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959).

[57] Section 2(e) provides: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 38 STAT. 730 (1914), as amended, 15 U.S.C. § 13(e) (1958).

[58] FTC v. Simplicity Pattern Co., 360 U.S. at 61 n.4.

[59] 38 STAT. 731 (1914), 15 U.S.C. § 15 (1958). See note 1 *supra* for the text of this statute.

[60] The action was originally brought by P. W. Husserl, Inc., Paul Husserl, and Smiles Stores. However, in a spurious class action, the additional

decision as prima facie evidence of an antitrust violation.[61] Plaintiffs were small retailers who found it necessary to stock patterns in order to boost their sales of fabrics. For various reasons Simplicity patterns are such that there are no adequate substitutes. More than half the patterns sold in stores similar to those of plaintiffs were produced by Simplicity. The sale of each pattern usually brings a sale in other materials, and the demand for this type of pattern is such that a permanent loss of customers could occur as a result of the denial of their source of supply.[62]

Plaintiffs' five-year contracts with Simplicity could be terminated by either party on sixty days notice. The contracts of six of the plaintiffs were either terminated at the end of the term or upon such notice. There was no indication that contracts of dealers other than plaintiffs were cancelled. Two of the plaintiffs were informed that their contracts would not be renewed unless they would withdraw from the action. Plaintiffs moved for a preliminary injunction restraining Simplicity from refusing to deal with them. It was contended that they would suffer irreparable injury, and that the contracts were cancelled solely as a punitive measure against them for pursuing their legal rights, and as part of a plan to deter other retail stores from bringing similar actions. The district court found for the plaintiffs stating that these cancellations were part of a "deliberate plan to cancel contracts of all those who elect to assert their rights . . . for the purpose of deterring suit through the exercise of economic coercion."[63] In reaching this "inescapable conclusion" the district court rejected attempts by Simplicity to show that the basis for the refusal was justifiable as a business practice. Claims that some of the plaintiffs were slow payers, had previously attempted to cancel their contracts, had contracts which were unprofitable, and could claim continuing

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plaintiffs were allowed to intervene. See P. W. Husserl, Inc. v. Simplicity Pattern Co., 25 F.R.D. 264 (S.D.N.Y. 1960).

[61] A final judgment or decree rendered in a government suit is prima facie evidence against the defendant as to matters which would constitute an estoppel between the parties, but consent decrees are excluded from this application. 38 STAT. 731 (1914), 15 U.S.C. § 16(a) (1958). For analysis of this section, § 5 of the Clayton Act, see Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. REV. 991 (1961); Note, *Clayton Act, Section 5: Aid to Treble Damage Suitors?*, 61 YALE L.J. 417 (1952).

[62] P. W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55 (S.D.N.Y. 1961).

[63] *Id.* at 59.

treble damages if the contract was not cancelled were regarded as unconvincing.

b. Bergen

The facts in the *Bergen* case are quite similar to those in *Simplicity*. Here the plaintiff, a distributor of pharmaceutical products, brought an action in the district court asking treble damages and injunctive relief for alleged violations of section 2 of the Sherman Act and section 2 of the Clayton Act.[64] In this case, however, no contract was involved since the plaintiff purchased supplies from Parke, Davis as needed, and upon prices reached by agreement between the parties. It was conceded that the previously existing relationships did not create any vested right in Bergen to continue to purchase the defendant's products as desired.[65] Following the commencement of the suit, Parke, Davis notified the plaintiff that it was permanently terminating their business relationship. Plaintiff, alleging irreparable damage to itself and its wholly-owned subsidiary, sought an injunction pendente lite asking that defendant be enjoined from cancelling the account, from refusing to fill orders, and requiring defendant to sell and deliver merchandise in the same manner as was done for other wholesalers. The refusal to sell was, in the words of the court, "actuated by a feeling of either resentment or disapproval of the pending litigation instituted against the defendant by the plaintiff."[66] It was argued that Parke, Davis had a patent monopoly over some of the merchandise, making it economically essential that plaintiff, a full-line distributor, be supplied with these articles.[67] It was shown, however, that plaintiff could still obtain these supplies from other distributors or retailers, although to do so would cause pecuniary damage, and that Parke, Davis itself did sell directly to retailers.[68] Even though the plaintiff could obtain Parke, Davis products from other sources, about twenty-five per cent of its orders required the use of de-

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[64] Bergen Drug Co., v. Parke, Davis & Co., 1961 Trade Cas. ¶ 70151 (D.N.J. 1961).

[65] *Id.* at 78,585.

[66] *Id.* at 78,583.

[67] *Id.* at 78,585. This approach suggests a possible argument that the duty to deal as used in the patent area could be applied here. See text at notes 50 and 51 *supra*.

[68] *Id.* at 78,584-85. However, if the plaintiff would be unable to obtain these supplies from other distributors or retailers as a result of any type of agreement with each other or with Parke, Davis or as a result of adherence to demands on the part of Parke, Davis, a situation similar to a boycott which is illegal per se or a conspiracy to restrain trade may exist. See notes 34 and 35 *supra*.

fendant's products. A substantial loss of good will and permanent loss of business would probably occur if Bergen Drug did not provide service equal to that of other wholesalers.

c. The rationale of the district courts.

Here, as in the appellate courts, contrary results were reached in these parallel situations. In *Husserl (Simplicity* in the district court) the injunction was granted; in *Bergen* it was denied. Judge Bryan in *Husserl,* in referring to the right not to sell, noted that it is not "unlimited and must under appropriate circumstances give way to considerations of public policy which require its reasonable restriction in the public interest."[69] This view is extended to the point where, if the "purpose is unlawful, there is no absolute right to refuse to deal in the untrammeled discretion of the trader."[70] This approach is quite similar to the dicta in a few cases which have equated economic coercion with restraints of trade, and which have said that the refusal must not be used for unlawful purposes.[71] This approach, which is not generally accepted, is not without merit, as the result in *Husserl* shows. The question of its validity and implications will be left for later discussion.

After reviewing the various statutory provisions relating to private actions, the court in *Husserl* stated:[72]

> In the case at bar the refusal to deal is a bold attempt on the part of defendant Simplicity to deter litigants by economic coercion from pursuing the lawful remedies granted them by Congress under the anti-trust laws. Congress envisaged such private suitors as "allies of the government in enforcing the anti-trust laws." To permit private suitors in that position to be coerced from pursuing the remedies which Congress gave them would frustrate the public policy which motivated Congress to grant such remedies. It would permit violators of great economic strength to rest secure from remedial and punitive action by private litigants through the exercise of their economic power. Such a result cannot be tolerated by the courts if the policies enunciated by Congress are to be carried out.

Previous cases were distinguished as not pursuing an objective

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[69] 191 F. Supp. at 61.

[70] *Ibid.*

[71] A. C. Becken v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959), *cert. denied,* 362 U.S. 962 (1960); Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir.), *cert. denied,* 348 U.S. 821 (1954); G. & P. Amusement Co. v. Regent Theater Co., 107 F. Supp. 453 (N.D. Ohio 1952), *aff'd. mem.,* 216 F.2d 749 (6th Cir. 1954), *cert. denied,* 349 U.S. 904 (1955). See also Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599 (D.C. Cir. 1960) (dissenting opinion).

[72] 191 F. Supp. at 61.

inimical to the purposes and policies of the law. In a balancing of interests, the court stated that the right to refuse to deal must give way to "overriding considerations of the strong public policy [behind private actions]."[73] Since the section 16 requirement of irreparable loss to plaintiff had been established, and since defendant would suffer no appreciable loss, relief was granted.

The district court in *Bergen*, after reference to *Husserl*, refused to issue an injunction since there was no vested right in the plaintiff to receive the products and since, even if plaintiff would succeed in the main action, the defendant "might be or would be at liberty, whatever its motives, short of violations of the antitrust laws, to cease doing business with the plaintiff."[74] The *Husserl* approach of balancing the right to refuse to deal against the public policy was rejected, and the court indicated that Parke, Davis' reaction to a lawsuit was quite natural, and was the natural risk of bringing such an action. The court found it "quite a novel precedent to chain two litigating parties together in a business relationship in the continuance of which neither has a vested interest at the outset of litigation," and found no interference with the operation of the antitrust laws.[75] Although in a particular case there may be no such interference with the antitrust laws, the view in *Husserl* of the effect of such a refusal to deal would in most cases seem closer to reality.

2. Simplicity and Bergen on appeal

a. *Simplicity*

House of Materials was the only plaintiff in the *Husserl* case to post the necessary bond. The other five plaintiffs evidently had found other sources for obtaining patterns. The Second Circuit, speaking through Judge Kaufman, reversed the district court on grounds that the injunction could not be sustained under section 16, and that the exercise of equity power was unwarranted. The appellate court did not use or discuss the balancing of public policy considerations. According to the court of appeals, there was no statutory authority for the injunction since there was no violation of the antitrust laws. It was noted that the district court

> appears to have found by implication in section 4 of the Clayton Act a prohibition against coercing persons who bring treble damages actions to discontinue them. . . . [S]uch an implication is unwarranted, for we find nothing in the language or purpose of the

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[73] *Id.* at 62.

[74] 1961 Trade Cas. ¶ 70151, at 78,585.

[75] *Ibid.*

> statute which suggests that Congress intended to force manufacturers to deal with persons who sue them, while not forcing them to deal with others.[76]

It was noted that in enacting the Clayton Act Congress had rejected a proposal to prohibit arbitrary refusals to sell. Since there was no indication that Congress intended such action to be an antitrust violation the court said: "[W]e cannot justify through improper judicial 'interpretation' of a section of the antitrust laws what amounts to an extension of the remedies given by Congress under the Sherman and Clayton Acts."[77] Likewise there was no violation of the Clayton Act, and the court thought that this was "too plain to merit discussion."[78]

The "deliberate" plan found by the district court in *Husserl* was rejected. Since House of Materials was the only original plaintiff to appeal, this may be correct; but the fact that House of Materials and another original plaintiff had not been told that the contract would not be renewed while they were parties to the suit, and that it would be renewed if they withdrew, was overlooked.[79] There was, according to the court of appeals, a "mere announcement" and a "simple refusal to deal"—a case of lawful "Doric" simplicity.[80] No other basis was found upon which a combination or conspiracy argument could rest; and even if such a combination did exist, the court could find no unreasonable restraint of trade. The general equity power of the court to grant such injunctive relief to protect the integrity of the judicial system was admitted. But the court said that such an injunction would be "singularly inappropriate" in this case[81] since it would conflict with the right to refuse to sell, and would give the plaintiff more rights by suing than he had under his contract. Beyond this, plaintiff could not acquire additional contract rights by an application of tort principles to this form of business coercion.[82]

b. *Bergen*

In contrast to the *Simplicity* decision, the Third Circuit in *Bergen Drug* not only considered the policy and importance of

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[76] House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 871 n.11 (2d Cir. 1962).

[77] *Id.* at 871.

[78] *Id.* at 871. See notes 45 and 46 *supra.*

[79] 191 F. Supp. at 58.

[80] 298 F.2d at 870.

[81] *Id.* at 872.

[82] *Ibid.*

effective private enforcement of the antitrust laws, but considered these as weighing "heavily with this court in considering whether equity jurisdiction should be exercised."[83] The starting point for the court was the existence of equity power to issue the preliminary injunction. The court found that it did have power to issue such an injunction, citing *Simplicity* and an analogous case in which such an injunction was issued.[84] It is clear that section 16 should not preclude the exercise of equity power, but the court did not discuss the point, nor did it discuss the possibility of there being an antitrust violation which would bring section 16 into operation. Rather than finding the refusal to be one of "Doric" simplicity, Colgate's section 2 exception of monopolizing or attempting to monopolize was used to find that case "inapposite."[85] In referring to *Colgate,* and indicating the basis of its decision, the court stated:[86]

> In [*Colgate*] . . . the Supreme Court qualified its statement concerning a seller's freedom to choose customers by indicating that the rule would not apply where there is a purpose to create or maintain a monopoly. The undisputed facts here are that the buyer-seller relationship was discontinued because of the filing of the main action. True enough, the defendant can choose customers, but it should not be permitted to do so in order to stifle the main action, especially where it is apparent that such conduct will further the monopoly which plaintiff alleges defendant is attempting to bring about and which, if proved, would entitle plaintiff to permanent relief. . . . The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.

When a party's conduct is calculated to frustrate litigation, the court may act. In this case the main action cannot successfully be prosecuted since plaintiff "will be unable to secure the cooperation of other wholesalers and of retailers to be witnesses because they fear the same sort of retaliatory action that plaintiff has experienced."[87] The court, noting the relative burdens of the parties, and finding little inconvenience on the defendant and irreparable

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[83] Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962).

[84] Bateman v. Ford Motor Co., 302 F.2d 63 (3d Cir. 1962). In this case the court allowed a preliminary injunction allowing plaintiff to keep his automobile franchise pending a determination of the issues. See the discussion of the applicable statute and its implications at notes 115-18 *infra.*

[85] 307 F.2d at 727.

[86] *Ibid.* While *Colgate* itself may be "inapposite" here, the gloss upon it certainly is not, and this approach ignores the justifications for the refusal to deal which the defendant could utilize. See note 32 *supra.*

[87] *Id.* at 728.

harm to the plaintiff, granted the injunction pendente lite compelling Parke, Davis to deal with Bergen.

3. CONTRASTS AND ANALYSIS

One possible basis for a distinction between *Bergen* and *Simplicity* is the allegation in *Bergen* of an attempt to monopolize in violation of the Sherman Act.[88] The court in *Bergen* had noted that the gravamen of the main claim was discriminatory dealing, monopolizing and attempts to monopolize which were unrelated to *Colgate*. While the defendant can choose customers, it cannot do so to destroy the main action, "especially where it is apparent that such conduct will further the monopoly which plaintiff alleges defendant is attempting to bring about. . . ."[89] It is true, of course, that plaintiff is entitled to permanent relief upon proving the section 2 violation, but this does not necessarily mean that temporary relief is justified, especially when the right to refuse to sell is balanced against it. In such a case the defendant has the burden of proving the justification of the refusal to sell.[90] In effect, this is a determination that a refusal to deal when the purpose is to stifle the main action is not sufficient justification. Further relief, once the allegation is proven, is not foreclosed if the injunction is not allowed; but, as a practical matter, proving the allegation would be impossible since the other wholesalers and retailers would not testify for fear of similar economic retaliation.

While the above points may be valid, this does not necessarily provide a basis for reconciling the two cases. In the first place, such a distinction is not essential to the decision in *Bergen*. Both cases recognize the existence of equity power in such circumstances, but reach a contrary result as to its application. It would have been possible to have decided *Bergen* the same way even if an antitrust violation other than section 2 were alleged, if the purpose of the refusal to deal were to frustrate litigation. The prevention of interference with the enforcement of a legal right, rather than the basis of the legal right, is the vital point. Secondly, while the allegation of an attempt to monopolize is not present in *Simplicity*,

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[88] It must be noted that in *Simplicity* the court noted that there was no allegation of a § 2 violation in any manner. 298 F.2d at 871. In National Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647 (5th Cir. 1962), the court distinguished *Simplicity* on that basis. *Id.* at 654. However *National Screen* did not involve the question involved in *Simplicity* or *Bergen* and granted an injunction under § 16.

[89] 307 F.2d at 727.

[90] Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

the market position of Simplicity is much larger and makes a stronger case for the economic argument of the effect upon a competitive market than does the market share of Parke, Davis.[91] Finally, a distinction based upon the difference between the case where a Sherman Act, section 2, violation is alleged and the case where no attempt at monopolization is involved (as in *Simplicity* where the Robinson-Patman Act was the basis of the main action) is in effect a judgment that such relief should be granted under the Sherman Act but not under Robinson-Patman.[92] Such an approach has been suggested and it certainly follows from the possible bases of distinction being discussed.[93] However, one statutory

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[91] More than half of the patterns sold in the retail stores were Simplicity Patterns which could not be obtained except from Simplicity, the largest producer whose size was greater than that of all other major producers combined. The district court in *Husserl* had noted the dominant market position of the defendant and found the plaintiffs to be placed at a severe competitive disadvantage. 191 F. Supp. at 63-64. On the other hand, Parke, Davis' position in the market is substantially less than Simplicity's. See United States v. Parke, Davis & Co., 164 F. Supp. 827 (D.D.C. 1958), for the findings of the district court regarding the market position of the defendant in the market area in question, the figures for which should be closed to that area in the present case. Still, about 25% of Bergen's orders require a Parke, Davis product, but these products, as contrasted to the patterns, could be obtained elsewhere.

[92] It was previously noted that Simplicity had acted in good faith in violating the Robinson-Patman Act, and this fact was not unnoticed by the court in the present case. 298 F.2d at 872 n.12. This is a reflection of the attitude of those who see an inherent unfairness in subjecting unwitting violators of the Robinson-Patman Act to the same treble damages as the intentional violator of the Sherman Act must face. This has led to proposals to allow discretionary treble damages rather than mandatory treble damages. See ATT'Y GEN. REP. 378-80. This proposal has been effectively attacked. See Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

When these considerations are transferred into the area of refusing to deal to deter the private litigant, the argument can be changed somewhat. When the private litigant brings an action under the Robinson-Patman Act, he is acting under a statute which has as one of its purposes the policy of balancing the buyer's economic inequality vis à vis his supplier. To accept the argument that unwitting violators should not be subjected to mandatory treble damages is to ignore the purposes of the act, and this is particularly true in the present case where the refusal to deal is to prevent an action from being brought at all.

[93] This distinction appears to be accepted by the writer in Comment, *Discouragement of Private Treble Damage Suits Through a Simple Refusal to Deal*, 71 YALE L.J. 1565, 1577 (1962). An interesting situation is presented if the action in *Simplicity* was not based upon a prior government suit and was simply a private action alleging Robinson-Patman Act violations. The distinction breaks down here since the violation of Robinson-Patman would be a violation of the antitrust laws without

enactment cannot be regarded as more important than the other, especially when the policies behind each are different; and this is particularly true when the basis for injunctive relief is the same in both cases. The injunction is issued to protect the private action and to prevent interference with litigation, regardless of what type antitrust violation is being alleged. Furthermore, the equities of the situation may actually favor the plaintiff in the price discrimination area, since the Robinson-Patman Act is designed to overcome the inequality of the buyer, and thus the argument in favor of an injunction is stronger in this case than in the case where a Sherman Act violation is alleged.

When *Bergen* and *Simplicity* are analyzed from the standpoint of whether it was appropriate to exercise equity jurisdiction, it is difficult to find significant differences to justify the contrary results. Both House of Materials and Bergen Drug were in the position of suffering severe losses if the injunction were not granted. Simplicity patterns, which were of great value in the plaintiff's business could not be obtained elsewhere; and, while Parke, Davis products could be obtained from other sources, there was no showing that this could be done under the same terms as plaintiff had purchased them from the defendant.[94] Even if Bergen could obtain the supplies elsewhere, there was a possible loss of good will and a permanent loss of business if its customers' orders could not be filled. Despite the fact that Bergen had no vested rights to the products since it did not operate under a contract, its position is really no different from a plaintiff operating under a terminable contract which does not necessarily grant such a vested right.[95] The fact that Bergen requested permanent injunctive relief if successful in the main action is not determinative since the underlying reason which would compel the issuance of the temporary injunction remains the same. In each case the position of the defendant is not significantly changed by being compelled to continue to deal,

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the argument of the necessity of protecting unwitting violators from treble damage suits being present. Such a case shows well that the type of distinction discussed is not valid in the present context unless the Robinson-Patman Act is in such disfavor that violators are to be protected in such a manner, in which case the change is for Congress rather than the courts.

[94] 307 F.2d at 728.

[95] One of the plaintiffs in P. W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55 (S.D.N.Y. 1961), did have a possible breach of contract action. *Id.* at 58. But the plaintiff was not a party in the Court of Appeals. *Quaere,* whether this type of action could justify the use of the tort doctrine of unlawful business compulsion to compel the issuance of the injunction?

and there is no doubt that in both cases the refusal was prompted by the antitrust action. The point regarding the difference between the intentions of the defendants has been discussed above; and while this does, of course, affect the equities, an argument can be made that the equities can be reversed on the basis of the policy behind the Robinson-Patman Act.[96]

Since *Bergen* and *Simplicity* are not different, either factually as to the precise issue, or as to the equities involved, questions arise as to the right to exercise equity powers, and the proper public policy which may call for its exercise in an appropriate situation. The court in *Simplicity* granted that such a power did exist, but regarded this case as "singularly inappropriate" for its exercise.[97] On the other hand, *Bergen* did not discuss the application of section 16, but started with the proposition that such power did exist. The view that section 16 removed the equity power of a court to deal with the present situation cannot be accepted unless it can be shown that this was the intent of Congress. Even though Congress may provide a legal right without granting the power to effectively enforce it, this does not necessarily preclude the exercise of equity power.[98] While the court in *Simplicity* did not weigh the considerations favoring private antitrust actions, continued private enforcement of the antitrust laws, and the necessity of protecting such a method of enforcement, was stressed in both *Husserl* and *Bergen*. It is this right to private actions for treble damages which is vital here, and the policy and place of the private action must be examined.

The private action was created by Congress to make private parties "allies of the government in enforcing the antitrust laws."[99] The role which the private suitor has in the enforcement of these statutes is shown by the prediction that the Antitrust Division of the government would have to be quadrupled to equal private enforcement.[100] The treble damage action is a very important

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[96] See note 92 *supra*.

[97] 298 F.2d at 872.

[98] Bateman v. Ford Motor Co., 302 F.2d 63, 66 (2d Cir. 1962). As to the power to give equitable relief to make effective a remedy granted by law, see 4 POMEROY, EQUITY JURISPRUDENCE § 1338 (5th ed. 1941), cited by the court in *Bateman*.

[99] 51 CONG. REC. 16319 (1914).

[100] Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

weapon,[101] and its use can be a more effective deterrent to possible antitrust violators than many other types of actions.[102] The deterrent value of the private suit is manifested in a variety of ways. The mere threat of private litigation forces many defendants to enter consent decrees,[103] and threatening litigation often brings about changes in conduct on the part of future defendants hopeful of avoiding legal action.[104] Also, a great many private actions are settled before trial, and many predatory business practices are prevented due to possible legal action if adopted.[105]

The burdens involved in these actions are so great that many possible plaintiffs are unwilling to bring suit, and it appears that fear of reprisal plays a very important role in discouraging treble damage actions and thus destroying the deterrent effect of the private action.[106] The refusal to deal exemplified by *Simplicity* and *Bergen* is a form of reprisal which effectively negates the deterrent effect of the legal right to damages. The denial of an injunction to prevent a refusal to deal with the antitrust suitor serves only to allow a defendant to render ineffective the statutory scheme of private actions. If equity power does exist outside the scope of section 16, one cannot imagine a more appropriate set of circumstances justifying its exercise than the refusal to sell to deter private treble damage actions such as existed in *Simplicity* and *Bergen*.

The exercise of equity power to protect a private suitor is not necessary if this refusal can be fitted within section 16 (requiring an antitrust violation before the injunction can be issued). There was no antitrust violation in *Simplicity* since this was a case of "Doric" simplicity, and the defendant's actions were nothing more than a "mere announcement" without any other means of combination.[107] In *Bergen* the question of whether the refusal by itself was

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[101] Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959); Loevinger, *supra* note 100, at 167; Wham, *supra* note 92, at 1061; Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952).

[102] Bicks, *supra* note 101, at 8; Loevinger, *supra* note 100, at 168; Comment, 61 YALE L.J. 1010, 1061 (1952).

[103] Bicks, *supra* note 101, at 8. This is due to the fact that § 5 of the Clayton Act does not apply to consent decrees. See note 61 *supra*.

[104] Comment, 61 YALE L.J. 1010, 1060 (1952).

[105] *Id.* at 1059-61.

[106] *Id.* at 1057 n.309.

[107] 298 F.2d at 870.

an antitrust violation was not discussed by the court, which dealt rather with the question of the existence of its equitable power to grant the requested relief. Could the refusal in these cases have been found to be an antitrust violation, and section 16 used as the basis for the injunction? It is possible that the doctrine of *United States v. Griffith*[108] (holding that the use of power to extend itself is illegal) could be applied here since monopoly power is being used to prevent the legal action which would limit it. Such an approach is very doubtful for several reasons. Government action is not precluded in these cases, and a showing of market power required in such a case is doubtful under the facts of either *Simplicity* or *Bergen*.[109] Also, the monopoly here, if it does exist, is not really being extended. There is no foreclosure of competition, and the supplier is not gaining market power, but rather is preventing legal action. A presumption of the essential market power on the basis of product uniqueness is quite difficult since Bergen still had access to these products.

A more likely basis for finding an antitrust violation is a conspiracy or combination theory. Implied conspiracy between the defendant and those dealers who did not sue is one possibility, but this approach has been labeled as "nonsensical" with some justification.[110] The doctrine of intra-corporate conspiracy could be argued, but it is clear that this doctrine has not been accepted.[111] If, in such a case, co-defendants would refuse to deal with the plaintiffs, joint action which would violate section 1 of the Sherman Act could no doubt be found. The assertion of the court in *Simplicity* that there is no violation since no restraint of trade could be shown in such a case is subject to question,[112] and the implied conspiracy of co-defendants could easily constitute a boycott.[113] Also, any enlisting of other parties, such as the other wholesalers or retailers in *Bergen*, would fall within this prohibition.

Another possible approach is that taken by the district court in *Husserl* where the refusal to sell was balanced against other factors and found to be for an unlawful purpose. This approach though

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[108] United States v. Griffith, 334 U.S. 100 (1948).

[109] See note 91 *supra*.

[110] Alexander, *Private Antitrust Actions for Refusal to Deal*, 6 ST. LOUIS L. REV. 489, 500 (1961).

[111] See note 37 *supra*.

[112] 298 F.2d at 871.

[113] For discussion of the boycott which is now illegal per se, see note 34 *supra* and accompanying text.

is not sanctioned by the authorities and was rejected in *Simplicity*. Such an approach, equating the use of economic coercion with restraints of trade, ignores the fact that while the action may be bad public policy, it still is not prohibited by the antitrust laws.[114] It seems apparent then that the refusal to deal for the purpose of deterring private suitors is not by itself prohibited by the antitrust laws, and the refusal to use section 16 as the basis for the issuance of an injunction is no doubt correct.

In enacting the Clayton Act Congress had rejected a proposal to prevent arbitrary refusals to sell in certain areas.[115] This type of compulsion to deal, and the protection of the buyer operating under economic inequality, has been enacted in the Dealers Day in Court Act which grants a cause of action to an automobile dealer whose franchise is cut off or not renewed without "good faith."[116] This act does extend the present antitrust law since the manufacturer in this area can no longer take refuge in *Colgate*,[117] and the Third Circuit has held that an injunction should be issued to make more effective this statutory right.[118] Other legislation which would in effect compel selling to all persons meeting the terms of the sale has been proposed,[119] but this cannot be justified when close substitute products can readily be obtained.[120] The economic arguments upon which these proposals are based are beyond the scope of this comment, and it is sufficient to say that the enactment of a broad duty to deal would be far beyond the existing state of the law, and such changes should come from Congress rather than the courts. As pointed out previously, however, the enjoining of the refusal to deal by the court of appeals in *Bergen* is an exercise of

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[114] See Alexander, *supra* note 110, at 501 where he states: "Even if *Colgate* had been overruled, actions which do not violate the substantive provisions of the antitrust laws would still seemingly be immune from suit. The lesser qualification of *Colgate* which has actually taken place still cannot be read as establishing a new antitrust law capable of supporting private suit."

[115] H.R. REP. No. 15,657, 63d Cong., 2d Sess. § 3 (1914).

[116] 60 Stat. 1125 (1956), 15 U.S.C. § 1222 (1958). See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957); Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 103-10 (1959).

[117] Kessler & Stern, *supra* note 116, at 107.

[118] Bateman v. Ford Motor Co., 302 F.2d 63 (3d Cir. 1962), cited in *Bergen* as authority for the exercise of the equity power to prevent interference with the exercise of the legal right to maintain the action.

[119] SEN. Doc. No. 32, 85th Cong., 1st Sess. (1959) (report to the Senate Small Business Committee).

[120] Kessler & Stern, *supra* note 116, at 115 n.511.

equitable power to prevent interference with the operation of the antitrust laws. On this basis it is submitted that the law as found in *Bergen* is not only desirable, but essential to the continued effective use and protection of the private treble damage action, and should be upheld. The injunction is not of a permanent nature, and a defendant can always show justification for the refusal to deal. *Simplicity* and *Bergen* indicate that the refusal will not be enjoined if oppressive to the seller, and in neither case was this a serious factor. Thus, an injunction compelling the defendant to deal until the economic motive of deterring private treble damage actions is gone should be allowed upon a proper showing of: (1) the sole purpose of the refusal being that of preventing legal action, (2) irreparable damage, and (3) lack of substantial damage to the seller.

IV. CONCLUSION

A seller who is refused further service or supplies has had very little success in actions against the manufacturer. The reasons for this lack of success vary from substantive law questions to problems of proving damages. There has been little recourse for refusals to deal, and many actions which otherwise would have been brought have no doubt been prevented by fear of reprisal. An injunction which prevents refusals to sell for the sole reason that an antitrust action has been brought will put the private litigant in a much stronger position. Such an injunction should prevent further reprisals intended to deter the bringing of private actions, and should prevent the threat of reprisals against witnesses which hinder the presentation of evidence and the proving of damages. The *Bergen* case should lead to a strengthening of the antitrust laws and provide a strong stimulus to the bringing of private treble damage actions.

The law in the area of unilateral refusals to deal is changed only to the extent that the refusal is not allowed for the purpose of deterring treble damage actions. This has been accomplished through the exercise of the court's power to prevent interference with the process of litigation. The denial of an injunction in such a case lacks an appreciation of the difficulties of the private litigant and the place of private actions. Even though the status of the refusal to deal has been questioned, the power to refuse to deal, within limits, is still lawful and correct in the absence of Congressional enactments further restricting the right. But the refusal should not impede enforcement of legal rights granted by Congress.

Robert Grimit, '63