Antitrust Implications from the Use of Consignment Contracts in the Petroleum Industry
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from the remainder of the treaty, the residue should be valid.

Viewed in this light, the dictum in Power Authority of New York v. Federal Power Commission" seems unfortunate. Although it may be politically inexpedient to enter treaties about a variety of subjects that historically have been considered of purely domestic concern, there is no judicially enforceable constitutional limitation to prevent it. What is a proper subject for international concern depends upon the development of international law and cooperation, and courts should not erect a standard to test the essential validity of treaties upon this term or its converse, domestic concern. The courts' function in reviewing essential validity, if any, should be limited to the narrow area where it is contended that the treaty is unlawful according to principles of international law. The treaty-making power is a political one and in the main should be left to the wisdom and discretion of those who are charged with its operation, and who are responsible to the people for their conduct.

ANTITRUST IMPLICATIONS FROM THE USE OF CONSIGNMENT CONTRACTS IN THE PETROLEUM INDUSTRY

Consignment is generally used as a device to protect a vendor from either the fraudulent bulk sales or insolvency of his vendee. Protection is afforded the vendor by his retention of title enabling him to set aside sales not made in the ordinary course of business and giving him sole claim to the goods in the event of the vendee's financial failure. Generally, the consignee retains the power to set the prices and is regarded as the bailee of the vendor for the sale of the goods. However, the vendor may exercise such control over the prices and business of the consignee that the consignee becomes the vendor's agent. When such control over the consignee's prices is exercised in conjunction with a genuine agency system of distribution, a consignment-agency plan exists, which has been held not to constitute a violation of the antitrust laws. The use of consignment raises problems which may include not only a determination as to the existence of a genuine agency but also the applicability

rights or obligations. Power Authority of New York v. Federal Power Commission, 247 F.2d 538, 541 (1957). The distinction to be noted is that the reservation in the Niagara River Power case was directly germane to the subject-matter of the treaty and an outgrowth of international negotiation. Id. at 549 (dissent). The illustrations, on the other hand, are remote from the negotiations and the subject-matter of the treaty. 90. 247 F.2d 538 (D.C. Cir), vacated as moot, 355 U.S. 64 (1957).
of the Miller-Tydings and McGuire Amendments to the Sherman and Federal Trade Commission Acts. These problems are exemplified by the use of consignment contracts, frequently labeled "C plans," in the petroleum industry.

In the early 1930's the major petroleum companies operated many of their own retail outlets. However, the major portion of the present retail outlets are independently operated while only a small portion operate under consignment and a smaller portion are company-owned and operated. Several developments brought about this complete change in the industry pattern of distribution. Independent stations were able to take business away from company-operated stations because prices could be cut on shorter notice with less risk of ill will and without violating the Clayton Act or one-price laws of a number of states. A big factor in some states was the severe chain store taxes imposed under laws enacted in 1935 and thereafter. In addition, the companies were anxious to eliminate the increasing responsibilities resulting from such factors as the unionization of station employees, social security taxes, withholding federal income taxes, and wage and hour legislation. Finally, the independent operation created a semblance of independent small business on the

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4. In reply to a questionnaire by the TNEC, the major oil companies reported a total of 42,270 service station operator-managers and employees as of June 30, 1935. Hearings Before the Temporary National Economic Committee on the Investigation of Concentration of Economic Power, 76th Cong., 2d Sess., pt. 14-A, at 7820 (1940). The number of domestic service stations owned or leased by the major oil companies was reported to be 75,547 for 1935. Id. at 7819.

In McLean and Haigh, The Growth of Integrated Oil Companies 289 (1954), the authors make this comment: "The withdrawal of most integrated oil companies from the direct salary operation of service stations was one of the most significant disintegration movements which has occurred in the history of the oil industry. Several integrated companies began to lease their company owned and operated service stations to private operators around 1930. In 1935 and the years immediately thereafter the program gained momentum and spread quickly throughout the industry."

5. In 1 Whitney, Antitrust Policies 126 (1958), the number of stations in each group was estimated as follows: (1) About 60,000 owned and 105,000-110,000 leased by the dealer; (2) 8,000 on consignment; and (3) 3,000 owned by suppliers and operated by salaried managers.
6. Id. at 125.
7. Ibid.
8. Although the major oil companies have discontinued their operation of most stations, they maintain extensive control over the stations by means of leases and oil and gasoline supply contracts executed with the dealers. At the present time about 50% of the stations are operated by dealers who lease their stations from their suppliers. Id. at 126. Other dealers who are not subject to control by lease frequently have oil and gasoline supply contracts with their suppliers. Examination of sample leases and supply contracts submitted to two Congressional subcommittees indicates that many of the leases impose a duty on the dealer to maintain the station in a neat and orderly condi-
retail level with a minimum investment by the companies; and, in the
majority of cases, the rent paid by the dealers exceeded the amount of
profit from integrated distribution.9

Although only about 8,000 service stations, out of approximately
181,000, are on consignment,10 the use of C plans has increased con-
siderably in recent months.11 Twelve major petroleum companies plus
a number of jobbers now use consignment in one form or another.12
This development seems to have arisen either as a part of a genuine
agency system created for various business purposes or as a method of
gaining control over retail prices while maintaining the advantages of an
otherwise independent system of distribution. The C plans are used on
both the retail and wholesale levels.13 However, since the legal problems
tend to be the same, discussion will be confined solely to the retail plans.
There is no set pattern or type of plan being used. The only common
denominator is that gasoline is always consigned to the dealer to be sold

tion and reserve a right in the supplier to re-enter and inspect at will. Both the
leases and supply contracts are for a short duration (usually one year) and in some
cases are subject to cancellation on short notice without cause. When the dealer is
under both a lease and a supply contract, termination or cancellation of one terminates
or cancels the other. Hearings Before a Subcommittee of the Senate Committee on
Small Business on a Study of Petroleum Marketing Practices in New Jersey, 84th Cong.,
1st and 2d Sessions, pt. 3, at 461-89, 498-537, 542-60, 569-77, 591-600, and 610-32 (1956);
Hearings on H. Res. 56 Before Subcommittee No. 5 of the House Committee on Small
1, at 246, 263, 320, 398; pt. 2, at 45; pt. 3, at 82, 121 (1957). The potentiality of having
their lease and supply contracts cancelled on short notice and the inability to liquidate
their investments in TBA (approximately $3,000-$5,000) tends to force dealers under
lease to accept "suggestions" by their lessor-suppliers; and, the difficulty of acquiring
gasoline and oil from another supplier on short notice places a similar, although more
limited, pressure on dealers who are under supply contracts but not leases. Indeed, a
vice-president of Shell Oil Co. commented that: "We are in an industry that is in ef-
fact an integrated operation, starting at the wellhead, to the refinery, to the pump for
the consumer." H.R. REP. No. 1423, 84th Cong., 1st Sess. 16 (1955). The subcommit-
tee before which this statement was made agreed. Id. at 2. Similar control over dealers
has been exercised by the use of franchise agreements in the automobile industry. See
Hewitt, Automobile Franchise Agreements (1956).

9. Surveys conducted by the oil companies indicate that, based upon the rental
which an independent dealer would have to pay, the companies in the majority of cases
cannot operate their own stations on the margin available to retail dealers without suf-
fering a net loss. The willingness to work longer hours and ability to operate the sta-
tions on less manpower were among the factors which enabled the independent dealers
to make a profit while paying rent in addition to the expenses paid by company sta-
(1954). Testimony presented to a house subcommittee was in accord. H. R. REP. No.
1423, 84th Cong., 1st Sess. 16 (1955).

10. See note 5 supra.
12. Ibid.
at a price fixed by the company with the dealer receiving a commission which may or may not vary with such price.\textsuperscript{14}

Since the purposes for the use of C plans tend to differ according to whether the plans are used in a permanent or an "off and on again" manner, the plans must be examined accordingly. Although some new dealers who desire to lease a company-owned station are required to go on consignment for a few months in order to measure their capabilities, most dealers who are placed on permanent plans remain on consignment.\textsuperscript{15} The considerations which prompt such plans cause each company's plan to be generally uniform. But the plans of the different companies vary considerably.\textsuperscript{16} Some companies consign all products while others consign only gasoline. The operating expenses of the station are assumed in varying degrees. In addition to the risks of doing business,\textsuperscript{17} a company must consider possible tort liability, workmen's compensation coverage, social security taxes, the withholding of federal income taxes, chain store taxes, and the necessary bookkeeping expenses associated with the foregoing responsibilities.

The extent to which these responsibilities are assumed seems to depend upon the purpose or purposes for which the permanent plan is used. If the purpose of the plan is to provide a test of sales potential for the determination of the proper rental value of a new station, to maintain high standards at "show-spot" stations, or to test the capabilities of new dealers, the company probably will find it more desirable to assume all responsibilities in order to maintain complete control over the station operation. On the other hand, if the purpose is either to make dealerships available to men who otherwise could not raise the necessary capital, or merely to gain control over the prices\textsuperscript{18} of a station, the company

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\textsuperscript{14} National Petroleum News, July 1956, p. 95.
\textsuperscript{15} Ibid.
\textsuperscript{16} See Ibid. which discusses four actual plans considered representative of the types being used.
\textsuperscript{17} Rent, wages, and general overhead expenses are the risks to be considered. However, the method by which these expenses are paid will determine whether or not any risk to the dealer exists. See text accompanying note 82 infra for a discussion of this point.
\textsuperscript{18} The importance of retail prices and other aspects of the retail market to the major oil companies is indicated by the following statement of a vice-president of Texas Co.: "... the oil industry works in a continuous flow from the well all the way to the last 10 feet of gasoline hose at the service station. If anything interferes with the operation at the last 10 feet, the entire costly operation is tied in knots. That is why we must have assured outlets. That is why we cannot be deprived of the right, or relieved of the responsibility, to see that our products get to the customers." H. R. REP. No. 1423, 84th Cong., 1st Sess. 5-6 (1955). This importance of retail markets to the major oil companies points out the dual character of such markets.

In an immediate sense they are the arenas for competition among local service stations, and for the emergence of primarily local aspects of retailers' marketing policies. In a broader sense they are the primary ground for the
undoubtedly will not assume extensive responsibilities.  

The circumstances surrounding the use of a permanent consignment plan may indicate the purpose or purposes for its use. For example, consignment can be used at strategically located stations as a means of instigating price wars in order to increase a company's share of the total volume sold in the area. Similarly, consignment can be used as a relatively effective means of maintaining maximum dealer margins in any given area. In this latter respect, if consignment is used at all stations, it is more effective than attempted control by means of wholesale tank wagon prices. Consignment is not subject to the dealer's discretion as to his retail price and source of supply, or to Robinson-Patman Act meeting in competition of the integrated refiners and for the determination of the general level of domestic gasoline and lubricant prices. Thus we have the mixed phenomenon in local retail markets of direct rivalry among major and other integrated refiners intermingled with a purely local sort of competition among major integrated retail outlets, other integrated outlets, and independent outlets handling both major and minor gasoline. 


19. See National Petroleum News, July 1956, p. 95, which discusses four actual plans and the reasons assigned by the respective companies for the use of each.  

20. This discretion will be non-existent if the dealer is unable to deviate from the retail market price because of the proximity of competing stations or unable to purchase from others, and if the other companies do not change their tank wagon price thereby effectuating a similar change in the retail market price. The non-brand dealer will most likely be the only type of dealer to change suppliers in the absence of a substantial drop in the margin because the brand dealer will be precluded by his supply contract (and possibly by his lease, if he leases from his supplier) from using the supplier's brand name on his signs except when the supplier's products are purchased.  


Sec. 2 (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .  

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.  

(c) That it shall be unlawful for any person engaged in commerce, in
complications which would necessarily result if the independent dealer's discretion were to be eliminated by means of discriminating against those dealers who refused to sell at the company's price.

The nature of "off and on again" C plans differs markedly from permanent C plans. "Off and on again" plans are temporary and are generally offered to all of a company's dealers in a competitive area, but only during severe price wars. Such plans enable a company to grant relief to efficient dealers who lack the capital to remain solvent during a severe price war. But, since there are other methods of achieving the foregoing result without controlling the dealers' prices, the main reason for "off and on again" C plans is the direct control which the company acquires over the consignee-dealers' prices. Such plans may be used by a company as a device for maintaining or increasing its share of the total gasoline sales by all companies. In this respect, a company may use consignment defensively or offensively as a means of instigating a price war. Due to the legal uncertainty of "off and on again" plans, a company will tend to assume only those business responsibilities deemed necessary to avoid antitrust violations.

The course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

23. An example of the defensive use of consignment occurs when a company lowers its price to maintain its share of the market volume following a prior reduction by another major or independent. Consignment is more effective than attempted control by means of reducing the wholesale tank wagon price to the dealers because consignment is not subject to the dealer's discretion as to retail price.

The offensive use of consignment to instigate a price war may be based upon a company's desire to increase its share of market sales or to dump an oversupply of gasoline on the market without suffering a loss of its share of market sales. The method of unloading excessive gasoline must be more indirect when consignment is not used. In the absence of company operated or C stations, the company cannot force the dealers to reduce prices at their retail outlets in the hope that a greater share of the market can be temporarily acquired while eliminating the oversupply of gasoline. Instead, the company will have to sell to non-brand dealers (probably through brokers); and, when the non-brand dealers cut their price in an attempt to increase their per cent of the market, the brand dealers will probably agree to meet the competition in exchange for a discount which partially covers their lower margin—the result is that (1) the non-brand dealer does not gain a permanent advantage, (2) additional gasoline is moved through both brand and non-brand outlets, and (3) part of the cost of this operation is borne by the brand dealer. Under consignment, the foregoing operation can be used with the assurance that the competition from the non-brand dealers will be met by the company's brand outlets; or, if sale through non-brand outlets is impossible, the company can attempt to unload the oversupply only through its own outlets. See H. R. REP. No. 1423, 84th Cong., 1st Sess. 15-16 (1955).
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The possible uses of an "off and on again" plan as a means of controlling retail prices and thereby increasing a company's gasoline sales in the market are illustrated by a recent Federal Trade Commission complaint against the Sun Oil Company. The complaint charges that Sun's use of a C plan in the Norfolk-Portsmouth-Virginia Beach area of Virginia constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The facts underlying the complaint are indicated by testimony before a Congressional subcommittee. According to this testimony, Sun Oil had twenty-six service stations in that area in November 1956, of which nine were company-operated. Sun Oil representatives informed the seventeen independent dealers that Sun intended to lower the price of gasoline at all company-operated stations. In addition, the dealers were informed that they would not be given a voluntary allowance or any other form of subsidy, but that they could obtain the help of Sun by accepting a C plan. Under this plan, Sun would fix the retail price and the dealer would be guaranteed 4\(\frac{1}{2}\) cents commission regardless of the extent to which the prices declined. The guaranteed commission was less than the normal dealer margin. This situation forced the dealers either to become consignees or to compete against their own supplier without any assistance in the ensuing price war. In addition the importance of the retail prices to the company's marketing policies may have caused some dealers who would have preferred to remain independent to fear that the company would retaliate by cancelling their lease or supply contracts. As a result of

25. 38 State. 717 (1914), as amended, 15 U.S.C. § 45 (1952) provides in part: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."
27. The temporary voluntary allowance which is a discount from the tank wagon price is the subsidy normally given to dealers during intensive price disturbances to enable them to compete against price cutters. See Cassady, Price Making and Price Behavior in the Petroleum Industry 228 (1954). An adjustment in the rent charged to the dealer is another subsidy which can be used in such situations. The granting of such discounts may violate antitrust laws. In a recent complaint the FTC charges that in the Norfolk-Portsmouth-Virginia Beach area Texas Company granted such discounts only to dealers who sold at prices fixed by the company. The complaint charges that such conduct constitutes price discrimination in violation of § 2(a) of the Robinson-Patman Act and price-fixing in violation of § 5 of the FTC Act. Texas Co., 3 TRADE REG. REP. ¶ 26754 (1958). It would seem that a price-fixing violation could be avoided by granting the discounts to all dealers, including those dealers who refuse to meet, to the extent desired by the company, the price competition provided by the price-cutting dealers. However, price discrimination difficulties will still exist if dealers in peripheral areas are either denied the discount or granted a different discount from other dealers. See note 73 infra. The difficulty lies in determining the extent of the competitive market.
28. See note 18 supra.
29. See note 8 supra.
this economic pressure, all seventeen dealers accepted C plans.

According to the testimony the resulting price war lasted several months, during which time Sun was able to exercise control over the competitive market price by its use of C plans. This assertion seems to be based upon the ability of Sun to force lower prices throughout the area by means of its price control over all Sun outlets. The major petroleum companies not using consignment did not possess this control, although they could have subsidized their outlets. At least, Sun's action tended to prevent or hamper the efforts of independents to enter the market because of the latter's inability to withstand the financial losses resulting from the price war. Sun's use of C plans raises serious questions of legality under both the Federal Trade Commission Act and the Sherman Act. Furthermore, since permanent C plans could be used in a similar manner, the questions are not confined to "off and on again" plans. The considerations determining legality vary according to whether the consignment contract is between parties who operate on the same or different levels of distribution.

**CONSIGNMENT CONTRACTS INVOLVING HORIZONTAL PRICE-FIXING**

A contract which fixes prices between two parties who operate on the same level of distribution and are competitors is called a horizontal price-fixing contract. Generally, the economic harm from horizontal price-fixing contracts is the elimination of the opportunity for price competition between the parties which creates the danger of arbitrary and unreasonable prices. As a result, such contracts consistently have been held to be illegal under both the Sherman and the Federal Trade Commission Acts where there was either power or intent to affect market price. Therefore, an important issue is whether or not the parties to a given consignment contract are competitors.

In the market area involved in the Sun Oil complaint, Sun Oil owned some retail outlets and made consignment contracts with inde-
pendent dealers owning or operating other outlets. The economic relationship of Sun and its dealers is similar to the relationship of the manufacturer and certain wholesalers in the recent case of United States v. McKesson & Robbins, Inc.\textsuperscript{34} a suit to enjoin price-fixing in violation of the Sherman Act. McKesson, a manufacturer that wholesaled\textsuperscript{35} both its own and competitors' brand products, distributed its own brand products to retailers through three channels: (1) sales by the manufacturing and wholesale divisions to independent wholesalers who sold in competition either with the direct sales of the manufacturing division or with the wholesale divisions; (2) direct sales by the manufacturing division; and, (3) sales by the wholesale divisions.

Prior to 1951, McKesson had fair trade agreements with twenty-one independent wholesalers purchasing directly from the manufacturing division. Of these independents, sixteen competed with McKesson's wholesale divisions while the other five competed with the manufacturing division for sales to chain drugstores located in their trading areas. On June 6, 1951, the McKesson wholesale divisions were notified to cease selling to any independent wholesaler who had not entered into a fair trade contract with the manufacturing division. As a result, seventy-three of the independent wholesalers who had been purchasing from McKesson wholesale divisions entered into fair trade agreements with the manufacturing division binding the independents to sell at prices fixed by the manufacturing division. Each of these independents was in direct competition with the McKesson wholesale division from which it purchased. The McKesson manufacturing division and wholesale divisions were free to sell at prices lower than the minimum prices agreed upon by the independents.\textsuperscript{36}

McKesson contended that its fair trade contracts with independent wholesalers came within the exemption provided by the Miller-Tydings Amendment. This amendment provides that nothing contained in Section 1 of the Sherman Act

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shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when
\end{quote}

\begin{itemize}
\item \textsuperscript{34} 351 U.S. 305 (1956).
\item \textsuperscript{35} Operating through 74 wholesale divisions located in 35 states, McKesson is the largest drug wholesaler in the United States. \textit{Id.} at 306.
\item \textsuperscript{36} Record, pp. 57-58.
\end{itemize}
contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State . . . in which such resale is to be made or to which the commodity is to be transported for such resale. . . . Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.37

The Supreme Court held that McKesson and the independent wholesalers were competitors and that the contracts were, therefore, illegal.38

In a more recent case, Esso Standard Oil Co. v. Secatores, Inc.,39 the parties were held to be competitors even though the company did not operate outlets in competition with its retail dealers. Esso sought to enjoin a "non-singer" service station dealer from selling the company's gasoline at prices less than those established by the company in fair trade contracts with other dealers. In addition to the sales made to the defendant and other dealers, Esso sold directly to large commercial customers in the defendant's market area. The defendant dealer also sold to large commercial customers. But, as contrasted with the McKesson case, the integrated company and the defendant were distributing only the products of the integrated company.40 Nevertheless, the company and the defendant were held to be competitors and the company was denied injunctive relief.41

It seems clear from the McKesson and Esso cases that a company and its dealers will be deemed competitors whenever the company either operates its own retail stations or sells directly to users within the competitive area of its independent dealers. But, both the McKesson and Esso cases involved fair trade contracts rather than consignment contracts and appear to have been based primarily on a literal interpretation of the Miller-Tydings and McGuire Amendments rather than on an

38. 351 U.S. at 313.
40. The defendant agreed to buy all of its gasoline requirements from Esso Standard. Id. at 18.
41. Id. at 21-22. The denial of relief extended not only to the sales made to commercial accounts but also to sales made to the general public for which the parties did not compete. Since the fair trade contracts specified minimum rather than precise retail prices, the decision as to sales made to the general public cannot be justified upon any possible economic abuse. Indeed, the court based its decision solely upon a literal interpretation of the Miller-Tydings and McGuire Amendments.
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analysis of the economic effects resulting from the use of the type of horizontal price-fixing contract involved. Therefore, the integrated company situation must be compared with three other types of horizontal price-fixing contracts to determine whether there is an economically significant difference between the use of consignment and fair trade contracts by an integrated company.

The simplest horizontal price-fixing contract is between two or more parties on the same functional level to fix the price at which they sell. The relevant market is solely the one in which the contracting parties formerly competed. Notwithstanding dictum in some cases that price-fixing contracts are illegal per se, the defendants in all of the cases involving this type of contract possessed either the power or the intent to affect the market price. Furthermore, a few courts have stated that power or intent is essential to render such contracts illegal. However, the power or intent required will vary with the method used to affect prices. This point was exemplified by the Supreme Court in United

42. In the McKesson case the court stated: "The issue presented is a narrow one of statutory interpretation. . . . It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend upon a showing of its unreasonableness, since it is conclusively presumed to be unreasonable." 351 U.S. at 309-10. "There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional per se doctrine." Id. at 310-11. "Congress thus made as plain as words can make it that, without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other. If they do, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices. . . . Since appellee [McKesson & Robbins] competes 'at the same functional level' with each of the 94 wholesalers with whom it has price-fixing agreements, the proviso [to the Miller-Tydings and McGuire Acts] prevents these agreements from falling within the statutory exemption [provided by the Miller-Tydings and McGuire Acts]." Id. at 313.

“Both the government and appellee press upon us economic arguments which could reasonably have caused Congress to support their respective positions. We need not concern ourselves with such speculation. Congress has marked the limitations beyond which price fixing cannot go.” Id. at 315-16.

In the Esso case the court stated: “The critical, and as we see it the controlling, question before the court below and before us is whether the plaintiff [Esso] and defendant [the dealer] are ‘corporations in competition with each other.’” 246 F.2d at 19. “Although their [the parties] techniques of doing business differ, they are nonetheless competitors, and this excludes application of the exemption from antitrust legislation.” Id. at 21.


Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it.

The actual or potential economic harm from such contracts is their tendency to lessen or eliminate price competition and to create the danger of an arbitrary and unreasonable market price. Therefore, a rule of per se illegality is unnecessary in situations where the parties do not have such power or intent. Admittedly, most agreements of this type will be made between parties possessing the requisite power or intent.

A second type of price-fixing contract which is essentially horizontal is an agreement between dealers competing on one level of distribution to coerce resale price maintenance contracts from a manufacturing or producing company. The relevant market is the competitive market of the dealers for sales of the company's product. The horizontal agreement creates the danger of two adverse economic effects. First, the agreement, which stems from the dealer's desire not to compete in price, may result in an arbitrary and unreasonable price whenever the coercing

46. 310 U.S. 150 (1940).
47. Id. at 223-24.
48. If there is no intent to affect or no actual effect on the market price, as contrasted with the price of the contracting parties, the contract or combination will be upheld. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). The intent or actual effect on market price occurs when the purpose or effect of the agreement is to raise, lower or stabilize the market price. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
49. United States v. Maryland & Virginia Milk Producers Ass'n, Inc., 179 F.2d 426 (D.C. Cir.), cert. denied, 338 U.S. 831 (1949); Anchor Hocking Glass Corp. v. FTC, 33 F.T.C. 547, petition for review dismissed, 124 F.2d 187 (6th Cir. 1941); Standard Oil of Kentucky, 8 F.T.C. 74 (1924).
dealers control the market and execute similar agreements with other competing companies. Second, if competition between the dealers would cause a lower price for the coerced manufacturer's product than for other manufacturers' products, the dealers might be able to sell a greater volume of the company's product than would be possible under a fair trade price; but, the company is forced by the fair trade contract to abandon this possibility. Such a possibility is important in industries such as the petroleum industry where advance estimates of demand frequently result in overproduction. The possibility of such effects is recognized by the McGuire Amendment which provides that the exemption for minimum or stipulated resale price-fixing contracts does not apply to contracts between parties in competition with each other. In view of the nature of this type of contract, the per se rule is properly applied.

A third type of horizontal price-fixing contract involves an agreement between two or more companies to fix the minimum, maximum, or precise resale price of their dealers who are competing on another functional level. The relevant market is the market in which the dealers sell. The economic harm in that market is the creation of an artificial floor or ceiling on price competition or the complete elimination of price competition between the dealers of the contracting parties. Similar to the second type of horizontal contract, these contracts are denied the protection of the McGuire Amendment by the proviso that the fair trade exemption does not apply to contracts between parties in competition with each other. If the objective of a company is the maintenance of reasonable dealer margins and resale price maintenance is not feasible, the company has the alternative of distributing its products through its own outlets. However, the Supreme Court has held that even when companies are legally precluded from distributing a certain commodity, an agreement between two such companies to fix the maximum resale prices of their independent distributors is illegal.

51. For a discussion of the interpretation given to this term, see text accompanying note 69 infra.
53. Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951). The most complete statement of facts appears in the opinion by the Court of Appeals, 182 F.2d 228 (7th Cir. 1950). This case involved an action by a liquor wholesaler for treble damages resulting from a violation of the Sherman Act. The defendants, Seagram and Calvert, were competing distillers selling to Kiefer-Stewart and other independent wholesalers. An Indiana statute precluded distillers from distributing their own products. The termination of the war and OPA gave Indiana wholesalers an opportunity to increase margins greatly reduced by wartime taxation by means of concerted activity. Following a meeting of the Indiana Wholesale Liquor Dealers Association in October 1946, attended by Kiefer-Stewart, the Indiana wholesalers filed identical
The foregoing types of horizontal price-fixing contracts provide a guide for the comparison of resale price maintenance and non-agency consignment contracts between an integrated manufacturing or producing company and its independent dealers who are competing with company-operated retail outlets. The relevant market is the competitive market in which the dealers and company-operated outlets compete for sales of the integrated company's product. The danger of adverse economic effects results from the fact that the price-fixing of the integrated company deprives its independent dealers of the opportunity to compete in price with the retail outlets of the company. The company can fix the prices at a level higher than the competitive price in order to protect inefficient company-operated outlets from the competition of independent dealers.

Seagram decided that increased prices were not in its best interest because of a declining post-war consumer market. See Business Week, July 9, 1949, p. 25. Accordingly, Seagram expended over $500,000 on advertisements against inflated whisky prices. Business Week, Nov. 16, 1946, p. 50. Seagram, however, did not wish to alienate liquor retailers because of their ability to influence consumers' brand choices. See Comment, 19 U. Chi. L. Rev. 837, 841 (1952). Therefore, Seagram notified Indiana wholesalers that wholesale prices would remain at the OPA level. Upon the concerted refusal by the wholesalers to comply with this order, Seagram suspended all shipments to Indiana wholesalers, including Kiefer-Stewart. Prior to this time Calvert, a wholly owned subsidiary of Seagram, had concluded negotiations giving Kiefer-Stewart a Calvert distributorship. After Seagram's action, Calvert assured Kiefer-Stewart that their relationship would be unaffected by the increased prices. A few days later, November 19, 1946, Calvert cancelled the distributorship. The jury concluded that this cancellation was the result of an agreement with Seagram. On February 3, 1947, all the wholesalers but Kiefer-Stewart filed notification with state authorities of their return to the OPA method of computing mark-ups.

Kiefer-Stewart claimed that as a result of the agreement between Seagram and Calvert to fix the resale prices of wholesalers, Kiefer-Stewart had lost the Seagram and Calvert lines of products, with consequent damage to its business. The Supreme Court held that as this agreement between competitors imposed the same restraint as an agreement between competitors to fix minimum resale prices, it was illegal and Kiefer-Stewart was entitled to damages. 340 U.S. at 213.

One writer has suggested that this decision eliminates the power or intent requirement. Comment, supra at 864. However, the defendants did have the power and intent to affect prices in the wholesalers' market which was the relevant market. The existence of a legally objectionable harm in this market, however, is not entirely clear. The wholesalers remained free to sell below the maximum prices. In addition, the competition in the whisky industry is typically non-price competition. If distillers acting individually were unable to effectuate such maximum price-fixing contracts, the decision deprived them of their only effective weapon against the monopolistic power of their distributors. As a result, the argument could be made that any such restraint imposed by this agreement would not justify the Kiefer-Stewart decision unless the distillers acting individually could have effectuated such agreements. Perhaps the difficulty of determining the individual distillers power in this respect legally justified the application of the rule of per se illegality. See Comment, supra at 864-68. But, in the absence of a statute precluding a distiller or other producer from distributing its own products, a sufficient economic harm for the agreement to be deemed illegal would definitely exist.
without the necessity of subsidizing the company outlets.\(^5\) On the other hand, the company can fix the dealers’ prices extremely low in order to establish a market price which will tend to prevent the entrance of new companies into the market area or cause the disappearance of financially weaker existing companies. Finally, whatever the price level, the company can undersell its independent dealers either by making direct sales through the manufacturing division to large volume customers at prices lower than the fair trade or consignment prices at which the dealers must sell or by excluding company-operated outlets from the provisions of the fair trade or consignment contracts enabling them to undersell the independent dealers.\(^5\)

The danger of these effects would seem to be present whether the contract is one which sets the resale prices of the dealers, held to be illegal in the *McKesson* case, or which merely eliminates passage of title enabling the integrated company to set the retail prices. The technical property distinction between the two contracts generally recognized for other purposes should not obscure this fact. Furthermore, consignment would seem to be a more flexible method of instigating price disturbances in order to stabilize or increase a company’s share of total market sales. Finally, consignment contracts confer the possibility of greater control over prices than fair trade contracts in the thirty states where fair trade is confined to the fixing of *minimum* prescribed prices.\(^5\)

As a consignment contract itself merely confers the controls of integration over price without actually establishing all of the responsibilities of full integration, the potential adverse effects of such a contract indicate that it should be deemed an illegal price control device. However, if the responsibilities of the outlet are assumed and if legitimate business purposes exist for the use of consignment, integration in the form of an agency system of distribution has actually occurred. In such a situation most of the adverse effects resulting from the use of consignment no longer exist.\(^5\) Since the remaining effects occur with all forms of

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54. In the *McKesson* case the Government argued this possibility as a reason for denying legality to fair trade contracts used by any integrated company. The Court refused to consider any of the economic arguments made by the parties. 351 U.S. at 316.

55. See *Ibid.* where the Government made the same argument with regard to direct sales by the manufacturing division of an integrated company. However, the Government apparently failed to mention the possibility of underselling retailers through the wholesale divisions (or retail outlets) when the latter are excluded from the provisions of the fair trade contracts, as were the McKesson wholesale divisions. Record, pp. 57-58.

56. Fifteen of the remaining states permit fair trade contracts which stipulate the precise resale price. The other three states do not have fair trade acts. See 1 TRADE REG. REP. ¶ 3003 (1958).

57. The possibility of prices being fixed at a low level in order to prevent or hamper the entrance of new companies or to eliminate financially weaker existing companies will still exist.
vertical integration, the use of consignment should be considered lawful unless vertical integration itself is to be prevented. 58

When a permanent C plan is used, the problem involves a determination of the extent to which the responsibilities must be assumed before a genuine agency is recognized. More responsibilities should be assumed before an agency is recognized for antitrust purposes than for other legal purposes because of the potential adverse economic effects which may occur. The legitimate reasons, under the antitrust laws, for the use of consignment do not seem to require that any of the economically significant responsibilities be assumed by the consignee-dealer. Therefore, in view of the fact that the integrated company is eliminating the independence of its former retail competitors, it would seem proper to require the integrated company to assume all the economically significant responsibilities.

In the case of an "off and on again" plan the problem is different as there is no legitimate business purpose, under the antitrust laws, for its use which could not be achieved without controlling dealers' prices. 59 The main purpose for its use is, therefore, a desire to control such prices. As a result, such C plans should never be considered as creating an agency but should be considered merely as an illegal price control device.

The foregoing discussion has indicated the relevant market and the adverse economic effects which may occur therein when an integrated manufacturer makes either non-agency consignment or fair trade contracts with its independent dealers. It remains to determine only whether the potential harm is such that a per se rule should be applied in all cases, or as has been suggested, 60 only when the integrated company is retailing (or wholesaling) both its own and other companies' products. 61 The suggested limitation is posited upon an assumption that an integrated company which does not distribute the products of other companies would lose profit due to decreased total sales by all its dealers, which would offset any benefits resulting to its own outlets from a consignment

58. An argument could be made that a manufacturer should not be allowed to compete with the independent distributors of its own and other competing manufacturers' products. Such competition enables the integrated manufacturer to stabilize both the retail and the manufacturing market in the same manner as consignment. The arguments on both sides on the issues of vertical integration and divorcement, however, are too complex and detailed to be considered herein. See generally Bork, Vertical Integration and the Sherman Act: The Legal History of An Economic Misconception, 22 U. Chi. L. Rev. 157 (1954).

59. See text accompanying note 22-23 supra.


61. Under this reasoning the Esso decision would have to be considered erroneous. See text accompanying notes 40, 41 supra.
or fair trade price higher than the price which would exist under competitive conditions. As a result, such an integrated company would not have any greater incentive for making fair trade or non-agency consignment contracts than a non-integrated company. This analysis assumes certain market conditions which do not always exist.

It is true that the integrated company which does not distribute the products of other companies would not have any additional incentive to make such contracts when the total demand for its product is such that an increased price will result in decreased volume. But, the demand for the individual company’s product may be sufficiently inelastic because of such factors as product differentiation, station location, and station appearance that slightly increased (or decreased) prices will not substantially affect total sales. However, a similar price difference between various outlets for the same product might have an adverse effect on the sales of the individual outlets. The extent of the effect would depend, among other factors, upon knowledge by the purchasers of the various prices of the individual outlets and the ability of purchasers to seek the lower prices. Thus, in some cases, the integrated company could use such contracts to maintain inefficient outlets which, unless deficit-financed by the company, would lose sales to independent outlets selling at lower prices. In addition, to the extent that the integrated company is the price leader of the industry, the company would have an additional incentive whenever the demand for the entire industry production is not inversely related to the industry price. Therefore, in order to determine whether the use of such contracts by an integrated company which does not distribute the products of other companies could result in adverse economic effects, a court would have to make a detailed analysis of the economic conditions in each defendant’s industry. As the purpose of the per se rule is to preclude the need for making such detailed analyses, both initially and periodically to determine if conditions have changed, the per se rule should be applied in such cases. The remaining inquiry involves a determination of the effect on the legality of C plans when the company is not a competitor of its dealers.

Consignment Contracts Involving Vertical Price-Fixing

When a company neither operates any retail outlets nor makes any direct sales in a dealer’s competitive area, the C plan is between non-competing parties on different functional levels and is termed “vertical.”

62. See Bain, Price Theory 273, 305-06 (1952); 1 Bain, The Economics of the Pacific Coast Petroleum Industry 197-201 (1944).
Vertical price-fixing contracts may result in two adverse economic effects. First, the contracts tend to eliminate competition between the dealers as to the manufacturing company's product. Second, in oligopoly markets it is probably true that vertical price-fixing contracts facilitate horizontal price-fixing at the manufacturing level. To prevent these adverse effects the Supreme Court has held vertical price-fixing contracts to be illegal under both the Sherman and Federal Trade Commission Acts in the absence of a genuine agency relationship between the company and its dealers. However, a substantial exemption from this general rule of illegality has been made for resale price maintenance contracts by the Miller-Tydings and McGuire Amendments. The first important issue is whether consignment contracts are within the protection afforded by these amendments.

The McGuire Amendment, which extends the exemption provided by the Miller-Tydings Amendment, provides in part:

Nothing . . . in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices . . . for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy . . . in any State . . . in which such resale is to be made. . . .

At least four problems of interpretation arise when this language is applied to C plans. These problems involve the meaning of "container," "stipulated prices," "any contracts," and "resale of a commodity." The recent case of United States v. Socony-Mobil Oil Co. provides authority as to the meaning of the first three of these terms. The district court held that sales from service station pumps bearing the brand name of the company and pumping gasoline from underground tanks came within the meaning of the word "container" as used in the McGuire Amendment. In dismissing the indictment, the court held that an allegation that the company had set the precise resale prices of its dealers did not amount to a violation of the antitrust laws because such conduct constituted merely the

64. See Comment, supra note 53 at 864-68.
65. E.g., Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).
68. Id. at 203-04.
setting of "stipulated prices" within the language of the McGuire Amendment. An allegation that the prescribed prices were non-uniform between dealers was also held to be insufficient because the protection afforded by the amendment extends to all resale price-fixing contracts protected by state law and not merely to fair trade contracts which prescribe uniform resale prices. Assuming that the district court is correct, the difficult question with regard to the applicability of this amendment to C plans is whether consignment contracts involve the "resale of a commodity." Generally, a company's retention of title by means of consignment results in only one sale, which is made between the company and the consumer (who receives title directly from the company rather than from the consignee-dealer who effects the transfer of possession). Therefore, it would seem that consignment contracts cannot properly be considered as contracts for "resale" within the exemption provided by the McGuire Amendment.

Assuming that consignment contracts are not protected by the exemption, a second issue is whether the exemption should be extended by analogy to consignment contracts. The argument for such an extension would be that consignment contracts have the same effects as contracts which stipulate non-uniform resale prices. Both contracts may result in two adverse effects in addition to those which tend to result from all vertical price-fixing contracts. First, the control over the prices of selected dealers enables the company to exert downward pressure on retail market prices in selected areas in order to stabilize prices and to maintain the status quo in market shares. Second, both contracts may be used to achieve price discrimination among the dealers without violating the provisions of the Robinson-Patman Act.

69. Id. at 204.
70. Ibid.
71. See note 8 supra.
72. See text accompanying note 64 supra.
73. See note 21 supra where these provisions are quoted. Discrimination may occur even though the dealers receive the same margin or commission because of the greater volume which will accrue to the "lower-priced" dealer. See Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957). In the Socony-Mobil case the company apparently was using price control to "meet competition." Although "meeting competition" is a defense to a charge of price discrimination under the Robinson-Patman Act, the propriety of such defense is quite controversial when it allows a company to stabilize market shares. In such cases effective price competition no longer exists. The adoption of the amendment proposed in S. 11, 85th Cong., 1st Sess. (1957) would probably eliminate this objection. But see Carlston, Senate Bill No. 11 and Antitrust Policy, 11 Vand. L. Rev. 129 (1957). But, the main objection to the extension of this defense to resale price-fixing or consignment contracts is that the control conferred over the prices of otherwise independent dealers is unnecessary for a company to "meet competition." In the absence of such control the company's independent dealers are competing with the dealers of other companies as well as with each other. If the company desires to eliminate the competition between its
The legality of contracts prescribing non-uniform resale prices, however, is not free from doubt. The district court in the *Socony-Mobil* case based its decision of legality on a literal interpretation of the McGuire Amendment. Consideration of the legislative purposes underlying both the Miller-Tydings and McGuire Amendments probably would have produced a different result. The purposes were to protect independent dealers from the "loss-leader" selling of chain-dealers and to protect the goodwill of the manufacturer's trade-mark or brand name from such price-cutting.\textsuperscript{74} Fair trade contracts effectuate such purposes. But, contracts prescribing non-uniform prices create the threat to the independent dealer of his manufacturer prescribing lower prices for sales by competing dealers and are unnecessary for the protection of the goodwill of the manufacturer's trade-mark or brand name. Consideration of the effects of the two types of resale price-fixing agreements also refutes the *Socony-Mobil* decision. Fair trade contracts are not as susceptible to market control as contracts which prescribe non-uniform resale prices and cannot be used to achieve price discrimination between dealers. Nevertheless, protection of fair trade agreements is highly controversial and considered by some to be an unwarranted departure from free competition.\textsuperscript{75} Therefore, the amendments should be interpreted as protecting only fair trade contracts. Such an interpretation would preclude extension of the exemption to consignment contracts since, as mentioned above, such contracts may have the same adverse effects as contracts which prescribe non-uniform resale prices.

Finally, as in the case of horizontal consignment contracts, the use of consignment may be legal if the company assumes sufficient responsibilities of the dealer to justify the recognition of an agency relationship

\textsuperscript{74} See citations to legislative reports and other authorities collected in 10 STAN. L. REV. 553 nn.12-17 (1958).

\textsuperscript{75} See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 153-54 (1955) which recommends repeal of the fair trade exemption. A similar position has been taken by the Department of Justice and the Federal Trade Commission. Id. at 153 n.90. A discussion of abuses resulting from the exemption is contained in Comment, 19 U. CHI. L. REV. 837, 865-67 (1952). On the other hand, the exemption has had the vigorous support of powerful organized retailers and manufacturers' groups. See FTC, REPORT ON RESALE PRICE MAINTENANCE 39-64 (1945). An interesting discussion of other forms of price maintenance with a suggestion that the "free and open competition" proviso of the fair trade exemption be extended to these other forms and be more vigorously enforced as to fair trade can be found in Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L. J. 967 (1955).
for purposes of antitrust law. In *United States v. General Electric Co.*,\(^{76}\) the Supreme Court sustained the use of consignment contracts because the contracts were a part of a genuine agency system of distribution. The Court has refused to recognize an agency, however, where the contracts are merely a subterfuge for price control\(^{77}\) even though the dealers are called "agents."\(^{78}\) The extent of the business responsibilities which must be assumed before the Court will recognize a genuine agency is indicated by the *General Electric* case.

In this case the Government contended that General Electric's system of distributing lamps was illegal under the Sherman Act because it enabled the company to fix the resale price of lamps in the hands of independent dealers. Lamps were consigned to the dealers with title remaining in General Electric. Transportation to the dealers was paid by General Electric. The dealers received fixed commissions from the proceeds of their sales which were made at prices fixed by General Electric. The dealers assumed all credit risks and all expenses of storage (including rent and other overhead expenses), handling, sale and distribution. Although the lamps were subject to return upon the demand of General Electric, the dealers assumed the risk of all lost or damaged lamps while in their custody. However, General Electric paid the insurance and taxes on the lamps and assumed all risk of fire, flood, obsolescence and price decline.

The Supreme Court held that these consignment contracts created genuine agencies and were, therefore, not a violation of the antitrust laws.\(^{79}\) The fact that the agents were independent wholesale and retail merchants in their regular business who had purchased as such from General Electric prior to the contracts was considered irrelevant. The Court distinguished the earlier case of *Dr. Miles Medical Co. v. Park & Sons Co.*,\(^{80}\) in which a purported agency was held to be merely a subterfuge and illegal. In the *Dr. Miles* case the only agency element was the control by the manufacturer of its dealers' minimum resale prices. In addition to stressing the failure of the manufacturer to control the absolute selling price of the dealers or to assume any agency responsibilities, the Court, in the *Dr. Miles* case, emphasized the existence of interlocking restrictions upon sales made between the dealers which could not be based

\(^{76}\) 272 U.S. 476 (1926).

\(^{77}\) Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911).

\(^{78}\) United States v. Masonite Corp., 316 U.S. 265 (1942). In this case a price-fixing agreement between competitors was held illegal notwithstanding the reference in the agreement to some of the parties as "agents."

\(^{79}\) Id. at 485-86.

\(^{80}\) 220 U.S. 373 (1911).
upon any agency relationship.\textsuperscript{81} Such restrictions were not present in the \textit{General Electric} case.

In the \textit{General Electric} case the consignment contracts were part of a permanent agency arrangement. The case indicates that when consignment involves vertical price-fixing, an agency will be recognized if \textit{some} of the economically significant responsibilities of the consignee-dealer are assumed. The nature of the responsibilities essential for the creation of an agency would seem to vary from case to case. For example, more than 50 per cent of all service station dealers lease their stations from either their supplier or a third person.\textsuperscript{82} The monthly payment of rent is a significant risk of doing business which the courts might conclude should be assumed by the company. However, if the dealer pays rent on a straight gallonage basis, the risk to the dealer of not being able to cover this expense from the sales of any given month no longer exists. In such a situation, rent would not even be a relevant factor. Similarly, the employees might be on a salary or commission basis making labor expenses variable.

The reasoning of the \textit{General Electric} case does not seem applicable to the use of “off and on again” C plans. An agency is recognized for the purpose of allowing a company to achieve business purposes which are legitimate under the antitrust laws. But, as in the case of horizontal consignment contracts, “off and on again” C plans between parties on vertical levels are used solely as a device for price control. There is no justification, therefore, for the recognition of an agency in connection with such C plans regardless of the extent of the consignee-dealer's expenses which a company is willing to incur for the achievement of its illicit purpose.

In summary, since consignment contracts involve price-fixing and are not protected by the Miller-Tydings and McGuire Amendments, the validity of consignment contracts appears to depend upon the recognition of a genuine agency relationship in connection with the contracts. An agency should not be recognized in connection with the use of an “off and on again” C plan regardless of the extent to which business responsibilities of the consignee-dealer are assumed because the main purpose of such plans is price control. On the other hand, the existence of other purposes for the use of a permanent C plan demands that recognition depend only upon the extent to which such responsibilities are assumed. If a few economically significant responsibilities of the consignee-dealer are assumed in connection with the permanent plan of a company

\textsuperscript{81} \textit{Id.} at 398-400.

\textsuperscript{82} See note 5 \textit{supra}.
which does not compete with its consignee-dealer, an agency will probably be recognized. But, when the company is integrated and competes with its consignee-dealer, it would seem that an agency relationship should be recognized only if the company assumes all of the economically significant responsibilities of the dealer.

FEDERAL RULES OF CIVIL PROCEDURE: LIBERAL JOINDER OF ISSUES AND THE SEQUENCE OF TRIAL

Prior to the promulgation of the Federal Rules of Civil Procedure, legal and equitable issues appeared together in a single action only to a limited extent. When the situation did arise, the rule followed in the federal courts was to try the equitable issues first, and then if any legal issues remained for trial, a jury was impaneled. The reasons for this practice were largely historical, stemming from the old rivalry between law and equity when the chancellor might enjoin an action at law pending determination of a related suit in equity.

The Federal Rules, however, have made it possible for all legal and equitable issues pertaining to a claim to appear in a single action; either where the plaintiff joins legal and equitable issues as independent or alternative claims, or where the defendant interposes an equitable counterclaim or defense in a legal action or a legal counterclaim or defense in an equitable action. These liberal joinder provisions, although administratively advantageous, have been attacked as procedural pitfalls which

1. The Federal Rules of Civil Procedure were promulgated by the Supreme Court on December 20, 1937, and became effective September 16, 1938. The Rules were amended in 1939, 1946, 1948 and 1951.
2. The Law and Equity Act of 1915 authorized the interposition of an equitable defense or counterclaim in an action at law, but it was not until the adoption of the Federal Rules that a legal counterclaim could properly be interposed in a suit in equity. Moore, Federal Practice § 39.12 (2d ed. 1951) [hereinafter cited as Moore].
5. "The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or alternative claims as many claims either legal or equitable or both as he may have against an opposing party . . . ." Fed. R. Civ. P. 18(a). See also Fed. R. Civ. P. 13(a) which states, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . ."