ANTI-TRUST LAW

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The Seventh Circuit found itself last term joining other circuits in facing the problem of suppliers terminating independent dealers and distributors in Mullis v. Arco Petroleum Corporation involving an appeal from an order enjoining the defendant from refusing to furnish petroleum products to the plaintiff. The case arose in the context of the "energy crisis" of 1973 and involved an apparent effort of the supplier to favor its own retail outlets over independent distributors and dealers. Thus the case raised important questions about the rights and duties of the vertically integrated company and its ability to refuse to deal with independent contractors. The case required the Seventh Circuit to consider the issues presented by a charge of "attempt to monopolize" including questions of relevant problems of oligopolistic industry structure, and the relevance of protecting competitors in order to insure competition in an industry.

*Mullis v. Arco Petroleum Corporation

Perry Mullis and ARCO, or its predecessor, Sinclair, had maintained a distributor agreement for approximately twenty years covering the Lawrence County area of Indiana. While the record contained allegations that Mullis had conducted itself in a manner to provide basis for revocation of the distributor agreement, the court of appeals found that the agreement had been maintained over time in face of this conduct and proceeded to consider whether ARCO had a right to cancel the distributor agreement simply because petroleum products

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3. Id. at 293.
were in short supply. After receipt of notification of the termination by ARCO, Mullis contacted twenty other suppliers of petroleum products to obtain a new source of supply, but was unable to find a new supplier. Mullis then instituted suit for equitable relief which resulted in the preliminary injunction from which ARCO appealed.

The court of appeals conceded that the cancellation of the distribution contract resulted in "irreparable injury" to Mullis. Nevertheless, it held that a preliminary injunction required more than a showing of irreparable injury; that in addition there must be a showing of "reasonable likelihood of success" in the prosecution of the suit. The standard required by the court of appeals was that "[t]here must also be substantial reason to believe that the conduct of which the plaintiff complains is unlawful and is the cause of his threatened loss." The application of this standard in turn required the Seventh Circuit to examine the record to determine if the alleged violations of the antitrust law were likely to result in a judgment for Mullis. The plaintiff relied in its briefs and argument primarily on the Robinson-Patman Act and on section 2 of the Sherman Act. The gravaman of the plaintiff's complaint was that ARCO had engaged in an attempt to monopolize by favoring its own retailers over an independent distributor with which it had a contractual relationship.

The court gave short shrift to consideration of any Robinson-Pat-
man violation by concluding that the Act did not prevent a termination of a distributorship or dealership even if such a termination represented a discrimination against an independent dealer. With regard to other promotional assistance and rebates provided to dealers associated with ARCO, the court concluded that even if such assistance was discriminatory and illegal, the illegality could be ended by terminating the independent dealership.

The main focus of the court's inquiry was based on section 2 of the Sherman Act. The plaintiff's theory was characterized as an attempt to monopolize. The court observed that "plaintiff's theory is not entirely clear, but apparently rests upon the premise that the competition which has heretofore existed between the plaintiff and defendant in the sale of ARCO products in Lawrence County will be replaced by defendant's monopoly control of such sales after the termination becomes effective." The court seems to have assumed that the plaintiff's assertion that ARCO attempted to monopolize requires that the plaintiff show that "as soon as the termination becomes effective, the attempt would ripen into a completed monopolization." This, however, seems to be a mistaken characterization of what is meant by an "attempt to monopolize" for it mistakenly looks to the ultimate realization of monopoly power as a crucial element of a charge of "attempt to monopolize." The proper focus is on the "intent to monopolize" and on the "probability" of success in that attempt.

In assessing the charge of an attempt to monopolize, the court suggests that "it is incumbent upon the plaintiff to define the relevant market in which the defendant's actions are to be appraised." The satisfaction of this requirement necessitates a description of both geo-

11. 502 F.2d at 296.
12. Id.
13. Id.
14. See United States v. Charles Pfizer & Co., Inc., 245 F. Supp. 737, 739 (E.D.N.Y. 1965) where the court observed: "[T]he gravaman of attempt is the specific intent to commit an illegal act, but falling short of it." The classic formulation of "attempt to monopolize" was provided in Swift and Co. v. United States, 196 U.S. 375, 396 (1905): "Where 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 . . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the completed result,"
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The court correctly observes plaintiff's failure to address the relevant market issue. Rather than describe ARCO's market, the plaintiff merely described the extent of its own sales market. At this point two possible perspectives open: ARCO operates in a national market where monopolization is being attempted or ARCO's activity is to be assessed in a local market. The court proceeded to consider the case in terms of a local market, that is, Lawrence County, with the reservation that sellers of petroleum products in surrounding counties faced no legal nor economic barriers to competition with sellers in Lawrence County. The defendant-appellant presented a convincing argument that if Lawrence County formed the relevant market, ARCO's share of the market precluded a finding of an attempt to monopolize where "intent" and a "dangerous probability of success" are required elements in such a charge:

Mullis neither alleged nor proved, nor did the court find as facts, any of the essential elements of a charge of monopolization or attempt to monopolize. No relevant market or section of the country is set forth in the complaint or specified by counsel. There is no evidence of any intent, specific or otherwise, to monopolize and there is no evidence that Atlantic had monopoly power. In fact, the sole evidence on the issue of monopoly power or dangerous probability of success was Mullis' testimony that Atlantic supplied only between 2½ to 3 per cent of the gasoline consumed in the state of Indiana and that there were at least 20 other oil companies competing in the supply of gasoline in his immediate marketing area or who had distribution facilities placing them in a position to sell in that area with no expense beyond the cost of erecting their signs at service stations.

15. 502 F.2d at 297.
16. Id.
17. Brief of Appellee at 7, Perry Mullis v. Arco Petroleum. The only discussion of market in the plaintiff appellee's brief is as follows:
Defendant-Appellant ARCO supplies its products to various outlets by means of district dealers, marketers and jobber-distributors. Plaintiff-Appellee Mullis owns four (4) service stations in and about Bedford, Indiana area and supplies sixteen (16) additional service stations that are owned by third parties, leased to Plaintiff-Appellee Mullis and then subleased to a dealer. In addition to his own stations, Mullis supplies governmental units in Bedford, Indiana, numerous industries in and about Lawrence County, Indiana and the United States Naval Depot at Crane, Indiana. In Plaintiff-Appellee's business, he purchases from Defendant Appellant ARCO and distributes to his customers approximately 430,000 gallons of gas per month and approximately 250,000 gallons of fuel oil per month.
18. 502 F.2d at 297.
19. Brief for Defendant-Appellant, at 43-44, Perry Mullis v. Arco Petroleum. In its Reply brief, defendant rested its argument primarily on the authority of Bushie v. Stenocord Corporation, 460 F.2d 116 (9th Cir. 1972), reading that case for the proposition that unless a manufacturer's product is shown to be so unique and so dominant in the relevant market area that any increase in control over his own product virtually assures destruction of competition, the manufacturer's own products may not be found to compromise a relevant market for purposes of a monopolization claim. Reply Brief for Defendant-Appellant at 3.
The court concluded that plaintiff had failed to prove either that sales of ARCO petroleum products in Lawrence County, Indiana, constituted a relevant market or, moreover, that ARCO products themselves must be considered a part of the petroleum market rather than a distinct or standardized commodity either because of their physical characteristics or their customer acceptance. In support of its latter finding, the court observed in a footnote that plaintiff had at times purchased fuel from other suppliers than ARCO and had considered shifting suppliers. Thus, the court adopted the findings that the ARCO products were competitive with other petroleum products, that there were at least twenty other suppliers of gasoline and oil in Lawrence County, and thus, ARCO's share of the relevant market was less than 3%. From this finding, the court found that "[t]here is no evidence that its share is growing, and certainly no basis for inferring any dangerous probability that it would ever approach monopoly proportions."

RELEVANT MARKET ANALYSIS

Four points of inquiry immediately arise for evaluation of the argument of the litigants and the reasoning of the court in this case with regard to the threshold question of relevant market in a charge of attempt to monopolize: (1) Is the determination of relevant market a necessary element of a charge of attempt to monopolize; (2) If the relevant market is essential to the analysis, is the relevant market the local market of the buyer or the national market of the supplier; (3) Even if the relevant market is a factor to be considered, is there an alternative consideration such as the market power of a supplier relative to market supply; and, (4) Should the relevant market analysis be modified where the question of an integrated company's refusal to deal with an independent retailer arises, that is to say, are there any conditions under which a supplier can be said to monopolize its own product.

The concept of "relevant market" is not to be found explicitly in the Sherman Act, but rather is a doctrine of judicial construction which has been developed in order to measure the degree of monopolization realized or attempted. In assessing the charges of the ultimate act

20. 502 F.2d at 296.
21. Id. at n.17.
22. Id. at 296.
23. Id. at 297.
of monopolization both product market and geographical market have been held to be necessary elements. The charge of attempt to monopolize involves two elements, the objective or result of monopoly power and the purpose or intent to obtain this power manifested expressly or inferentially. Although the Supreme Court has not yet had occasion to rule on the necessity of showing of relevant market in an attempt to monopolize case, it did refuse certiorari in Lessing v. Tidewater Oil Co. in which the Ninth Circuit noted: "When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is not in issue." In Lessing the defendant manufacturer had engaged in resale price tying arrangements making the sale of automobile accessories a condition to the purchase of petroleum products. The defendant argued that proof of an attempt to monopolize required proof of a dangerous probability of success which depended on a finding of defendant's power in a relevant market. The court held, however, that a showing of specific intent was sufficient evidence of dangerous probability and that the relevant market was not at issue.

A reading of cases from other lower courts, however, suggests some remaining significance for the showing of relevant market in attempt to monopolize cases. This is the case where a finding of relevant market provides a basis for the determination of whether a defendant's course of conduct, if and when completed, would amount to monopolization. Such significance is suggested by United States v. Charles Pfizer & Co., Inc. where a district court held that a showing of a relevant product market was necessary in order to determine whether monopolization of that market would violate section 2, prior to a determination of whether an attempt to monopolize that market...
would be illegal. The district court opinion maintained that as "the gravaman of attempt is specific intent to commit an illegal act, but falling short of completion," the relevant market must be determined in order to assess the intent of the defendant.

**ANALYSIS OF INTENT AND INDUSTRY STRUCTURE**

The Pfizer opinion, as does the opinion of the Seventh Circuit in Mullis, places an unduly restrictive interpretation on section 2 of the Sherman Act in the face of the intent and purpose of the section to reach conduct in its incipiency that is not covered by section 1. The Pfizer opinion correctly emphasizes that "specific intent" is the crucial consideration rather than "probability of success." The Lessing approach to assessing the "specific intent," however, seems to be more compelling. While emphasizing the centrality of "specific intent," the court in Lessing properly minimized the need to consider the relevant market on the "not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." Where the defendant judges his course of action to be of benefit in achieving his objective of control, the court should be hesitant to judge his intent as innocent on the basis of some independent determination of the scope of the market. While an argument can be made that a firm is so small and its activities are of such minimal significance that a court should refrain from finding illegal conduct, such an argument does not seem compelling when we are considering a major petroleum supplier.

The de-emphasis of "relevant market" in cases of attempt to monopolize has been defended by Donald F. Turner, former Assistant Attorney General for the Antitrust Division of the Department of Justice. Turner argued that in post-World War II cases decided by the United States Supreme Court, the definition of market in attempt and

33. *Id.* at 739.
34. *Id.*
35. See Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61 (1911). The Court observed that:

Having by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2nd section seeks, if possible, to made the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section.

36. 327 F.2d at 474.
conspiracy cases has been virtually eliminated as a result of construing the "any part" language of section 2 to mean a substantial amount of commerce rather than a market in an economic sense. In cases involving vertical integration, of a type similar to that in Mullis, Turner states that specific intent shown by coercive conduct or absence of a normal business purpose was a sufficient showing of a complete offense when there was some showing a substantial amount of commerce was affected. The distinction between monopolization and attempt to monopolize can provide a basis for requiring a showing of relevant market in the former and not the latter; monopolization raises questions of power to control price and exclude competitors, and attempt to monopolize raises questions of purpose and intent rather than the result itself. The emphasis in attempt to monopolize is on the method of achieving power and the legitimacy of the conduct. In discussing attempts to monopolize, Turner clarifies why the emphasis should be on method and intent rather than on result or relevant market:

The kind of conduct that typically establishes the requisite 'specific intent' in attempt and conspiracy cases is clearly conduct which has no social or economic justification. No benefits can be expected, at least in the long run, from predatory price cutting, coercive refusal to sell and similar abuses of economic power. If defendants are attempting to drive someone out of the market by foul means rather than fair, there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes.

In sum, it can be said that the charge of attempt to monopolize is properly applied to one who engages in other than normal business conduct for the purpose of gaining greater economic power. Nevertheless, if a defendant can show that its acts were undertaken for legitimate business purposes and were not accompanied by an intent to in-

39. *Id.*
40. See Turner, *supra* note 37. Turner suggests that *Yellow Cab* and *Columbia Steel* "both seemed to proceed on the theory suggested above, namely, that proof of undue restraint, or in short that unreasonable specific intent is itself the offense." Turner, *supra* note 37, at 295 n.44. Turner goes on to cite the Court's opinion in *Paramount Pictures* to the effect that "Vertical integration runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs." United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).
42. *Id.* at 305.
43. *Hale* and *Hale*, *supra* note 24, at 364. The authors observe that "[d]epartures from the competitive norm may indicate a specific intent to commit the crime of monopolization."
crease its economic power, it can overcome a charge of attempt at monopolization. Moreover, it is possible to argue that the injury to a single competitor cannot constitute an attempt to monopolize unless it can be shown to be a part of a general plan to increase the defendant's economic power. Thus, it should be sufficient in an attempt to monopolize case to show specific intent through an assessment of the conduct charged to be anticompetitive as long as there is also some showing of an effect on some substantial amount of commerce.

It is possible that a court might employ the relevant market analysis in order to determine whether there was a substantial amount of commerce involved. Yet relevant market is a technical concept: "We try to include in the relevant market only those suppliers—of the same or related product in the same or related area—whose existence significantly restrains defendant's power. This process of inclusion is spoken of as 'market definition.'" The test of substantial amount of commerce is a quantitative test rather than one of measuring cross-elasticity of demand. The objective of the quantitative test is to avoid adjudicating cases of a de minimis character. The plaintiff's business was valued in the amount of $500,000 involving the distribution of 433,000 gallons of gasoline and 250,000 gallons of fuel oil per month. The plaintiff distributed these products to 20 retail gasoline stations. This would seem sufficient by any reasonable test to meet the requirement of substantial amount of commerce.

Even if the relevant market is a factor to be considered in determining the involvement of a substantial amount of commerce and if

44. See, e.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 627 (1953). "While the completed offense of monopolization under § 2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged."


47. Cross-elasticity is a technical term in economics referring to the substitute quality of one product for another. A high cross-elasticity of demand is the chief characteristic of a product market and refers to the fact that as price increases for one product consumers will quickly choose to purchase the substitute product. The concept refers to interchangeability of product as well as to willingness to seek a product in other geographical areas as price increases in a given area.

48. 502 F.2d at 293,
it is necessary to the determination of an economic effect of the defendant's activity, it remains necessary to consider the propriety of the Seventh Circuit's reference to a local market to the exclusion of consideration of the national impact of the defendant's activity or plan of action. The court assumed that the relevant market was the market for the sale of petroleum products in Lawrence County, Indiana. In *United States v. Grinnel Corp.*, the district court suggested the need to consider both the local and national market in assessing charges of monopolization and attempt to monopolize. This makes sense when considering the national power of a major firm who through incremental gains in local markets may be accumulating great power on a national scale. Moreover, this seems a particularly apt consideration in a charge of attempt to monopolize where each act or acquisition is to be evaluated in terms of a long term plan or program. Thus the significance of ARCO's refusal to deal with Perry Mullis can only be assessed in light of ARCO's relations with its other independent dealers. The Seventh Circuit cannot be faulted for failure to consider the national significance of ARCO's activity without any effort on the part of plaintiff to plead or prove the existence of a national plan or program of refusals to deal with independent distributors. Yet, it remains the case that the only way the significance of ARCO's refusal to deal with Perry Mullis can be evaluated is by considering the specific intent and the effect on ARCO's economic position and the existence of or lack of a plan or program of monopolization. This in turn requires consideration of the activity and impact of such refusals to deal on a national scale. Nevertheless, it might be urged that the acquisition of total control of the distribution of its product in one market represents a first step by ARCO in a program of attempted monopolization absent any showing of business justification for its refusal to continue to deal with the plaintiff. While "[refusals to deal without more do not violate the law,]" one must consider the reasons for refusing in this case and to evaluate those rea-

49. *Id.* at 297.

50. *United States v. Grinnel Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966). The district court suggested the need to consider both local and national market:

It is not merely a congeries of segregated local or city markets. Of course, in addition to the principal national market, there may well be local markets of limited territorial area, or city markets, which in other litigation might be found in themselves to constitute, for purposes of the antitrust laws, definable, separate markets, wherein prohibited monopolies, or prohibited monopolization, or prohibited restraints, or prohibited attempts to achieve those forbidden ends might be enjoined or punished. But regardless of such local or city markets, there exists a national interstate market in the defendant's product.

sons against the industry structure in order to determine whether there is evidence of an attempt to monopolize.

The justification for its refusal to continue to deal with Perry Mullis that ARCO offered was a shortage of gasoline. As a result of the shortage ARCO decided to discontinue its dealings with independent dealers and to continue supplying, in as great a quantity as it could, its own vertically controlled dealers. Moreover, Perry Mullis found itself unable, due to the shortage, to obtain a supply from any of the other twenty dealers in the Lawrence County area. The Seventh Circuit suggests that it is the right of any supplier to refuse to deal with a distributor and, moreover, that Perry Mullis would ordinarily be free to bid, by offering a higher price, to have a quantity of petroleum redirected from other distributors to him. Of course, it is not always the case that a refusal to deal, particularly a parallel refusal to deal, will not be viewed as a violation of the Sherman Act.\(^5\)

While there was no showing of a parallel refusal to deal based on any concerted activity, there was a rejection of Perry Mullis' offer to purchase petroleum products by twenty-one suppliers. The Seventh Circuit observed quite correctly that during this period of shortage oil companies were not entirely free to adjust prices or to take on a new distributor when it offered a higher price than distributors currently under contract.\(^5\) The Seventh Circuit, however, took the view that absent specific legislation affecting distributor contracts or the allocation of scarce quantities of petroleum products, it was not proper to apply the Sherman Act in such a way to achieve these ends:

Regulatory controls may limit price, either in maximum or minimum terms which the seller may change; may require the continuation of service to unprofitable accounts; or may direct that products in short supply be allocated to essential or priority uses. Such functions, however, are not properly performed by laws which are designed to eliminate restraints of trade.\(^5\)

The court properly suggested its limited role in enforcing regulatory controls and relied upon the largely unassailable position that it is not a legislature and should not exercise jurisdiction to lay down requirements for a supplier as to the manner in which it is to allocate a scarce supply. However, a court may too narrowly confine its jurisdiction

\(^{52}\) See Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances."

\(^{53}\) 502 F.2d at 299.

\(^{54}\) Id. at 299-300.
when it is presented with a case where an argument can be made that a supplier has violated laws designed to eliminate restraints of trade by conducting itself in such a manner in the face of a limited supply. Such a case would seem to be presented by a vertically integrated oligopoly which uses the occasion of a scarcity of supply to favor its own vertically integrated dealers over independent contractors. The assessment of such a case requires that one consider the market power of the supplier in terms of the structure of the industry of which the supplier is a member.

The Seventh Circuit concluded that ARCO controls only 3% of the Lawrence County area market and that it faces the competition of at least 20 other competitors in this area. This understates the market power of ARCO in the Lawrence County area and more particularly in the nation as a whole. ARCO is the ninth largest producer of petroleum products in the country and ranks number twenty-five in total value of sales among the largest corporations in the United States. ARCO's sales for 1972 amounted to $3,320,793,000; its assets amount to $4,629,013,000 which caused it to be ranked the sixteenth largest corporation in assets in America in 1972. It is obvious that ARCO has significant economic power as a supplier of petroleum. Moreover, calculated efforts on its part to gain greater control of the distribution of petroleum products by favoring its own vertically integrated distributors and by excluding or destroying independent distributors would constitute an attempt to monopolize. The opinion of the Supreme Court in *Otter Tail v. United States* held section 2 of the Sherman Act to preclude a refusal to deal by a vertically integrated monopolist. While, it would require some extension of *Otter Tail* to conclude that oligopolies and other possessors of great market power would be required to deal with independent distributors, the opinion does suggest that the restraining effect on competition of a refusal by such a vertically integrated company to deal with an independent should be measured against the requirements of the anti-trust laws.

The Seventh Circuit refused to consider ARCO's own products as

55. Id. at 297.
57. Id.
a "relevant market" in satisfaction of the test for an "attempt to monopolize" which it sets forth. The court observed:

[T]here is no proof suggesting that ARCO products are in any way different from other brands of petroleum products available in Lawrence County. Even if we were to assume, without proof, that ARCO's gasoline or fuel oil is not a standardized commodity, either because of physical characteristics of the product or because advertising has enhanced its consumer acceptance, there is no evidence indicating the extent of its differentiation from other brands or the competitive significance of any such possible differentiation.60

The conventional analysis seems correct from the viewpoint of the consumer or from the position of the supplier at the time of the refusal to deal. And while the court is correct in its invocation of its aphorism: "For in Sherman Act litigation we must adhere to the admonition that the statute is concerned 'with the protection of competition, not competitors,'"61 it is often the case that the maintenance of the existence of competitors is the only means available of protecting competition.62 It is possible to argue that the traditional analysis of product market open to the consumer is inappropriate given the concentrated character of the supplier's industry and the power of the defendant in that industry. This argument becomes all the more compelling when the relative impotence of the plaintiff supplier who not only faces the scarcity of supply resulting from the fuel shortage with which the court deals, but also the oligopolistic and highly concentrated market of petroleum refiners and suppliers is considered.63 Moreover, the chief reason for the supplier's desire to gain control of distribution is to extend its market position and power from the level of refining and supply to the level of distribution. As one economist described it:

[V]ertical integration may enable firms to extend their market position from one level to another. To the extent that the latter market is more susceptible than the former to the development of oligopolistic pricing policies, this extension will lead to enhanced market power. This result, however, requires that firms at the

60. 502 F.2d at 296.
61. 502 F.2d at 298. Nevertheless, it is true that the protection of competitors, particularly independent distributors and dealers, is a matter of concern to legislators. See Bartlit, Practical Problems in Terminating Distributors and Dealers, 42 Antitrust L.J. 317, 320 (1973). "There is a recent trend towards state laws intended to freeze distributor relationships to protect dealers and distributors." Id.
63. This concern is affirmed by the recent announcement that the Justice Department plans to proceed against Texaco to compel it to supply crude oil to two small companies under a mandatory reallocation program. The suit, filed in Wilmington, Delaware would benefit Grant Industries and J & W Refinery. "U.S. Sues to force oil Sale," Chicago Tribune Nov. 19, 1974, § 1, at 10, col. 4.
original stage of production have sufficient power to extend their
market position into the second stage, while at the same time, not
be able to gain all the advantages of market power.  

What is true of vertical mergers is also true of the vertically integrated
company which uses its power at one level to extend its power at the
second level by terminating the contracts of independents at the latter
level of production.  
The character and nature of the competitive ef-
fect of vertical integration and the protection or favoring of vertically
controlled dealers or distributors is to be observed and measured at the
level of distribution where greater power is sought as well as at the
original level of supply where new barriers to entry are raised and
where entrenchment of market power is realized.  
It is proper to con-
sider the firm's own product as a particular market in order to deter-
mine the former effects.  The more conventional analysis of product
market is properly limited to determination of the latter effects.  The
Seventh Circuit failed to properly consider the real competitive signifi-
cance of a powerful company like ARCO favoring its own vertically
integrated dealers and distributors during periods of scarcity as well as
at any other time.  Such preference for the vertically integrated dis-
tributor has real competitive significance and can constitute an "attempt
to monopolize."  The protection which the Seventh Circuit said did not
exist for Perry Mullis under the Sherman Act is not protection merely
for the sake of competitors.  This protection is in fact necessary to
maintain competition at the level of distribution or any secondary level
below that of a firm in the line of production which possesses monopoly
or other great economic power and is vertically integrated.

64. Comaner, Vertical Mergers, Market Powers, and the Antitrust Laws, LVII
AMER. ECON. REV. 254, 262 (1967). (Papers and Proceedings of the Seventy-Ninth
Annual Meeting of the American Economic Association).

65. Id. at 259. The process of utilizing entrenched power to gain greater power
at a second level is amplified.
Although vertical integration may well have the important effect of extending
high concentration levels from one stage of production to another, it cannot
be held responsible for high concentration prior to integration.  And it is the
latter that results in market power which is exercised through vertical rela-
tionships.  In addition, since vertical integration is relatively unlikely to provide
a vehicle for the extension of market shares where existing shares are greatest,
integration should not lead to higher concentration at the stage where market
power is founded.

66. See Comment, Attempt to Monopolize under the Sherman Act: Defendant's
Market Power As a Requisite to a Prima Facie Case, 73 COLUM. L. REV. 1451, 1475
(1973). The author rejects the use of a relevant market requirement in attempt
to monopolize cases suggesting a structural test as outlined above.  "[F]uture Courts
should avoid perfunctory invocation of traditional market power analysis in attempted
monopolization cases and focus instead on economic power, however manifested, in
reaching the admittedly difficult decision that a defendant firm's conduct constitutes an
illegal attempt to monopolize."  Id.
Mullis v. Arco Petroleum Corp. presented the Seventh Circuit with the need to determine the obligations of a vertically integrated oligopoly toward its independent dealers and distributors. The plaintiff had been terminated as an independent dealer during the fuel crisis of 1973. While inadequacies of pleading and proof by the plaintiff did not provide the court an easy occasion to determine the anti-trust significance of the termination of an independent distributor, the court did proceed to consider the charge of “attempt to monopolize” under section 2 of the Sherman Act and its application to such a dealer termination. The Seventh Circuit required a showing that the defendant’s conduct would after the attempt “ripen into a completed monopolization.” This requirement of a showing of ultimate realization places too heavy a burden on the plaintiff. It is enough to show specific intent to monopolize and a probability of success in that attempt.

In assessing an attempt to monopolize, the Seventh Circuit gave extensive consideration to the relevant market which it held to be an element in a charge of attempt to monopolize. The court found that the relevant market was a local one, the Lawrence County area, and that the product market was a general one, petroleum products. It would seem of dubious benefit to require a showing of relevant market as a necessary element in an attempt to monopolize case. A showing of specific intent to monopolize involving a substantial amount of commerce should suffice. A showing of relevant market seems necessary only where it is a factor in assessing the specific intent of the defendant. Where the business conduct of the defendant is shown to be coercive or without a normal business purpose this meets the requirement of a showing of specific intent to attempt to monopolize. The defendant should then have the burden of proving lack of an intent to monopolize. A requirement of pleading and proving a relevant market would appear superfluous, while a showing of an involvement of substantial commerce remains necessary. The definition of a relevant market for this purpose seems inappropriate given the highly technical character of such a definition which depends on cross-elasticity of demand. In the Mullis case, the plaintiff showed the involvement of a substantial amount of commerce by the valuation of its business and the amount of petroleum products it sold each month.

To the extent that relevant market is properly considered in Mullis, the court seems to have taken an unduly limited view centering on the local market. While the termination of this dealership occurred
in a particular area, its impact and significance could only be measured by reference to the actions of ARCO on a national scale. The act of termination in an attempt to monopolize case should be assessed both in the local market and in the national market as part of a program or plan of monopolization.

While the Seventh Circuit correctly observed a supplier's right to refuse to deal absent any anticompetitive purpose, it severely limited its analysis of the reasons given for and the significance of this refusal to deal against a backdrop of the fuel shortage. Such a refusal to deal, however, can only be evaluated against the structure of the industry and the market power of the firm refusing to deal and favoring its own vertically integrated dealers or distributors. ARCO is one of the largest firms in the United States and a major producer of petroleum products operating in an oligopolistic market. If it were a monopoly, its refusal to deal would clearly constitute a violation of the Sherman Act. As an oligopoly, its termination of an independent distributor should also be assessed in terms of its anticompetitive effects. Here, a termination as part of a general plan is likely to result in the translation of its great market power as a supplier and refiner into great power at the distribution level. For this reason it seems desirable to consider ARCO's own products as a product market for purposes of assessing the competitive impact of its termination of the independent in order to determine the "monopolizing" effects at the distribution level. And it seems proper to restrict the more conventional product market definition to measure the effects of ARCO's termination on the entrenchment of its market power at the refining and supply level and on the increase in barriers to entry at this latter level of production. While further proof in *Mullis* would be required under the analysis set out as criticism of the theory under which the court proceeded, such an approach to the problem of termination of independent dealers and distributors by vertically integrated companies would further the purpose of the Sherman Act in protecting competition.