

# University of Pennsylvania Law Review

FOUNDED 1852

Formerly  
American Law Register

---

---

VOLUME 103

MAY, 1955

No. 7

---

---

## REFUSALS TO DEAL UNDER THE FEDERAL ANTITRUST LAWS

Charles F. Barber †

The bearing of the antitrust laws on refusals to deal involves questions of increasing practical importance.<sup>1</sup> The question reaches into everyday business operations of most firms, particularly in times of shortages of supply. A refusal to deal, like the making of a contract, is in itself an ordinary commercial act. It may reflect a firm's effort to promote the legitimate development of the enterprise through the intelligent selection of distribution outlets. A refusal to sell to a particular buyer may reflect poor credit, a history of unsatisfactory business relations, contract obligations to another or a clash of personalities. On the other hand, it takes no elaborate analysis to show that a refusal to deal or threat to refuse to deal can be used effectively as an economic weapon of persuasion, coercion or denial and applied to the accomplishment of objectives prohibited by the antitrust laws.

Developing conspiracy and monopoly doctrines<sup>2</sup> together with an appreciation of the coercive power of a refusal to deal have led to increasing challenge and renewed judicial examination of the lawful scope of one's freedom to select customers or suppliers under the anti-

---

† B.S. 1939, Northwestern University; LL.B. 1942, Harvard University; B. Phil. 1948, Oxford University; Member of the Bar of the District of Columbia.

1. Refusals to deal include both refusals to sell and refusals to buy. While most of the cases challenging unilateral refusals to deal concern conduct of sellers, the principles derived from these cases are equally applicable to refusals to buy. A refusal includes not only an absolute refusal to do business, but also a refusal to do business at the price and on the terms and conditions customary in the trade in question. Threats to refuse to deal, at least those threats "which fall within the common understanding of 'coercion'" as distinguished from "other practices for which 'persuasion,' 'exposition' or 'argument' are fair characterizations" stand on the same ground. See *Ford Motor Co. v. United States*, 335 U.S. 303, 317-18 (1948).

2. See text at p. 882 *et seq.*

trust laws. One writer has intimated that this freedom has been so circumscribed by the courts as to remain only as an "abstract" right,<sup>3</sup> whereas another distinguished authority, writing in the same symposium, finds that in recent years, "the judicial pendulum has reversed its swing" to uphold "the core of customer selection."<sup>4</sup> The recent Report of the Attorney General's National Committee to Study the Antitrust Laws takes the position that refusals to deal, standing alone, are "entirely legitimate" and that they acquire antitrust consequences only when employed as an element in a course of conduct otherwise unlawful.<sup>5</sup> It is timely, therefore, to make a detailed analysis of the nature of refusals to deal and their relation to the antitrust laws.

### REFUSAL TO SELL AS A FORM OF DISCRIMINATION

It takes a buyer and a seller to complete a sale. In addition to the question of price, there is inherent in every transaction a willingness on the part of each party to do business with the other.

In the case of an isolated transaction, the question of price and the question of doing business with each other may be one and the same. In a free economy, the seller's freedom not to sell and the buyer's freedom not to buy are both essential elements in the price-determining process. In this context, the seller's right to refuse to sell is unqualified. Deprived of this freedom, some other form of regulation would have to be provided to protect the seller's right in his property.

In the case of an established market, however, the question of price and the question of doing business with a particular customer are more often separate questions. The price-bargain is made with the market as a whole, and the question as to whom the product will be offered at the price is separately determined. In this market context, a refusal to sell is inescapably a form of economic discrimination. Some customers are favored with sales, others are refused. If the effect of a refusal to sell is analyzed against a theoretically perfect competitive model, it may be shown to introduce distortions in the allocation of resources not unlike those introduced by discriminations in price. But to point out that a refusal to sell is a form of discrimination is not to

---

3. Timberg, *Selection of Customers* in HOW TO COMPLY WITH THE ANTITRUST LAWS 117 (1954); compare Comment, 58 YALE L.J. 1121 (1949).

4. Austern, *Dealing with Uncertainties* in HOW TO COMPLY WITH THE ANTITRUST LAWS 343, 351 (1954). See also Gordon, *Walking Backward into the Future* in *id.* at 47 n.7; Rifkind, *Division of Territories* in *id.* at 136; Dean, *Supervision of Selling* in *id.* at 226-29.

5. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 132-37 (GPO 1955) (hereinafter cited as REPORT OF ATT'Y GEN.'S COMM.).

condemn it under the antitrust laws. The relevant antitrust question relates to its purpose or effect, or both.

Except insofar as it may control the conduct of a monopolist, the Sherman Act<sup>6</sup> does not reach refusals to sell which are arbitrary, rather than purposeful. An arbitrary refusal can hardly be pursuant to a conspiracy, for a conspiracy must have an object; nor can it be reached as an attempt to monopolize, for the law here requires a showing of specific intent.

It has been suggested that unilateral refusals to sell as such should be subject to attack under Section 2 of the Clayton Act<sup>7</sup> as total discriminations in price.<sup>8</sup> Since conspiracy is not an element of the conduct proscribed by Section 2, such an approach would bring within the scope of judicial regulation any refusals to sell, including arbitrary refusals, which are found to have the effect on competition proscribed by the Act.

This view has not found favor in the courts. With exceptions not here important, Section 2(a) applies to discriminations "in price between different purchasers of commodities of like grade and quality." This, the courts have held, means that prohibited discriminations can occur only in the context of completed transactions where sales of like commodities have in fact been made to different purchasers at different prices.<sup>9</sup> Similarly, charges that refusal to quote prices or to sell constitutes discrimination in services or facilities prohibited by Section 2(e)

---

6. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1952).

7. 38 STAT. 730 (1914), as amended, 15 U.S.C. § 13 (1952).

8. See Comment, 58 YALE L.J. 1121, 1132-34 (1949).

9. *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939) (manufacturer of electrical supplies refused to quote prices to former dealer but did quote prices to competitor of dealer who bid on and was awarded contract); *Naifah v. Ronson Art Metal Works, Inc.*, CCH 1954 TRADE CASES ¶67,925 (10th Cir. 1954) (manufacturer of cigarette lighters discontinued sales to plaintiff when it commenced dealing through a competing distributor); *Sorrentino v. Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E.D. Pa. 1942) (brick manufacturer refused to continue to sell to dealer pursuant to threat of another dealer in the area to withdraw its account if manufacturer did not do so); *A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass. 1949) (paint manufacturer quoted price to dealer for bid on public tender and then itself submitted bid at lower price and was awarded contract); see Note, 29 HARV. L. REV. 77 (1915); *cf. Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947); *United States v. Borden Co.*, 111 F. Supp. 562, 580 (N.D. Ill. 1953). *But cf. American Can Co. v. Bruce's Juices*, 187 F.2d 919, 924, 190 F.2d 73, 74 (5th Cir. 1951); *Sidney Morris & Co. v. National Ass'n of Stationers, Office Outfitters & Mfrs.*, 40 F.2d 620 (7th Cir. 1930).

Other decisions involving refusals to sell have dismissed complaints alleging *inter alia* violations of § 2 without analysis of the point here under discussion. *E.g.*, *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830 (N.D. Cal. 1939) (no interstate commerce); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 828 (D. Md. 1938) (point not reached since no showing of lessening of competition); *National Biscuit Co. v. FTC*, 299 Fed. 733 (2d Cir. 1924) (FTC order set aside); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566 (S.D.N.Y. 1915) (preliminary injunction enjoining refusal to sell denied); see *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723, 734 (M.D. Ga. 1942).

have failed,<sup>10</sup> as Section 2(e) by its terms applies only to discriminations "in favor of one purchaser against another purchaser." The basis of these decisions is that Congress intended Section 2 of the Clayton Act to reach only completed transactions; it was designed to prevent actual interference with the existing current of commerce and not to require a trader to sell to any would-be customer at a nondiscriminatory price merely because at the same time he is selling goods of like grade to another customer at that price.

It may be noted that Section 2(a) of the Clayton Act contains an express proviso:

". . . that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."<sup>11</sup>

This proviso recognizes that there is an area wherein refusals to sell shall not be prohibited as discriminations in price; it also possibly yields the negative implication that there are some refusals to sell, *i.e.*, those not in "bona fide transactions" and those "in restraint of trade" which may be prohibited by Section 2(a). While the legislative history of the proviso indicates some confusion as to the significance of this qualifying language,<sup>12</sup> any notion that it was intended

10. *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863, 866 (7th Cir. 1949); *Naifah v. Ronson Art Metal Works, Inc.*, CCH 1954 Trade Cas. ¶67,925 (10th Cir. 1954); see *Shaw's, Inc. v. Wilson Jones Co.*, 105 F.2d 331, 334 (3d Cir. 1939).

11. 38 STAT. 730 (1914), 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952). Note that whereas in the Robinson-Patman Act, 49 STAT. 1526 (1936), the proviso is contained in § 2(a), it appears in the Code, 15 U.S.C. § 13 (1952), as a proviso to "sections 12, 13, 14-21, 22-27 of this title," that is, to the entire Clayton Act including, for example, § 3, 15 U.S.C. § 14 (1952).

12. SEN. REP. No. 698, 63d Cong., 2d Sess. 44 (1914). The original House bill contained the proviso without the qualifying language. See H. REP. No. 627, 63d Cong., 2d Sess. 2 (1914). The latter was added by the Senate Committee on the Judiciary which explained that the addition of the language "in bona fide transactions and not in restraint of trade, . . . will enforce good faith and prevent restraint of trade by this method." SEN. REP. No. 698, 63d Cong., 2d Sess. 44 (1914). The proviso was not further discussed in either the House or the Senate in 1914. Perhaps the Committee was taking care not to embrace within the proviso selection of customers in concert with others or group boycotts. The simultaneous comment of the Senate Committee in striking language of the House bill outlawing arbitrary refusals to deal in certain basic industries, see note 165 *infra*, would appear to preclude any suggestion of an intent to circumscribe the trade freedom of sellers acting individually.

The proviso was retained without change in § 2(a) of the Robinson-Patman Act. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). Representative Utterback interpreted the proviso as prohibiting a seller, once he had accepted a person as a customer, "to refuse discriminatorily to sell to him particular distinctions of quality, grade or brand." He added, "Nor does it permit absolute refusal to sell to particular customers where the facts are such as to show that it is done for the purpose of injuring or destroying them and that the elimination of their competition effects a restraint of trade." 80 CONG. REC. 9418 (1936). Comments on the proviso in the Senate were more general. Senator Patman explained: "Each manufacturer

to reach certain refusals to sell encounters the objection that a proviso ought not to be given affirmative content, and the courts have properly so ruled.<sup>13</sup>

We may conclude, therefore, that Section 2 of the Clayton Act does not reach refusals to sell, whether or not they substantially affect competition,<sup>14</sup> and turn to a discussion of the cases which have arisen under the Sherman Act, Section 3 of the Clayton Act<sup>15</sup> and Section 5 of the Federal Trade Commission Act.<sup>16</sup>

#### REFUSAL TO SELL TO PRICE CUTTERS—NON-STATUTORY RESALE PRICE MAINTENANCE

Most discussions of refusals to deal begin with the classic statement of the rule in the unanimous opinion of the Supreme Court in the *Colgate* case.<sup>17</sup> There the Court, after referring to defendant's contention of "the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same,"<sup>18</sup> stated:

"The purpose of the Sherman Act is . . . to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as

---

must treat his customers fairly and not discriminate between them. Under existing law (which is not changed by this bill) a manufacturer has the right to select his customers. But having selected, he is not permitted to discriminate between them." *Id.* at 5728. Compare *PATMAN, THE ROBINSON-PATMAN ACT* 151 (1938) ("A seller shall not refuse to sell, or to select customers, where the effect restrains trade."). See 80 CONG. REC. 6333, 8124 (1936); 40 COL. L. REV. 157 (1940).

13. See cases cited in notes 9, 10 *supra*.

14. *But cf.* REPORT OF ATT'Y GEN.'S COMM. 135. In its discussion of refusals to deal under the Clayton Act, the report states that a "refusal to accord proportionally equal treatment to an already established customer may be a violation of the 'allowances' or 'services' provisions" of §2(e), citing, *e.g.*, *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 743-44 (1945). This is correct on analysis, but confusing in that it suggests that the refusal has something to do with the violation. In the situation noted, proof of the discriminatory sales and not of the refusal to sell, makes out the violation of §2(e). The report further states, without supporting analysis, that refusals to sell are "ordinarily" exempt from §2(a). REPORT OF ATT'Y GEN.'S COMM. 135 n.27. The qualifying adverb perhaps reflects a nod toward the Fifth Circuit opinions in *Bruce's Juices, Inc. v. American Can Co.*, 187 F.2d 919, 924 (5th Cir.), *modified and rehearing denied*, 190 F.2d 73, 74 (5th Cir. 1951) which insofar as they hold a refusal to quote a non-discriminatory price on a particular item to be a violation of §2(a), are, for reasons stated in the text, incorrectly decided.

15. 38 STAT. 731, 15 U.S.C. §14 (1952).

16. 38 STAT. 719, as amended, 15 U.S.C. §45 (Supp. 1954).

17. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

18. *Id.* at 306.

to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."<sup>19</sup>

The *Colgate* case has been much criticized and much misunderstood. It stands for the principle that, absent monopoly, unilateral refusals to deal are lawful, notwithstanding the fact that the intended and actual result of the refusals to deal would be unlawful if accomplished by agreement. As such, the decision stands unqualified, as shall be explained in detail, by more recent developments in the anti-trust laws. It is only the gloss of the decision—the unwarranted implication that restrictive schemes implemented by refusals to deal enjoy some sort of immunity under the antitrust laws—which has been eroded.

The indictment charged, *inter alia*, that Colgate had engaged in a combination with its dealers to maintain resale prices named by the company in that dealers were urged to observe the prices on pain of losing their supply, dealers were urged to and did report any sales by others at different prices, assurances of future compliance were secured from reported price cutters and the company uniformly refused to sell to those who failed to give such assurances.<sup>20</sup> The trial court dismissed the indictment as failing to charge a violation of law. The Supreme Court considered itself bound by the interpretation given to the indictment by the trial court; thus the only problem before the Court was "to ascertain . . . what interpretation the trial court placed upon the indictment—not to interpret it ourselves."<sup>21</sup> The gloss of the decision arose from the fact that the Supreme Court did not conclude that the trial court had interpreted the indictment to charge a violation of the Sherman Act. The trial court had plainly said that the indictment charged Colgate with entering into a combination with its wholesale and retail customers, because it agreed with them upon prices at which its products might be resold.<sup>22</sup> Inasmuch as the Supreme Court had long since held price maintenance agreements unlawful under the Sherman Act<sup>23</sup> and had further held that the agreement necessary to make out a violation could be inferred from con-

---

19. *Id.* at 307. Earlier cases in the lower courts to the same effect include, *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915); *Union Pacific Coal Co. v. United States*, 173 Fed. 737 (8th Cir. 1909); *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 571 (S.D.N.Y. 1919). *But cf.* *United States v. Keystone Watch Case Co.*, 218 Fed. 502 (E.D. Pa. 1915), *appeal dismissed*, 257 U.S. 664 (1921).

20. *United States v. Colgate & Co.*, 250 U.S. 300, 302-03 (1919).

21. *Id.* at 306.

22. *Id.* at 304.

23. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

duct of the parties,<sup>24</sup> a decision sustaining the indictment would seem to have been required. But the Court instead focused on the further statement of the trial court that purchasers from Colgate were free to sell what they had purchased at any price they chose, and concluded, albeit with "some serious doubts,"<sup>25</sup> that as interpreted by the trial court the indictment had failed to charge an agreement bringing the conduct within the ambit of the Sherman Act.

Just nine months later, in *United States v. A. Schrader's Son, Inc.*,<sup>26</sup> the Court spelled out in unmistakable terms the nature of its holding in *Colgate*. A district court, citing *Colgate*, had dismissed an indictment charging that defendants had entered into contracts for the maintenance of resale prices. Mr. Justice McReynolds, who had written the *Colgate* opinion, rather impatiently pointed out that *Colgate* had plainly declared that the Court was concerned only with the interpretation made by the trial court of the indictment and, in reversing, spoke of

"the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices."<sup>27</sup>

Price maintenance agreements previously had been held unlawful under the Sherman Act in the *Dr. Miles* case.<sup>28</sup> There was nothing in *Colgate* which qualified the *Dr. Miles* rule; the hope which may have been entertained by some of reading into *Colgate* any such qualification might well have died with *Schrader*.

In the *Beech-Nut* case,<sup>29</sup> decided three years after *Colgate*, the Supreme Court had before it a price maintenance scheme under which Beech-Nut secured the cooperation of its distributors in keeping supplies from price cutters by means not unlike those charged in *Colgate*. In the *Beech-Nut* case, however, which was brought under Section 5 of the Federal Trade Commission Act, the Court reached the question of the inferences to be drawn from the facts, and had no difficulty in-

---

24. *Lawlor v. Loewe*, 235 U.S. 522, 534 (1915); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914). This principle was stressed in the Government's brief, Brief for Petitioner, pp. 12-16, *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

25. 250 U.S. at 306.

26. 252 U.S. 85 (1920):

27. *Id.* at 98-99.

28. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

29. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

ferring from this cooperation the agreement essential to making out a violation of law.<sup>30</sup> But, in line with *Colgate*, it directed that the Commission's order, which had, *inter alia*, directed Beech-Nut to cease and desist from refusing to sell to distributors who failed to adhere to the resale prices, be modified to prohibit such refusals to sell only when pursuant to "cooperative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it."<sup>31</sup>

The problem reached the Supreme Court again in 1944 in the *Bausch & Lomb* case.<sup>32</sup> Confronted by a resale price maintenance scheme enforced by refusal to sell to non-cooperating retailers, it had no difficulty in implying the essential conspiracy. Following the *Beech-Nut* case, it found "more . . . than mere acquiescence of wholesalers in Soft-Lite's published resale price list."<sup>33</sup> But while it held the resulting conspiracy and combination unlawful, the Court refused to extend the decree, as requested by the Government, to require Soft-Lite to undertake to "sell its product, without discrimination, to any person offering to pay cash therefor."<sup>34</sup>

In asking for this blanket provision, the Government had argued that Soft-Lite could avoid the effect of the decree simply by selling only to customers it knew would cooperate in a distribution scheme of

30. *Id.* at 454-55. The Court referred to the *Colgate* case, noted that "the essential agreement . . . might be implied from a course of dealing," *id.* at 452, and held the Beech-Nut system unlawful because it went "far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* case was held to be within the legal right of the producer." *Id.* at 454.

31. *Id.* at 455-56. The pertinent provisions of the FTC order are quoted in the opinion. *Id.* at 444 n.1.

Similarly, the lower courts, while frequently reiterating the freedom of a trader acting individually to refuse to sell, have repeatedly held systems of resale price maintenance implemented by refusals to sell to price cutters unlawful under § 5 of the Federal Trade Commission Act or § 1 of the Sherman Act whenever customer participation was sufficient to support a finding of agreement or combination between the seller and his customers to maintain resale prices. *Connecticut Importing Co. v. Continental Distilling Corp.*, 129 F.2d 651 (2d Cir.), *cert. denied*, 317 U.S. 664 (1942); *Shakespeare Co. v. FTC*, 50 F.2d 758 (6th Cir. 1931); *Q.R.S. Music Co. v. FTC*, 12 F.2d 730 (7th Cir. 1926); *Moir v. FTC*, 12 F.2d 22 (1st Cir. 1926); *Hills Bros. v. FTC*, 9 F.2d 481 (9th Cir.), *cert. denied*, 270 U.S. 662 (1926); *Cream of Wheat Co. v. FTC*, 14 F.2d 40 (8th Cir. 1926) (FTC order modified); *Toledo Pipe-Threading Machine Co. v. FTC*, 11 F.2d 337 (6th Cir. 1926). *Cf. Harriet Hubbard Ayer, Inc. v. FTC*, 15 F.2d 274 (2d Cir. 1926) (no violation), *cert. denied*, 273 U.S. 759 (1927); *American Tobacco Co. v. FTC*, 9 F.2d 570 (2d Cir. 1925) (no violation), *aff'd*, 274 U.S. 543 (1927); *United States v. Hudnut*, 8 F.2d 1010 (S.D.N.Y. 1925) (Sherman Act—no violation). See Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 991 (1928); Note, 27 COL. L. REV. 183 (1927).

32. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

33. *Id.* at 723.

34. *Id.* at 728.

the sort which the Court there held unlawful. In rejecting this argument, the Court said:

“Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection.”<sup>35</sup>

In a more questionable decision,<sup>36</sup> the Court of Appeals for the Second Circuit refused to allow the defense of illegality under the anti-trust laws in a suit for rescission of a contract on the ground that the importer had failed to carry out provisions of the contract which required him “to maintain the price and to limit the number of distributors.”<sup>37</sup> A majority of the court held that the evidence did not indicate the presence of an agreement between the importer and his customers to fix resale prices, and approved the contract, citing the *Colgate* case:

“There are legitimate means of price maintenance in spite of the provisions of the Sherman Act. . . . Such means include a refusal to sell in the future to those who had not maintained a suggested price.”<sup>38</sup>

While emphasizing the fact that refusals to sell confer no special antitrust immunity on the course of conduct of which they form a part, the Supreme Court has continued to cite *Colgate* with approval.<sup>39</sup>

---

35. *Id.* at 728-29. More recently, the Supreme Court has approved, as a “recognized remedy,” compulsory sale provisions in a contested decree. *Besser Mfg. Co. v. United States*, 343 U.S. 444, 447 (1952).

36. *Adams-Mitchell Co. v. Cambridge Distributing Co.*, 189 F.2d 913 (2d Cir. 1951).

37. *Id.* at 914.

38. *Id.* at 916. Judge Frank filed a vigorous dissent. If something more than a bare refusal to sell were required, he would have found it in the existence of a general program by the seller of cutting off price cutters, in the further agreement to limit the number of distributors of its products or in the importer's promise to adhere to that program. *Id.* at 924. The latter element would seem sufficient to support a finding of the essential “agreement.”

39. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). *But cf.* *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). In the course of his opinion for the Court holding unlawful a combined refusal to sell to dealers who resold at prices above suggested maximum resale prices, Mr. Justice Black made an obvious reference to the *Colgate* doctrine when he said: “Seagram and Calvert acting individually *perhaps* might have refused to deal with petitioner or with any or all of the Indiana wholesalers.” *Id.* at 214 (italics added). This caveat was probably prompted by the argument in *Standard Oil Co. v. FTC*, 340

Of course one would not advise a seller that he could effectively enforce resale price maintenance by cutting off price cutters. Resale price maintenance schemes enforced by refusals to sell to price cutters enjoy no special immunity under the antitrust laws. Apart from statutory resale price maintenance,<sup>40</sup> any systematic refusal to sell to dealers, who do not maintain suggested resale prices, which is made known to the trade would inevitably raise serious questions under the antitrust laws; the implementation of any such policy, without giving rise to facts sufficient to support a finding of unlawful agreement or combination or of something more than a "mere acquiescence" of dealers in published price lists, may be impossible. It is the scheme as a whole which is declared unlawful, not the act of refusing to sell to any particular customer. Since resale price maintenance agreements are unlawful per se, it is appropriate that the courts should look carefully for evidence of that agreement with customers which is required to make out a violation of Section 1 of the Sherman Act.

On the other hand, a seller should remain free to discontinue sales to an otherwise unsatisfactory dealer who happens to be a price cutter and is known as such.<sup>41</sup> Any other rule would permit a dealer about

---

U.S. 231 (1951), which was before the Court at the same time and decided the following week. The *Standard Oil* case involved the validity of an FTC order prohibiting Standard from selling gasoline to wholesalers who resold such gasoline to retailer customers at less than Standard's posted prices to its own retailer customers. On review, the Court of Appeals for the Seventh Circuit upheld the order with minor modifications. 173 F.2d 210 (7th Cir. 1949). Judge Minton, writing for the Court of Appeals, observed that this did not compel price maintenance unlawful under the Sherman Act since, to comply with the order, Standard need only "govern its own conduct" and refuse to sell to price-cutting wholesalers. *Id.* at 217. In the Supreme Court, Standard argued that no seller "in his right mind" familiar with the antitrust laws would attempt to enforce such a resale price maintenance system. Brief for Petitioner, pp. 46-47. The FTC disagreed, citing *Colgate*. Brief for Respondent, p. 71. On oral argument, Mr. Justice Frankfurter suggested that *Colgate* "was rather under a cloud." See 18 U.S.L. WEEK 3211 (U.S. 1950). The Supreme Court decided the case on other grounds and did not consider the merits of the order. See Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 942-44 (1951).

40. The conclusions stated in the text are relevant to the legality of attempts to extend the effect of the "fair trade" laws by refusals to sell. Of course, refusals to sell to persons who refuse to make contracts specifically authorized by the McGuire Act, 66 STAT. 631 (1952), 15 U.S.C. § 45(a) (1) (Supp. 1954), amending § 5 of the Federal Trade Commission Act, 38 STAT. 719 (1914), and by the relevant state legislation would be unexceptionable. The condition of sale in such cases—the making of a lawful resale price maintenance contract—is a lawful condition. But this is a narrow exception to the general rule. The McGuire Act gives no immunity to price maintenance schemes enforced by refusals to sell which do not come within the specifically authorized statutory scheme. Cf. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Comment, 61 YALE L.J. 381, 398-403 (1952). It would not condone concerted refusal to sell to persons who refuse to execute fair trade contracts, cf. United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945), or refusal pursuant to agreement with other distributors to sell to customers who cut prices. Connecticut Importing Co. v. Continental Distilling Corp., 129 F.2d 651 (2d Cir. 1942); cf. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

41. Cf. Blue Bell Co. v. Frontier Refining Co., 213 F.2d 354 (10th Cir. 1954).

to be dropped because he does not adequately represent the seller to ensure the continuation of his dealer status simply by notoriously cutting prices. Such a result would be inconsistent with the preservation of market freedom to which the antitrust laws are dedicated.

Analytically, this dichotomy based on the seller's motive may be clear. But as a practical matter, the antitrust risk of cutting off a price-cutting dealer is great, particularly where most of the other dealers—as will normally be the case—follow the price policy suggested by the seller. Of course, the risk may be reduced by building up a record which demonstrates that the particular dealer does not adequately represent the seller, but the possible inference from other facts of combination or conspiracy between the seller and his other dealers to enforce resale price maintenance will always be present. Still common sense and judicial regard for the requirements of business can probably safely be relied on to exclude from the impact of the price maintenance cases those situations where a refusal to sell to a price-cutting customer represents no more than a warranted shift in distribution arrangements.

#### UNILATERAL REFUSALS TO DEAL FOR PURPOSES OTHER THAN CONTROLLING RESALE PRICES

In the ordinary flow of commerce, refusals to deal by individual firms occur in contexts not involving resale price maintenance. While most of the cases under this heading have arisen in connection with the policing by the seller of his distribution system, the principles concerned apply equally to attempts by a trader to control the use of the product sold or attempts to coerce other conduct of the buyer or seller.

Absent conspiracy or monopoly, the cases indicate that an individual has full freedom to refuse to sell to or buy from any person for any reason. The cases range from situations of inherent anti-trust interest, such as exclusive dealing<sup>42</sup> or the enforcement of terri-

---

42. *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9th Cir.), *cert. denied*, 348 U.S. 875 (1954) (refusal to sell to dealer who refused to deal exclusively in seller's product); *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954) (refusal to renew franchise of Hudson dealer who also had Willys dealership); *Nelson Radio & Supply v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (wholesale distributor's franchise for Motorola radios cancelled when he refused to abandon demand that he be permitted to handle communication equipment manufactured by Motorola or, in the alternative, acquired from other manufacturers); *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946) (distributor cut off by Pepsi-Cola when he refused to discontinue handling other non-alcoholic beverages); *Journal of Commerce Publishing Co. v. Tribune Co.*, 286 Fed. 111 (7th Cir. 1922) (refusal to sell newspapers to independent carriers who handle Chicago Journal of Commerce); *United States v. J. I. Case Co.*, 101 F. Supp. 856, 867-68 (D. Minn. 1951) (some dealers who handled or took on competing lines or who failed to carry full line of seller cut off); *Camfield Mfg. Co. v. McGraw Elec. Co.*, 70 F. Supp. 477 (D. Del. 1947) (refusal to sell "Toastmasters" to distributors who handled plaintiff's electric toasters); see

torial restrictions on sales outlets,<sup>43</sup> to situations where the reason for the refusal suggested less well-established categories of antitrust problems<sup>44</sup> or where the reason was obscure and it appeared that the dealer was cut off because his services were deemed unsatisfactory.<sup>45</sup> Similarly, unilateral refusals to buy, absent conspiracy or monopoly, have been held free of antitrust condemnation under a variety of circumstances.<sup>46</sup> The reason for the refusal to deal in these cases was unimportant. What was crucial was the failure of the plaintiff to allege or prove the requisite contract, conspiracy, monopoly or unlawful sales-on-condition to bring the questioned conduct within the ambit of the antitrust laws.

Of course, antitrust questions would arise in such cases, absent monopoly, only where the conduct, if pursuant to contract or agree-

---

Dublin Distributors, Inc. v. Edward and John Burke, Ltd., 109 F. Supp. 125, 127-28 (S.D.N.Y. 1952) (franchise of distributor of Guinness Stout who commenced dealing with imported Beamish Irish Stout cancelled when he refused to discontinue handling the latter).

43. Boro Hall Corp. v. General Motors Corp., 37 F. Supp. 999 (S.D.N.Y. 1941), *aff'd*, 124 F.2d 822 (2d Cir.), *rehearing denied*, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943). See Rifkind, *Division of Territories in How to Comply with the Antitrust Laws* 127, 132, 136 (1954).

44. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954) (refusal to sell first-run films to theater not in downtown area); Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) (New York Cotton Exchange refused to authorize sale of its market quotations to the Odd-Lot Cotton Exchange, some of the members of which it suspected of unlawful "bucket shop" operations); Johnson v. J. H. Yost Lumber Co., 117 F.2d 53 (8th Cir. 1941) (refusal intended to preserve the good will of another customer who was a competitor of the person refused); G. & P. Amusement Co. v. Regent Theater Co., 107 F. Supp. 453 (N.D. Ohio 1952), *aff'd*, 216 F.2d 749 (6th Cir. 1954), *cert. denied*, 23 U.S.L. WEEK 3251 (U.S. April 12, 1955) (same); Windsor Theatre Co. v. Walbrook Amusement Co., 94 F. Supp. 388 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951) (same); Sorrentino v. Glen-Gery Shale Brick Corp., 46 F. Supp. 709 (E.D. Pa. 1942) (same); Green v. Electric Vacuum Cleaner Co., 132 F.2d 312 (6th Cir. 1942), *cert. dismissed*, 319 U.S. 777 (1943) (refusal to sell parts to dealer who rebuilt and sold traded-in and junked vacuum cleaners); National Biscuit Co. v. FTC, 299 Fed. 733 (2d Cir.), *cert. denied*, 266 U.S. 613 (1924) (refusal to grant discounts for pooled orders of individual merchants equivalent to discounts allowed on similar purchases by chain stores); Mennen Co. v. FTC, 288 Fed. 774 (2d Cir.), *cert. denied*, 262 U.S. 759 (1923) (refusal to sell at wholesale price to retailer cooperatives); Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2d Cir. 1915) (refusals to sell to other than wholesalers); Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824 (D. Md. 1938) (refusal to sell to distributor in order to coerce distributor to buy up or sell out to another distributor). Cf. Green v. Victor Talking Machine Co., 24 F.2d 378 (2d Cir. 1928) (action in tort by distributor cut off when it refused to sell stock in itself to defendant manufacturer).

45. Shotkin v. General Elec. Co., 171 F.2d 236 (10th Cir. 1948); Feddersen Motors, Inc. v. Ward, 180 F.2d 519 (10th Cir. 1950); Riedley v. Hudson Motor Car Co., 82 F. Supp. 8 (W.D. Ky. 1949); Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286 (S.D.N.Y. 1954).

46. FTC v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924) (refusal of wholesaler to buy from manufacturer who sold to third firm which was 10% in the wholesale business and 90% in the retail trade without paying jobber's profit to wholesaler upheld under § 5 of the Federal Trade Commission Act); United States v. Minneapolis Elec. Contractors Ass'n, CCH 1954 TRADE CAS. ¶67,737 (D. Minn. 1954) (refusal of wholesaler to buy from manufacturer who sold directly to consumers). The conduct coerced by threats to refuse to buy, such as the grant of discriminatory prices, may independently encounter antitrust condemnation. Cf. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

ment, was of the sort which unreasonably restrained trade or substantially affected competition. Exclusive dealing, territorial dealer franchises, and the exercise of control over customers to develop and protect the seller's good will in his product are not *per se* unlawful. If control of customer conduct would be lawful if accomplished by contract, refusal to deal with customers who fail to so conduct themselves would *a fortiori* be unexceptionable. In such cases, the refusals to sell involve no novel issues requiring examination here.

The question remains whether coercion of conduct, which would be unlawful if the subject of contract, is free of antitrust condemnation if accomplished by threats of refusal to deal and refusals to deal with offending customers or suppliers. It is in this situation that sharp conflict arises between the policy of the antitrust laws in eliminating unreasonable restraints on trade and the policy of the general law in preserving the freedom of a trader acting unilaterally to develop his business according to his personal judgment.

The theoretical problem is identical to that encountered in the price maintenance cases, and its solution is probably governed by those cases. On the one hand, something more than mere acquiescence in the seller's offending policy would be required to support a finding of the existence of that agreement or understanding essential, in the absence of monopoly, to making out a violation of the antitrust laws. On the other hand, common sense compels the conclusion that a producer should remain free to discontinue business relations with individual distributors or dealers who are not doing an effective job of selling, whether this ineffectiveness results from business ineptitude or from the fact that the dealer has diluted his efforts by handling competing lines, or the fact that his activities derogate from the public good will attaching to the producer or his product.<sup>47</sup> It is of the essence of competition that the manufacturer or wholesaler should and does have wide freedom in maintaining the quality of his distribution system.

The concern of some antitrust lawyers following the *Standard Oil of California*<sup>48</sup> decision, that one would have to tread warily in

---

47. Cf. *United States v. J. I. Case Co.*, 101 F. Supp. 856, 863 (D. Minn. 1951): "A farm machinery manufacturer must have independent discretion as to any person or concern which it will designate as a dealer. If a dealer is handling competitive lines to the detriment of Case, for instance, sound business permits it to withdraw and look for another dealer. The suggestion was made in argument by plaintiff's counsel that a dealer has the inherent right to handle as many lines as he desires regardless of the consequences to him business-wise. Granted, but he has no right to require the manufacturer to fail with him. Surely, where a dealer is so wedded to a competitive line that Case is a mere stepchild in the dealer's family, there can be no restriction upon the right of Case to look for another business home in the community."

48. *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293 (1949). The Court there held that the competitive effect requirement of § 3 of the Clayton Act was

cutting off any dealer who accounted for a not insignificant volume of business and who took on a competing line, has not been borne out by the recent cases.<sup>49</sup> Indeed, treble damage suits brought by cut-off dealers have uniformly failed.<sup>50</sup> Perhaps because dealers do not have as great an interest in policing activities of other dealers outside the field of price maintenance, the courts have not been inclined to infer conspiracy between the manufacturer and others in his distribution system to bring a refusal to sell to a cut-off dealer within the principle of the group boycott cases.<sup>51</sup> As between the seller and the cut-off dealer, there remains no element of agreement to bring the refusal within the scope of Section 1 of the Sherman Act, nor is there a sale-on-condition to invoke the prohibitions of Section 3 of the Clayton Act. The latter applies only to executed transactions. It outlaws certain sales-on-condition and not refusals to sell.<sup>52</sup>

In a suit brought by the Government, however, a refusal to sell to a dealer who takes on or handles a competing line may tend to establish that sales to other dealers are being made on the condition or understanding that they shall not deal in competing lines, such as to make out a violation of Section 3 of the Clayton Act or Section 5 of the Federal Trade Commission Act. In the absence of express contract, proof of the actual use of such sanctions would tend to dis-

---

satisfied "simply by proof that a substantial portion of commerce is affected" and that it need not be shown that "competitive activity has actually diminished or probably will diminish" (*id.* at 299). More recent decisions suggest that the Court may have retreated somewhat from this position. Compare *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). See REPORT OF ATT'Y GEN.'S COMM. 141 *et seq.*

49. Compare Austern, *Inconsistencies in the Law in BUSINESS PRACTICES UNDER THE FEDERAL ANTITRUST LAWS* 158, 162 (1951) and his later comment when the article was republished under the title *Dealing with Uncertainties in How to COMPLY WITH THE ANTITRUST LAWS* 343, 351 (1954).

50. See cases cited in notes 42 and 45 *supra*.

51. But see, *e.g.*, *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, *rehearing denied*, 341 U.S. 906 (1951) (§1 complaint based on conspiracy between General Motors and a wholly owned subsidiary). Compare cases cited note 153 *infra*. See discussion on group boycott beginning at p. 872 *infra*.

52. *E.g.*, *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9th Cir.), *cert. denied*, 348 U.S. 875 (1954); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *cf.* *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954). See *Hunter Douglas Corp. v. Lando Products, Inc.*, 215 F.2d 372, 376 (9th Cir. 1954). But see *Dublin Distributors, Inc. v. Edward and John Burke, Ltd.*, CCH 1952-1953 Trade Cas. ¶67,477 (S.D.N.Y. 1953) (motion to dismiss count in complaint by distributor cut off charging violation of §3 denied); 53 COL. L. REV. 874 (1953); 28 N.Y.U.L.Q. 1170 (1953).

The rationale of the *Motorola* and *Meyberg* cases is that the cut-off dealer was not injured by a sale-on-condition but rather by the absence of a sale, a situation not covered by the terms of §3. This strict construction of §3 as applicable only to executed transactions is consistent with the construction given by the courts to §2 of the Clayton Act which has been held to apply only to completed sales to purchasers and not to refusals to sell. See cases cited notes 9, 10 *supra*. See also REPORT OF ATT'Y GEN.'S COMM. 136 n.28.

tinguish possibly unlawful exclusive dealing from situations where dealers of their own free choice handle exclusively the seller's line.<sup>53</sup> Similarly, refusal to sell a particular product or a component of such product, except in combination with another product, may be relevant in establishing coerced purchases in combination, or tying sales, subject to attack under the same provisions of the antitrust laws.<sup>54</sup>

The recent *Times-Picayune*<sup>55</sup> case must be noted because Mr. Justice Clark included in his opinion for the Court an essay on refusals to sell. That case involved the legality, under Sections 1 and 2<sup>56</sup> of the Sherman Act, of the Times-Picayune's policy of selling certain advertising in its morning and evening papers only under a contract requiring the advertiser to advertise in both papers. Mr. Justice Clark first examined the unit contract itself under Section 1 and, finding neither unlawful purpose nor effect, held the contract reasonable and not unlawful. He then considered the question whether "refusal to sell advertising space except *en bloc*, viewed alone, constitutes a violation of the Act."<sup>57</sup> This discussion appears gratuitous, for if the condition included in the contract is lawful, the refusal to sell pursuant to the condition would necessarily also be lawful. The discussion is of interest, however, in that the Court reaffirmed once more that "refusals to sell, without more, do not violate the law."<sup>58</sup> The contracts themselves being lawful and not a part of an otherwise unlawful scheme, Section 1 of the Sherman Act did not reach them.

In summary, absent monopoly, any practical limitations on a trader's freedom unilaterally to refuse to deal for non-price reasons stem not from the refusal to deal but from the bearing of the refusal on some *other* conduct of the seller which may be subject to question under the antitrust laws. The antitrust significance of a refusal to sell to a particular customer must be found in the seller's overall scheme

---

53. Compare *Carter Carburator Corp. v. FTC*, 112 F.2d 722 (8th Cir. 1940), *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941), *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd*, 343 U.S. 922 (1953), *with United States v. J. I. Case Co.*, 101 F. Supp. 856, 863, 867-68 (D. Minn. 1951). See *Ford Motor Co. v. United States*, 335 U.S. 313, 316 n.3 (1948).

54. Compare *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (combination sales held not unlawful), *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-59 (1948) (block booking of copyrighted motion pictures held unlawful), *with United States v. Kohler Co.*, CCH 1952-1953 TRADE CAS. ¶¶ 67,453, 67,553 (E.D. Pa. 1953) (alleged tie-in selling not established where proof did not show refusal to sell items separately).

55. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), 102 U. OF PA. L. REV. 125 (1953).

56. See text at p. 865 *infra*.

57. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 624-25 (1953).

58. *Id.* at 625.

of distribution. If a refusal to deal is used as an instrument of anti-trust violation, it may come within the proscriptions of those laws, but not otherwise. The refusal to deal itself, if not pursuant to agreement or monopoly, is unexceptionable.

#### LIMITATIONS ON A TRADER'S INDIVIDUAL FREEDOM TO REFUSE TO DEAL UNDER SECTION 2 OF THE SHERMAN ACT

In recent years, the courts have been exploring the availability of Section 2 of the Sherman Act as a route to judicial control of business activities, including refusals to deal, of individual firms. This use of Section 2 to reach unilateral refusals to deal was forecast in the early cases. The classic statement of the right to refuse to deal in the *Colgate* case, for example, is qualified as obtaining "in the absence of any purpose to create or maintain a monopoly,"<sup>59</sup> and this theme runs through subsequent cases upholding refusals to deal.<sup>60</sup> Similarly, where a policy of refusing to deal with a particular customer or particular class of trade or with particular suppliers except on condition has been employed as an element in an over-all monopolistic scheme, the policy of refusing to deal has been held unlawful along with the rest of the scheme.<sup>61</sup>

The first case testing the legality of a refusal to deal as such under Section 2, *Eastman Kodak Co. v. Southern Photo Materials Co.*,<sup>62</sup> arose in the aftermath of the Government's successful monopoly case against the Eastman Kodak Company.<sup>63</sup>

Plaintiff, an established Kodak dealer, was cut off from supplies after Kodak had acquired control of a supply house competing with plaintiff and had unsuccessfully attempted to purchase plaintiff's business. Plaintiff alleged that this refusal was in pursuance of monopoly, Kodak having attempted to monopolize trade in photographic supplies, *inter alia*, by acquiring control of competing manufacturers and the businesses of wholesalers and dealers. Its allegations with respect to Kodak's intent to monopolize and as to specific predatory practices

59. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

60. *E.g.*, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926); *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924); *FTC v. Gratz*, 253 U.S. 421, 428 (1920).

61. *E.g.*, *United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936); *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949).

62. 273 U.S. 359 (1927).

63. *United States v. Eastman Kodak Co.*, 226 Fed. 62 (W.D.N.Y. 1915), *decree signed*, 230 Fed. 522 (1916), *appeal dismissed*, 255 U.S. 578 (1921).

were supported by the final decree in the Government's monopoly suit, which was received in evidence at the trial. Judgment was for plaintiff and the Supreme Court affirmed. "Although there was no direct evidence . . . that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose . . . to warrant the submission of this question to the jury."<sup>64</sup>

*Southern Photo Materials* involved no novel application of Section 2. The prohibited attempt to monopolize or monopolization being founded on conduct separate and apart from the refusal to sell in issue, it was necessary only to connect the refusal to sell to the illegal course of conduct to establish plaintiff's right to relief.<sup>65</sup>

More troublesome are the cases involving refusals to sell by a person in the position of sole supplier of a particular customer or class of customers. We will assume that, but for the refusal to sell, the position of the supplier as sole supplier in the market, as defined, is not subject to attack under Section 2. Every manufacturer is the sole supplier of products of his own manufacture, and the object of his business activity is to develop and maintain customer preference for his products. Under what circumstances, if any, does Section 2 place on one who produces for sale a duty to sell to all customers or to any particular customer? We may note at the outset that successful selling always has the effect of limiting *pro tanto* the opportunities of the seller's competitors to sell competitive products to the same customers.

The first and perhaps still most extreme case in this area is *United States v. Klearflax Linen Looms, Inc.*<sup>66</sup> The district court there held a unilateral refusal by the only manufacturer of linen rugs to sell to a distributor in order to prevent that distributor from selling linen rugs to the United States Government in competition with the manufacturer was unlawful under Section 2 as an attempt "to monopolize the sale of linen rugs in interstate commerce to the United States." The court explicitly found that Klearflax's position as sole producer of linen rugs was not due to any unlawful practices. Moreover, the

---

64. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927).

65. See *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F. Supp. 362, 365 (E.D. Pa. 1947): "A combination may be liable for acts, but for the fact that it is conducting an illegal monopoly, it could perform with impunity. Thus an illegal monopoly cannot discriminate against or refuse to deal with a person without sufficient cause." Cf. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).

66. 63 F. Supp. 32 (D. Minn. 1945).

court found that linen rugs, while they had certain distinctive features, were in active competition with rugs of other materials, some of which, to varying degrees, possessed qualities not unlike those of linen rugs. Klearflax's annual production of \$1,000,000 comprised less than one-half of one percent of the total rug business in the United States.

Klearflax sold its rugs through distributors, jobbers and retail stores as well as directly to users. While there were no restrictions on the distributors bidding on Government tenders, Klearflax itself had customarily sold directly to the United States Government. A controversy between Klearflax and one of its distributors arose when the latter underbid Klearflax on a Government tender. Klearflax, under Government pressure, supplied the rugs to its distributor for this order. When the incident was repeated, Klearflax effectively removed the distributor from competition for this business by reducing his status to that of jobber, in which classification he was entitled to a lower discount.

Having put its product in the channels of trade, Klearflax was held to be disabled thereafter from cutting off a distributor which had underbid it for sales to one of its own direct customers. While the result may be explained in terms of judicial hostility to a manufacturer who might be said to be profiteering on Government contracts in time of war, the application of Section 2 to monopolization of the business of a particular customer for a specialty product for which there are many close substitutes is extreme.<sup>67</sup> This decision represents frank and complete judicial intervention on the side of the buyer, at least where the buyer is dealing in turn with the Government. A comparable situation would seem to arise wherever any dealer by classification or otherwise, or any competitor of the seller, is excluded from any particular line of business in any product for which a perceptible consumer demand based on advertising or distinctive quality has been developed.<sup>68</sup> Appropriately, this decision was ignored by the Supreme

---

67. The Government charged only a violation of Section 2. It appears from the decision that the evidence might have supported a finding of violation of Section 1 on familiar group boycott principles. The court at one point in its decision observed that in addition to refusing itself to sell to Floor Products, Klearflax obtained "the cooperation of the other distributors so that they would not sell Floor Products." *Id.* at 40.

68. For example, Judge Frank dissenting in *Adams-Mitchell Co. v. Cambridge Distributing Co.*, 189 F.2d 913 (2d Cir. 1951), suggested that the fact that an exclusive agent "had a monopoly . . . of the right to make sales to wholesalers in Massachusetts of a special brand of imported whiskey" was relevant to the legality of a contract under which he agreed "to refuse to sell further supplies of that monopolized brand to other wholesalers in the state." *Id.* at 924-25. A view more consonant with business realities is that of Judge Chesnut in *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1938), where in dismissing a complaint brought by a distributor cut off from supplies, he observed: "Every manufacturer has naturally a complete monopoly of his particular product especially when sold under his own

Court until it was cited in Mr. Justice Clark's essay on refusals to sell in the *Times-Picayune* decision.<sup>69</sup>

The question of the application of Section 2 to refusals to sell has recently been before the Supreme Court in the *Lorain Journal*<sup>70</sup> and *Times-Picayune* cases. Both of these cases involved refusals to sell which had the effect, like exclusive dealing and tie-in sales, of restraining trade between customers and the seller's competitors.

In *Lorain Journal*, Mr. Justice Burton, for an unanimous Court, held that the Journal's policy of refusing to sell newspaper advertising to concerns which advertised on a radio station in a neighboring town constituted an unlawful attempt to monopolize under Section 2. The Journal was a local newspaper, selling about 13,000 copies daily in Lorain and reaching 99 per cent of Lorain's families. The Court stressed the importance of surrounding circumstances which established the Journal as "an indispensable medium of advertising for many Lorain concerns."<sup>71</sup> The district court had found that the purpose and intent of the Journal's refusals to sell "was to destroy the broadcasting company."<sup>72</sup> The Journal's policy, moreover, "often amounted to an effective prohibition of the use of" the local radio station for similar advertising purposes.<sup>73</sup> Admitting the "general right" of a private business concern to refuse to sell, the Court held that this right was no defense for its "exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act."<sup>74</sup>

In the *Times-Picayune* case, the Supreme Court had before it an appeal from the district court's conclusion that Section 2 had been violated:

"Defendants . . . by the use of the unit rate device, attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not because of budgetary limitations or financial inability purchase space in both afternoon newspapers. This was clearly an attempt to monopolize a part of trade or commerce among the several states, within the meaning of the Statute."<sup>75</sup>

---

private brands, and no private controversy with a distributor could legally tend to increase that type of a natural monopoly. The Sherman Act is, therefore, clearly not really involved." *Id.* at 828.

69. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953).

70. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); see Note, 66 HARV. L. REV. 89, 137 (1952).

71. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152 (1951).

72. *Id.* at 149. The Supreme Court adopted this finding. *Id.* at 154.

73. *Id.* at 153.

74. *Id.* at 155.

75. *United States v. Times-Picayune Publishing Co.*, 105 F. Supp. 670, 681 (E.D. La. 1952), *rev'd*, 345 U.S. 594 (1953).

The Supreme Court noted that the offense of attempt to monopolize under Section 2 requires a showing of specific intent to destroy competition or build monopoly. It held that the charge failed since the unit rate was predominantly motivated "by legitimate business aims."<sup>76</sup> The Court adverted to the fact that at the time the unit rate was adopted, a Times-Picayune competitor, which then published morning and afternoon papers, also employed a unit rate, that the unit rate reduced overhead costs and permitted Times-Picayune better to compete for national display advertising, and to the failure of the Government to prove its charges of monopolistic design. It distinguished the *Lorain Journal* case on the ground that there the single newspaper's refusal to sell space to advertisers who advertised on the local radio station manifested "bold, relentless, and predatory commercial behavior." The Court's emphasis on specific intent suggests that it regarded this as controlling on the Section 2 issue, even though the Court considered that Times-Picayune did not enjoy a "dominant" position in the relevant market—which it considered to be the newspaper advertising market in New Orleans including both morning and afternoon papers.<sup>77</sup>

Another aspect of the Section 2 problem arises wherever a seller of product *A* competes with his customers in the sale of product *B*, in the manufacture of which product *A* is required. This is a common problem in the case of vertically integrated firms which manufacture and sell both raw materials and products made from those materials.<sup>78</sup> It arises in a pronounced form when supplies of product *A* are short or when competition in product *B* is severe. It will be apparent that any vendor of a product or raw material, for which there are no satisfactory substitutes available on the market at any given time, has the power, at least in the short run, to control competition from his customers by reducing, cutting off or pricing their supplies so as to limit their

---

76. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 622 (1953).

77. Mr. Justice Burton, who had written the opinion in *Lorain Journal*, wrote a dissenting opinion in which Justices Black, Douglas and Minton joined. *Id.* at 628. The dissenters believed that, since the Times-Picayune enjoyed a "distinct, conceded and complete monopoly of access to the morning newspaper readers in the New Orleans area," its refusal to sell advertising in its morning paper except in combination with its evening paper violated the Sherman Act. While not expressly so stating, the dissenters appear to have considered that the unit contracts violated § 1 as contracts in restraint of trade under *International Salt Co. v. United States*, 332 U.S. 392 (1947), or that Times-Picayune's refusal to sell advertising in the morning paper alone constituted a use of its strategic position in the morning market "to gain a competitive advantage" unlawful under the monopolization provisions of § 2, see *United States v. Griffith*, 334 U.S. 100, 107 (1948), or both.

78. See FTC STAFF REPORT, *MONOPOLISTIC PRACTICES AND SMALL BUSINESS* 39 *et seq.* (1952).

ability to compete. Unless competitor-customers enjoy a special status by virtue of their being competitors, one would expect that they would stand in the same position as any other customers of the seller.

The classic example of antitrust violation in this area is the so-called "price squeeze" of the aluminum products industry.<sup>79</sup> Alcoa was the only United States manufacturer of virgin ingot aluminum. It sold ingot to fabricators engaged in rolling sheet aluminum. Alcoa itself also engaged in rolling sheet aluminum and selling it in competition with such fabricators. The prices at which it sold the ingot and its own sheet aluminum had been such as to leave an insufficient "spread" to permit the other fabricators to make a living profit. The Second Circuit in 1945 found that the ingot price was higher than a "fair price." The price squeeze was then itself<sup>80</sup> an "unlawful exercise of Alcoa's power," at least after Alcoa had been put on notice of the fabricators' complaints. In the circumstances of this case, there could be no doubt as to the economic consequences of Alcoa's sales policy. Indeed, the record showed that four out of eight competing fabricators had gone out of business during the period of the alleged price squeeze.

A similar element was involved in the *Klearflax* case.<sup>81</sup> Klearflax sold both finished rugs and rolls of linen rug material to distributors who cut the rolls into rug sizes as ordered by dealers and bound and fringed the edges, and to jobbers who purchased only the finished line of floor covering material. Consequently, the demotion of a distributor to the status of jobber, in addition to depriving it of the distributors' discount, deprived it of an opportunity to participate in the cut-order phase of the business. The court adverted to this additional fact in finding that Klearflax had effectively removed the offending distributor from competition for Government business in violation of Section 2.<sup>82</sup>

---

79. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Baush Machine Tool Co. v. Aluminum Co. of America*, 72 F.2d 236 (2d Cir. 1934), *cert. denied*, 293 U.S. 589 (1934).

80. The court said it did not consider Alcoa's pricing of ingot to fabricators "as part of the reasoning by which we conclude that the monopoly was unlawful." Moreover, it accepted the trial court's finding that it "was not part of an attempt to monopolize the 'sheet' market." *United States v. Aluminum Co. of America*, 148 F.2d 416, 438 (2d Cir. 1945).

81. *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945).

82. *Id.* at 40. For additional discussion of *Klearflax*, see text at note 66 *supra*. See also *Martin v. American Home Products Corp.*, 94 F. Supp. 57 (S.D.N.Y. 1950) (court denied motion to strike for failure to state a claim allegations in the complaint that defendant, on learning of profits to be made from a penicillin cattle remedy manufactured by plaintiff, one of its customers, undertook the manufacture of a competing remedy and thereafter refused to sell penicillin to plaintiff).

Two recent lower court decisions have inquired into the ultimate question whether Section 2 may impose on a seller, who enjoys a monopolistic position in any market, what in practical effect amounts to a duty not to refuse to sell.

An attempt by the Government to spell out a violation of Section 2 by the largest seller of a commodity who refused to sell that commodity except to selected customers failed in the recent "cellophane" case.<sup>83</sup> The Government charged duPont with monopolizing, attempting to monopolize and conspiring to monopolize trade in cellophane. One phase of the case was that duPont's selective converter policy, *i.e.*, its refusal to sell bulk cellophane for manufacture into bags, wrappers, etc., to all converters who wished to buy from duPont, "was done to promote and maintain a monopolistic position."<sup>84</sup> The district court, however, concluded otherwise:

"That program is conceded to be legal, for it entailed little more than duPont's wholly independent and lawful exercise of its undisputed rights to select the persons to whom it would sell. . . . DuPont chose to sell through a limited but steadily expanding number of converters, rather than by offering its goods to converters generally. In promoting its new and high-priced material, it concluded this would enable it to select concerns who were interested in promoting cellophane and would encourage these concerns to give their best efforts to the distribution of cellophane."<sup>85</sup>

Nor did the fact that duPont formerly had exclusive contracts with some of its converters change the situation. The court noted that these exclusive contracts were one-year contracts, terminable by either party on 30-days' notice—and that in fact the converters had shifted back and forth between duPont and Sylvania, a second manufacturer of cellophane. The court concluded, therefore, that the volume of duPont's sales to converters was due not to monopoly but "to the superior quality of duPont cellophane, better service, and creative selling."<sup>86</sup> More generally, the court expressed its difficulty with this phase of the case as follows:

"Plaintiff's position appears to be since duPont had a substantial percentage of cellophane production, any distribution plan adopted would have been improper and that its only recourse was

---

83. *United States v. E. I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *appeal pending*, Sup. Ct., No. 162, Oct. Term 1954.

84. *Id.* at 229.

85. *Ibid.*

86. *Id.* at 230.

to sit back and wait for people to come to its plant and take away cellophane. DuPont had to sell the goods it made. It had to adopt a plan of distribution.”<sup>87</sup>

The ultimate position on behalf of a duty to sell under Section 2 was perhaps reached by the Court of Appeals for the First Circuit when, in a suit by a disappointed buyer-competitor, it considered the plaintiff's burden of proof satisfied once the seller's position as a latent monopolist was shown.

In *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*,<sup>88</sup> a circuit court articulated what in practical effect is a duty on the part of a seller to justify a refusal to sell to a buyer-competitor to escape violation of Section 2. Defendant corporation operated a building along the railroad tracks which served as a produce market where the Providence, R. I., car-lot wholesale fruit and vegetable trade was concentrated. Car-lot wholesaler tenants of the building were among the stockholders of defendant corporation. All the leases contained a covenant under which the lessee agreed not to “transfer or permit to be transferred any interest in the business” without permission of defendant. Owing to financial difficulties, plaintiff's stock was transferred to a “potentially lower priced” Boston firm; permission of the defendant was not obtained. Thereafter, defendant refused to renew plaintiff's lease.

Plaintiff sued under Sections 1 and 2 of the Sherman Act and the district court found for defendants. The First Circuit reversed. The finite limitations of the building had “thrust monopoly power upon the defendants,”<sup>89</sup> and defendants had ousted plaintiff “at the very moment of his affiliation with a potentially lower priced outsider.”<sup>90</sup> The conjunction of power and motive to exclude with an exclusion not justified by reasonable business requirements,<sup>91</sup> the court said, “estab-

---

87. *Id.* at 229. Other attempts to make out a violation of § 2 where the customer refused supplies was not in competition with the seller have similarly failed. *E.g.*, *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1938).

88. 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), 101 U. OF PA. L. REV. 550 (1953).

89. *Id.* at 487. The Court accepted the finding of the district court that duplicate physical facilities could be constructed elsewhere along the New Haven tracks, but regarded this as insufficient to “destroy the illegality of the asserted monopolization.” *Id.* at 488.

90. *Ibid.*

91. The court suggested as acceptable justification “lack of available space, financial unsoundness, or possibly low business or ethical standards.” *Id.* at 487. These justifications of refusal to rent space were subsequently recognized in a consent judgment entered in a Sherman Act case brought by the Government. See *United States v. Providence Fruit & Produce Bldg., Inc.*, 1954 Trade Cas. ¶ 67,872, Part IV (A).

lishes a prima facie case of the purpose to monopolize.”<sup>92</sup> Since defendant had failed “to come forward with some business justification,” the court held that a violation of the Sherman Act had been made out.<sup>93</sup>

The Section 2 cases demonstrate the versatility of the Sherman Act in reaching refusals to deal of economic significance by individual sellers or buyers. Thus the refusal to deal may constitute an unlawful use of monopoly power subject to attack under the monopolization provision of Section 2. This was the basis of Judge Hand’s ruling with respect to the price squeeze in the *Alcoa* case and of the decision in the *Gamco* case. The possible scope of this doctrine is suggested by the *Gamco* case and by Mr. Justice Douglas’ statement in *United States v. Griffith*,<sup>94</sup> quoted in both *Lorain Journal* and *Times-Picayune*, that the owner of the only theatre in a particular town may violate the monopolization provisions of Section 2 when he uses that “strategic position” “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.”<sup>95</sup> If this be the law, inasmuch as the *Griffith* case also held that specific intent is no longer an element of the offense of monopolization under Section 2, one need only define the relevant field of monopoly to fit the particular case in order to bring a refusal to deal within the ambit of activity subject to challenge under Section 2.

Secondly, the refusal to deal may constitute an attempt to monopolize where accompanied by evidence of a specific intent to accomplish the forbidden results. This was the situation in the *Lorain Journal* and *Klearflax* cases. The ingenuity of the courts in defining

---

92. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 488 (1st Cir.), cert. denied, 344 U.S. 817 (1952).

93. *Id.* at 489. The *Gamco* decision, by placing the burden of justification on the seller who discontinues relations with a customer, misconceives the nature of a refusal to sell. The result, however, is not so much to be criticized as the route followed by the court. The court’s decision might better have been framed in terms of a conspiracy among competing wholesalers to monopolize the wholesale fruit and vegetable business of Providence by excluding competition deemed undesirable. *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912); *American Federation of Tobacco Growers, Inc. v. Neal*, 183 F.2d 869 (4th Cir. 1950); *United States v. Tarpon Springs Sponge Exchange*, 142 F.2d 125 (5th Cir. 1944); *United States v. New England Fish Exchange*, 258 Fed. 732 (D. Mass. 1919). Cf. *Associated Press v. United States*, 326 U.S. 1 (1945). The Antitrust Division subsequently filed a complaint against the Providence Fruit & Produce Building, Inc., and certain tenants of the building charging a conspiracy to restrain and monopolize trade in fruit and vegetable produce. See CCH 1953 TRADE REG. REP. ¶ 66,067; 1954 Trade Cas. ¶ 68,872 (consent judgment). The court of appeals in the *Gamco* case intimated this route was available but chose not to overturn a trial court finding of no conspiracy. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 488-89 (1st Cir. 1952). It is to be regretted that the Supreme Court cited the *Gamco* decision without indicating disapproval in *Times-Picayune v. United States*, 345 U.S. 594, 611 n.29 (1953).

94. 334 U.S. 100 (1948).

95. *Id.* at 106, 107.

the relevant market in these cases to fit the circumstances before them indicates the further scope of Section 2 as a route to judicial control over refusals to deal where a specific intent to exclude is shown.

Thus, the legality of a unilateral refusal to deal under Section 2 turns on the question whether the "market" occupied by the one who refuses to deal or the "market" from which one who refuses to deal attempts to exclude another is such as to invoke the monopoly prohibitions of the Act. It has been said that the appropriate market is the "area of effective competition"<sup>96</sup> within which the trader concerned operates. This in turn depends upon "discovering patterns of trade which are followed in practice,"<sup>97</sup> in terms of both the products affected by the conduct, including a consideration of substitutes and potential competition, and the geographical area concerned. This market question is ably discussed in the recent report of the Attorney General's Committee,<sup>98</sup> and will not be explored in this Article. It is our purpose here only to suggest the relation between the development of the market concept under Section 2 and one's freedom to refuse to deal. For such purposes, the policy question becomes this: What is that "monopoly" which so offends the public interest in market freedom as to warrant federal control of the trade freedom of the person who seeks or enjoys that "monopoly?" This is, of course, but one facet on the field of monopoly problem under Section 2.

At one extreme, from the perspective of this study, we may confidently suggest that recognition of the public interest in liberty of contract requires that "monopoly" for Sherman Act purposes consists of something more than the power to deny something to a buyer to his disadvantage by refusing to deal with him. Of course, the power to injure a buyer by refusing to deal implies the lack of alternative sources of supplies to the buyer in question, for if perfect substitutes were available the refusal of any particular supplier to sell would be a matter of indifference to the buyer. In an economic sense, therefore, the power to disadvantage a buyer by refusing to deal is itself an indicia of what is called monopoly power. But to accept such a showing as sufficient to invoke the prohibitions of the monopoly provisions of the Sherman Act would be to use an act founded on the philosophy that it is in the public interest to preserve freedom of trade, to destroy that freedom throughout a large sector of the economy without analysis of the broader economic and political implications of such destruction.

---

96. *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293, 299 n.5 (1949).

97. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

98. REPORT OF ATT'Y GEN.'S COMM. 44 *et seq.* See further Note, *The Market: A Concept in Anti-Trust*, 54 COL. L. REV. 580 (1954).

At the other extreme are situations such as that presented by the "price squeeze" aspects of the *Alcoa* case. It is patently consistent with our traditions of market freedom that a firm in the position of Alcoa in the early 1930's should be precluded by the antitrust laws from controlling competition by pricing supplies so as to eliminate competition from customer-competitors.

Between these poles lie the cases discussed above. While the writer has considerable difficulty, for example, with the idea that the "monopoly" enjoyed by the only manufacturer of linen rugs or the owner of a building, or the "market" represented by the requirements of the Government or any other single customer should be controlling in determining the legality under Section 2 of a refusal to deal, it may be noted that the cases where violations of Section 2 have been found each involved what might be characterized as predatory refusals to deal successfully aimed at directly eliminating competition with the seller.

Section 2 of the Sherman Act left to the courts the determination of the point at which freedom to trade should give way to federal control over the freedom of individuals not to trade. "Monopoly is the talismanic word. An individual's freedom not to trade is unqualified, regardless of motive, so long as he neither seeks nor enjoys a "monopoly." The cases reviewed above indicate that the courts are groping for an appropriate rationale of the monopoly provisions of the Sherman Act which, while limiting the freedom of a trader unduly to exploit trade advantages stemming from his market position, will assure the preservation of his essential freedom to develop his business, including his supplier and customer relationships, in accordance with his personal business judgment.

#### CONCERTED REFUSAL TO DEAL

Concerted refusals to deal include both refusals designed to coerce or exclude third parties, commonly called group boycotts, and refusals which stem from contractual obligations or joint ventures which affect third parties only indirectly. It is important to distinguish the two situations inasmuch as the courts have properly allowed greater scope for group action which falls within the latter category.

#### *Concerted Refusal to Deal Intended to Coerce Conduct of Third Parties or to Secure Their Removal from Competition*

Throughout the history of the Sherman Act, the courts have had little difficulty in finding unreasonable restraints of trade in agreements among competitors, at any level of distribution, designed to

coerce those subject to a boycott to accede to the action or inaction desired by the group or to exclude them from competition.<sup>99</sup> The leading case involving commercial boycotts has long been *Eastern States Retail Lumber Dealers Ass'n v. United States*,<sup>100</sup> which involved a scheme to deter wholesale dealers from selling directly to customers of retailers through circulation to the member retailers of a list of offending wholesalers. Although the members of the association had not expressly agreed to refrain from dealing with the listed wholesalers and there was no penalty for failure to do so, it was conceded by defendants that the circulation of this information had the natural tendency to cause retailers receiving the reports to refuse to buy from the listed concerns.

The Court had no difficulty in inferring a conspiracy to boycott. In holding that this agreement went beyond the "normal and usual agreements in aid of trade and commerce which may be found not to be within the act,"<sup>101</sup> the Court emphasized that the group action there involved placed involuntary restraints on the buying opportunities of strangers to the agreement. In disposing of the argument that the conduct was reasonably necessary for the protection of the retail trade and promotion of the public welfare in providing retail facilities, the Court ruled that the Sherman Act was designed to prevent resort to practices which unduly restrained trade and added that "private choice of means must yield to the national authority thus exerted."<sup>102</sup> The Court did not doubt that a retail dealer could stop dealing with a wholesaler for reason sufficient to himself, but considered that, when he joined with others to do this, the act became unlawful under the Sherman Act.

The same reasoning has been echoed in subsequent decisions where the Court declared unlawful agreements among dominant groups of motion picture distributors not to supply films to an exhibitor unless he dealt with all the distributors,<sup>103</sup> not to license pictures except under a standard form contract which included a provision for the arbitration of all disputes under the contract,<sup>104</sup> or not to lease films to

---

99. See generally, Note, 58 *YALE L.J.* 1121, 1136-40 (1949); Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 *GEO. WASH. L. REV.* 302 (1942).

100. 234 U.S. 600 (1914). Prior group boycott cases under the Sherman Act include *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912).

101. *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 612 (1914).

102. *Id.* at 613.

103. *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923).

104. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930).

theaters which had changed hands, unless the new owner assumed the obligations of the former owners to the distributors or deposited with the lessor in advance cash security as specified by the distributors.<sup>105</sup> Judicial abhorrence of concerted refusal to deal intended to coerce action by third parties is further reflected in decisions outlawing concerted refusals to sell by members of cooperatives enjoying limited exemptions under the antitrust laws.<sup>106</sup>

On the other hand, during the same period the courts indicated that concerted refusal to deal, even by a dominant group, might be justifiable where in aid of the payment of bills due,<sup>107</sup> the avoidance of relationships illegal in themselves<sup>108</sup> and the elimination of trade abuses.<sup>109</sup> In *Sugar Institute, Inc. v. United States*,<sup>110</sup> Chief Justice Hughes, in a frequently-quoted passage, made reference to this area when he stated:

"Designed to frustrate unreasonable restraints, they [the prohibitions of the Sherman Act] do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And co-operative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law."<sup>111</sup>

The significance of the cases upholding group action has, however, been limited by the decision of the Supreme Court in *Fashion Originators' Guild v. FTC*.<sup>112</sup> There the Supreme Court applied the rule forbidding group boycotts which unreasonably restrain trade to condemn group action to control style piracy—an unethical, if not tortious practice. The Fashion Originators' Guild sought to destroy competition from manufacturers who pirated designs of Guild members by

105. *United States v. First Nat. Pictures, Inc.*, 282 U.S. 44 (1930).

106. *Hinton v. Columbia River Packers Ass'n, Inc.*, 131 F.2d 88 (9th Cir. 1942) (refusal by cooperative formed under Fisheries Cooperative Marketing Act, 48 STAT. 1213-14 (1934), as amended, 15 U.S.C. §§ 521, 522 (1952), to sell fish to packer who refused to agree not to purchase fish from non-members of cooperative held unlawful); *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531 (N.D. Cal. 1941).

107. *Swift & Co. v. United States*, 196 U.S. 375, 394 n.1 (1905); *United States v. Fur Dressers' & Fur Dyers Ass'n*, 5 F.2d 869 (S.D.N.Y. 1925); see *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588, 604 (1925).

108. *United States v. American Livestock Commission Co.*, 279 U.S. 435, 438 (1929).

109. *Butterick Publishing Co. v. FTC*, 85 F.2d 522, 526 (2d Cir. 1936).

110. 297 U.S. 553 (1936).

111. *Id.* at 597-98.

112. 312 U.S. 457 (1941).

refusing to sell to retailers who sold such copied garments. The scheme operated through the circulation of lists of noncooperating retailers to whom no sales were to be made by Guild members.

In holding the practice unlawful, the Court noted that the Guild occupied a "commanding position" in its line of business<sup>113</sup> and further held that it was not error for the Federal Trade Commission to refuse to hear much of the evidence offered on the reasonableness of the scheme to protect the trade against the "devastating evils" growing from the pirating of original designs. The reasonableness of the methods was "no more material than would be the reasonableness of the prices fixed by unlawful combination."<sup>114</sup>

The distinguishing feature of the group boycott cases is group action to coerce third parties to conform to the pattern of conduct desired by the group or to secure their removal from competition.<sup>115</sup> The essential combination may be horizontal<sup>116</sup> or vertical.<sup>117</sup> Such action offends the concept of a free market because it places involuntary restraints on the trading opportunities of strangers to the group. In holding such concerted refusals to deal unlawful, the courts have focused on the *means* used—the group boycott—noting that the objective of the group itself may be lawful and the effect not unlawful if accomplished by an individual not acting in concert with others.

The harsh judicial attitude toward group boycott stems partly from the assumption that group action directed against individuals involves an inherent imbalance in economic power,<sup>118</sup> which may or

---

113. In 1936, Guild members sold more than 38% of all women's garments wholesale at \$6.75 and up and more than 60% of those selling at \$10.75 and above.

114. *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 467, 468 (1941). The Court of Appeals for the First Circuit, in a treble damage action, had previously upheld the group boycott organized by the Guild as reasonably designed to deter admitted trade abuses. The court found no threat of monopoly, noting that dresses in all price ranges were available from manufacturers who were not members of the Guild and that dresses of Guild members could have been obtained by cooperating. *Wm. Filene Sons Co. v. Fashion Originators' Guild*, 90 F.2d 556 (1st Cir. 1937).

115. See, *e.g.*, cases cited in notes 100-14 *supra*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (combined refusal to sell to dealer who failed to observe suggested maximum resale prices); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945); *Millinery Creator's Guild, Inc. v. FTC*, 312 U.S. 469 (1941); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945), 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948); *Johnson v. J. H. Yost Lumber Co.*, 117 F.2d 53 (8th Cir. 1941); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142 (3d Cir. 1936), *cert. denied* 305 U.S. 610 (1938); *United States v. Minneapolis Elec. Contractors Ass'n*, 99 F. Supp. 75 (D. Minn. 1951), *appeal dismissed*, 207 F.2d 782 (8th Cir. 1953); *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942).

116. See cases cited in notes 100-05 *supra*.

117. *E.g.*, *Straus v. Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) (refusal by Victor and cooperating dealers to sell to Macy's at other than retail prices); *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942) (refusal by watch manufacturer and cooperating jobbers and retailers to sell to other than approved outlets).

118. See, *e.g.*, *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, 311-12 (1923); *United States v. Associated Press*, 52 F. Supp. 362, 369 (S.D.N.Y. 1943).

may not be true depending on the relative market position of the individual and the group considered as a unit, and partly in the fact that a group boycott can easily be identified as a practice which imposes a direct restraint on the freedom of others to trade and, as a practical matter, can be easily remedied by injunction. For a justification of group boycotts, one can look only to the specific group interest in self-protection in the particular case, not to the broad public interest in a free market; the public interest in preserving the freedom of a person to develop business relations as he likes, which is invoked to support cases concerned with unilateral refusals to deal, is not here in issue. Limitations on group boycotts are designed to protect that very freedom of the individual.

One may question whether there are any circumstances, outside of a possible *de minimis* area,<sup>119</sup> where the group boycott should be accepted as a "reasonable means to protect interstate commerce from destructive or injurious practices."<sup>120</sup> The most plausible justifications for its use are perhaps in aid of reasonable credit provisions and the avoidance of relationships illegal in themselves. But even here the case for permitting group boycott is not commanding. The public interest may better be served by leaving to each trader individually the decision whether to deal with any particular person whose trade practices offend standards of conduct conventionally accepted by the business of which he is a part. The possible injury to competition from private regulation of trade outweighs what interest there might be in reserving to the group freedom under the antitrust laws to set up private means of self-protection enforced through group boycott.

*Concerted Refusals to Deal Involving the Acceptance of Limitations on Individual Freedom to Deal Not Intended to Coerce Action by Third Parties or to Secure Their Removal from the Market*

When the element of purpose to coerce the trade policy of third parties or to secure their removal from competition is absent, the policy question raised by agreements under which the parties mutually limit their own freedom to deal with outsiders becomes more difficult, and the courts have appropriately outlined wider limits before declaring such agreements illegal.

There are many "normal and usual agreements in aid of trade and commerce," to use the *Eastern States* language, which involve the acceptance by the parties of limitations on their freedom individually

---

119. Cf., *Ruddy Brook Clothes, Inc. v. British Foreign Marine Ins. Co.*, 195 F.2d 86, 89-90 (7th Cir.), cert. denied, 344 U.S. 816 (1952).

120. See text at note 111 *supra*.

to deal with others. Restrictions of the sort upheld at common law on the trade activities of a vendor of a business ancillary to its sale is one such form of agreement. Requirements contracts, exclusive dealing contracts and contracts involving exclusive territories all involve limitations on the freedom of one or more of the parties to do business with others.

Similarly, trade associations which limit the availability of their services to members,<sup>121</sup> or exchanges which establish rules for the government of the members of the exchange,<sup>122</sup> or terminal facilities established cooperatively by those interested in the development of the facilities<sup>123</sup> or joint sales agencies wherein the members limit their right to sell except through the joint agency<sup>124</sup> all involve horizontal agreements which limit the freedom of the participants to deal with outsiders.

Because all of these situations involve an agreement between two or more persons under which one or more of them agree not to deal with third persons and for that reason foreclose a part of the market to such third persons, they are all subject to scrutiny under the anti-trust laws. But in the ordinary case these do not involve combining for the primary purpose of coercing or excluding; rather they involve combinations of two or more persons to further directly the business of the parties to the agreement, and the effect on third parties and on competition is indirect. The issue in these cases is not the existence or nonexistence of concerted refusal to deal, but rather whether the purpose and effect of the operation of the contract, association, exchange or joint sales agency was such as unreasonably to exclude outsiders from participation in the trade in question. The principle of the group boycott cases—that it is *prima facie* unreasonable for a dominant group to combine to coerce—is not here applicable.

The point requires emphasis because of the confusion introduced by the *Associated Press*<sup>125</sup> case and the subsequent dicta of the Supreme Court in the *Columbia Steel*<sup>126</sup> and *Times-Picayune*<sup>127</sup> cases. In *Columbia Steel*, the Supreme Court cited *Associated Press* together with three group boycott cases<sup>128</sup> for the proposition that where a

---

121. *E.g.*, *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926).

122. *E.g.*, *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918).

123. See *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 405 (1912).

124. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

125. *Associated Press v. United States*, 326 U.S. 1 (1945).

126. *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948).

127. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953).

128. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

complaint charges that the defendants "have concertedly refused to deal with non-members of an association . . . then the amount of commerce involved is immaterial because such restraints are illegal *per se*."<sup>129</sup> In *Times-Picayune*, the Court carried the suggestion that any agreement involving limitations on the freedom of the parties to deal with others was *per se* unlawful still further, when it said, citing *Associated Press*, that "group boycotts, or concerted refusals to deal, clearly run afoul of § 1."<sup>130</sup> Of course, the use of the words "concerted refusals to deal" in conjunction with "group boycotts" suggests action directed at outsiders and might be so limited. But the Court's citation of *Associated Press* leaves open the suggestion that the antitrust consequence of association is an automatic obligation to make the product of the association available to all who seek to buy or otherwise participate.

The *Associated Press* case involved the legality of the by-laws of AP, which placed restrictions on the admission to membership of applicants serving the same area as any existing member, and other by-laws forbidding AP members to sell news to nonmembers. The latter by-laws involved, by definition, a concerted refusal to deal.

In analyzing the issues, Judge Learned Hand, for a three-judge district court, cited the group boycott cases in suggesting that "any use by a combination of its economic power to force a third person not to deal with another whom the combination wishes to coerce" is unlawful as such, but properly noted that the case before him fell outside this area.<sup>131</sup> The element of combining to coerce being absent, the court was required to weigh the advantages gained by the combination through their association for the collection and dissemination of news against the injury done to the public—that is, to appraise the significance of the restraint in the context of the particular industry against the standards of reasonableness which have developed under the Sherman Act. Judge Hand appraised the dominant position of AP in the news-gathering field and concluded that the effect of the by-laws restricting membership in AP was to restrain trade unreasonably. The by-laws restricting sale of spot news to nonmembers "taken by themselves, and apart from the restrictions on membership," according to the court, "would be valid." Such agreements not to deal with outsiders were reasonable and ancillary to the main lawful purpose of AP.<sup>132</sup>

---

129. *United States v. Columbia Steel Co.*, 334 U.S. 495, 522-23 (1948).

130. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953).

131. *United States v. Associated Press*, 52 F. Supp. 362, 369-70 (S.D.N.Y. 1943).

132. *Id.* at 373-74.

A majority of the Supreme Court agreed with the district court that the AP arrangement resulted in an unlawful restraint of trade. The Supreme Court, however, shifted the emphasis from the restrictions on membership to the refusal to deal with outsiders. The Court relied heavily on the group boycott cases. It did not distinguish them in principle, but wove them into an opinion grounded on the dominant position of AP in the news-gathering field and the effect of the by-laws in limiting the competitive opportunities of nonmembers.

The Court's characterization of the AP set-up as "designed to stifle competition"<sup>133</sup> was drawn by inference from the by-laws themselves. Accordingly, its reliance on the group boycott cases was misleading. As pointed out by Mr. Justice Murphy in his dissent, the group boycott cases were "relevant only to a situation where there is some element of coercion or unfairness present,"<sup>134</sup> which does not appear to have been shown in the *Associated Press* case.

It is a short step from the Court's use of the group boycott cases in *Associated Press* to its dictum in the *Columbia Steel* case, which opens the door to per se illegality of any business agreement involving commitments not to deal with third parties. The voluntary acceptance of limitations on one's own freedom to deal with others dissociated from a purpose to coerce or to exclude is not necessarily unlawful; if adequate scope is to be given to the requirements of trade and the productive capabilities of group activities, the purpose and effect of such a contract or combination ought to be examined in the context of its operation.<sup>135</sup> Nothing in the *Associated Press* case requires a contrary interpretation of the Sherman Act. This is an area where the public interest requires careful regard for the balancing of competing interests within the framework of the rule of reason.<sup>136</sup>

#### POLICY ALTERNATIVES

The courts have been consistently effective in striking down trade restraints implemented in important measure by refusals to deal and threats to refuse to deal. This is the basis of the recommendation of the Attorney General's Committee against any revision of the antitrust

---

133. *Associated Press v. United States*, 326 U.S. 1, 19 (1945).

134. *Id.* at 58.

135. *Cf. Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286, 299-301 (S.D.N.Y. 1954).

136. See *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952), where the Court intimated that a "concerted refusal to deal" by Oregon physicians with private health associations might come within the permissible area of group activity because "there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters."

laws designed to modify their impact on refusals to deal.<sup>137</sup> Concerted refusals to deal if designed to coerce or exclude third parties are themselves unlawful restraints.<sup>138</sup> Resale price maintenance or unlawful exclusive dealing schemes enforced by systematic refusals to sell are reached under Section 1 of the Sherman Act wherever there is evidence of agreement or combination with cooperating dealers.<sup>139</sup> Refusals to sell to dealers who handle or take on competing lines may be relevant evidence of an unlawful condition or understanding in sales to others which may be reached under Section 3 of the Clayton Act.<sup>140</sup> Exploitation of a monopoly position to restrain or prevent competition in any market by refusals to deal may be controlled under Section 2 of the Sherman Act.<sup>141</sup> Provided there is present the requisite elements of agreement, understanding, combination, or monopoly to make out a violation of the Sherman Act or Section 3 of the Clayton Act, schemes employing refusals to deal may be controlled under Section 5 of the Federal Trade Commission Act.<sup>142</sup> In general, however, except as restraint of trade or monopoly independent of the refusal may be shown, a person conducting an entirely private business is free to refuse to deal with any person for any reason. The pattern of conduct of which it forms a part, not the refusal to deal, is the relevant object of antitrust inquiry.

These conclusions may be stated as settled law. More, however, should be said about refusals to deal by individual firms.

Wherever there is specific consumer demand for the product concerned, an indication by a seller to his customers of his sales policy may result in a market situation which is the economic equivalent of sales-on-condition. In this day of studied product differentiation, this will indeed be the case throughout a large segment of the economy. The antitrust laws are concerned with economic realities, not with conceptual niceties; they are aimed "at substance rather than form."<sup>143</sup> Should not a court, when confronted with a situation which would be unlawful if enforced by contract, strike it down under the antitrust laws if it results from the trader's individual decision not to deal with the customer or class of trade concerned? Should one be permitted to ac-

---

137. See REPORT OF ATT'Y GEN.'S COMM. 137.

138. See pp. 872-76 *supra*.

139. See pp. 851-62 *supra*.

140. See text at note 53 *supra*.

141. See pp. 862-72 *supra*.

142. *E.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); FTC cases cited in note 31 *supra*.

143. United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

comply indirectly that which is prohibited if done directly? Consideration of the implications of this question nurtures the instinct in antitrust lawyers to advise clients not to cut off customers who displease them, except in the presence of the clearest sort of justification.<sup>144</sup>

While the soundness of such advice as a practical matter is not questioned, one must be careful not to lose sight of the nature of the interests involved. In the *Colgate* case,<sup>145</sup> the Supreme Court had to choose between infringing Colgate's freedom not to sell and permitting Colgate to accomplish indirectly what all agreed could not be accomplished directly by agreement, express or implied. Since it considered itself bound by the interpretation the district court had given to the indictment—that no agreement was charged—it could not escape this choice. Unanimously it held that no violation of the Sherman Act was charged: "The purpose of the Sherman Act is . . . to preserve the right of freedom to trade."<sup>146</sup> Subsequent cases involving refusals to deal where antitrust violations were found do not detract from the clarity of this decision; they reflect only an appropriate alertness on the part of courts, when presented with a full record, to find that essential agreement deemed missing in the *Colgate* indictment, in the entire course of dealings revealed by the evidence.

There have been many approaches to the problem of reaching refusals to deal by individual firms as such.

It was at one time suggested that trade abuses stemming from the power of large trusts, by refusing to deal, to coerce resale price maintenance, exclusive dealing, rebates and the like, might be controlled under the general law through an extension of the law of common employments to businesses enjoying a virtual monopoly in their line of commerce<sup>147</sup> or to business generally.<sup>148</sup> But this suggestion did not find favor in the courts. It conflicted with the political and economic philosophy of the times and aroused concern as to the possible impact of the constitutional guarantees of private property as limiting the classes of business which might be held to be affected with a public

---

144. See, e.g., Timberg, *Selection of Customers* in *HOW TO COMPLY WITH THE ANTITRUST LAWS* 117 (1954); Rifkind, *Division of Territories* in *id.* at 127; Dean, *Supervision of Selling*, in *id.* at 218.

145. See pp. 851-53 *supra*.

146. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

147. Wyman, *The Law of Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156-73, 217-47 (1904).

148. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135 (1914). The author reviews the earliest cases and disputes the historical validity of the distinction between public and private callings. Public or common employments, he contends, were all those in which a man undertakes to deal with persons indifferently for profit—a characteristic of all business. The historical distinction lay in the private as distinguished from the public exercise of a trade.

interest and therefore, under established constitutional doctrines, subject to public regulation.<sup>149</sup>

The Clayton Act had not been on the books a year when A. & P. attempted to use Section 2, making unlawful discriminations in price which substantially affect competition, to compel the Cream of Wheat Company to sell to it.<sup>150</sup> In the early 1920's the Federal Trade Commission sought to control unilateral refusals to deal under Section 5 of the Federal Trade Commission Act; but the courts, consistent with the *Colgate* ruling, held that unless the course of dealing evidenced a contract or combination in restraint, an attempt to monopolize or unlawful sales on condition, there was no violation of the Federal Trade Commission Act.<sup>151</sup>

More recently advocates of greater control over unilateral refusals to deal have looked hopefully toward new interpretations of conspiracy as that term is used in Section 1 of the Sherman Act.<sup>152</sup>

Significantly, the "intra-corporate" conspiracy doctrine has been suggested and tested in cases involving refusals to deal. In situations involving several corporate entities, agreements among the members of the corporate family to refuse to deal have been held to violate Section 1.<sup>153</sup> The Government, in two cases involving refusals to deal by single firms, charged a violation of Section 1 in that the officers of the corporation conspired to refuse to deal. In one case, the court found it unnecessary to decide the issue;<sup>154</sup> in the other the Government abandoned these charges after trial when it appeared that more tra-

149. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1876); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566, 574-75 (S.D.N.Y.), *aff'd*, 227 Fed. 46 (2d Cir. 1915); see also *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 66 Fed. 637, 645 (2d Cir. 1895).

150. *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566 (S.D.N.Y.), *aff'd*, 227 Fed. 46 (2d Cir. 1915). See text beginning at pp. 849-51 *supra*.

151. E.g., *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *FTC v. Gratz*, 253 U.S. 421 (1920); see REPORT OF ATT'Y GEN.'S COMM. 136. *But cf.* *FTC v. Cement Institute*, 333 U.S. 683, 721 n.19 (1948) ("While we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the [Federal] Trade Commission Act.").

152. See Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?*, 11 FED. B.J. 130 (1951); Comment, 63 YALE L.J. 372, 385-87 (1954); cf. Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950).

153. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (§1, refusal to sell to dealer who did not observe maximum prices); *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941) (§1, criminal, refusal to sell except in combination). Cf. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98, 606-07 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); Note, 100 U. OF PA. L. REV. 1006 (1952).

154. See *United States v. Lorain Journal Co.*, 92 F. Supp. 794, 799-800 (N.D. Ohio 1950).

ditional violations were made out.<sup>155</sup> A judicial test occurred, however, in *Nelson Radio and Supply Co. v. Motorola*,<sup>156</sup> when the Fifth Circuit affirmed dismissal of the complaint where a Motorola distributor, cut off from supplies, founded its Section 1 action upon an alleged intra-corporate conspiracy.

The *Motorola* decision is to be welcomed and the result appropriately has received the endorsement of the Attorney General's Committee.<sup>157</sup> If the conspiracy requirement should be read out of Section 1, any firm which refused to sell to any person would do so at the peril that the effect of the refusal would on suit by such person be found unreasonably to have restrained trade. This is so, because under Section 1 proof of specific intent to bring about the effect shown is not an essential element of the offense. Such a result would not only ignore the basic structure of the Sherman Act, wherein Congress reserved controls over conduct of individual firms to monopoly situations covered by Section 2, but also would erode, without analysis, that freedom for the entrepreneur acting as an individual which historically has been one of the most important sources of the competitive vigor of our economy.

Attempts to control unilateral refusals to sell have also been made via the implied conspiracy doctrine where competing sellers have each refused to sell to the same would-be buyer. No criticism is made of those cases wherein the courts have implied the essential conspiracy among the sellers but have required proof from surrounding business circumstances of collaboration or knowing participation in the conspiracy to buttress the inference to be drawn from parallel refusals to sell,<sup>158</sup> and absent such proof have failed to find conspiracy.<sup>159</sup> One court, however, intimated that a seller could not refuse to sell to a particular customer when he knew, or ought to have known, that his competitors had previously refused or intended to refuse dealings with this

---

155. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953).

156. 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *accord*, *Marion County Co-op. Ass'n v. Carnation Co.*, 114 F. Supp. 58, 62-63 (W.D. Ark. 1953), *aff'd*, 214 F.2d 557 (8th Cir. 1954); *Hershel California Fruit Products Co. v. Hunt Foods, Inc.*, 1954 Trade Cas. ¶67,928 (N.D. Cal. 1954).

157. REPORT OF ATT'Y GEN.'S COMM. 31.

158. *E.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945), 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142 (3d Cir. 1936), *cert. denied*, 305 U.S. 610 (1938).

159. *E.g.*, *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F.2d 797 (4th Cir. 1951); *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 190 F.2d 951 (2d Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); *Johnson v. J. H. Yost Lumber Co.*, 117 F.2d 53 (8th Cir. 1941); *G. & P. Amusement Co. v. Regent Theatre Co.*, 107 F. Supp. 453 (N.D. Ohio 1952), *aff'd*, 216 F.2d 749 (6th Cir. 1954), *cert. denied*, 23 U.S.L. WEEK 3251 (U.S. April 12, 1955); *Fanchon & Marco Inc. v. Paramount Pictures, Inc.*, 215 F.2d 167 (9th Cir.), *cert. denied*, 348 U.S. 912 (1954).

customer.<sup>160</sup> The case concerned an attempt by a drive-in theater to get first run films. The responsible officials of the motion picture distributors concerned each testified that his decision not to license first run films to the drive-in theater was grounded on his experience and the economics of the business, and was made without any knowledge of similar action on the part of the others. The court, however, rejected this testimony despite the absence of any evidence to the contrary. "In practical effect, consciously parallel business practices have taken the place of the concept of meeting of the minds. . . . Present concert of action, further proof of actual agreement among the defendants is unnecessary. . . ." <sup>161</sup> The court apparently thought that drive-ins ought to be given a chance and found "the conscious parallel action equals conspiracy" approach a handy route to this end. Happily, the Supreme Court, in the *Theatre Enterprises* case, which involved individual refusals by several motion picture distributors to license first run pictures to plaintiff, has since made it clear that "'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."<sup>162</sup> This relegates the evidentiary significance of a refusal to sell to its proper role as a fact which may have a tendency to corroborate other evidence from which the fact finder may infer agreement.

\ The problem of the appropriate scope of Section 2 of the Sherman Act in controlling unilateral refusals to deal by individual firms is more difficult. The Section 2 cases have been rather fully discussed in this Article because, in the writer's view, the proscriptions of Section 2 are of cardinal importance in working out an appropriate accommodation between the public interest in preserving trade freedom for the individual business entity acting unilaterally and the public interest in preserving essential market freedom for those with whom it deals. Under the Sherman Act, this accommodation is to be worked out by the courts. It in no sense involves a conflict between right and wrong; the conflict is rather between rights of equal dignity. The federal courts, responsive to the requirements of changing times, have long since retreated from the notion that Spencerian laissez-faire economics was embodied in the Sherman Act.<sup>163</sup> The perimeter of trade freedom for the business entity acting unilaterally is an evolving one to be worked out under the distinct legislative standards of Section 2.

---

160. *Milgram v. Loew's, Inc.*, 94 F. Supp. 416 (E.D. Pa. 1950), *aff'd*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

161. 94 F. Supp. at 419.

162. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

163. Cf. Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. OF PA. L. REV. 295 (1954).

There are those, of course, who conceive public policy as requiring a trader to deal with all on non-discriminatory terms and conditions. The antitrust laws, flexible and with a tradition of growth, could be made to serve this end; we have indicated the routes available and noted the suggestions in recent decisions and writings which point in this direction. But the antitrust laws should not, it is submitted, be so used.

The understandable search by enforcement agencies for universals in the interest of simplified enforcement and the trend toward more extensive coverage of the Sherman Act should not be permitted to obscure the aims of the statute. We have shown that the courts applying traditional conspiracy and monopoly doctrines have been consistently effective in dealing with restraints of trade implemented by refusals to deal without "destroying all liberty of contract" and "causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve."<sup>164</sup> Congress in enacting the Clayton Act rejected a provision outlawing arbitrary refusals to sell as projecting it into a field of legislation "untried, complicated and dangerous."<sup>165</sup> The Supreme Court has steadfastly protected the entrepreneur's freedom to deal and not to deal when that freedom has been attacked as such. Unilateral refusals to deal where considerations of monopoly are not involved are normal incidents of the enjoyment of that trade freedom which has been a unique characteristic of our economic system. Refusals to deal are not evil in themselves; suggestions that they are and that it would be in the public interest to impose on ordinary private business standards of conduct not unlike those imposed on public utilities stem from political considerations separate and apart from those underlying the antitrust laws. Frank recognition of this frees antitrust analysis of situations involving refusals to deal from considerations foreign to antitrust and leaves the presumption of legality where, in the absence of some new expression of the legislative will, it belongs, on the side of freedom of action for the individual trader.

---

164. *United States v. American Tobacco Co.*, 221 U.S. 106, 180 (1911).

165. The House bill, which was the forerunner of the Clayton Act, contained a section making it unlawful for sellers of coal, oil, gas, and electricity "to refuse arbitrarily to sell such products to a responsible person." H.R. 15,657, 63d Cong., 2d Sess. § 3 (1914). In striking this provision as "unwise," the Senate referred not only to its possibly doubtful constitutional validity as denying freedom of contract to one of the parties, but also to the fact that it would project Congress "into a field of legislation at once untried, complicated and dangerous." SEN. REP. No. 698, 63d Cong., 2d Sess. 44 (1914). Compare text at note 149 *supra*.