LEGAL REMEDIES OF A DISTRIBUTOR TERMINATED PURSUANT TO A CONTRACTUAL PROVISION OF TERMINATION UPON NOTICE

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According to many critics, our jurisprudence has never successfully dealt with the legal problems created by the summary termination of a distributorship.1 In most instances the distributor can summon no successful remedy against the manufacturer or supplier even if the termination is arbitrary and without cause; because generally, the contract between the parties expressly permits the supplier to cancel upon short notice. Nevertheless, the courts have been sympathetic to the distributor; however, cases granting recovery to an injured distributor are legal "sports" and have not grown organically out of the preceding case law.2 These cases prove the adage that hard facts make bad law and suggest that a strong undercurrent exists in hard cases for giving the terminated party an opportunity to prove that he was terminated arbitrarily.3

It is not the purpose of this article to consider whether the traditional freedom of contract should give way to equitable considerations. Rather, the article will discuss the remedies available to the terminated distributor and show how their inadequacy, in effect, has made the Sherman Act4 potentially the main vehicle of relief for the aggrieved distributor.

Before doing so, the equities of the hard case should be con-

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3. In addition to judicial sympathy, it cannot be denied that in this era of large organizations a judicial concern exists for the small, independent businessman, in short, a concern for the texture and quality of life. One well-known commentator has commented on the need for the development of an ethic to govern the relationship of the organization to the individual in such a society. DRUCKER, THE AGE OF DISCONTINUITY Part III (1966).
sidered. In doing so, I do not suggest that the equities are always on the side of the distributor. For instance, the distributor may be a chain with enormous purchasing power whose business is very attractive to the supplier. Quite obviously, the courts need not be concerned with the equities of the agreement between two such parties. In such case, arbitrary termination is a consequence of the distributor's bargain.

Primary consideration will be given herein to the case of the distributor who has no bargaining power whatsoever. If he wants to deal at all, he must deal on the terms of the supplier and those terms invariably include a provision for termination upon very short notice. He may have primary responsibility for developing a territory and must make a substantial investment in warehouse or showroom space, advertising, trucks, and service facilities. After making this investment and before he reaps the fruit of his expenditure and energy, the supplier may arbitrarily exercise the termination clause. The product supplied is in such a concentrated market that the distributor cannot find an alternative source of supply. As a result, the newly appointed distributor gains the benefit of the careful cultivation of the territory by the terminated distributor. Legal remedies available for such a distributor are limited.

I. AUTOMOBILE FRANCHISE LEGISLATION

Automobile dealers do not suffer from this problem as do their fellow distributors. The National Association of Automobile Dealers has successfully lobbied laws through many state legislatures and Congress limiting the right of the manufacturer to arbitrarily terminate a dealer's franchise. This class legislation has enabled the terminated dealer to have his day in court to prove that he was discharged arbitrarily.

7. Lawsuits by dealers claiming to have been treated not in good faith have generally been unsuccessful on the ground that the manufacturer did not use coercion or intimidation but was motivated by legitimate business reasons. Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965); Woodard v. General Motors Corp., 298 F.2d 121 (5th Cir. 1962), cert. denied, 369 U.S. 887 (1964); Abbott-Stansell Motor Co. v. Chrysler Motor Corp., 333 F.2d 322 (5th Cir. 1964); Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964); Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), cert. denied, 375 U.S. 896 (1963); Garvin v. American Motor Sales Corp., 318 F.2d 518 (3d Cir. 1963); Pierce
The state statutes in general provide that termination may only be for cause. The federal statute requires that termination must be exercised in good faith. This type of legislation may become model legislation for all classes of distributors; but to date, only Puerto Rico has enacted such legislation. Puerto Rico's statute applies to all types of distributorships and requires that they be terminated only for cause.\textsuperscript{8}

The source of legislative reluctance to adopt such a drastic remedy is the fear that it will upset the delicate balance and tension that must exist between the supplier and distributor for the economic distribution of goods. Certainly, in many commercial markets, the bargaining power enjoyed by the supplier is equal to that of the distributor and alternative sources of supply are available to the distributor. A statute allowing termination only upon a showing of good faith may inequitably wed the supplier to the distributor because of the supplier's fear of litigation. Such a result could encourage inefficient distributors or produce forward-integration, substituting a whole army of clerks of the supplier for the performance of the function of the individual distributor. Interference in every distributorship situation with the supplier's freedom to contract is strong medicine. The cure might be worse than the disease.

\section*{II. THE UNIFORM COMMERCIAL CODE}

The Code's provisions with respect to the enforcement of unconscionable clauses are so general that their meaning must be left to development by the courts.\textsuperscript{9} To date that development has not aided terminated distributors.

\begin{footnotesize}

The above cases suggest that distributorships usually are terminated only for good cause, although this result may be an effect of the legislation. See legislation cited note 5 and 6 supra.

8. P.R. LAWS ANN. Tit. 10, Ch. 13, § 278-278d (Supp. 1966). Section 278 reads as follows:

Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the independent right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration except for just cause.

9. UNIFORM COMMERCIAL CODE § 2-302 (1):

If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable
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In Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.\textsuperscript{10} the New York Supreme Court, special term, refused to find unconscionable a clause in a distributorship agreement providing that the agreement could be terminated at any time by either party without notice or cause. The court focused its attention on the statement of the Official Comment to section 2-302\textsuperscript{11} to the effect that the test of unconscionability must be applied at the time of the making of the contract:

For all that appears the mere creation of any relationship between Sinkoff and Schlitz was, \textit{at that first point in time}, of great benefit to both and perhaps even particularly favorable (and thus especially inoppressive) to Sinkoff.\textsuperscript{12}

Although not mentioned by the court in \textit{Sinkoff}, section 1-102(3) affirmatively engrafts the principle of “freedom of contract” into all Code sections (unless otherwise provided). Also, section 1-102 (2) (b) establishes that one of the underlying purposes and policies of the Code is “to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.” Taken together these fundamental provisions of the Code suggest that the sections on unconscionability are not meant to give the courts an opportunity to introduce their own concepts of fairness but are only intended to encourage judicial interpretations consistent with the concepts of fairness existing in the trade. In order for the courts to give relief to aggrieved distributors under this section, they would have to ignore this legislative intent by disregarding the custom of summary termination prevailing in most trades. It might be helpful for an association of distributors to pass a resolution condemning arbitrary termination clauses in order to give courts a peg on which to declare such clauses contrary to the concepts of fairness existing in the trade. Conceivably, more and more distributors will be using this section in the future, however, as of yet judicial interpretations of the pertinent Code sections have been insufficient to determine how the case law will develop.

\textsuperscript{10} UNIFORM COMMERCIAL CODE § 2-309 (3):
Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.
\textsuperscript{12} 11. \textbf{UNIFORM COMMERCIAL CODE} § 2-302, Comment 1.
\textsuperscript{12} 12. 51 Misc. 2d at 448, 273 N.Y.S.2d at 367.
III. THE COMMON LAW

The overwhelming majority of courts have refused to countenance a claim of breach of contract when a supplier arbitrarily exercises a contract right to terminate upon notice in a written contract. However, a few courts, obviously appalled by the unfairness of such a result to the distributor, have created a remedy if such termination is found to have been made in bad faith with intent to injure the other contracting party.

In Philadelphia Storage Battery v. Mutual Tire Stores, a radio manufacturer brought an action on a check given by a jobber in payment for the first goods purchased from him under a jobber agreement. The jobber had stopped payment on the check after the manufacturer exercised, according to the contract terms, his right to terminate the jobber agreement. The court recognized that by terminating the agreement the manufacturer had relieved himself of the obligation to fulfill the warranties in the radios purchased under the jobber agreement and to service them. However, the jobber charged in his answer and in a counterclaim that the manufacturer had acted in bad faith by cancelling the agreement after inducing the jobber, by means of the agreement, to make substantial purchases. The Court said,

[D]efendant has, in the opinion of the court, set forth in his answer these things which entitle him to show by the evidence, if he can do so, that it would be against equity and good conscience to permit plaintiff . . . to terminate the jobber's agreement in the manner, and with the intent and purpose alleged against it in the answer.

Since there was no evidence of fraudulent representation to the jobber, it is apparent that the complaint was not based on common law fraud.

Similarly, in J. R. Watkins Co. v. Rich, a sales agent was indebted to a supplier under a contract. In order to obtain a surety's guarantee of the debt and also of future debts, the supplier entered into a new agreement with the sales agent. Soon thereafter the supplier arbitrarily terminated the agreement, pursuant to the contract, and eventually brought an action against the sureties and the agent. The court held, however, that the manufacturer could not collect on the guarantee because he had caused a breach of the guaranteed agreement by terminating in bad faith. The Court said,

13. See note 1 at 476 n. 43 supra.
14. See text beginning at note 15 infra.
16. Id. at 489, 159 S.E. at 827.
A provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the option may be exercised only in good faith. 18

Dicta to the same effect has appeared in other cases. 19 For instance, in another case, a Texas court, in a widely quoted remark, stated:

It is a well-established rule of law that a contract may provide for its termination at the option of one or either of the parties, and such a stipulation, when fairly entered into, will be enforced if not contrary to equity and good conscience. 20

These cases and the dicta are perversions in the fabric of the law and fall into no conceptual framework. Their disregard of the contractual language, even when elements of common law fraud are lacking, are justified only upon vague notions of fairness and unjust enrichment. The conceptual weakness of these theories gives a terminated distributor little hope of persuading other courts to adopt them.

More logical concepts could be presented by arguments to the effect that arbitrary termination clauses are contrary to the public policy of those states which have adopted automobile franchise legislation, or by the development of a theory of fiduciary or confidential relationship between manufacturer and distributor. 21 But, these concepts remain only theories and do not, in the present state of the law, give much solace to summarily terminated distributors.

We have assumed that most distributorship contracts today provide for termination upon notice. Where the agreement contains no provision whatever for termination, however, the courts usually imply that the contract is terminable at will after a reasonable time. 22 If an exclusive distributor has spent a substantial sum

18. Id. at 84-85, 235 N.W. at 846.
20. 23 S.W.2d at 338 (Tex. Com. App. 1930) (emphasis added).
21. See A.S. Rampbell, Inc. v. Hyster Co., 3 N.Y.2d 369, 144 N.E.2d 371, 185 N.Y.S.2d 475 (1957), where the court refused to dismiss a cause of action for malicious interference with a contract terminable at will because of the confidential relationship between the manufacturer and the dealer.
of money, his distributorship can be terminated only after he has had a reasonable time in which to recoup his investment. In this day and age, few courts, if any, will find that such a contract is void for lack of mutuality.

Strangely enough, the terminated distributor may have a better remedy if he has no written contract. Astute counsel can usually find many expressions of good will by the representatives of the manufacturer or supplier, particularly in the beginning of the relationship, to the effect that the distributor will have the franchise as long as he does a good job. Upon these statements he can predicate an agreement, the duration of which is for as long as the distributor performs satisfactorily. Cases along this line have been successfully pleaded, avoiding both the statute of frauds and lack of mutuality. However, courts in some jurisdictions have denied relief on the grounds that such an agreement lacks mutuality or is within the statute of frauds. In order to avoid the defect of lack of mutuality, it is wise for the distributor, if the facts justify it, to plead that the supplier had promised an exclusive territory to the distributor and had imposed upon him the duty of spending substantial sums of money to develop the area.

IV. THE FEDERAL ANTI-TRUST LAWS

The lure of trebled damages and counsel fees and the inadequacy of the remedies cited above usually leads the distributor with sophisticated counsel to claim that the refusal of the supplier to

23. See, e.g., Martin v. Meles, 179 Mass. 114, 117, 60 N.E. 397, 398 (1901), where Justice Holmes speaking for the Court in a much quoted comment said:

There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise.

24. See, e.g., Burgermeister Brewing Corp. v. Bowman, 227 Cal. App. 2d 274, 38 Cal. Rptr. 597 (1964). But see Terre Haute Brewing Co. v. Dugan, 102 F.2d 425 (8th Cir. 1939), where the oral contract alleged did not set forth any detriment on the part of the distributor or promise as consideration.


deal with him is a violation of sections 1 and 2 of the Sherman Act or Section 3 of the Clayton Act. Counsel will search for evidence that the refusal of the supplier to deal was motivated by some anti-competitive purpose—an effort to maintain the resale price of his products; to prevent the distributor from carrying a competitive line; to "bootleg" his products into another geographical area; to sell his products to a certain class of customers; or to demand that the distributor buy additional products.

At trial the distributor may have difficulty in showing that the termination was the result of the distributor's refusal to comply with the anti-competitive activities of the manufacturer. The large manufacturer will generally have a well-documented file to show the legitimate business reasons that led to the plaintiff's termination. Important in judging the honesty of the manufacturer's alleged business reasons is whether he has applied to other distributors the same standards applied to the plaintiff. Recent developments in the case law have greatly increased the distributor's chances of success in such an action, assuming that evidence exists of the necessary anti-competitive purposes and that they caused the termination.

A. SECTION 1 OF THE SHERMAN ACT

Fifty years ago, the Court enunciated the single trader doctrine, also known as the Colgate Doctrine:

In the absence of any purpose to create or maintain a monopoly, the 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.27

In reliance upon Colgate, untold numbers of American businessmen during the last fifty years have cut off distributors or dealers for failing to follow their policies regarding resale prices, for handling goods of competitors, and for selling within a certain territory or to certain customers.

In 1960, the scope of the Colgate Doctrine was considerably narrowed by United States v. Parke, Davis & Co.28 In fact, Justice Harlan29 and a good many members of the anti-trust bar viewed the decision as sending Colgate to its demise. In Parke, Davis, by

29. Id. at 49 (dissenting opinion).
going beyond the bare announcement of its resale price policy, specifically, by inducing wholesalers to stop dealing with offending retailers and by obtaining agreements from the retailers to stop price advertising, the manufacturer was held to have created combinations or conspiracies to enforce resale price maintenance in violation of sections 1 and 3 of the Sherman Act.\(^3\)

Section 1 of the Sherman Act, of course, requires for its violation some sort of joint action:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . \(^3\)

Many lawyers, on the basis of the implied conspiracy theory enunciated in *Interstate Circuit, Inc. v. United States*,\(^3\)\(^2\) speculated after *Parke, Davis* that the mere announcement of a policy by a manufacturer to his several distributors followed by their compliance would spell out the requisite joint action. As the District Court in *Klein v. American Luggage Works, Inc.*,\(^3\)\(^3\) just subsequent to the *Parke, Davis* decision, theorized:

> In the face of an advance announcement by the manufacturer that price cutters will be denied supply, a seller's compliance with prices suggested strongly infers a tacit or implied resale price maintenance agreement.\(^3\)\(^4\)

The Third Circuit reversed the district court in *Klein*, citing an absence of enforcement activities by the manufacturer other than abrupt termination.\(^3\)\(^5\) Also, subsequent courts have reaffirmed *Colgate*. However, the district court's implied conspiracy theory in *Klein* is supported by dicta in recent Supreme Court opinions pertaining to marketing policies.

The implied conspiracy theory was advanced by Justice White, speaking for the majority in *Albrecht v. Herald Co.*\(^3\)\(^6\) In that case a newspaper distributor had raised the price of newspapers in defiance of the publisher's suggested maximum price. After threats of termination, the publisher hired a circulation company to solicit the distributor's customers. Upon termination of

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30. *Id.* at 45-46.
34. *Id.* at 937.
the distributorship, the distributor brought a treble damage action to recover the value of his lost distributorship. He contended that the actions of the publisher went beyond the bare announcement of a resale price policy permitted by Colgate and was therefore a joint, rather than a unilateral, action. Using the terminology of "combination" rather than the more familiar phrase, "conspira-

cy," Justice White found a "combination" between the publisher and the circulation company employed by the publisher to solicit the distributor's customers. More importantly, for the purposes of this discussion, he stated categorically that had the theory of implied conspiracy been pleaded it would have been successful:

Under Parke, Davis petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it.

Justice Harlan, dissenting in Albrecht, admitted that Parke, Davis could be justified on the theory, also advanced by Professor Turner, that a supplier merely by announcing a Colgate policy tends to produce tacit or implied minimum price agreements among otherwise competitive dealers and, in effect, issues an invitation to retailers to agree with each other as well as with the manufacturer. He stated that the majority in effect was making it unlawful for one person to dictate resale prices to another, even unilaterally:

The Court's difficulties on all of its theories stem from its unwillingness to face the ultimate conclusion at which it has actually arrived: it is unlawful for one person to dictate price floors or price ceilings to another; any pressure brought to bear in support of such dictation renders the dictator liable to any dictatee who is damaged. The reason for the Court's reluctance to state this conclusion bluntly is transparent: this statement of the matter takes no account of the absence of a combination or conspiracy.

37. Id. at 150 n. 6.
38. Id. at 162. See Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusal to Deal, 75 HARV. L. REV. 655, 685-86 (1962). Nevertheless, Justice Harlan still thinks that the Colgate Doctrine prohibits the making of such an implication:

[T]here is no "combination" when a manufacturer simply states a resale price and announces that he will not deal with those who depart from it; there is a combination when the manufacturer goes one inch further.

390 U.S. at 163.
39. 390 U.S. at 162.
Also, in United States v. Arnold, Schwinn & Co., Justice Fortas seemed to agree with the implied conspiracy theory by ominously commenting:

Once the manufacturer has parted with title and risk . . . his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a per se violation of § 1 of the Sherman Act.\textsuperscript{41}

The dicta in these cases suggest that the recently rediscovered word “combination” may be the magic term for construing a supplier’s unilateral conduct as joint action in violation of the Sherman Act, at least whenever there is a pattern of coercion or of compliance with respect to a multiplicity of distributors.\textsuperscript{42}

But what of the simple vertical arrangement where only one manufacturer and one distributor are involved? Certainly, Justice White’s dictum to the effect that a warning followed by compliance produces a “combination” implies that he would apply the Sherman Act, even in the absence of a marketing scheme and horizontality.\textsuperscript{43} This is a radical concept and opens up avenues of recovery formerly denied to terminated distributors. However, Justice White might permit recovery under this theory only in a price fixing situation (which Albrecht was) because the per se illegality of vertical price fixing agreements has been recognized for years.\textsuperscript{44}

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\item \textsuperscript{40} 388 U.S. 365 (1967).
\item \textsuperscript{41} Id. at 382 (emphasis added).
\item \textsuperscript{42} No one knows exactly what is meant by the statutory phrase “combination in the form of trust or otherwise.” See Baker, Combinations and Conspiracies. Is there a Difference, 12 Anti-Trust Bull. 71 (1969). Justice Douglas, in Simpson v. Union Oil Co., 377 U.S. 13 (1964), emphasizes a coercive pattern of price fixing through written consignment agreements. The Solicitor General in his amicus brief filed in Amplex of Maryland v. Outboard Marine Corp., 380 F.2d 112 (4th Cir. 1967), cert. denied, 389 U.S. 1036 (1968), contended that whenever any substantial proportion of a supplier’s distributors acquiesce in an announced policy of the supplier (therein an alleged refusal to deal with competitors dealing in competing products), there is a “combination” within the scope of the Sherman Act. The Supreme Court denied certiorari probably because there was no evidence in the record of an announced policy.
\item \textsuperscript{43} See Albrecht v. Herald Co., 390 U.S. 145, 149 (1968).
\item \textsuperscript{44} Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). See Broussard v. Socony Mobil Oil Co., 226 F. Supp. 195 (W.D. La.
In the leading boycott case, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, the Court disregarded the fact that the elimination of a single victim had no effect on competition. *Klor's* held that a horizontal conspiracy that excludes a single party from business, because it interferes with the natural flow of interstate commerce, is illegal even though there may be no public injury in the sense that destruction of the plaintiff's business may make little difference to the economy. However, the Court confined the legal concept enunciated to horizontal boycotts. Justice Black, for the majority stated, "[t]his is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship." The doctrine of vertical boycott has so far had little actual support in the lower courts, except in cases of coercive price fixing.

Another problem created by Justice White's theory is the paradox that the distributor who refuses to comply has no remedy in contrast to one who complies. This has greatly troubled some jurists and has led them to substitute coercion and attempt for the joint action required by section 1.

One problem at least which the terminated distributor will
not have to surmount is that created by the fact that he participated in the illegal combination with his supplier. The Supreme Court has emasculated the doctrine of "pari delicto" to permit a coerced distributor to press his claim.49

The courts, except in price fixing situations, will probably refuse to apply section 1 of the Sherman Act where the only participants in the "boycott" are the supplier and the distributor. Section 3 of the Clayton Act, more properly applicable to strictly vertical relationships between seller and buyer, at present does not offer much help to the terminated distributor,50 but the Albrecht doctrine may be used to liberalize the type of evidence needed to find an agreement under this section as well as under section 1. The question for the courts to resolve definitively under section 1 is whether Klor's is to be extended to a vertical agreement between one supplier and one distributor wherein the supplier refuses to deal with another distributor for reasons other than price.51

B. SECTION 2 OF THE SHERMAN ACT

A neglected part of the Colgate Doctrine and one which, because of difficulty in proof, has resulted in recovery for only one terminated distributor to date,52 is the rule that a single trader, even though acting unilaterally, cannot refuse to deal if he has any purpose to create or maintain a monopoly. The terminated distributor under section 2 has been required to prove that his former supplier had a monopoly, and, secondly, that he has a specific intent to monopolize or maintain his monopoly.53

The requirement of a dangerous probability of success has been greatly attenuated in many cases,54 but the broad "Celophane" definition of the relevant market as including all interchangeable products, as announced in United States v. Dupont &

50. See text beginning at note 57 infra.
Co.,\textsuperscript{55} despite a Ninth Circuit deviation,\textsuperscript{56} continues as the greatest bar to recovery. Unless the courts narrow the relevant market to include only the distributors who carry the defendant's products and exclude distributors who carry interchangeable products, the remedy will probably not be of much aid to the terminated distributor. The radical Ninth Circuit deviation would, if adopted by other jurisdictions, make vulnerable to a section 2 violation any supplier who attempts to control the prices or purchasing practices of a substantial number of his distributors.

C. \textsc{Section 3 of the Clayton Act}

This section makes illegal vertical arrangements requiring the distributor to deal exclusively with the seller if the effect may be to substantially lessen competition or to tend to create a monopoly in any line of commerce.\textsuperscript{57} Despite the language of the Act, the courts, unduly influenced by \textit{Colgate}, have misconstrued section 3 to apply only to consummated agreements.\textsuperscript{58} A supplier who conditions his sales to the distributor by announcing to

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  \item[56.] Lessig v. Tidewater Oil Company, 327 F.2d 459 (9th Cir. 1964).
  \item[57.] 15 U.S.C. § 14 (1964):
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    [I]t shall be unlawful for any person . . . to lease or make a sale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . where the effect . . . may be to substantially lessen competition . . . .
    \end{quote}
\end{itemize}
him that he will refuse to deal if the distributor carries competing lines or unless he buys a full line from the supplier, does not violate section 3. Until Colgate is finally repudiated, this entrenched misconstruction will probably continue, although the Albrecht doctrine of a warning plus compliance creating a "combination" may be argued as having overruled the standard construction of section 3. This section will probably continue to be of little help to the terminated distributor whose former supplier has unilaterally refused to deal with him unless Albrecht works its way from section 1 into section 3.

SUMMARY

The terminated distributor has more and more turned to section 1 of the Sherman Act, in view of the inadequacy of the other remedies available to him. In only a few cases has he recovered damages. The relaxation by the courts of the requirements for finding a "combination" and a "public wrong" may make a cause of action under this section a more profitable remedy in the future. This section, intended for saving competition, may become the section for saving summarily terminated distributors as well.