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United States v. Parke Davis

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public notice on the union bulletin board suffice? A special set of problems is encountered when employees, upon receiving notice of hearing, decide to intervene in the arbitration proceedings. Will this not cause a substantial delay in the arbitration procedure? Will it not increase expenses?

GEORGE F. GRAF

United States v. Parke Davis—In a prosecution by the Justice Department under Sections One and Three of the Sherman Act,[1] a conspiracy and combination in restraint of trade by resale price maintenance was alleged. During a period of time when there was no Fair Trade Law coverage in the District of Columbia or Virginia, Parke Davis Drug Company distributed a catalogue containing a schedule of minimum wholesale and retail prices to wholesalers and retailers in the affected area. Since Parke Davis made it clear that it would refuse to deal with those who did not adhere to the minimum price schedules, most of the wholesalers and retailers indicated their willingness to follow the price policy.

In spite of large profits obtainable under the schedule of minimum prices, some retailers refused to follow the price policy. One of these retailers, Dart Drugs, explained that it was forced to cut the prices of Parke Davis products since a nearby drug store, a member of the People's Drug chain, was advertising Parke Davis products at reduced prices. At once Parke Davis took steps to curtail this price-cutting by People's, which had agreed to observe the stated price lists. The result of these efforts was an assurance by the vice-president of People's Drugs that it would abide by the price policy in the future.

Although Parke Davis' efforts were successful with the People's drug chain, Dart Drugs continued to retail its stock of Parke Davis products at a discount. Dart and others finally agreed to stop the advertising of cut-rate prices in exchange for the resumption of Parke Davis shipments. There was evidence that Parke Davis had decreased its efforts in the ensuing months under greater and greater threat of prosecution by the Justice Department.

It was held by the United States Supreme Court that there were facts in the record which were sufficient as a matter of law to show

[1] 15 U.S.C. §1, 3: Sec. 1-Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy, hereby declared to be illegal shall be deemed guilty of a misdemeanor. . .; Sec. 3-Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in . . . the District of Columbia and any State or States or foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor.

a conspiracy or combination in restraint of trade for the purpose of fixing prices.[2] To support its finding that Parke Davis' action had gone beyond the mere refusal to deal allowed by the *Colgate* case,[3] the Court pointed out that the wholesalers adopted the Parke Davis plan affirmatively by stating that they would not sell to price-cutting retailers and by dropping price-cutting retailers from wholesale lists promptly. The mere announcement of its price policy to the wholesalers by Parke Davis was not deemed a violation, but because Parke Davis had obtained the full cooperation of the wholesalers through assurances and through a system for punishing violators, the Court found a conspiracy or combination in restraint of trade.[4]

The Court examined carefully the means which Parke Davis used to stop the advertising of its products at cut-rate prices by Dart and others. There was no simple announcement of a refusal to deal. A discussion with Dart was had. When Dart agreed to stop its harmful advertising, this acquiescence was used as a lever to secure the acquiescences of others to stop the advertising of Parke Davis products at cut-rate prices. This action by Parke Davis indicated to the Court a policy based upon more than the individual self-interest of every retailer. The Court found a studied attempt by Parke Davis to secure adherence to its price line or at least to prevent harmful advertising of cut-rate prices, which required affirmative assurances from the parties involved. The Court thus found a conspiracy with the retailers in restraint of trade in addition to the conspiracy with the wholesalers which it had previously found.[5]

The fact that Parke Davis had desisted somewhat from these practices in the months preceding the action was not deemed a defense in view of the admissions by Parke Davis which seemed to make it clear that the Company had only desisted under pressure from the Government. *United States* v. *Parke Davis and Company.*[6]

In a vigorous dissent written by Justice Harlan, the view was expressed that the Court had in fact reversed the *Colgate* case which had been the touchstone decision, holding that mere refusal to deal did not amount to a conspiracy in restraint of trade.[7] The *Beech Nut*[8] and *Bausch and Lomb*[9] cases, upon which the majority it was felt, relied did not represent departures from the *Colgate* doctrine but rather instances of true concert of action in which no formal agreement had to be shown. But, the dissent argued, there were no facts in the present

[2] United States v. Parke Davis and Co., 80 S. Ct. 503 (1960).
[3] United States v. Colgate and Co., 250 U.S. 300 (1919).
[4] United States v. Parke Davis and Co., *supra,* note 2 at 512.
[5] *Id.* at 513.
[6] *Ibid.*
[7] *Id.* at 514.
[8] Beech Nut Packing Co. v. United States, 257 U.S. 441 (1921).
[9] United States v. Bausch and Lomb Optical Co., 321 U.S. 707 (1944).

record sufficient to show this concert of action which must be shown in the absence of an agreement. Since the finding of the District Court that no agreement existed, effectively foreclosed any finding by the United States Supreme Court that an agreement did exist, the dissent felt that the Court's decision represented a plain departure from the previous rulings in the area of refusal to deal.[10]

In order to be able to judge the validity of the majority opinion and the contentions of the dissent, an inquiry into the various decisions upon which the Court relied may be valuable. Particularly important, is an inquiry into the question of whether a strong concert of action must be shown, or whether, as Brennan suggests, only a departure from the limited dispensation of the *Colgate* case need be shown to prove a conspiracy.

In the *Doctor Miles* case,[11] the United States Supreme Court laid down the general rule that agreements to maintain retail prices are illegal *per se* under the Sherman Act. This opinion was narrowed somewhat by the opinion in *United States v. Colgate Company*[12] in which the Court held a complaint insufficient to indicate a conspiracy when the complaint merely alleged attempts by Colgate to maintain retail prices but failed to allege any agreement. The Court stated the rule within which all price maintenance plans must stand or fall:

> In the absence of any purpose to create or maintain a monopoly, the Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal, and of course, he may announce in advance the circumstances under which he will refuse to sell.[13]

Unfortunately the rule has been found difficult of application by the courts. Within a short time after the decision in *Colgate* the Supreme Court was asked to determine whether the *Colgate* case had overruled the *Dr. Miles* doctrine that retail price agreements are illegal *per se*. In *United States v. Shrader's Sons*[14] the Government's prosecution was directed at agreements entered into by a component manufacturer with retailers, jobbers, and manufacturers who sold his products. The trial judge had declared that to draw a distinction between the action charged in *Colgate* which seemed to show an implied agreement and the action in the case at hand which showed a written agreement was to make "a distinction without a difference." The Supreme Court reversed the trial court's decision. It held that *Colgate* merely stands for the rule that a manufacturer may announce his prices in

[10] United States v. Parke Davis and Co., *supra*, note 2 at 518.
[11] Dr. Miles Medical Co. v. John D. Park and Sons, 220 U.S. 373 (1911).
[12] *Supra*, note 3 (1919).
[13] *Id.* at 307.
[14] 252 U.S. 85 (1920).

advance and decline further dealings with those who fail to observe them, but implied or express agreements to maintain prices are prohibited by the Sherman Act.[15]

Frey and Sons Inc. v. Cudahy Packing Company[16] further delineates the scope of the *Schrader* decision in holding that an implied agreement found upon the facts from the dealings of the defendants may constitute a conspiracy in restraint of trade and that no *formal* oral or written agreement need be shown. The Supreme Court, however, disapproved of the trial court's broad instruction to the jury.[17] In *Parke Davis,* Brennan intimates that today the instruction may be proper.[18]

Perhaps the most important of decisions relied upon in the majority opinion in the *Parke Davis* case is the case of *Beech Nut Packing Company v. United States.*[19] Beech Nut had adopted a policy of refusing to sell its products to wholesalers or retailers who refused to hold to the Beech Nut price line. The effective enforcement of this policy required that if wholesalers sold to retailers who cut prices, the wholesalers also would be refused sales by Beech Nut.

Beech Nut employed a complex system for reporting price-cutters. Wholesalers and retailers who had knowledge of any price-cutting cooperated by reporting such practices together with the names of the price-cutters. A card file was kept by Beech Nut for the purpose of blacklisting any buyer who cut prices. Before a customer could be taken off this list he had to give assurances that he would not in the future violate the Beech Nut price policy. A code number system which enabled Beech Nut to find out which wholesaler had sold to a price-cutting retailer was also employed as part of the plan.

The system employed by Beech Nut was enjoined by the United States Supreme Court.[20] The two most damaging elements of the plan in light of the majority opinion in the *Parke Davis* case were the cooperation given by wholesalers and retailers in reporting price-cutters and the requirement of assurances from a price-cutter that in the future he would adhere to the price schedules before he could be returned to the approved list kept by Beech Nut.[21] The former seems

[15] *Id.* at 99.
[16] 256 U.S. 208 (1921).
[17] *Id.* at 210.
[18] *Supra,* note 2 at 510. The instruction is to this effect. If the jury should find as facts that the defendant "indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and . . . (that) defendant called this particular feature of this plan to their attention on very many different occasions, and . . . (that) the great majority of them not only (expressed) no dissent from such plan, but actually (cooperated) in carrying it out by themselves selling at the prices named. . . . 256 U.S. 210-211."
[19] *Supra,* note 8.
[20] *Id.* at 455.
[21] *Supra,* note 2 at 511.

to represent the broad interpretation of a combination in restraint of trade; the latter seems an example of a type of implied agreement, even though the Court in the *Parke Davis* case speaks of conduct equivalent to an agreement.

United States v. Bausch and Lomb[22] exemplifies the cooperation which is struck down so readily by the Court when it is found in the area of resale price maintenance. In this case a distributor, Soft Lite Lens Company, offered to its wholesalers a plan by which retail prices would be set, sales would be limited, and the approval of retail licensees would be accomplished by the cooperation of the distributor and the wholesalers. This "package" which the distributor defended on the ground that it was necessary in order to protect good will was termed a violation of the Sherman Act by the United States Supreme Court. The Court found that the cooperation between the distributor and its wholesalers in selecting a limited number of licensees and in agreeing upon the qualifications of retailers who were to market the lenses, was tied closely to the retail price lists provided the wholesalers, and thus a combination to maintain prices in violation of the Sherman Act could be found upon the facts.[23] The Court rejected the defense of good will, stating that such was not a valid defense in view of the *per se* nature of the violation found.[24]

From the decisions above and from decisions in proceedings before the Federal Trade Commission, certain conclusions can be drawn.[25]

1. The attempt to fix prices by contract, combination, or conspiracy is a *per se* violation of the Sherman Act and no defense of

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[22] *Supra,* note 9.
[23] *Id.* at 723
[24] *Ibid.*
[25] Decisions before the Federal Trade Commission seem to give added force to Brennan's statement that *Colgate* gives only a limited dispensation to a distributor to refuse to deal. In the cases cited below the actions described were enjoined. J. W. Kobie Co. v. F.T.C., 23 F. 2d 41 (2d Cir. 1927) (Defendant solicited the aid of customers to report the names of price cutters); Cream of Wheat v. F.T.C., 14 F. 2d 40 (8th Cir. 1926) (The defendant:

1. sought prior assurances that customers would maintain prices and cooperate to secure observance by others,
2. solicited information and reports as to price cutting,
3. notified customers as to persons cutting prices and required customers not to sell to them,
4. charged higher prices to those who had cut prices.);

Hills Bros. v. F.T.C., 9 F. 2d 481 (9th Cir. 1926) (The defendant requested dealers to report price cutters and requested assurances of future price observance from dealers charged with price cutting.); Moir et al. v. F.T.C., 12 F. 2d 22 (1st Cir. 1926) (Prior assurances were received and requests were made to dealers to report price cutters.); Q.R.S. Music Co. v. F.T.C., 12 F. 2d 730 (7th Cir. 1926) (The same type of assurances and cooperation as in the *Hills Bros.* case were given.); Shakespeare Co. v. F.T.C., 80 F. 2d 358 (6th Cir. 1931) (Assurances given as to future acquiescence in the policy.); Toledo Pipe Threading Machine Co. v. F.T.C., 11 F. 2d 337 (6th Cir. 1926) (Assurances were given as to future action.).

insubstantiality or requirement to protect good will can be made.[26]

2. Any cooperation from wholesalers or retailers in the form of distributing price lists, or reporting price-cutters will not be allowed.[27]
3. Any assurances exacted by the distributor from retailers or wholesalers will probably be regarded as equivalent to implied contracts and thus violative of the Sherman Act.[28]
4. When a price policy based upon refusal to deal is acquiesced in by a buyer holding an exclusive dealership from a producer or distributor of goods, the courts will probably find cooperation in maintaining the prices of goods.[29]
5. In the absence of an attempt to monopolize, a manufacturer has the right to refuse to deal with any customers who do not adhere to his price line. However, when he tries to enforce this price policy by methods other than the reliance upon individual self-interest to bring about general acquiescence in a policy which has the effect of eliminating price competition, he is acting in violation of the Sherman Act.[30]

It seems clear, if these conclusions are correct, that a manufacturer will only succeed in holding buyers to a price line when they are themselves disposed to follow it. Perhaps the producer can protect himself somewhat by choosing wholesalers and retailers to whom he will sell on the basis of past performance in adhering to such plans, but if a general failure to adhere to the price lists occurs, such as Parke Davis experienced, this would probably portend the breakdown of the whole system since the methods which Parke Davis employed to maintain its price line are no longer permitted.

ROBERT G. ULRICH

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26 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 at 223; United States v. Bausch and Lomb Optical Co., *supra*, note 9.
27 United States v. Parke Davis and Co., *supra*, note 2 at 512-513.
28 *Ibid.*
29 United States v. Bausch and Lomb Optical Co., *supra*, note 9 at 723.
30 United States v. Colgate, *supra*, note 3 at 307; United States v. Parke Davis and Co., *supra*, note 2.