Dual Distribution and Attempted Monopolization under Section 2 of the Sherman Act

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The marketing process is a major phase of business management. Corporations have great impact at the consumer level. Effective market penetration is a goal for which all major companies strive. One of the most common marketing schemes is known as dual distribution. This marketing system takes various forms, but for purposes of discussion it will be limited to one type. A manufacturer of a product frequently establishes distributorships owned by private individuals. A good example is an automobile producer. The maker of the car sells the finished product to an independently-owned dealer who resells it to the consumer. A dual distribution system exists when a distributorship, owned and capitalized by the manufacturer is also established. The independent dealership competes with the so-called "company-owned store" for the retail sales of the manufacturer's product.

Dual distribution is favored in some industries while not favored in others. Generally, the automobile manufacturers do not wish to establish dual systems for marketing cars. The manufacturer lacks the expertise to effectively operate on the retail level. The problems presented by retailing are not hastily assumed by an auto maker. Dual distribution is an unwanted necessity borne of declining market shares or the inability of an independent dealer to profitably operate in a particular area. This fact is verified by the few number of company-owned dealerships which exist.

Independent distributors view dual distribution through eyes glaring with discontent. More competition for retail sales is not something for which they wait with bated breath. In the automobile industry, independent distributors complain the company-owned stores are recipients of favorable financing arrangements with the manufacturer. Capital contributions from the manufacturer to the wholly-owned subsidiary, allegedly used for advertising expenses, have raised the anger of the independent dealers. The general complaint is the purported advantageous treatment received by the company-owned stores as a result of their affiliation with the manufacturer. These advantages, as seen by the independent dealers, enable the company-owned stores to unfairly compete for retail sales because they can run at a loss but still be profitable in the long-run for the manufacturer. The competitive effects of dual distribution are the source of many aggravating moments for a privately capitalized distributor. The non-integrated dealers have looked to the antitrust laws for relief. Their aim has been to sue the manufacturer for the allegedly anti-competitive effects produced by the establishment of the dual distribution system.

For purposes of analyzing the application of the antitrust laws to the establishment of a dual distribution system, it is helpful to consider a model problem. An automobile manufacturer, for example, previously established an independent dealer in a metropolitan area. Subsequently, the dealer ran into financial problems and was forced out of business. The car manufacturer was faced with the decision of replacing the old dealer or losing that share of the retail market. Replacement of the dealership was the preferred choice. Because the old dealer had a difficult time in that location it may be hard to immediately find a person willing to invest his money in a private dealership. Further, the start-up costs for a dealership are significant. Considering these factors, the manufacturer decided to replace the old dealer with a wholly-owned subsidiary. It was hoped a private dealer could be found in the near future.

The near-by independent dealers still in existence wish to attack the establishment of the dual system under section 2 of the Sherman Act.[1] They allege the manufacturer is attempting to monopolize the retail sales of its product by creating the retail subsidiary.

This problem represents a direct attack on the system of dual distribution. Section 2 may or may not apply. Only close scrutiny of the relevant case law will remove doubt.

The former head of the Department of Justice's Antitrust Division, Richard W. McLaren, characterized the government's attitude toward application of the antitrust laws to dual distribution programs.[2] Before the House of Representatives Subcommittee on the Activities of Regulatory Agencies Relating to Small Business, Mr. McLaren said:

> In our opinion, dual distribution is not, and should not be made, unlawful *per se*. By operating in this manner, manufacturers are often able to achieve significant economies which re-

1. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1970), makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several states. . . ."
2. BNA ATRR NEWS X-1 to X-5 (No. 453 March 17, 1970).

dound to the benefit of the consuming public. Moreover, in a free enterprise system, businessmen should remain free to alter their methods of distribution in accordance with the demands of changing economic circumstances.[3]

In terms of art of the Sherman Act, Mr. McLaren expressed the view that no "restraint of trade" should be found to exist, within the meaning of section 1 of the Sherman Act, when a manufacturer establishes a dual distribution system. Indeed, no courts have held dual distribution is a "restraint of trade."[4]

In testifying before the same House Subcommittee, McLaren also said:

> A manufacturer could decide to convert completely to a system of distributing through its own outlets without necessarily violating the antitrust laws, even though such a change would result in a loss of business to firms which had formerly acted as the manufacturer's distributors.
>
> On the other hand, there are circumstances in which a manufacturer's attempts to engage in dual distribution may very well violate the antitrust laws. . . . [A]ttempts by partially integrated manufacturers to engage in predatory pricing, *i.e.*, pricing designed to drive competitor-distributors from the market, are subject to challenge as an attempt to monopolize in contravention of Section 2 of the Sherman Act.[5]

The substantive offenses of section 2 are monopolization, attempt to monopolize, and conspiracy to monopolize. In the model for analysis, the independent dealer could claim the manufacturer had monopolized the retail sales of the cars sold by the dealer, and produced by the manufacturer, by establishing a dual distribution system. The charge of monopolization would be made if the degree of forward integration by the manufacturer had reached an advanced level. The charge of monopoly is assumed not to have been made in the model problem. Monopoly power has been described as the power to raise prices and exclude competition.[6] In the automobile industry it is clear no single

3. *Id.* at X-2 to X-3.
4. Only "unreasonable" restraints of trade are illegal. United States v. Standard Oil Co., 221 U.S. 1 (1911). Some restraints are illegal per se, such as price fixing and horizontal divisions of territory. *Id.* Other restraints are illegal only if they fail to pass the "rule of reason" test. In applying the rule of reason to a particular restraint, courts will consider (a) the facts peculiar to the business, (b) the nature and effect of the restraint, (c) the history of the restraint, (d) the evil thought to exist, (e) the reason for implementing the particular remedy, and (f) the purpose sought to be attained by the restraint. Chicago Board of Trade v. United States, 246 U.S. 231 (1918).
5. BNA ATRR NEWS, *supra* note 2, at X-2.
6. United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956).

manufacturer has this power. Ford cannot raise its prices much higher than Chevrolet without losing a significant number of retail sales. And, General Motors does not control enough of the car industry to be able to exclude Chrysler from any given area of the country.

The charge to be argued most vigorously by plaintiff in the model action is attempt to monopolize. To prove an attempt to monopolize, the plaintiff must show the defendant had a specific intent to gain monopoly power in the relevant product market, and acts, pursuant to that intent, which create a "dangerous probability" of successful monopolization.[7]

Since the acts done pursuant to the intent to monopolize must be appraised within the relevant market, the starting point in analyzing an attempt to monopolize is to define that product market. The leading case in this area is *United States v. E.I. duPont de Nemours & Co.*[8] Dupont was charged with monopolizing the market in cellophane. The trial court found the relevant product market to be flexible packaging materials in general, not just cellophane. The complaint was dismissed and the United States Supreme Court affirmed the lower court action.

In determining how to define the relevant product market in *duPont*, the Court said:

> [N]o more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.[9]

As this language indicates, the essence of the relevant product market under section 2 is interchangeability of products. Interchangeability exists if the consumer is willing to substitute one product for another without having to experience great discrepancies in price, use, or appearance of the commodities. If, on an objective basis, it can be said one product is functionally similar to another, both products will be included in the same relevant product market for purposes of measuring monopoly power.

It is difficult to argue with the proposition that all cars have enough similarities to be classified in the same product market for purposes of

7. Walker Process Equip., Inc. v. Food Mach. & Chem. Co., 382 U.S. 172 (1965); Allen Ready Mix Concrete Co. v. John A. Denie's Sons Co., 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,955 (W.D. Tenn. April 13, 1972); Bushie v. Stenocord Corp., 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,896 (D. Ariz. March 15, 1972).
8. 351 U.S. 377 (1956).
9. *Id.* at 395.

determining antitrust violations. The reasons why a consumer chooses to buy a Chevrolet, rather than a Ford product, usually involve personal preferences, financing arrangements, dealer-customer relations, and other considerations, all of which do not involve significant differences in the quality of the two cars.

The Supreme Court, in *duPont,* recognized almost no manufacturers product, by itself, can be a relevant product market:

> A retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station, or because no one else makes a product of just the same quality or attractiveness of his product, as for example in cigarettes. Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.[10]

The holding in *duPont,* that the relevant product market for an attempt to monopolize is defined in terms of interchangeability, has been recited in several recent decisions. In *Bushie v. Stenocord Corp.,*[11] plaintiff charged defendant with section 2 violations in the market of Stenocord dictating machines. The Court of Appeals for the Ninth Circuit, in affirming the trial court's grant of defendant's motion for summary judgment, rejected plaintiff's definition of the relevant product market. The market was not limited to Stenocord products but included all dictating machines.

> To the extent that Bushie's argument suggests that the "relevant market" to be used in considering Stenocord's market share is to be arrived at by disregarding those other sellers of dictating equipment whose products are similar, both in design and function . . . we reject it.[12]

In *Cal Distributing Co. v. Bay Distributors, Inc.,*[13] defendant was charged with attempting to monopolize the market in United Vintners wines. The district court specifically referred to *duPont* and held the wine market in general was the relevant market. After discussing the test of interchangeability set forth in *duPont,* the district court said:

10. *Id.* at 392-93.
11. 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,896 (D. Ariz. March 15, 1972).
12. *Id.* at 91,720.
13. 337 F. Supp. 1154 (M.D. Fla. 1971).

> As can be seen from facts set out above and below, United Vintners wines face direct competition from numerous other brands of wines, especially Gallo wines. The relevant product market in this case, i.e. the "commodities reasonably interchangeable by consumers for the same purposes," is all wine distributed in the relevant geographic market.[14]

The relevant product market in the model will be the car industry in general. The same principle of interchangeability of the major manufacturers' products will prevent a producer from being guilty of an attempt to monopolize his own product. Even the acts by a car maker pursuant to his attempt to gain complete control over the distribution of his own product are not prohibited by section 2 of the Sherman Act.

The decisions regarding attempts to monopolize an automobile manufacturer's own product conclude no violation of the antitrust laws is involved, except in rare circumstances to be discussed later.

In *Packard Motor Car Co. v. Webster Motor Car Co.*,[15] the manufacturer-defendant eliminated one private dealership so he could grant to another dealer the exclusive right to sell Packard cars in Baltimore. The district court submitted to the jury the issue of whether Packard was guilty of attempting to monopolize the relevant market. The jury found for the plaintiff. Post-trial motions by the defendant were denied. The court of appeals reversed because it said no monopoly was possible in Packard cars since they effectively competed with cars of other manufacturers.[16] An illegal monopoly being impossible, no attempt to do what is lawful could be prohibited by section 2. The court made it clear since Packard competed against other, larger manufacturers of cars, it would be unfair to prohibit it from effectively competing in the Baltimore area.[17] It was to Packard's business advantage to reorganize its distribution system. Effective competition in the car industry in general—the relevant product market—would be promoted, rather than destroyed, by allowing Packard to control completely its marketing scheme.

The District Court for the Western District of Texas, in *Johnny Maddox Motor Co. v. Ford Motor Co.*,[18] clearly stated the reason why

14. *Id.* at 1158. *See also* Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.), *cert. denied,* 354 U.S. 923 (1957).
15. 243 F.2d 418 (D.C. Cir. 1957).
16. *Id.* at 420.
17. *Id.* at 421.
18. 202 F. Supp. 103 (W.D. Tex. 1960).

Ford cars could not be the relevant product market under section 2. In granting defendant's motion for a summary judgment it was said, quoting *Arthur v. Kraft-Phoenix Cheese Corp.*:[19]

> Every manufacturer has naturally a complete monopoly of his particular product especially when sold under his private brands, and no private controversy with a distributor could legally tend to increase that type of a natural monopoly. The Sherman Act is, therefore, clearly not really involved.[20]

Madsen v. Chrysler Corp.,[21] also held no attempt to monopolize one car manufacturer's product is within the prohibitions of the Sherman Act. The district court applied the *duPont* holding to conclude the relevant product market was cars in general. It would be unrealistic to find Chrysler-Plymouth dealers compete only with themselves for retail sales in Chrysler cars. They compete actively with dealers of other manufacturers for retail sales of all cars.

The language in the decisions discussed clearly leads to the conclusion that section 2 of the Sherman Act is not really applicable to the model problem. When an independent dealer sues a car manufacturer for monopolizing or attempting to monopolize the manufacturer's product by establishing a dual distribution system, he may have a variety of contentions. However, in all claims he ultimately reaches the critical point of proving the relevant product market. As seen from the case law, and from business practice, the relevant product, for an independent car dealer's suit, will always be the car industry as a whole. It cannot be the cars of a single manufacturer alone because one manufacturer's cars compete with those of all other manufacturers. Furthermore, a natural monopoly exists over one manufacturer's cars. Natural monopoly power cannot be made illegal by practices which merely tend to increase that power. In a case based purely on the practice of dual distribution, where a manufacturer is charged with monopolizing, or attempting to monopolize his own cars, the Sherman Act is not involved. The same result has been reached in decisions dealing with practices of manufacturers of other industries.[22]

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19. 26 F. Supp. 824 (D. Md. 1937).
20. *Id.* at 828.
21. 261 F. Supp. 488 (N.D. Ill. 1966).
22. *See* E.A. Weinel Constr. Co. v. Mueller Co., 289 F. Supp. 293 (E.D. Ill. 1968) (involving construction supplies); United States v. Charles Pfizer & Co., 245 F. Supp. 737 (E.D.N.Y. 1965) (accidulants in food and beverages and acids in effervescent alkalizing preparations); A-1 Business Mach. Co. v. Underwood Corp., 216 F. Supp. 36 (E.D. Pa. 1963) (involving the market in business machines); Bushie v. Stenocord Corp., 5 TRADE

Recently one case in the Western District of Pennsylvania has led to some confusion in this area. *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*,[23] includes language which is less than completely clear. Plaintiff charged Chrysler with selling Dodge cars to its company-owned stores at lower prices than it was selling them to the independent dealers in Allegheny County. Other facts were averred which tended to show company-stores were receiving advantageous subsidies which led to allegedly anti-competitive effects.

The district court started its process of confusion by stating Dodge cars in Allegheny County were a significant enough "part" of commerce to be the subject of a monopoly charge.[24] In terms of previous decisions, this is certainly a conclusion of dubious legal validity. However, shortly thereafter, the court seemed to correct itself by saying, as a matter of law, because of the competition from other car manufacturers in Allegheny County, Chrysler could not be guilty of monopolizing the local car industry.[25] When the charge of attempted monopolization of Dodge cars in Allegheny County was considered, it was allowed to go to the jury. *Mt. Lebanon* resulted in the confused holding that Chrysler could not be guilty of monopolizing its own product, but could be guilty of attempting to monopolize the relevant product market in Allegheny County.

There are two ways in which *Mt. Lebanon* can be read. Because of the confusing language it is not at all clear which reading was intended by the district court. Although the court said Dodge cars in Allegheny County are a "part" of interstate commerce which could be monopolized, it did not specifically say that was the product being considered in the charge of attempt. If *Mt. Lebanon* is read to mean Chrysler can be guilty of attempting to monopolize the market in its own product it stands by itself in a long line of precedent holding the contrary. This interpretation of *Mt. Lebanon* makes it incompatible with all previous decisions concerning monopolization of one manufacturer's product. It is difficult to assign validity to the opinion of *Mt. Lebanon* if it means a car manufacturer can violate section 2 of the Sherman Act with practices limited to the market in its own product. All other decisions

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Reg. Rep. (1972 Trade Cas.) ¶ 73,896, at 91,717 (D. Ariz. March 15, 1972) (involving dictating machines); Brewer Sewing Supplies Co. v. Fritz Gegauf, Ltd., 1970 Trade Cas. ¶ 73,139, at 88,469 (N.D. Ill. April 3, 1970) (involving the sewing machine industry).

23. 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969).

24. *Id.* at 460.

25. *Id.* at 461.

in this area, as discussed before, hold the relevant product market in such a case is the car industry in general.

Another way to read *Mt. Lebanon* is to say it holds evidence of price cutting and advantageous subsidies from a manufacturer to a company-owned store raise a jury question as to whether the manufacturer attempted to monopolize the entire car industry. This holding would make *Mt. Lebanon* more consistent with previous decisions.[26] However, it must be immediately recognized this type of action is not a case involving pure dual distribution practices. The model problem is based on the independent dealer's complaint that the company stores unfairly compete in the retail sales of the manufacturer's product. It is very different to say the establishment of company-owned stores reveals anti-competitive practices in the car industry as a whole. The latter example has not been discussed heretofore, and is completely separate from the dual distribution problem described by the model. The model involves an attack on the dual distribution system itself. The *Mt. Lebanon* case may be read as a suit attacking a manufacturer's attempted monopolization of the entire car industry whereby the system of dual distribution was merely the vehicle incidental to the illegal attempt.

The distinction between a pure dual distribution case, involving a charge of attempted monopolization of the manufacturer's product, and a case involving the attempted monopolization of the industry in general, is crucial. The result of not finding a violation of section 2 under the facts of the model problem does not mean a car producer, or any manufacturer, may do anything it pleases regarding its own product. If real anti-competitive practices take place, the manufacturer may be guilty of attempting to monopolize the industry in general. For example, an auto maker could open a retail subsidiary to replace a failing independent dealership and begin selling its cars at $100 each. In such a case there would be enough evidence to allow a jury to decide whether the defendant was attempting to monopolize the entire car industry. The problem of proving the relevant product market is not the same as in the model problem. It is not intended the reader be left with the impression that because the model describes no attempted mo-

26. It is unclear in *Mt. Lebanon* whether the court faced the issue of a dangerous probability of monopolization. It is hard to imagine how, for example, Ford Motor Company, could come so close to monopolizing the entire car industry that its acts could constitute a dangerous probability of success. If this element was not made out, the case should never have gone to the jury, even if the relevant product market can be assumed to be correct.

nopolization, the manufacturer is free to do as it likes as long as it confines its actions to the market in its own cars.

A pure dual distribution case is one involving a suit based on the manufacturer's alleged anti-competitive practices in the market of its own product. The cases discussed above do not mean a pure dual distribution case is never possible. They hold, however, in an industry where several manufacturers compete, all producing interchangeable products, the relevant product market cannot be limited to one of those manufacturers' products. This rule of law leads one to consider an industry in which only one manufacturer exists. The product of such an industry would be so unique that no interchangeable products compete with it. In such a situation, it is logical to expect the relevant market, for purposes of the Sherman Act, to be determined by that one manufacturer's product. However, this case differs substantially from the model problem because the structures of the two industries involved differ. The instances where a single manufacturer's product will, by itself, constitute a relevant product market are indeed rare. A few cases have shown the situation to exist, however, infrequently.[27]

The most famous case holding a single manufacturer's product a relevant market is *United States v. Klearflax Linen Looms*.[28] Although this case was decided before *duPont* it can be easily reconciled with the cases discussed above. This decision did not involve a problem of dual distribution as set forth in the model problem. Klearflax Looms had previously sold to Floor Products, Inc., a distributor. Klearflax quit delivering linen rugs to Floor Products over a dispute concerning which one would service a government contract. The Justice Department instituted suit alleging, among other things, that Klearflax had illegally monopolized the sale of linen rugs. The district court had to decide, as a matter of law, what was the relevant product market. Although some competition between linen rugs and other types was bound to exist, Klearflax's product was unique in enough respects to negate any possibility of significant interchangeability.

> Undoubtedly, linen rugs compete with other floor coverings which are available on the market and widely, distributed, but the evidence does establish that Klearflax rugs are unique and distinc-

27. Related to this consideration is the principle that a monopoly gained by exercising business acumen is not an illegal monopoly under the Sherman Act. Neither is a monopoly which has been "thrust upon" a manufacturer by the inability of others to effectively compete in the industry. *See* United States v. Grinnell Corp., 384 U.S. 563 (1966); American Tobacco Co. v. United States, 328 U.S. 781 (1946).
28. 63 F. Supp. 32 (D. Minn. 1945).

> tive. It is not without significance that the [government] contract lists linen rugs separately from other floor coverings, and the government demand indicates their desireability, particularly for public buildings.[29]

The government quite apparently preferred Klearflax rugs and considered them as having distinctive advantages and qualities over other types of floor coverings. The district court made it quite clear Klearflax Looms was not being sued for monopolizing the manufacture of rugs in general.[30]

In *Bushie v. Stenocord Corp.*[31] the possibility of one manufacturer's product constituting a relevant market was squarely addressed. In that case Stenocord dictation machines were held not to be a market in themselves. The reason for this holding is expressed in language which also helps in understanding *Klearflax*:

> A single manufacturer's products might be found to comprise by themselves, a relevant market for the purposes of a monopolization claim, if they are so unique or so dominant in the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed.[32]

Klearflax linen rugs were unique enough to constitute a relevant product market by themselves. However, Ford or Chrysler cars are not so unique. This fact explains why the relevant product market in the model problem must be cars in general.

Another opinion of the Ninth Circuit Court of Appeals held if a private antitrust plaintiff avers the proper facts, he must be permitted to offer evidence at trial to show defendant's product constitutes a relevant product market because it is not interchangeable with other products. This decision was made in reversing a grant of defendant's motion for summary judgment in *Industrial Building Materials v. Interchemical Corp.*[33]

With regard to the section 2 charges, the *Industrial* opinion is very confusing. Industrial Building first alleged Interchemical monopolized the entire sealant industry. The affidavits from both sides, regarding the structure of the sealant industry, raised questions of fact, according

29. *Id.* at 39.
30. *Id.*
31. 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,896 (D. Ariz. March 15, 1972).
32. *Id.* at 91,720.
33. 437 F.2d 1336 (9th Cir. 1970).

to the circuit court. Industrial also charged Interchemical, if not completing the monopoly, had attempted to monopolize the sealant industry. The confusion in the opinion came about when the court said, for attempt to monopolize, no relevant product market is in issue.[34] However, immediately thereafter it was concluded because Industrial had also alleged Interchemical's sealant product, Presstite, was so unique as to constitute a relevant product market in itself, the plaintiff should have an opportunity at trial to prove the allegation. Thus, while denying the need to prove a relevant product market for attempt to monopolize, the court twice discussed at some length the two possible product markets raised by the plaintiff's allegations. Regardless of the confusion, Industrial was given the opportunity to prove Presstite products were a relevant product market in themselves.[35]

The conclusions to be gathered from all the cases discussed concerning dual distribution and section 2 of the Sherman Act are complicated and difficult of explanation. In a situation such as the model problem, where dual distribution is directly attacked as a monopolistic practice or attempt to monopolize, section 2 will rarely be applicable. This is so in an industry, such as the automobile business, where more than one manufacturer's product compete for retail sales. The critical question is always the relevant product market. In the car industry all cars compete for sales and no single manufacturer's product is unique enough to be a relevant product market. Thus, the pure dual distribution problem is not within the practices contemplated by the Sherman Act's prohibitions embodied in section 2.

If the independent dealer sues under section 2, alleging dual distribution was the vehicle by which the manufacturer monopolized or attempted to monopolize the entire industry, the same problem of relevant product market does not arise. However, such a case is not one attacking the practice of dual distribution in and of itself. It centers on the monopoly or attempt thereof, and the anti-competitive effects on the industry in general. Dual distribution is an incidental factor; a mere vehicle by which the illegal goals are sought to be accomplished.

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34. This principle was first applied in Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), where it held the relevant product market was not an issue to be discussed in analyzing an attempt to monopolize. This case was not followed in a recent case decided by the Ninth Circuit Court of Appeals. *See* Bushie v. Stenocord Corp., 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,896 (D. Ariz. March 15, 1972). Its precedential value is not very great.

35. 437 F.2d at 1345.

The only time a purely direct attack on dual distribution can be successful is if the manufacture in the action has a product which is so unique it does not compete with any others. These cases will be extremely rare because a unique product line surely invites competition from newly established firms or from older firms extending to new manufacturing areas.

The cases discussed have been confused and cited for propositions which are not based on intelligent readings. The principles of monopoly and attempts to monopolize are based on the *duPont* decision. For problems of dual distribution the same principles must be applied. A court should not misread the case law in order to find for a small, independent dealer because he represents the "underdog" in a battle against a corporate giant. The public's right to more efficient distribution of a manufacturer's product is protected by the Sherman Act. The federal courts cannot be turned into a theatre for unwarranted judicial intervention into business decisions which comply with the laws of competition promoted by the antitrust provisions.

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