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UNILATERAL REFUSALS TO SELL PRODUCTION FACILITIES: SHOULD COURTS "SHAKE" THE INVISIBLE HAND?

“A wise man never refuses anything to necessity.”*

INTRODUCTION

A unilateral refusal to deal is an independent decision of an individual person or company not to sell goods, services, or production facilities to one or more customers or competitors. Generally, a company may unilaterally refuse to deal with a party for any reason, absent a “purpose to create or maintain a monopoly” in violation of

* Publilius Syrus, Maxim 540.

1. 16 G. von Kalinowski, Antitrust Laws and Trade Regulation § 61.01 (1980). Included under the rubric of refusals to deal are absolute refusals as well as refusals to do business on any except relatively unfavorable terms. Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 847 n.1 (1955). A concerted refusal to deal or group boycott is a refusal to deal that is initiated and enforced pursuant to an agreement of two or more firms. See Hampton, Hibner, Jr. & Varner, Horizontal Restraints of Trade—The Sherman Act in Antitrust Adviser § 1.32, at 34-36 (2d ed. C. Hills 1971). Although the two terms are used interchangeably, Professor Sullivan defines a boycott as a concerted refusal to deal “aimed at depriving competitors of some needed resource,” which is per se illegal. He would evaluate all other concerted refusals according to their net impact on competitive conditions, a rule of reason. L. Sullivan, Handbook of the Law of Antitrust § 90, at 256 (1977). A concerted refusal to deal is more likely to be condemned under the antitrust laws than a unilateral one, even when both are aimed at achieving the same result. Osborn v. Sinclair Ref. Co., 286 F.2d 832, 839 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961). “[T]he distinction between unilateral and collaborative or conspiratorial action . . . reflects a philosophy that exalts the liberty, and initiative of the individual enterprise and looks with suspicion on collective action. The latter is inherently dangerous because it represents aggregations of power that are likely to be used in a manner detrimental to the public interest.” Fulda, Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?, 30 Law & Contemp. Prob. 590, 603 (1965).

2. United States v. Colgate & Co., 250 U.S. 300, 307 (1919). Unlawful unilateral refusals to deal may be distinguished according to the particular monopolistic goals they seek to achieve. For example, the refusal to deal may be employed by a monopolist in one market to distort or destroy competition in another market. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Six Twenty-Nine Prod., Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966). A monopolist can refuse to deal with customers who deal with rivals. Lorain Journal Co. v. United States, 342 U.S. 143 (1951). A company that controls a facility that cannot be easily duplicated can deny access to the facility to other firms. United States v. Terminal R.R., 224 U.S. 383 (1912), modified and aff’d, 236 U.S. 194 (1915); cf., Donovan v. Pennsylvania Co., 199 U.S. 279 (1905) (exclusion of noncompeting firm is not monopolization). A company can utilize a refusal to deal in conjunction with other coercive conduct to enforce an anticompetitive arrangement such as resale price maintenance, tying agreements, or exclusive dealing contracts. Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th
section 2 of the Sherman Act. Refusals to sell goods and services must be distinguished from refusals to sell production facilities because the potential harm of each is significantly different. The sale of goods and services often entails an ongoing series of transactions. A distributor who depends on a particular manufacturer to supply all or part of its requirements, for example, will place another order with the manufacturer each time its stock is depleted. The refusing company, therefore, may use a refusal to deal to monopolize or unreasonably restrain trade. Because the sale of production facilities involves a single transaction, however, it is less clear that this type of refusal will have a significant anticompetitive effect. Indeed, because enjoining a refusal to sell production facilities may unreasonably restrict the transfer of resources, there may be greater harm to the economy from condemning such a refusal than deferring to the refusing firm's independent business judgment. Thus, it is necessary to examine the economic consequences of a refusal when analyzing production facility cases.

Because few cases have addressed the issue of the legality of unilateral refusals to sell production facilities, there is little precedent to guide the courts in making their decisions. The question is likely to be increasingly contested, however, as companies seek to contract their operations in declining American industries such as automobiles

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7. Competitive markets may be maintained by ensuring that resources may be transferred to their most productive employments. D. Needham, Economic Analysis and Industrial Structure 138 (1969); F. Scherer, Industrial Market Structure and Economic Performance 9, 18 (1970); A. Smith, Wealth of Nations 99, 125-26, 134 (Cannan ed. 1937); accord L. Weiss, Case Studies in American Industry 10 (3d ed. 1980). Furthermore, the theory of comparative advantage holds that allocative efficiency is maximized by transferring resources to those industries that have a comparative cost advantage. Id. at 212-13.
and steel. This Note examines unilateral refusals to sell production facilities according to established legal standards and economic theory. It concludes that a company should have an unfettered right to refuse to sell its production facilities unless the refusal is part of a course of conduct calculated to distort or destroy competition.

I. UNILATERAL REFUSALS TO SELL GOODS AND SERVICES: THE SCOPE OF A PERMISSIBLE REFUSAL UNDER THE SHERMAN ACT

Most contested unilateral refusals to deal have involved refusals to sell goods to customers. In United States v. Colgate & Co., the defendant manufacturer refused to sell its products to dealers who would not adhere to its fixed resale prices. The Government alleged that Colgate’s resale price maintenance scheme violated section 1 of the Sherman Act, which prohibits contracts, combinations, and conspiracies in restraint of trade. Although the Supreme Court rejected the Government’s contention because there was no evidence of an agreement between Colgate and the dealers, the Court announced a broad rule upholding the right of a firm to decide independently with whom it will deal. The Court wrote that

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

Thus, a unilateral refusal to deal is lawful unless it violates section 2 of the Sherman Act, which prohibits persons from monopolizing or attempting to monopolize any part of interstate commerce. Because

10. 250 U.S. 300 (1919).
11. Id. at 304-05.
12. Id. at 302-03.
13. Id. at 305-07.
14. Id. at 307.
15. 15 U.S.C. § 2 (1976). Section 2 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 the trade or commerce among the several States.” Id.; see Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Times-Picayune
a unilateral refusal to deal, by definition, precludes concerted action, it is not prohibited by section 1 of the Sherman Act.\textsuperscript{16}

\textsuperscript{16} The Court considered when a firm’s conduct would go beyond a simple refusal to deal and become a contract, combination, or conspiracy in restraint of trade in violation of § 1 of the Sherman Act in United States v. Parke, Davis & Co., 382 U.S. 29 (1960). To insure compliance at the retail level, Parke, Davis induced wholesale distributors to discontinue sales to retailers who refused to adhere to its resale prices. Id. at 33. The Court held that Parke, Davis’s use of wholesalers to enforce its resale price maintenance scheme on retailers constituted an unlawful combination in restraint of trade prohibited by § 1. \textit{Id.} at 47. Thus, according to \textit{Parke, Davis}, a company’s conduct is unilateral if it consists of a mere, independent announcement of policy and a refusal to sell. \textit{Id.} at 44. Any attempt to enforce an anticompetitive policy with the aid of other parties in addition to a simple refusal to deal, elevates the firm’s conduct to a restraint of trade that violates § 1 of the Sherman Act. \textit{Id.}, see \textit{Sahm v. V-1 Oil Co.}, 402 F.2d 69, 71 (10th Cir. 1968); \textit{Lessig v. Tidewater Oil Co.}, 327 F.2d 459, 464 (9th Cir.), \textit{cert. denied}, 377 U.S. 993 (1964); \textit{Carr Elecs. Corp. v. Sony Corp. of Am.}, 472 F. Supp. 9, 11 (N.D. Cal. 1979); \textit{Pearl Brewing Co. v. Anheuser-Busch Inc.}, 339 F. Supp. 945, 951 (S.D. Tex. 1972); \textit{Carbon Steel Prods. Corp. v. Alan Wood Steel Co.}, 289 F. Supp. 584, 588 (S.D.N.Y. 1968). If a contested refusal to deal is deemed unilateral, as defined by the Supreme Court in \textit{Parke, Davis}, the legality of the refusal is then evaluated under the principle expressed in \textit{Colgate}. See \textit{Mid-Texas Communications Sys.}, Inc. v. American Tel. and Tel. Co., 615 F.2d 1372 (5th Cir.), \textit{cert. denied}, 101 S. Ct. 286 (1980); \textit{Clairol, Inc. v. Boston Discount Center of Berkley, Inc.}, 608 F.2d 1114 (6th Cir. 1979); \textit{Universal Brands, Inc. v. Philip Morris, Inc.}, 546 F.2d 30 (5th Cir. 1977); \textit{Reed Bros. v. Monsanto Co.}, 525 F.2d 486 (8th Cir. 1975), \textit{cert. denied}, 423 U.S. 1055 (1976); \textit{Bushie v. Stenocard Corp.}, 460 F.2d 116 (9th Cir. 1972); \textit{Fontana Aviation, Inc. v. Beech Aircraft Corp.}, 432 F.2d 1080 (7th Cir. 1970), \textit{cert. denied}, 401 U.S. 923 (1971); \textit{Shapiro v. General Motors Corp.}, 472 F. Supp. 636 (D. Md. 1979); \textit{Natrona Serv. Inc. v. Continental Oil Co.}, 435 F. Supp. 99 (D. Wyo. 1977); \textit{Paddington Corp. v. Major Brands, Inc.}, 359 F. Supp. 1244 (W. D. Okla. 1973); \textit{Kendall Elevator Co. v. LBC&W Assocs.}, 350 F. Supp. 75 (D.S.C. 1972); \textit{Carbon Steel Prods. Corp. v. Alan Wood Steel Co.}, 289 F. Supp. 584 (S.D.N.Y. 1968); \textit{Arzee Supply Corp. v. Ruberoid Co.}, 222 F. Supp. 237 (D. Conn. 1963).
A unilateral refusal to deal can be characterized as an act of unlawful monopolization under section 2 of the Sherman Act. To establish unlawful monopolization, the plaintiff must prove the defendant's possession of monopoly power in the relevant market and the defendant's "willful acquisition or maintenance of that power." A defendant's purpose may be inferred from circumstances surrounding its refusal to deal. For example, a monopolist manufacturer's refusal to deal that follows an unsuccessful attempt to purchase the plaintiff's retail business after acquiring other, competing retail dealerships has been held to manifest "an intention and desire to perpetuate a monopoly."

19. The relevant market is comprised of a product and geographic market. See A. Austin, Antitrust: Law, Economics, Policy § 2.3 (1976).
22. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927) (citation omitted). In Kodak, plaintiff, a photographic supply store, had purchased goods from Kodak, a monopolist manufacturer of photographic materials, on the same terms made available to other dealers. After acquiring control of several competing supply stores, Kodak made an unsuccessful attempt to purchase the plaintiff’s business. Shortly thereafter, Kodak refused to sell supplies to the plaintiff at dealer prices. The plaintiff was able to obtain the supplies from Kodak only at the prices at which Kodak’s newly acquired dealers sold to consumers. Plaintiff, therefore, was effectively unable to compete with the other dealers. One commentator has disagreed with the Supreme Court’s finding that Kodak’s refusal to deal evinced a monopolistic purpose. "Kodak’s offer to buy out its second-level competitors [should
Unlawful monopolization has also been found when a firm with a bottleneck monopoly in one market refuses to deal with competing firms in another market. A bottleneck monopoly is one lawfully obtained from possession of some scarce resource or facility, such as a transportation terminal or power transmission line, that cannot easily or economically be obtained or duplicated by competitors. When a bottleneck monopolist begins to operate in the markets of its suppliers or customers, its refusal to sell to competitors who are also customers or suppliers in the other markets enables it to eliminate those competitors. A refusal to sell under these circumstances is, therefore, deemed to be aimed solely at the maintenance or creation of a monopoly in those markets. Equal access to the monopoly market on fair terms is generally required.

When the unilateral refusal is intended to create a monopoly, rather than to maintain one, it can be challenged under section 2 as an attempt to monopolize a relevant market. A proper cause of action for attempt requires that the plaintiff allege a specific intent to

23. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Otter Tail produced electric power and sold it to 465 towns in three states, transmitting electricity through its own lines. In many areas of Otter’s territory, these were the only transmission lines available (Otter’s bottleneck monopoly). Otter Tail provided power pursuant to municipally granted franchises for a fixed term. Upon expiration of these franchises, various towns sought to replace Otter with municipal systems. Otter refused to sell power at wholesale to municipal systems and refused to transfer power of other wholesalers over its transmission lines to the municipalities. Those towns that did not have access to other transmission facilities were, therefore, forced to renew Otter Tail’s retail franchise. The Supreme Court held that there was sufficient evidence to support a finding that Otter’s refusals to deal were aimed solely at the maintenance of its retail monopolies. Id. at 378.

monopolize\textsuperscript{28} and a dangerous probability of success.\textsuperscript{29} The specific intent element focuses on the impact of the defendant's conduct on competitive conditions.\textsuperscript{30} The defendant's state of mind is irrelevant.\textsuperscript{31} Thus, a defendant may be held to have a specific intent to monopolize when its refusal to deal has an unreasonably anticompetitive effect on the market.\textsuperscript{32} Specific intent may be inferred from

\textsuperscript{28} Specific intent has been defined as an "intent to destroy competition or build monopoly." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953). See note 20 supra for an explanation of general intent.

\textsuperscript{29} Swift & Co. v. United States, 196 U.S. 375 (1905). In Swift, Justice Holmes wrote that "[w]here acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." Id. at 396; see Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 332 U.S. 172, 177-78 (1965); Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951); United States v. Columbia Steel Co., 334 U.S. 495, 531-32 (1948); American Tobacco Co. v. United States, 228 U.S. 781, 809 (1916); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 850, 845 (9th Cir. 1980); Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 54 (2d Cir. 1979); White Bag Co. v. International Paper Co., 579 F.2d 1384, 1387 (4th Cir. 1974); Structure Probe, Inc. v. Franklin Inst., 450 F. Supp. 1272, 1281 (E.D. Pa. 1978), aff'd, 595 F.2d 1214 (3d Cir. 1979); L. Sullivan, supra note 1, § 50, at 134. See generally, Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich. L. Rev. 373 (1974); Hawk, Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine, 58 Cornell L. Rev. 1121 (1973). Only the Ninth Circuit has eliminated the dangerous probability requirement. See Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), cert. denied, 377 U.S. 993 (1964). But cf., Janich Bros. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977) (dangerous probability of success is an element of attempted monopolization unless there is proof of specific intent and predatory conduct), cert. denied, 439 U.S. 829 (1978); Bushie v. Stenocard Corp., 460 F.2d 116, 121 (9th Cir. 1972) (rejection of dangerous probability requirement only when attempted monopolization claim founded on a substantial claim of restraint of trade).

\textsuperscript{30} See California Computer Prods., Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979); Berkley Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); Greyhound Computer Corp. v. IBM Corp., 559 F.2d 486 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978); Scott Publishing Co. v. Columbia Basin Publishers Inc., 293 F.2d 15 (9th Cir. 1961); Hawk, supra note 29, at 1171-72.

\textsuperscript{31} See note 30 supra.

\textsuperscript{32} H.E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2d Cir. 1963). "[S]ome appreciable part" of the market must be adversely affected by the refusal. Id. (appreciable part not affected when defendant's refusal to fabricate granite prevented plaintiff from supplying granite for the construction of a single building); see Best Advertising Corp. v. Illinois Bell Tel. Corp., 339 F.2d 1009 (7th Cir. 1965) (advertising agency's refusal to accept Yellow Pages ads from another agency in one section of Illinois did not constitute illegal monopolization or attempt to monopolize when there were a number of classified directories throughout Illinois). See also United States v. Foley, 598 F.2d 1323, 1329 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); Santa Fe-Pomeroy, Inc. v. P&Z Co., 569 F.2d 1054, 1100 (9th Cir. 1982).
a refusal to deal if the refusal is aimed at enhancing or acquiring monopoly power, but not if it is motivated by a legitimate business purpose that encourages the improvement of a company's competitive viability. Thus, the reduction of costs and the improvement of production or distribution efficiency are legitimate business aims that may justify a unilateral refusal to deal. In Lorain Journal Co. v. United States, for example, the only newspaper in Lorain, which was read by ninety-nine percent of the families in town, refused to accept advertisements from parties who also placed ads with a newly established radio station. The Supreme Court ruled that the defendant's refusal was intended to eliminate the radio station as a


35. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 623-24 (1953). In Times-Picayune, defendant newspaper refused to sell ad space to buyers of general display and classified advertising unless the ads appeared in both the morning and evening editions. This practice reduced printing costs. Defendant's contracts for the sale of advertising were challenged as vehicles utilized in an attempt to monopolize a segment of interstate commerce in violation of § 2 of the Sherman Act. The Supreme Court upheld the defendant's conditions for obtaining advertising space because they were predominantly motivated by legitimate business purposes, characteristic of industry practice, and without significant anticompetitive effect. Id. at 624-27.

36. Sargent-Welch Scientific Co. v. Ventron Corp, 567 F.2d 701, 712 (7th Cir. 1977), cert. denied, 439 U.S. 822 (1978). A company with monopoly power “is not forbidden from improving [its] efficiency in manufacturing or marketing, even though the effect of doing so will be to maintain or improve [its] sales.” Id.

37. International Rys. of Cent. Am. v. United Brands Co., 532 F.2d 231 (2d Cir.), cert. denied, 429 U.S. 835 (1976). The abandonment of an unprofitable business is a legitimate business reason for refusing to deal. Id. at 239-40. In Pacific Tobacco Corp. v. American Tobacco Co., [1974-1] Trade Cas. (CCH) ¶ 74,991 (D. Or. 1974), defendants independently refused to sell cigarettes to a plaintiff who wanted to market them under the brand name Cancer “so as to encourage smokers to stop smoking by calling attention to the health hazards” of their habit. Id. at 96,398. Defendants claimed that their individual refusals were based on the belief that plaintiff’s product would adversely affect the entire cigarette industry. The court held that defendants’ refusals were motivated by legitimate business concerns and thus not violative of the Sherman Act. Id. at 96,402.

38. 342 U.S. 143 (1951).
competitor for local advertising and, thereby, to gain a monopoly in the local dissemination of news and advertising. The Supreme Court held that the refusal to deal constituted an attempt to monopolize because the refusal was not predominantly motivated by legitimate business purposes.

In addition to specific intent, most courts require proof of dangerous probability of success as an element of an attempt to monopolize claim. Dangerous probability of success may be shown when "the means used, if not abated, are likely to move the defendant progressively closer to monopoly." An examination of dangerous probability of success focuses on a defendant's market share both before and after the challenged conduct has occurred because the conduct's "restrictive effects will vary directly with the market power of the firm involved." A predominant share of the market ordinarily implies monopoly power, but need not do so. Other structural characteristics of the industry in which a defendant is engaged are also

39. Id. at 153. Defendant's attempt to monopolize succeeded in depriving the radio station of income without forcing it out of business. Id.
40. Id. at 154.
41. See note 29 supra and accompanying text.
42. L. Sullivan, supra note 1, § 51, at 137.
43. Hawk, supra note 29, at 1151.
44. Id. at 1154 (quoting Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281, 314 (1956)). The dangerous probability requirement is a safeguard against condemnation of conduct that is neither clearly harmful nor beneficial. Id. at 1155, 1174. Professor Sullivan has argued, however, that there is no reason "to hesitate to condemn conduct short of close probability of success on the ground that such a rule would unduly discourage effective, though aggressive, competitive conduct. By requiring (under the intent test) that the conduct be of a kind plainly threatening competitive conditions, the rule already filters out any serious risk that desirable conduct will be inhibited. Conduct which constitutes an attempt is predatory, coercive, or calculated to heighten entry barriers; there is nothing which should make us hesitate to condemn it if the evidence leaves no doubt that the conduct has been properly characterized." L. Sullivan, supra note 1, § 51, at 138 (footnote omitted).
See generally American Tobacco Co. v. United States, 328 U.S. 781, 813-14 (1946); Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979); United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).
considered. Barriers to entry that result from a defendant's conduct, for example, may be evidence of monopoly power. Conversely, low or no barriers to entry imply the absence of monopoly power. Thus, "only a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists."

In evaluating unilateral refusals to deal, a few courts have adopted a broader legal standard that proscribes some refusals even when they do not manifest a purpose to create or maintain a monopoly. These courts have held that a unilateral refusal to deal is unlawful if it is an unreasonable restraint of trade, a restraint that is anticompetitive.

Other measures of monopoly power include the Lerner index, which indicates the departure of a company's price from its marginal cost. The Lerner index value for a company in a perfectly competitive market is zero and is correspondingly higher "[t]he more a firm's pricing decisions depart from the competitive norm." F. Scherer, supra note 7, at 50. The Herfindahl index, which correlates the number of sellers in a market with each seller's market share, assigns values zero to one, one representing pure monopoly, to reflect the degree of concentration in the market. Id. at 51.

47. An artificial barrier to entry is a practice of an existing company, such as predatory pricing, that prevents new companies from entering a market. Natural barriers to entry are basic market conditions, such as economies of large scale operation. See L. Sullivan, supra note 1, § 23, at 77-79.
50. Byars v. Bluff City News Co., 609 F.2d 843, 851 (6th Cir. 1979). "[M]arket analysis has but one function—to help pinpoint the danger areas. This tool is not a qualitative tool. It tells where one may expect a monopoly or a substantial lessening of competition in a given line of commerce carried on in a given geographical area."
52. Compare Osborn v. Sinclair Ref. Co., 286 F.2d 832, 839 (4th Cir. 1960) (absent a purpose to create or maintain a monopoly or the existence of a conspiracy or combination, a refusal to deal is lawful even if its underlying aims constitute an unreasonable restraint of trade), cert. denied, 366 U.S. 983 (1961) with Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1115-16 (5th Cir. 1979) (refusal to deal is unlawful if it has any anticompetitive purpose or effect or if it creates or maintains a monopoly) and Tim W. Koerner & Assocs., Inc. v. Aspen Labs Inc., 492 F. Supp. 294, 302 (S.D. Tex. 1980) (same) and McDaniel v. General Motors Corp., 480 F. Supp. 666, 673 (E.D.N.Y. 1979) (same), aff'd, 628 F.2d 1345 (2d Cir. 1980).
tive in purpose or effect. This standard traditionally has been applied to concerted conduct alleged to violate section 1 of the Sherman Act. When it is applied to a unilateral refusal to deal, however, the standard focuses on the net competitive impact of a single actor's conduct. If its purpose is not clear, or if its effects are varied, a refusal is evaluated according to its net competitive effect. The refusal is condemned if it has an adverse effect, such as the maintenance of resale prices or a significant restriction on entry, on competitive market conditions.

II. THE LEGALITY OF REFUSALS TO SELL PRODUCTION FACILITIES: A CRITICAL ANALYSIS

To determine whether unilateral refusals to sell production facilities affect competitive markets in a manner that is prohibited by section 2 of the Sherman Act, it is necessary to apply the foregoing legal standards and to examine certain relevant economic concepts. This analysis will indicate that a unilateral refusal to sell production facilities, by itself, does not harm competition. Thus, regardless of whether courts employ the Colgate standard or the broader restraint of trade standard, they will seldom, if ever, find a violation of section 2 in production facility cases.

53. California Computer Prods., Inc. v. IBM Corp., 613 F.2d 727, 735-36 (9th Cir. 1979). To prove an attempt to monopolize, for example, the Ninth Circuit requires a showing of "(1) only specific intent and (2) some illegal (under Section 1) or predatory activity from which specific intent can be inferred." Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 627 (9th Cir. 1977) (citations omitted).


55. See Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); United States v. New York Coffee & Sugar Exch., 263 U.S. 611 (1924); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Cargill v. Board of Trade, 164 F.2d 820 (7th Cir. 1947), cert. denied, 333 U.S. 880 (1948); L. Sullivan, supra note 1, § 71, at 194-95.

A. Restraint of Trade

The restraint of trade standard is derived from the underlying purpose of the Sherman Act—the preservation of competitive markets through the protection of the competitive process. Thus, when employed to evaluate the legality of unilateral refusals to sell production facilities, the restraint of trade standard provides a method for determining whether the refusals unreasonably interfere with the competitive process.

Competition can be defined in terms of models that describe the general structure of a relevant market. The model of pure and perfect competition describes a competitive ideal. An industry is perfectly competitive if it is comprised of a large number of companies producing a homogeneous product, each company having such a small share of the market that it cannot significantly vary the price by varying output. Perfectly competitive markets are also characterized by the presence of perfect knowledge of market conditions, continuous divisibility of raw materials and final products, and the absence of barriers to entry and exit. The model of perfect competition, however, does not accurately reflect the realities of the American market economy. As one economist noted, "perfect com-

57. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688-89 (1978); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979); Comment, Draining the Alcoa "Wishing Well": The Section 2 Conduct Requirement After Kodak and Calcomp, 48 Fordham L. Rev. 291, 297 (1979) [hereinafter cited as Section 2 Conduct Requirement]. "Competition should be considered not just a narrow term of law nor just a part of the logic of economics but as a social mechanism, as a device for administering society's economic activities to achieve economic and social and political objectives." Bernhard, Divergent Concepts of Competition in Antitrust Cases, 15 Antitrust Bull. 43, 68 (1970).

58. See generally Bernhard, supra note 57, at 44.

59. Structural characteristics of a market include the number of buyers and sellers, product differentiation, barriers to entry, cost structures, vertical integration, and the number of conglomerate firms. F. Scherer, supra note 7, at 4-5. Performance, which is evaluated in terms of production and allocative efficiency, progress, full employment, and equity, is affected by the conduct of sellers and buyers. Id. at 3-4. Conduct comprises "the choices the firm makes among alternative possible responses to the conditions which it faces, its tactics as it strives in the market to achieve its goals." L. Sullivan, supra note 1, § 6, at 23. An evaluation of conduct involves the examination of pricing behavior, product strategy, research and innovation, and legal tactics. F. Scherer, supra note 7, at 5. Market conduct is largely determined by market structure. Id. at 4. This Note confines the discussion of competition primarily to the structural characteristics of competitive markets. The competitive impact of refusals to sell production facilities will be examined in terms of structural characteristics of the relevant market before and after the refusal.

60. A. Austin, Antitrust: Law, Economics, Policy § 1.4 (1976); F. Scherer, supra note 7, at 9-10.

61. See note 60 supra.
petition’ does not and cannot exist and has presumably never existed.” Nevertheless, the theory’s importance rests on its underlying goals. In a competitive market, no one company or group of companies should exercise significant control over price, the quantity of products supplied should reflect the demands of consumers, and the interaction of product supply and consumer demand in the market should determine the product’s price.

Dissatisfaction with the model of perfect competition led to the formulation of new competitive models. To reconcile the goals underlying the perfectly competitive model with real-world conditions, the new models suggest criteria for determining whether industries are workably competitive. To be workably competitive, a market should have at least as many companies as are warranted by scale economies. Although sellers need not be so numerous as to be devoid of market power, customers should have a variety of suppliers from which to choose. Furthermore, there should be no artificial barriers to mobility or entry. The existence of these market conditions indicates that resources are being allocated efficiently.

63. F. Scherer, supra note 7, at 11-19; L. Sullivan, supra note 1, §§ 5-6, at 20-24.
64. See L. Sullivan, supra note 1, § 6, at 22-23.
65. Bernhard, supra note 57, at 75.
66. See F. Scherer, supra note 7, at 36-37.
67. "Fewness is not necessarily noncompetitive. . . . The key condition is not large numbers but independence; although large numbers are not necessary for independence, they nearly always suffice." Economic Concentration: Hearings on Economic Concentration before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 229 (1964) (statement of Morris A. Adelman).
68. See Markham, An Alternative Approach to the Concept of Workable Competition, 40 Am. Econ. Rev. 349, 356 (1950).
69. See F. Scherer, supra note 7, at 37. Professor Markham has proposed a definition of workable competition in terms of dynamic market conditions. "An industry may be judged to be workably competitive when, after the structural characteristics of its market and the dynamic forces that shaped them have thoroughly been examined, there is no clearly indicated change that can be effected through public policy measures that would result in greater social gains than social losses." Markham, supra note 68, at 361.
70. D. Needham, supra note 7, at 138; F. Scherer, supra note 7, at 18. The efficient allocation of resources is an important benefit derived from, as well as a way of obtaining, competitive markets. Id. at 9, 18. Other benefits of competition include maximum production efficiency, relatively low prices and costs, and a decentralization of power. Id. at 11-13. Adam Smith posited that, notwithstanding short run aberrations from competition, competitive markets can be attained as long as resources move from industries in which their returns are low to those in which their returns are high. The long run mobility of resources requires an absence of artificial barriers to resource transfers. See A. Smith, supra note 7, at 99, 125-26, 134; L. Weiss, supra note 7, at 10.
Restraint of trade analysis examines the degree of competition within the market in question prior to the refusal. If there are a sufficiently large number of sellers and low barriers to entry, the refusal will have a negligible impact on competitive conditions.\textsuperscript{71} Easy entry will ensure that the market remains competitive.\textsuperscript{72} Thus, when a company that operates in a workably competitive market refuses to sell its production facilities to a potential entrant, competitive pressures from other existing companies, as well as opportunities for \textit{de novo} entry, prevent the refusal from having an unreasonably anticompetitive effect, regardless of whether the company that is the object of the refusal ever enters the market.\textsuperscript{73}

\textit{Local 1330, United Steel Workers of America v. United States Steel Corp.}\textsuperscript{74} illustrates that a refusal to sell production facilities does not, by itself, have an anticompetitive effect on the market in which the refusing company operates. United States Steel Corporation (USS)


\textsuperscript{74} 631 F.2d 1264 (6th Cir. 1980). The district court dismissed the antitrust claim on the ground that it was not ripe for adjudication. The court reasoned that no binding offer to purchase the Youngstown plants had been submitted to United States Steel (USS). \textit{Id.} at 1282. The district court's judgment on the antitrust claim was vacated and remanded by the Sixth Circuit for briefing and argument on the merits. The two issues on remand were whether there had been "a flat refusal to deal with plaintiffs on the basis alleged," and if so, did that refusal constitute an antitrust violation. \textit{Id.} at 1283. The Sixth Circuit affirmed the district court's dismissal of plaintiff's claims under federal labor law, contract law, and property law. \textit{Id.} In addressing the question of the legality of USS' refusal to sell its plants to the plaintiffs, the Sixth Circuit failed to distinguish between refusals to sell production facilities and refusals to sell goods. The court stated that "[t]he ramifications of [USS'] refusal would be far-reaching. Could United States Steel, in the event the Chrysler Corporation sought to manufacture some portion of its own steel needs, refuse to sell steel to that corporation because of the massive aid which the federal government has seen fit to supply to Chrysler?" \textit{Id.} (footnote omitted). USS could refuse to supply steel to Chrysler absent a purpose to create or maintain a monopoly. \textit{See} note 2 \textit{supra} and accompanying text. The court's question, however, fails to recognize the different economic harms created by a refusal to sell production facilities and a refusal to sell goods and services. \textit{See} notes 4-7 \textit{supra} and accompanying text. On remand, the complaint was dismissed on the ground that plaintiffs lacked standing to sue. Williams v. United States Steel Corp., No. 79-2337 (N.D. Ohio Nov. 19, 1980).
announced the closing of two steel mills located in Youngstown, Ohio because they were unprofitable and "could not be made otherwise due to obsolescence and change in technology, markets, and transportation." The Steelworkers, former employees of the plants, expressed an interest in purchasing and operating the steel mills. The Steelworkers formed the Community Steel Corporation and hoped to obtain the capital necessary to acquire the Youngstown mills through a federally guaranteed loan. After USS rejected the Steelworkers' purchase proposal, stating that it would not sell to a government subsidized competitor, the Steelworkers claimed that USS violated section 2 of the Sherman Act.

Under the restraint of trade analysis, USS' refusal could not have violated section 2. Market share statistics reveal the existence of workable competition within the American steel industry. Concentration within the industry has declined over time, and the number of steel companies has increased steadily. Consequently, USS' share of the market has diminished. This steady erosion of the market shares of the dominant companies in the industry reflects low

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75. 631 F.2d at 1266. For a discussion of how unions may help to cause this result, see Medoff, Layoffs and Alternatives under Trade Unions in U.S. Manufacturing, 69 Am. Econ. Rev. 380 (1979).
76. Brief of the Appellants at 9, Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).
77. Reply Brief of the Appellants at 15-16, Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).
78. Sease, Closing of a Steel Mill Hits Workers in U.S. With Little Warning, Wall St. J., Sept. 23, 1980, at 20, col. 2; Brief of the Appellants at 9, Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).
79. Brief of the Appellants at 33-38, Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).
81. The four-firm concentration ratio is the market share of the four largest firms in the industry. L. Weiss, supra note 7, at 6-8. Thus, an industry is deemed to be an oligopoly, a few sellers, each with substantial monopoly power, F. Scherer, supra note 7, at 10, when its four-firm concentration ratio exceeds 50%. L. Weiss, supra note 7, at 6-8. The concentration ratio for the steel industry, based on physical units of production and shipments, declined from 64.7% in 1942 to 52.8% in 1976. FTC Report, supra note 80, at 53. Based on the value of shipments in 1972, the four-firm concentration ratio was 45%, just slightly higher than U.S. manufacturing generally. Id. at 44.
82. The number of companies increased from 148 in 1958 to 241 in 1972. Id.
83. Id. at 169.
natural and artificial barriers to entry. To the extent entry has been limited, that limitation is primarily attributable to natural barriers such as the steel industry's relatively low levels of profitability, and the relatively large size of capital investment required to establish a firm of minimum optimal size. Profits in steel have been consistently below the average for all manufacturing industries. The barrier created by the large absolute cost of entry, however, has been eroded by the emergence of small steel mills or minimills, which require lower capital investment than larger mills.

The influx of relatively low priced steel imports provides further evidence of the absence of substantial entry barriers. Although domestic consumption of foreign steel is limited by a government-created barrier to entry, the trigger or reference price system, Japanese producers had been able to offer most steel products at

84. See F. Scherer, supra note 7, at 231-32.
85. Id. at 232 n.62; L. Weiss, supra note 7, at 202. Another barrier to entry is the concentrated control over iron ore resources. This barrier has been lowered by the growing international market in ore. Id. at 166.
86. FTC Report, supra note 80, at 67; Kiers, Putting Steel Into America's Share of World Markets, N.Y. Times, Nov. 7, 1979, § A, at 31, col. 5. USS announced a loss of $561.7 million for the fourth quarter of 1979. Salpukas, U.S. Steel Has a Record Loss, N.Y. Times, Jan. 30, 1980, § D, at 4, col. 3. Persistently low profits indicate that resources are not being allocated efficiently. L. Weiss, supra note 7, at 11. One consequence of the poor return on investment in steel production has been the diversification of many American steel producers into other industries. FTC Report, supra note 80, at 64. USS, for example, now operates in such other industries as cement, real estate development, coal and chemicals, and steel structure building. Id. Non-steel operations comprised 86% of USS' operating income in 1978. N.Y. Times, March 15, 1979, § D, at 4, col. 2.
88. FTC Report, supra note 80, at 28; L. Weiss, supra note 7, at 161 n.3.
89. See American Iron and Steel Institute, Annual Statistical Report 8 (1979); FTC Report, supra note 80, at 69. As a percentage of domestic shipments, imports have ranged between 14% and 18% since 1976. Id. Imports constituted 16.6% of domestic shipments during the first eight months of 1980. American Iron and Steel Institute, Apparent Supply of Steel Mill Products (Net Tons) Year 1980, at 2 (1980).
90. In February 1978, in response to the complaints of American steel producers, the Secretary of the Treasury announced a system of "trigger prices" based on Japanese costs for steel production and transportation. Under this system, if any foreign steel producer attempts to sell steel products in the United States below the established trigger price, an investigation follows. If the government investigation reveals that the foreign producer is selling steel in the United States at prices below the producer's costs, a penalty of increased duties is imposed. L. Weiss, supra note 7, at 211-12. Although trigger pricing was suspended from March to October of 1980, the system is currently in effect and prices vary according to the cost of Japanese steel products. Wall St. J., Feb. 17, 1981, at 8, col. 2. Until 1982, USS initiated all of the price changes in the steel industry. After 1962, when other price leaders appeared, USS began to give secret discounts on announced list prices. Discounting
prices ten to twenty percent below those of American producers.91 Because of recent increases in the trigger price and tariffs, however, Americans currently pay more for Japanese steel than for American steel.92 Nevertheless, the Japanese possess large advantages in the cost per ton of producing steel.93 These lower production costs94 should result in an increase in the domestic consumption of imported steel, creating further competitive pressures on domestic producers.

Finally, USS' refusal does not necessarily preclude the Steelworkers' entry.95 If a government guaranteed loan had been available for

by small domestic steel companies and foreign steel producers prevented any one price leader from raising prices significantly above competitive levels. This change in pricing practices indicated that the industry was becoming more competitive. FTC Report, supra note 80, at 159-61; F. Scherer, supra note 7, at 167-69. Some American producers contended that low import prices were the result of cyclical dumping, L. Weiss, supra note 7, at 210, the pricing of exports below domestic levels during recessions when domestic demand is low. FTC Report, supra note 80, at 228. Dumping may be defined as exporting at prices below the costs of production. L. Weiss, supra note 7, at 211. In practice, the foreign cost of production is "a constructed value of average cost based on the direct cost per unit (materials, energy, and labor) plus a minimum of 10% of direct cost for overhead expense and a minimum of 8% of direct cost plus overhead for profits." Id. (footnote omitted). Trigger prices are based on this cost. Id. at 211-12. The trigger pricing system has been described as a "deal" between the Carter Administration and American steel producers to prevent the latter from initiating antidumping suits against our European allies and alienating them in the process. Big Steel's Bluff—and Problem, N.Y. Times, Feb. 4, 1980, § A, at 18, col. 1. It is estimated that, at prevailing price and consumption levels, trigger prices impose an additional cost on American steel consumers of about $1 billion annually. There was an additional, estimated $177 million lost because of the misallocation of resources resulting from the reference price system. FTC Report, supra note 80, at 557. Furthermore, the reference price system may have adversely affected the international competitive position of all products composed of steel. Silk, Inflation, Trade Protectionism and Rising Steel Prices, N.Y. Times, May 11, 1978, § D, at 5, col. 1.

92. N.Y. Times, Feb. 22, 1981, § A, at 18, col. 1. It is estimated that, at prevailing price and consumption levels, trigger prices impose an additional cost on American steel consumers of about $1 billion annually. There was an additional, estimated $177 million lost because of the misallocation of resources resulting from the reference price system. FTC Report, supra note 80, at 557. Furthermore, the reference price system may have adversely affected the international competitive position of all products composed of steel. Silk, Inflation, Trade Protectionism and Rising Steel Prices, N.Y. Times, May 11, 1978, § D, at 5, col. 1.
93. COWPS Report, supra note 91, at xvi. According to one estimate, foreign steel is now 5% more expensive than domestic steel because of increased trigger prices and transportation and tariff costs borne by steel imports. N.Y. Times, Feb. 22, 1981, § 3, at 18, col. 3. Prior to the recently announced trigger price increase, however, Japanese total steel production costs were estimated to be 15% to 20% below those of American producers. COWPS Report, supra note 91, at xvi. Although trigger prices are to rise 4.4%, Japanese unit production costs have risen only 2.7%. N.Y. Times, Feb. 22, 1981, § 3, at 18, col. 3. The Japanese, therefore, still have a cost advantage that is masked by two inflationary, protectionist devices—trigger prices and tariffs.
94. The cost advantages are primarily attributable to the lower relative cost of Japanese labor. COWPS Report, supra note 91, at xv. The higher productivity of Japanese labor accounts primarily for its relatively lower cost. Id. at 43-46; L. Weiss, supra note 7, at 212.
95. In United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958), Bethlehem Steel argued that it could not operate in the Chicago area unless it
the purchase of the Youngstown plants, it probably would have been available for the purchase of alternative plants of equivalent cost—whether already existing or newly constructed facilities.\(^96\)

Although USS' refusal did not have an anticompetitive effect, it is less clear that the refusal did not have an anticompetitive purpose. USS announced that it would not sell its mills to any government subsidized competitors.\(^{97}\) This stated reason for not selling to the Steelworkers may suggest discrimination. It does not necessarily imply, however, that USS intended to foreclose completely the Steelworkers' entry into the market or to distort or destroy competition.\(^98\) Indeed, USS could not distort or destroy competition in the steel industry by a refusal to sell its facilities.\(^99\) Thus, USS' actual purpose for refusing to sell should not affect the conclusion as to the refusal's legality.

Restraint of trade analysis changes when the industry in question does not appear to be workably competitive. When entry is impossible except through the purchase of existing production facilities, the propriety of a refusal to sell such facilities can be determined only by identifying the source of the entry barriers. It is important to discover whether barriers to de novo entry are primarily attributable to practices of the defendant apart from its refusal,\(^{100}\) or to natural conditions of a particular market, such as economies of scale.\(^{101}\) Only artificial barriers, those erected by a defendant's conduct, are subject to condemnation under the antitrust laws.\(^{102}\)

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acquired the Youngstown Sheet and Tube Company. After the merger was denied, Bethlehem constructed a new plant at Burns Harbor, Indiana. FTC Report, \textit{supra} note 80, at 59. \textit{See generally} Barber, \textit{supra} note 1, at 871.

\(^96\) Another steel company has received government-backed financial assistance at its inception. L. Weiss, \textit{supra} note 7, at 201.

\(^97\) \textit{See} note 78 \textit{supra} and accompanying text.


\(^99\) \textit{See} notes 80-96 \textit{supra} and accompanying text.


\(^101\) \textit{See} Brozen, \textit{Competition, Efficiency, and Antitrust}, in \textit{The Competitive Economy} 8-11 (1975). Professor Brozen argues that the Antitrust Division of the Justice Department should confine its activities to the removal of artificial barriers to entry. There would be no need, therefore, to attempt to break up highly concentrated industries or to become entangled in questions of what constitutes the relevant market. \textit{Id.} at 8.

A potential competitor that faces substantial natural barriers to entry is precluded from entering the market even when existing production facilities are not available for sale. In this situation, the harm to a potential competitor of a refusal to sell production facilities is no different from the "harm" inflicted by the natural entry barriers. It is necessary, therefore, to draw a distinction between harm to competitors and harm to competition that may result from a refusal to sell production facilities, especially in a market characterized by natural barriers to entry. Only harm to competition is actionable under the Sherman Act. Judicial interference with a legitimate business decision to abandon production facilities merely because another company would be adversely affected is "an intolerable application of the Sherman Act" that infringes on the right of businesses to decide independently with whom they will deal, and that may also constitute a barrier to the transferability of resources to their most productive uses.

The failure to determine the source of entry barriers as well as the failure to apprehend fully the distinction between harm to competitors and harm to competition led the Ninth Circuit to a questionable conclusion in Helix Milling Co. v. Terminal Flour Mills Co. In

103. See note 47 supra.
104. The harm inflicted by a refusal to sell production facilities is incidental to a lawful, independent exercise of business discretion that is not actionable under the Sherman Act. See International Rys. of Cent. Am. v. United Brands Co., 532 F.2d 231 (2d Cir.), cert. denied, 429 U.S. 835 (1976). The harm that results from the existence of natural entry barriers is not the product of anticompetitive conduct and thus is also not actionable. See notes 101-02 supra.
108. See note 14 supra and accompanying text.
110. 523 F.2d 1317 (9th Cir. 1975), cert. denied, 423 U.S. 1053 (1976).
Helix, the plaintiff operated a flour and millfeed mill that was destroyed by fire. Helix alleged that it could remain in the milling business only through the acquisition of an existing mill in the Pacific Northwest. It claimed that the cost of constructing a new mill would be prohibitive given its expected profitability. Helix, therefore, offered to purchase defendant General Foods' mill, which was being sold because it had become unprofitable to operate. General Foods rejected Helix's offer and sold its mill to another competitor, Terminal Flour Mills. Helix claimed that the sale of General's mill to Terminal constituted a contract in restraint of trade in violation of section 1 of the Sherman Act because it excluded Helix from the market.

Without examining the net competitive impact of the sale, the court held that "the exclusion of a [competitor] collaborative action, [the sale of the mill] having the necessary effect of restraining trade would violate the Sherman Act." The Ninth Circuit cited Albrecht v. Herald Co. to support its contention that any agreement that adversely affects a competitor is an unlawful combination in restraint of trade. Albrecht, however, stands for no such proposition. In Albrecht, the defendant went beyond a simple refusal to deal and employed another party to coerce the plaintiff into complying with its resale prices. The arrangement in Albrecht had the specific anticompetitive purpose of maintaining resale prices and, thus, was held an unlawful combination in restraint of trade. In Helix, however, the

111. Id. at 1319-20.
112. Plaintiff alleged that the defendants were two of the five remaining competitors in the Pacific Northwest flour and millfeed market. Terminal and General had market shares of 19.6% and 10.3%, respectively. Helix also alleged that sales to the Defense Supply Agency constituted a submarket of which Helix had 56% before the destruction of its mill. Subsequently, General acquired 8% and Terminal acquired 64%. Id. at 1319 n.1. Despite Helix's assertion to the contrary, the Defense Supply Agency cannot be characterized as a submarket. Markets are defined by product characteristics and geographic location, not by customer, unless the product is altered in some manner for a distinct class of customers. See Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); West Texas Utils. Co. v. Texas Elec. Serv. Co., 470 F. Supp. 798, 820 (N.D. Tex. 1979).
113. 523 F.2d at 1322. The court held that "there was evidence which, interpreted in the light most favorable to the plaintiff, would support a finding of a contract or combination to restrain trade." Id.
115. 523 F.2d at 1322. Not every contract that incidentally inflicts some harm upon a competitor is an unreasonable restraint of trade within the meaning of § 1 of the Sherman Act. "If defendants did conspire to drive [plaintiff] out of business, then a combination in restraint of trade existed which fits within the plain words of the statute." Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 (9th Cir. 1978); see Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir.) (en banc), cert. denied, 440 U.S. 924 (1978); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, 416 F.2d 71, 76 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); Bay City-Abrahams Bros. v. Estee Lauder, Inc., 375 F. Supp. 1206, 1214 (S.D.N.Y. 1974).
agreement should not have been considered to be collaborative action in violation of the Sherman Act. Because only one mill was available for sale and two parties wanted to purchase it, harm to one party was inevitable and incidental to the transaction.\textsuperscript{117} There was no evidence that General's refusal to sell to Helix and its subsequent sale to Terminal had the purpose or effect of excluding Helix from the milling market or had a substantial anticompetitive effect on that market. Helix's plight was the result of the concurrence of two fortuitous events: the destruction of its mill by fire and the failure of General's mill to generate sufficient profits. Had neither event occurred, Helix would not have asserted an antitrust claim. Neither event is even remotely related to the type of anticompetitive conduct the antitrust laws have traditionally condemned. A finding of an antitrust violation under these circumstances would mean that every company that contemplates a sale of its production facilities must sell to a potential competitor to avoid antitrust liability, regardless of the dictates of its own business judgment. This result defies common sense, logic, and the principle expressed in \textit{Colgate},\textsuperscript{118} which allows a person engaged in business to exercise his own discretion regarding with whom he will deal. Helix's self-serving claim that it had no alternative means of re-entry should not have been determinative.\textsuperscript{119} Helix obviously did

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\item \textsuperscript{117} Contracts, such as the one entered into in \textit{Helix}, "do not involve combining for the primary purpose of coercing or excluding; rather they involve combinations of two or more persons to further directly the business of the parties to the agreement, and the effect on third parties and on competition is indirect. The issue in these cases is ... whether the purpose and effect of the operation of the contract ... was such as unreasonably to exclude outsiders from participation in the trade in question." Barber, \textit{supra} note 1, at 877. In \textit{General Chems., Inc. v. Exxon Chem. Co.}, 625 F.2d 1231 (5th Cir. 1980), Exxon sold all of its polyethylene scrap to General throughout the early 1970's. In the first quarter of 1976, Exxon sold more scrap to Bamberger Compounds Corporation than to General, even though the latter submitted a higher bid. \textit{Id.} at 1232. General brought an action against Exxon and Bamberger, claiming that the two companies conspired to exclude General from the scrap market in violation of § 1 of the Sherman Act. \textit{Id.} The Fifth Circuit held that Exxon's sale of the scrap to Bamberger at a price lower than that bid by General did not constitute sufficient evidence of a conspiracy to eliminate competition. \textit{Id.} at 1233-34. \textit{General} and \textit{Helix} are analogous because both cases involve a refusal to sell to one party accompanied by a contract for sale to another party. \textit{General}, however, stands for the correct proposition that such a contract standing alone, without further evidence of an anticompetitive purpose or effect, is not a restraint of trade within the meaning of § 1 of the Sherman Act.

\item \textsuperscript{118} See note 14 \textit{supra} and accompanying text.

\item \textsuperscript{119} See note 95 \textit{supra}. Apparently this is the very trap that the Ninth Circuit fell into. The court held that "[a] jury could find ... an unreasonable restraint of trade as a necessary consequence of the fact that Helix would have purchased the mill but for General's decision to sell it to Terminal, and that defendants' course of action would necessarily exclude competition from the market because of the closed nature of the market." 523 F.2d at 1320-21. The court, however, did not define the term "closed market," nor did it recognize the need to determine whether the "closed nature of the market" was attributable to perfectly legal, natural entry barriers that would have precluded entry under any circumstances.
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not find its *de novo* entry into the market so costly as to be unprofitable. In any industry, the average rate of return, subject to a risk premium, will determine whether entry will take place.\(^{120}\) Presumably, if Helix were earning normal profits prior to the destruction of its mill, and normal profits were anticipated in the long run, Helix would have considered investment in a new mill desirable.\(^{121}\) If profits were expected to be below normal, then Helix or any other potential entrant would find entry undesirable and seek a more profitable employment for its capital. Thus, assuming that Helix could re-enter only through the purchase of an existing mill, General's refusal to sell should be deemed a Sherman Act violation only if General had raised artificial barriers, apart from its refusal, that prevented Helix's re-entry. Otherwise, the situation is merely the lawful one in which a seller has exercised his legitimate business right to dispose of his property as he wishes, and natural barriers militate against a potential competitor's entry.

Restraint of trade analysis is a means of identifying those refusals to sell production facilities that have an anticompetitive purpose or effect, but do not constitute acts of monopolization or attempts to monopolize.\(^{122}\) The latter standard is narrower and, therefore, more difficult for plaintiffs to satisfy.\(^{123}\) Refusals to sell production facilities, however, seldom amount to an unreasonable restraint of trade because a refusal rarely raises significant barriers to entry.\(^{124}\) The purchase of existing production facilities, if available, is one of a number of entry options in a market lacking substantial artificial or natural entry barriers.\(^{125}\) A plaintiff, therefore, will be even less likely to prevail on a claim that a refusal is an act of monopolization or an attempt to monopolize.

B. Purpose to Create or Maintain a Monopoly

Analysis of refusals to sell production facilities according to the dicta in *Colgate* focuses upon conduct to determine whether there is an intent to create or maintain a monopoly.\(^{126}\) A refusal may indicate

\(^{120}\) FTC Report, *supra* note 80, at 547; see L. Sullivan, *supra* note 1, § 6, at 22.

\(^{121}\) See L. Weiss, *supra* note 7, at 202.


\(^{123}\) See note 52 *supra*.

\(^{124}\) See note 73 *supra* and accompanying text.

\(^{125}\) See notes 120-21 *supra* and accompanying text.

\(^{126}\) See notes 17-31 *supra* and accompanying text. Although courts require a showing of general intent to monopolize to prove actual monopolization, see note 20 *supra*, "cases discussing a monopolist's duty to deal have effectively required a finding of specific intent to monopolize." Byars v. Bluff City News Co., 609 F.2d 843, 859 (6th Cir. 1979).
such an intention if it is part of an unlawful course of conduct calculated to distort or destroy competition,127 or if it can be characterized as "bold, relentless, and predatory." 128

Actual monopolization cannot be inferred from a monopolist's refusal to sell production facilities because production facilities are abandoned when they become unprofitable.129 The closing of unprofitable or obsolescent plants is necessary to make a company's operations more efficient and more profitable.130 By contrast, companies that refuse to sell goods and services do not always have a legitimate business purpose for the refusal.131 Thus, it is possible, especially when the refusing company operates in two related markets, to infer that a company's refusal to sell goods or services, by itself, is aimed at creating or maintaining a monopoly.

A recent case supports the contention that a refusal to sell production facilities does not constitute an act of monopolization. In International Railways of Central America v. United Brands Co.,132 plaintiff claimed that United Brands' abandonment of and refusal to sell its banana plantations caused the railroad to lose profits and, thus, violated sections 1 and 2 of the Sherman Act.133 Specifically, plaintiff

128. Lorain Journal Co. v. United States, 342 U.S. 143, 149 (1951) (citation omitted).
130. See Salpukas, supra note 109, at 1.
131. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); see note 2 supra.
133. Id. at 239. Plaintiff's § 1 claim was premised on the theory that the refusal to sell the plantations was the result of a conspiracy or combination between United Brands and its subsidiary CAG, rendering the refusal a per se illegal group boycott. Id. at 240; see note 1 supra. The court assumed, without deciding, that an intra-corporate conspiracy between United Brands and CAG did exist. 532 F.2d at 240. United Brands argued that Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), which announced the "intra-corporate conspiracy" doctrine, only condemned anticompetitive agreements "between two commonly owned enterprises which were held out to be and were in fact competitors." 532 F.2d at 240. United Brands' action was in essence unilateral because it only dealt with International Railways through United Brand's subsidiary, CAG. Id.. The court, however, rejected the plaintiff's contention that the concerted refusal to deal was per se illegal even if it appeared reasonable under the circumstances. The court distinguished United Brands' refusal from joint boycott cases in which a per se rule had been applied. The
alleged that the refusal was an abuse of United Brands' monopoly power and, thus, an act of monopolization. The Second Circuit rejected plaintiff's section 2 claim on the ground that United Brands neither had, nor exercised monopoly power. The court noted that the absence of such power was demonstrated by the decline in United Brands' profits over a ten year period and by United Brands' inability to obtain low freight rates from plaintiff. As to the exercise of monopoly power, the court held that United Brands "had no reason-able business alternative but to abandon an unprofitable and uncom-fortable operation. This cannot possibly be characterized as an act of monopolization, which is the exercise of a power to fix prices or to exclude competition."

The legitimate business purpose for refusing to sell production fa-
cilities also negates allegations of specific intent to monopolize in attempted monopolization actions. Furthermore, a refusal to sell production facilities does not constitute an attempt to monopolize because such a refusal, by itself, will not provide a defendant with a dangerous probability of success. The presence of rival companies latter condemned concerted refusals aimed solely at the elimination of competition. The court specifically referred to Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941), in which the defendants, manufacturers and designers of original textiles and women's dresses, agreed to refuse to sell to retailers who stocked relatively inexpensive copies manufactured by the so-called "style pirates." In that case, the Supreme Court held that "the aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with Guild members. The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." 312 U.S. at 467-68. United Brands, however, had legitimate business reasons for abandoning its plantations. United Brands' plantations were the targets of Panama disease and excessive "blowdowns" that destroyed large portions of the plantations, rendering them unsuitable for the cultivation of bananas. Id. at 237. Furthermore, United Brands' refusal to sell, by itself, was not "indicative of an interest to prevent competitors from entering the field." Id. at 243.

134. Id. To establish unlawful monopolization under § 2 of the Sherman Act, the plaintiff must prove the defendant's possession of monopoly power in the relevant market and the defendant's "willful acquisition or maintenance of that power." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). International Railways claimed that United Brands violated § 2 of the Sherman Act "no matter how legiti-mate its reasons for giving up the Tiquisate operation." 532 F.2d at 239.

135. 532 F.2d at 240. The Second Circuit assumed that the relevant market was the "importation of bananas into the United States solely from Guatemala." Id. at 240 n.18.

136. Id. at 239; see P. Areeda & D. Turner, Antitrust Law, ¶ 736e, at 274 (1978) ("It requires a long stretch to call an individual refusal to deal 'monopolizing' when it does nothing to increase the refuser's monopoly power and nothing to increase his position in any market").

137. See note 34 supra and accompanying text.

and opportunities for de novo entry prevent a refusing company from significantly increasing its market share merely by refusing to sell its production facilities.139 In the United Steel Workers case,140 for example, even if United States Steel's refusal precluded the Steelworkers' entry, USS could not monopolize the American steel market given the existence of vigorous competition from foreign and domestic producers.

Thus, a refusal to sell production facilities will rarely constitute actual monopolization or an attempt to monopolize under the Colgate standard. Unless there is additional anticompetitive conduct, a company's refusal will not rise to the level of conduct proscribed by the Sherman Act.

C. Policy Considerations: The Theory of Comparative Advantage

The foregoing analysis indicates that defendants should not incur liability for a unilateral refusal to sell production facilities in most cases. This result is especially appropriate when unprofitable or obsolescent facilities are abandoned in a domestic industry that cannot compete effectively with foreign producers. Condemnation of the refusal and enforcement of a sale may have the long term, adverse effect of significantly distorting the allocation of resources within a given industry as well as the entire economy. Because competitive markets may be maintained by ensuring that resources are free to move to their most productive uses,141 the goal of preserving competitive markets will be frustrated if courts prevent companies from transferring obsolescent production facilities to more profitable uses. Thus, the long term policy of preserving competitive markets142 by promoting allocative efficiency143 may require judicial sanction of refusals that might otherwise be condemned after applying the short term evaluative criteria utilized under the Colgate and restraint of trade standards.

378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); F. Scherer, supra note 7, at 37; L. Sullivan, supra note 1, § 203, at 633; Markham, supra note 68, at 356.
139. See note 138 supra.
140. The Steelworkers claimed that USS' refusal to deal constituted an attempt to monopolize in violation of § 2 of the Sherman Act, because it was an "[exercise of] 'monopoly power' for the purpose of preventing a potential competitor from entering the steel market." Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264, 1282 (6th Cir. 1980).
141. See A. Smith, supra note 7, at 99, 125-26, 134; L. Weiss, supra note 7, at 10.
143. See Brozen, supra note 101, at 8-11.
The theory of comparative advantage or comparative cost is a useful model for identifying the situations in which allocative efficiency justifies a refusal to sell production facilities. The theory prescribes the manner in which resources should be allocated to promote international trade and to capture the gains from such trade.\(^{144}\) The basic premise of this theory is that nations should produce commodities whose relative costs are lower than those of a comparable foreign industry.\(^{145}\) Prices at home and abroad will then determine the amount and type of commodities produced for trade.\(^{146}\) By improving the efficiency of resource utilization, trade will raise the real income of all trading nations.\(^{147}\) To promote allocative efficiency, nations should contract industries that lack comparative advantage and transfer resources to growing industries that possess it.\(^{148}\) Policies that impede this transfer result in allocative inefficiency and loss of income to the world community.\(^{149}\) Thus, resources are misallocated when a refusal to sell production facilities is enjoined in a domestic industry in which costs are higher than those of a comparable foreign industry.\(^{150}\)

The American steel industry, for example, lacks comparative advantage.\(^{151}\) Steel production costs in Japan, the world's most efficient steel producer, are fifteen to twenty percent below those in the United States.\(^{152}\) The theory of comparative advantage indicates that domestic and world income can be raised by contracting the resources devoted to the domestic production of steel and by increasing domestic consumption of Japanese steel.\(^{153}\) Requiring USS to sell its plants would thwart the goal of allocating resources to those industries that enjoy a comparative advantage.

The policy implication of the theory of comparative advantage for refusals to sell production facilities is clear. A company's right of refusal should be upheld in an industry that lacks comparative advantage, even when the refusal enhances artificial entry barriers.\(^{154}\) This policy prescription is grounded in the normative judgment that antitrust enforcement resources should be used to police viable

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145. Id. at 237.
146. Id. at 217-18.
147. Id. at 237.
148. Id. at 238; see L. Weiss, supra note 7, at 212-13; When Giant Industries Falter, N.Y. Times, Dec. 3, 1979, § A, at 24, col. 1.
149. M. Kreinin, supra note 144, at 238.
150. Id. at 237.
151. L. Weiss, supra note 7, at 213.
152. See notes 91-93 supra and accompanying text.
153. L. Weiss, supra note 7, at 216; see note 148 supra and accompanying text.
154. See notes 141-43 supra and accompanying text.
industries and is justified by the gains to the economy from improved allocative efficiency.

**Conclusion**

A unilateral refusal to sell production facilities should generally not be deemed a violation of section 2 of the Sherman Act. Absent a purpose to create or maintain a monopoly, the courts should not interfere with a business' decision concerning the disposal of its property. Because the question whether a company will sell its production facilities arises only after it decides to abandon unprofitable operations, it is unlikely that a refusal to sell indicates a specific intent to monopolize. Furthermore, the transfer of resources out of unproductive uses and into more productive ones is a manifestation of the operation of competitive markets. Enforcement of the antitrust laws should not "shake" the invisible hand and thereby promote allocative inefficiency.

Once a company decides to close one of its facilities, it should be entitled to dispose of the property as it wishes. Assuming that the industry of which it is a part does not lack comparative advantage, a company should be required to sell an abandoned facility to a potential competitor only when the refusal is part of a course of conduct calculated to distort or destroy competition and when no alternative means of entry are feasible. The foregoing conditions for a judicially enforced sale will probably be present only when a defendant has erected artificial barriers to entry apart from a refusal to sell its production facilities.

*Seth Schwartz*


156. A. Smith, *supra* note 7, at 423.