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The Right to Refuse to Deal

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tunity to defend. There are no statutory grounds provided for vacating a judgment within the term in which it was rendered. Of course, the provisions of section 2325.01 of the Ohio Revised Code are available to the court, but whether a judgment will be vacated within term is largely a matter within the discretion of the court. When the defendant is attempting to vacate the judgment in a subsequent term of court, the reasons urged upon the court must fall within Ohio Revised Code section 2325.01. Although, if at all possible, the court will assist a defendant against whom a default judgment has been entered, if the defendant or his counsel has been negligent in the pursuit of the action, the court will refuse to offer any aid. If the defendant has had a chance to litigate the matter, but failed to do so through his own negligence or inattention, he cannot and should not be able to enlist the court's assistance. Only the non-negligent defendant to a default judgment is entitled to the court's special consideration and to the benefits of a motion to vacate such a judgment under the Ohio statutes.

MYRON L. JOSEPH

The Right to Refuse to Deal

INTRODUCTION

Manufacturers often attempt to fix resale prices in order to prevent "price cutters" from undermining a product's reputation when sold to the public below standard retail prices.¹ A conflict often arises between this practice and the spirit of the antitrust laws.² The Sherman Antitrust Act declares, generally, that all agreements, combinations, or conspiracies in restraint of trade are unlawful.³ The Federal Trade Commission Act,⁴ which was enacted to supplement the Sherman Act,⁵ empowers the Commission to restrain unfair methods of competition. The obvious purpose of the antitrust laws is to preserve competition so that the buying public will receive the most for its dollar. In carrying out this purpose, the Supreme Court has declared that all agreements between a manufacturer and wholesalers or retailers to fix resale prices are in violation of the

1. This reasoning was used by a manufacturer of eyeglass lenses in one of the leading cases concerning a manufacturer's right to maintain resale prices through the device of refusing to sell to all dealers who did not obey resale price stipulations. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

2. The Attorney General's National Committee to Study Antitrust Laws has condemned all methods of resale price maintenance as being contrary to the basic tenets of the national antitrust policy. *Report of the Attorney General's Nat'l Comm. to Study the Antitrust Laws* (1955). See Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936).

3. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

4. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958).

5. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

spirit of the antitrust laws in general and are specifically illegal under the Sherman Act.⁶ The Supreme Court reasoned that to allow such price-fixing agreements would be to deny to the public the right to buy from retailers who are free to sell at whatever price they feel will bring them a just return. Manufacturers agree that the public is entitled to purchase from retailers who are not bound to sell at a certain price, but deny that the public has a right to purchase from a retailer who sells below the average market price:

It is a mere truism to say that the fixing and maintaining by a manufacturer of a fair price above cost is not only a right but a commercial necessity; and any other course must end in bankruptcy. When such fair prices are departed from, and they are unreasonably raised and exacted from the purchasing public, the public is prejudiced thereby. On the other hand, when the price is so unreasonably lowered as to drive others out of the business, with a view of stifling competition, not only is that wronged competitor individually injured, but the public is prejudiced by the stifling of competition.⁷

Despite this contention, which in practice may well be true, the Supreme Court has consistently held to its position that *all agreements* to fix resale prices are illegal under the antitrust laws.⁸ The same result is

6. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Trenton Potteries Co. v. United States*, 273 U.S. 392 (1927); *Nash v. United States*, 229 U.S. 373 (1913); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). See also, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (conspiracy to effect maximum resale prices held a violation of the Sherman Act, *i.e.*, agreement to fix prices). The agreements to control resale prices usually take either of two forms: (1) "vertical price-fixing" agreements, wherein a buyer or seller operating in different markets or at different levels of the same market agrees that a product is not to be resold below a certain price. The "vertical" agreements were found to be violations of the Sherman Act as early as 1911 in the *Dr. Miles* case, *supra*; (2) "horizontal price fixing," in which competitors at the same level in the same market agree to fix resale prices. This latter type agreement clearly violates § 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958), and the Supreme Court has so held. *United States v. Socony-Vacuum Oil Co.*, *supra*; *Trenton Potteries Co. v. United States*, *supra*.

7. This contention was made by the New Jersey District Court in the case of *United States v. United States Steel Corp.*, 223 Fed. 55, 89, (1915), *aff'd*, 251 U.S. 417 (1918). See also *Great Atl. & Pac. Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915); *United States v. Freight Ass'n*, 166 U.S. 290, 322-24 (1896); *John D. Park & Sons Co. v. National Wholesale Druggists Ass'n*, 175 N.Y. 1, 67 N.E. 136 (1903).

8. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *Trenton Potteries Co. v. United States*, 273 U.S. 392 (1927); *Nash v. United States*, 229 U.S. 373 (1913); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). See also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (conspiracy to effect maximum resale prices held a violation of the Sherman Act, *i.e.*, agreement to fix prices).

9. *Trenton Potteries Co. v. United States*, 273 U.S. 392 (1927). Although the Supreme Court from the case of *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), to the present date has interpreted the Sherman Act to prohibit contracts, combinations or conspiracies having unreasonable terms, there are some contracts, agreements or conspiracies which are by their very nature so unreasonable as to constitute a Sherman Act violation in and of themselves. Situations falling within the above category are labeled *per se* violations of the Sherman Act. One type of *per se* Sherman Act violation is the contract or agreement by which the parties attempt to fix the prices at which goods are sold, be it a "horizontal" or "vertical" agreement; see cases cited note 8 *supra*. Concerning the courts' application of the "rule of reason" to Sherman Act cases, see HANDLER, ANTITRUST IN PERSPECTIVE chap. 2 (1957).

reached even though the prices fixed by such agreements are reasonable prices,⁹ or when the agreement fails to achieve its stated purpose.¹⁰

The manufacturer, however, has two possible ways of controlling resale prices while not specifically agreeing to fix prices. One approach is to comply with the pertinent state "fair trade laws," and come within the exemptions from the antitrust laws. These exemptions are set forth in the Miller-Tydings Act¹¹ and the McGuire Act.¹² The alternative approach to controlling resale prices is based on the *Colgate* doctrine established by the Supreme Court in the case of *United States v. Colgate & Company* in 1919.¹³ Under this doctrine a manufacturer has the right to specify resale prices, announce in advance that he will refuse to sell to customers who fail to maintain the specified prices, and in fact refuse to sell to such customers if they fail to comply. The danger the manufacturer faces in attempting to follow the permissive course of the *Colgate* doctrine is two-fold. First, the manufacturer in attempting to enforce his "refusal to deal" policy by informing his customers of the plan and acquiring their consent to deal with him on such a basis, may be held to have agreed with them to fix prices and thereby have violated the Sherman Act.¹⁴ Second, a manufacturer who has refused to deal with a customer, be it a retailer, wholesaler, or distributor, and has been joined in this refusal to deal with such a customer by others with whom the manufacturer deals, may be charged with violation of the Sherman Act. This is due to the *concerted* action taken by the manufacturer and his other customers. It is said by the courts that they are in effect boycotting the dealer who is not willing

10. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940).

11. 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1958). The Miller-Tydings Act was an amendment to § 1 of the Sherman Act. It provides, in general, that fair trade contracts, *i.e.*, vertical price-fixing agreements, legal under state law, are exempt from the federal antitrust laws.

12. 66 Stat. 632 (1952), as amended, 15 U.S.C. § 45(a) (1958). The usual fair trade acts provide that agreements between a manufacturer and retailer, fixing the prices at which the retailer would sell, were not illegal under state law and further that it was unfair competition for any other retailer, with notice of the existence of the agreement, to sell below the price specified in the fair trade contract. The clauses in the fair trade acts which bound retailers having notice of the fair trade contract have been referred to as "non-signer clauses." The United States Supreme Court in the case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), held that the exemption created by the Miller-Tydings Act was not as broad as the state fair trade laws. It specifically struck down all "non-signer clauses" as not being within the scope of the Miller-Tydings Act. In response to the *Schwegmann Bros.* case, Congress enacted the McGuire Act as an amendment to § 5 of the Federal Trade Commission Act. The McGuire Act specifically exempted the "non-signer clauses" from the federal antitrust laws, thereby filling the gap which the Supreme Court opened in the Miller-Tydings Act. It should be noted that the fair trade exemption of the McGuire Act is not applicable to any type of horizontal arrangement. For example, if a manufacturer has a fair trade contract with a wholesaler and the manufacturer also acts as a wholesaler, the agreement is not within the exemption because it is in effect a "horizontal agreement" between two wholesalers. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

13. 250 U.S. 300 (1919).

14. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920).

to accept the manufacturers' terms and are excluding him from trade in the particular article manufactured. Such concerted refusals to deal or group boycotts are per se violations of the Sherman Act.¹⁵ The confusion arises when a manufacturer's actions can be said to have gone beyond a simple refusal to deal and yet have not reached the stage of an agreement or "concerted action."

This note will be primarily devoted to a discussion of the law concerning a manufacturer's right to refuse to deal in order to maintain resale prices and the extent to which a manufacturer can proceed with such a policy in the face of the proscriptions against price-fixing agreements and concerted refusals to deal. The state "fair trade laws" will not be discussed.

CONCERTED REFUSALS TO DEAL

In the case of *Eastern States Retail Lumber Dealers' Association v. United States*,¹⁶ the Supreme Court quoted with approval the following language:

An act harmless when done by one may become a public wrong when done by many acting in concert.¹⁷

The above quotation typifies the courts' approach to the problem of concerted refusals to deal, commonly known as group boycotts. Partly due to an assumption that group action is more effective,¹⁸ and partly due to the explicit terms of the antitrust laws,¹⁹ the emphasis in this area is shifted from the refusal itself to the agreement or combination.²⁰ The *Eastern States Retail Lumber Dealers' Association* case²¹ involved a scheme

15. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945). The Attorney General's Committee has condemned such combinations as a per se violation. *Report of the Attorney General's Nat'l Comm. To Study Antitrust Laws* 137 (1955).

16. 234 U.S. 600 (1914).

17. *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440 (1910).

18. *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). Criticism of this basis is often made: "No attempt is made in the case to ascertain the combine's economic strength. A boycott by a powerful corporation, under the *ratio decidendi* of the courts, would presumably be upheld while the combined boycott of several pigmies would be denounced. Although the presence of a combination invites the application of the conspiracy concept, nevertheless the element of numbers seems, at best, but an adventitious factor." Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 207-8 (1936). See also Hardy, *Loose and Consolidated Combinations Under the Antitrust Laws*, 21 GEO. L.J. 123 (1933).

19. "Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

20. *E.g.*, *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, 312 (1923). A combination or conspiracy can be formed without any specific agreement on the part of the conspirators. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225, 227 (1939); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738, 743-5 (3d Cir. 1945).

21. 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.*

to deter wholesale lumber dealers from selling directly to customers of retailers. This scheme was effectuated by distributing to member retailers 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 a failure to do so, it was found that the natural tendency on the part of retailers receiving the reports was to refuse to buy from the listed wholesalers. The Court had no problem in finding a conspiracy to boycott nonconforming wholesalers. It held that the agreement between members of the association placed involuntary restraints on outsiders to the association. The members' actions amounted to a boycotting of all wholesalers who failed to conform to the Retail Association's desires. The Court did not doubt that a retail dealer could stop dealing with a wholesaler for reasons sufficient unto himself, but when he joined with others to do this, the act became unlawful under the Sherman Act. This same reasoning has been used in all subsequent group boycott cases.²²

The case of *Fashion Originators' Guild v. FTC*²³ is the first case to lay down explicitly the modern principle of group boycott, *i.e.*, that it is *prima facie* unreasonable for a dominant group to combine to coerce outsiders to follow a pattern of trade as dictated by the group. In this case the Supreme Court struck down, as a group boycott, activity on the part of the Guild to control "style piracy." The Fashion Originators' Guild sought to destroy competition from manufacturers who pirated designs of guild members, by refusing to sell to retailers who sold such copied garments. The scheme operated through the circulation of lists of non-cooperating retailers to whom no sales were to be made by Guild members. In holding the practice unlawful, as constituting a group boycott, the Court also held that it was not error for the Federal Trade Commission to refuse to hear much of the evidence offered by the Guild on the reasonableness of the scheme to protect the trade against the "devastating evils" growing from the pirating of original designs. The Court held that the reasonableness of the methods was "no more material than would be the reasonableness of the prices fixed by unlawful combination."²⁴

United States, 226 U.S. 20 (1912). See generally, Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 GEO. WASH. L. REV. 302 (1942); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. OF PA. L. REV. 847 (1955).

22. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930) (agreement not to lease pictures except under a standard form contract which included a provision for the arbitration of all disputes under the contract); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44 (1930) (agreement not to lease films to theatres 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); *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923) (agreements among dominant groups of motion picture distributors not to supply films to any exhibitor unless he dealt with all the distributors).

23. 312 U.S. 457 (1941).

24. *Id.* at 467-68.

The strong judicial attitude against group boycott was further exemplified by the case of *Associated Press v. United States*²⁵ and the dicta of the Supreme Court in the later cases of *United States v. Columbia Steel Company*²⁶ and *Times-Picayune Publishing Company v. United States*.²⁷ The *Associated Press* case involved the legality of the bylaws of the AP, which placed restrictions on the admission to membership of applicants serving the same area as any existing member, and other bylaws forbidding AP members to sell news to nonmembers. A majority of the Supreme Court agreed with the district court that the AP arrangement resulted in an unlawful restraint of trade. The Court relied heavily on the group boycott cases in condemning the AP bylaws which required the membership to refuse to deal with outsiders. Such bylaws were held to be unlawful regardless of the purpose for which they were designed. In the *Columbia Steel* case, the Supreme Court cited the *Associated Press* case together with three group boycott cases²⁸ for the proposition that where a complaint charged that the defendants "have concertedly refused to deal with nonmembers of a group . . .," then the amount of commerce involved is immaterial because such restraints are illegal per se.²⁹ In the *Times-Picayune* case the Court reiterated the proposition that any agreement involving limitations on the freedom of parties to deal with others was per se unlawful when it said, citing the *Associated Press* case, that "group boycotts, or concerted refusals to deal clearly run afoul of section 1 of the Sherman Act."³⁰

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 the removal of outsiders from competition.³¹ The

25. 326 U.S. 1 (1945).

26. 334 U.S. 495, 522 (1948).

27. 345 U.S. 594, 625 (1953).

28. *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).

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

30. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953). Some authorities contend that the rule condemning group boycotts as per se violations of the Sherman Act applies only to cases where there is an element of coercion upon third parties. Barber, *Refusals to Deal Under Antitrust Laws*, 103 U. OF PA. L. REV. 847, 879 (1955); Note, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1139 (1949). The above position does not seem sound since the Supreme Court has recently reasserted the rule of per se illegality of all group boycotts. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

31. *Evening News Publishing Co. v. Allied Newspaper Carrier of N. J.*, 263 F.2d 715 (3d Cir. 1959), cert. denied, 360 U.S. 929 (1959); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (group boycotts are among those practices conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (concerted refusal to sell to a dealer who did not observe specified resale prices unlawful per se); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945); *Millinery Creator's Guild, Inc. v. FTC*, 312 U.S. 469 (1941).

combination may be either horizontal³² or vertical.³³ 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 of the group action not unlawful if accomplished by an individual not acting in concert with others.

INDIVIDUAL REFUSALS TO DEAL

Not only has the Supreme Court struck down group refusals to deal designed to maintain resale prices,³⁴ but also it has condemned all express agreements which attempt to control resale prices.³⁵ The case of *Dr. Miles Medical Company v. John D. Park & Sons Company*³⁶ established the rule that a manufacturer may not, consistently with the Sherman Act, sell the articles he makes to others and yet by contract with them fix the price of future sales.

Although a trader may not *agree* to fix resale prices, there is one method by which this objective may be lawfully achieved (leaving aside the statutory methods available in fair trade states). An individual manufacturer in the exercise of his freedom to trade, may freely refuse to sell to another the articles he produces, for any reason he pleases, or for no reason, if he acts alone in the course of a private business which is free from unlawful monopoly.³⁷ Therefore, a manufacturer has the right

32. Cases cited note 22 *supra*; *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); see also note 6 *supra* and accompanying text.

33. Cases cited note 31 *supra*; *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791 (2d Cir. 1924) (refusal by dealers to sell to retailers at other than specified resale prices); *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942); see also note 6 *supra* and accompanying text.

34. Cases cited note 31 *supra*.

35. Cases cited note 8 *supra*.

36. 220 U.S. 373 (1911).

37. *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Great Atl. & Pac. Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915). Recent cases illustrative of further confirmation of this principle are: *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954) (dissatisfaction with performance and business methods); *Meyers Motors v. Kaiser-Frazer Sales Corp.*, 178 F.2d 291 (8th Cir. 1949) (dissatisfaction with performance and business methods); *Interborough News Co. v. Curtis Publishing Co.*, 225 F.2d 289 (2d Cir. 1955) (same); *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946) (to protect goodwill of supplier's product); *Osborn v. Sinclair Refining Co.*, 171 F. Supp. 37 (D. Md. 1959) (deficiencies in over-all performance); *Miller Motors v. Ford Motor Co.*, 149 F. Supp. 790 (D.N.C. 1957), *aff'd*, 252 F.2d 441 (4th Cir. 1958); *Herren Candy Co. v. Curtiss Candy Co.*, 153 F. Supp. 751 (N.D. Ga. 1957); *Whitely v. Foremost Dairies*, 151 F. Supp. 914 (W.D. Ark. 1957); *G.D. Searle & Co. v. Institutional Drug Distribs.*, 151 F. Supp. 715 (S.D. Cal. 1957) (same); *United States v. Twentieth Century-Fox Film Corp.*, 137 F. Supp. 78 (S.D. Cal. 1955) (protection of existing investment in distribution facilities); *Coca-Cola Co. v. J. G. Butler & Sons*, 229 Fed. 224 (E.D. Ark. 1916) (to protect good will of supplier's product).

to specify resale prices and to announce in advance that he will refuse to sell to customers who fail to comply with those prices.³⁸

This legally sanctioned method of controlling prices grew out of the case of *United States v. Colgate & Company*.³⁹ The *Colgate* case involved the sufficiency of an indictment which charged the defendant with engaging in a combination with its dealers to maintain resale prices specified by Colgate. The dealers were urged to observe the prices on pain of losing their supply. Dealers were urged to and did report any sales secured from reported price cutters. Colgate, after investigation of the price cutters, placed their names on "suspended lists," and then requested, and received in some cases, promises of future adherence to stipulated resale prices. The company uniformly refused to deal with those dealers who did not give the requested assurances. Although the Supreme Court eight years before *Colgate* had held price maintenance agreements unlawful under the Sherman Act,⁴⁰ and has since held that the agreement necessary to make out a violation can be inferred from conduct of the parties,⁴¹ the Court sustained the district court's decision that the indictment failed to allege any contract or agreement between Colgate and its dealers.

[W]e must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company. . . . [T]he act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. *And, of course, he may announce in advance the circumstances under which he will refuse to sell.*⁴² (Emphasis added.)

The federal courts thereby began to apply the law as laid down by the Supreme Court.⁴³ But, it was not long before the Court began to clarify its position in the *Colgate* case.

In *United States v. A. Schrader's Son, Incorporated*,⁴⁴ the Court spelled out the nature of its holding in *Colgate*. A district court, citing *Colgate*, had dismissed an indictment charging that defendants, A. Schra-

38. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Such action must be taken without any intent to monopolize the particular market.

39. 250 U.S. 300 (1919).

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

41. Cases cited note 37 *supra*.

42. *United States v. Colgate & Co.*, 250 U.S. 300, 306-7 (1919).

43. Permissible activities under the *Colgate* doctrine have included the receipt of assurances from price cutters that they would adhere to fixed prices in the future, the mailing of form letters to price cutters insisting upon the upholding of retail prices, and the requests to customers for information on price cutting through company salesman. *Harriet Hubbard Ayer, Inc. v. FTC*, 15 F.2d 274 (2d Cir. 1926), *cert. denied*, 273 U.S. 759 (1927); *American Tobacco Co. v. FTC*, 9 F.2d 570 (2d Cir. 1925), *aff'd*, 274 U.S. 543 (1927); *Toledo Pipe Threading Mach. Co. v. FTC*, 11 F.2d 337 (6th Cir. 1926).

44. 252 U.S. 85 (1920).

der's Son, Incorporated, had entered into contracts for the maintenance of resale prices.⁴⁵ The defendant had argued that since resale price maintenance achieved through a refusal to deal was valid, the same objective achieved through oral agreement must also be valid. Upon writ of error the Supreme Court reversed the judgment of the district court. The Court held that the *Dr. Miles* case, which outlawed any agreements by a manufacturer and retailer to fix resale prices, was still sound law and was not overruled by the *Colgate* decision. Mr. Justice McReynolds, who wrote the *Colgate* opinion, distinguished the *Colgate* case from the one at bar:

[There is an] 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. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs, and thereby destroy competition and restrain the free and natural flow of trade amongst the states.⁴⁶ (Emphasis added.)

The *Schrader* case therefore established first, that the rule of the *Miles* case, *i.e.*, all agreements to fix resale prices are unlawful, is not modified or limited as a result of the *Colgate* case; and second, that unlawful contracts or agreements to fix resale prices may be either express or *implied* from a course of dealing or other circumstances.

The Supreme Court by clarifying the position taken in *Colgate* again placed emphasis on the *means* used by manufacturers, in achieving resale price maintenance, in determining whether a violation of the Sherman Act has occurred. If a manufacturer achieves resale price fixing by the threat of refusing to deal, his action is lawful (*Colgate*).⁴⁷ On the other hand, if he agrees, either expressly or impliedly, with his customers on a fixed resale price, he has violated the antitrust laws (*Dr. Miles*).⁴⁸ Yet, there is no difference as far as the public is concerned; it buys an article at a fixed price. As far as the retailer is concerned, the discretion he can exercise as to the resale price of the article he owns has been limited — in one case by fear of not being able to deal in the article again, and in the other case because he expressly agreed to limit his discretion as to resale price.

The legal reasoning in the *Schrader* case was continued in the case of

45. United States v. A. Schrader's Son, Inc., 264 Fed. 175 (N.D. Ohio 1919).

46. United States v. A. Schrader's Son, Inc., 252 U.S. 85, 98-99 (1920).

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

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

Frey & Son, Incorporated v. Cudahy Packing Company.⁴⁹ In that case, Frey & Son, Incorporated, a wholesale grocer, brought a civil suit under the Sherman Act⁵⁰ because of injuries claimed to have been sustained in its business by reason of an alleged combination or agreement between the defendant and wholesale dealers in one of defendant's products, "Old Dutch Cleanser," to maintain resale prices fixed by the defendant.⁵¹ The case was submitted to the jury to determine whether a combination or agreement in fact existed. A jury verdict for the plaintiff⁵² was reversed by the court of appeals⁵³ on the ground that the defendant's actions fell within the permissive area of refusal to deal as laid down by the *Colgate* case. The Supreme Court in affirming the court of appeals held that the trial court had not erred in sending the case to the jury, but rather in issuing the following instructions:

[I]f you shall find that defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find . . . an agreement or combination forbidden by the Sherman Anti-trust Act.⁵⁴ (Emphasis added.)

The Supreme Court ruled that the above findings, standing alone, would not constitute a violation of the Sherman Act, *i.e.*, agreement to fix prices. It would therefore follow that something more than uniform prices achieved through a "refusal to deal" plan is necessary for the manufacturer's conduct to be considered an agreement to fix prices in violation of the Sherman Act. The *Frey & Son* case left unanswered the question of what activities by a manufacturer are necessary before his "refusal to deal" program is considered an *agreement* to fix prices in violation of the Sherman Act, when such program achieves fixed resale prices.

In the case of *Federal Trade Commission v. Beech-Nut Packing Company*,⁵⁵ the Court attempted to spell out the conduct which, in addition to refusal to deal, would constitute a violation of the Sherman Act. The *Beech-Nut* case was decided under the Federal Trade Commission Act,⁵⁶ which outlaws unfair trade practices. Its decision is helpful in the Sherman Act area because the Sherman Act cases have been held to be guides

49. 256 U.S. 208 (1921).

50. See 15 U.S.C. § 15 (1958).

51. *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921).

52. 243 Fed. 205 (D. Md. 1917).

53. 261 Fed. 65 (4th Cir. 1919).

54. 256 U.S. 208, 210 (1921) (charge not printed in opinions below).

55. 257 U.S. 441 (1922).

56. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1958).

to what constitutes a violation of section 5 of the Federal Trade Commission Act.⁵⁷ In that case, the defendant, Beech-Nut Packing Company, enforced its resale price maintenance plan by refusing to deal with all distributors who did not observe suggested resale prices. Among the steps taken by Beech-Nut, in addition to its announced refusal to deal policy, were:⁵⁸

- (1) Use of agents, distributors and customers to report price-cutting dealers;
- (2) Reinstatement of those offending dealers who promised to observe the suggested prices;
- (3) Numbering of its products so as to trace an underpriced product back to its seller;
- (4) Listing of price cutters who were not to be sold to by all other dealers and circulating these lists among all its customers; and
- (5) Soliciting wholesalers' help in preventing the listed price cutters from obtaining Beech-Nut products.

In condemning the Beech-Nut policy the Court stated:

The facts found show that the Beech-Nut system goes 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. . . . The system here disclosed necessarily . . . restrains the natural flow of commerce From this course of conduct a court *may infer*, indeed, cannot escape the conclusion, that competition among retail distributors is practically suppressed, for all who would deal in the company's products are constrained to sell at the suggested prices.⁵⁹ (Emphasis added.)

The Court found that there existed an agreement between Beech-Nut and its distributors through the following reasoning:

Nor is the inference overcome by the conclusion stated in the commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which *the company secures the co-operation of its distributors and customers, which are quite as effectual as agreements, express or implied, intended to accomplish the same purpose.* By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.⁶⁰ (Emphasis added.)

The Supreme Court in effect reversed its ruling on the charge in the *Frey & Son* case by now holding that if the methods used by a manu-

57. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

58. *FTC v. Beech-Nut Co.*, 257 U.S. 441, 443-44 (1922).

59. *Id.* at 454-55.

60. *Id.* at 455.

facturer, plus a "refusal to deal" program, are as effectual as actual agreements would be in achieving fixed resale prices, then the agreement, essential for a violation of the Sherman Act, can be inferred.⁶¹ The Court required proof of sufficient facts to allow it to draw the inference of an *agreement* despite the government allegation of a combination to fix prices. In subsequent criminal and civil cases the Supreme Court and the lower federal courts have often used the rationale of the *Beech-Nut* case to strike down any refusal to deal program whenever fixed resale prices were the *result* of such a program.⁶² These results have been achieved despite the defense by the manufacturers that their actions fall within the permissive area of the *Colgate* doctrine, *i.e.*, an announced plan of refusing to sell to all those who do not observe suggested resale prices.

The judicial trend narrowing the *Colgate* doctrine continued in the case of *United States v. Bausch & Lomb Optical Company*.⁶³ A sales plan with the objective of obtaining uniform resale prices was initiated by the defendant, a distributor of eyeglass lenses. The plan not only included threats of refusing to deal with nonconforming wholesalers and retailers and an investigatory system to detect price cutters, but also a scheme whereby the defendant carefully selected and licensed his wholesalers and retailers. The plan successfully achieved a uniformity of resale prices which conformed with the suggested price list distributed to all dealers by the defendant. After selecting his retailers, the defendant-distributor enforced his retail price maintenance policy by notifying his wholesalers of any retail price cutters. A wholesaler that continued to sell to a price cutter after receiving notification was excluded from receiving the distributor's product.

The trial court found that the distributor had combined and conspired with wholesalers to fix prices in violation of the Sherman Act.⁶⁴ In affirming the trial court, the Supreme Court acknowledged the continuing validity of the *Colgate* doctrine. The Court noted, however, that in

61. 257 U.S. 441, 455 (1922). Mr. Justice McReynolds, the author of the *Colgate*, *Schradler's* and *Cudahy* decisions, dissented in the *Beech-Nut* case, saying that the manufacturer's conduct in that case amounted to nothing more than an exercise of his rights under the *Colgate* case. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 450-59 (1922) (dissenting opinion).

62. *Connecticut Importing Co. v. Continental Distilling Corp.*, 129 F.2d 651 (2d Cir. 1942), *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); *Toledo Pipe Threading Mach. Co. v. FTC*, 11 F.2d 337 (6th Cir. 1926). *But cf.* *Harriet Hubbard Ayer, Inc. v. FTC*, 15 F.2d 274 (2d Cir. 1926), *cert. denied*, 273 U.S. 759 (1927); *American Tobacco Co. v. FTC*, 9 F.2d 570 (2d Cir. 1925), *aff'd*, 274 U.S. 543 (1927); *United States v. Hudnut*, 8 F.2d 1010 (S.D.N.Y. 1925).

63. 321 U.S. 707 (1944).

64. 45 F. Supp. 387 (S.D.N.Y. 1942).

the case at bar, there was more than mere acquiescence by the wholesalers in the distributor's resale price list because of their fear of being cut off by the distributor in accord with its refusal to deal policy. The Court said that the acceptance by the wholesalers of the price maintenance plan by cooperating in selling at the suggested prices and by limiting sales to approved retailers was sufficient to constitute an agreement to fix prices in violation of the law. It would seem that the Court was holding true to its reasoning in the *Beech-Nut* case, *i.e.*, that a refusal to deal in order to maintain resale prices plus some other activity which results in uniform resale prices is equivalent to an agreement to fix prices.

Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.⁶⁵

From the above statement the inescapable conclusion must be that acquiescence plus assistance on the part of wholesalers in maintaining resale prices under threat of refusal to deal by the supplier, raises the inference of an agreement. This conclusion is logical since in the case which the Court had before it, a violation of the Sherman Act was found in that there was a combination to fix prices. Although a combination to fix prices was the finding, the Court required the government to establish sufficient facts which would allow the Court to draw the inference of an *agreement* to fix prices.⁶⁶ For support of its decision the Court cited cases in which it had held that all agreements, express or implied, to fix resale prices are unlawful.⁶⁷

THE PARKE, DAVIS CASE

The rationale of the *Beech-Nut* and *Bausch & Lomb* cases was carried one step further in the case of *United States v. Parke, Davis & Company*.⁶⁸ In that case the Court held that the finding of an agreement, express or implied, to fix resale prices was *not* necessary to establish a violation of the Sherman Act when the defendant had been charged with combining with others to fix resale prices. Parke, Davis Company, a large manufacturer and distributor of pharmaceutical products, announced that it would refuse to deal with all retailers who failed to resell its products at suggested prices. It also informed its distributors (wholesalers) that if they dealt with a retailer who had not observed the suggested

65. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723 (1944).

66. *Ibid.*

67. 321 U.S. at 720. It has been suggested that the Court in the *Bausch & Lomb* case did not explain whether it meant that acquiescence coupled with assistance was sufficient to cause the inference of an agreement, or that there was no need to show an agreement in order to prove a Sherman Act violation. Note, *Resale Price Maintenance and The Parke, Davis Case*, 46 VA. L. REV. 976, 986 (1960).

68. 362 U.S. 29 (1960), *reversing* 164 F. Supp. 827 (D.D.C. 1958).

prices, they too would be refused Parke, Davis products. Parke, Davis informed the wholesalers and retailers that their competitors were receiving the same warning. Parke, Davis and the wholesalers in fact refused to deal with several retailers who cut prices. One large retail chain which had cut prices and was excluded from dealing in Parke, Davis products was reinstated as a customer when Parke, Davis received assurances of future compliance with its suggested minimum resale prices. Parke, Davis influenced certain retailers to stop advertising its products at cut rate prices by assuring them that their competitors would discontinue similar advertising. Shortly thereafter, all retailers stopped the cut rate price advertising and Parke, Davis and its wholesale distributors continued to sell drugs to the complying retailers. The government sought an injunction alleging that Parke, Davis conspired and combined with retail and wholesale druggists to maintain wholesale and retail prices of its pharmaceutical products.⁶⁹ The trial court dismissed the complaint,⁷⁰ stating that Parke, Davis's conduct was sanctioned by the *Colgate* doctrine.⁷¹ The trial court concluded that from all the evidence it was unable to find a combination, conspiracy or agreement, express or implied, to fix resale prices between Parke, Davis and the wholesalers or retailers.⁷² The Supreme Court reversed the district court's judgment and remanded the case for entry of an appropriate judgment.⁷³

Although the Parke, Davis conduct had not resulted in absolutely uniform prices, the Supreme Court held that it had gone beyond a mere announcement of a refusal to deal in an attempt to fix resale prices and had violated the Sherman Act. The Court recognized the philosophy of *Colgate, i.e.*, that an individual has a right to choose his own customers and to announce in advance upon what terms he will deal with them, but went on to state that this right must be balanced with the right of society in preserving price competition.⁷⁴ The district court, stated Mr. Justice Brennan, "apparently assumed that the government could prevail only by establishing a contractual arrangement, albeit implied, between Parke, Davis and its customers."⁷⁵ Citing the *Beech-Nut* and *Bausch & Lomb* cases, the Supreme Court declared that a judicial inquiry into price-

69. See § 4 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958).

70. 164 F. Supp. 827 (D.D.C. 1958).

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

72. 164 F. Supp. at 835. The trial judge did not describe the standard he used in determining whether or not a combination or agreement to fix resale prices had existed. Since the trial judge described Parke, Davis' conduct as "properly unilateral," it would seem to be reasonable to assume that he did not find evidence of an agreement between Parke, Davis and its wholesalers. 164 F. Supp. at 829. The United States appealed to the Supreme Court under the Expediting Act. 15 U.S.C. § 29 (1958).

73. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

74. *Id.* at 43.

75. *Ibid.*

fixing cases could be had without the necessity of finding evidence of an agreement, express or implied, to fix resale prices when the defendant had been charged with conspiring and combining to fix prices.⁷⁶ The Court then set out the test to be applied:

Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used.⁷⁷

In applying the test to the actions of Parke, Davis the Court found:

In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act.⁷⁸

The Court pointed out that the Sherman Act not only forbids contractual agreements, but also combinations which restrain trade.⁷⁹ Therefore, according to the *Parke, Davis* decision, where a combination to fix resale prices is alleged, between a manufacturer and wholesalers, it is not necessary for the Court to find an agreement either express or implied.⁸⁰ The Court in the *Beech-Nut* and *Bausch & Lomb* cases went no further than to infer an agreement through the cooperation and acquiescence of the wholesalers and retailers in maintaining resale prices when coupled with a threat of refusing to deal. In the *Parke, Davis* case, the possibility or necessity of inferring an agreement to fix prices in violation of the Sherman Act, when resale prices were maintained, was discounted. The Court found the unlawful act to be the combined action on the part of the manufacturer and its wholesalers and retailers, plus a threat of a refusal to deal for noncompliance, and the resulting suppression of trade. What constituted the suppression of trade was not made explicit. Since the finding of a suppression of trade is in itself a conclusion, the fact that some of the retailers did maintain prices for fear of not receiving Parke, Davis products could be the only element which constituted the suppression of trade.

The majority also concluded that the suppression of advertising of the cut rate prices by Parke, Davis and the retailers was also concerted action resulting in a suppression of trade.

The dissent in *Parke, Davis* maintained that the existing case law required a finding of some price-fixing *agreement*, express or implied, in order to remove a manufacturer from the shield of the *Colgate* doctrine

76. *Id.* at 44.

77. *Ibid.*

78. *Id.* at 45.

79. *Ibid.*

80. *Id.* at 44.

despite the government's allegation of a combination to fix prices in violation of the Sherman Act.⁸¹ It also pointed out that there could not be a finding of concerted action on the part of Parke, Davis and its wholesalers. In referring to the threats of refusing to deal which Parke, Davis made to its wholesalers and retailers, Mr. Justice Harlan, speaking for the dissenting justices stated:

I cannot see how such unilateral action, permissible in itself, becomes any less unilateral because it is taken simultaneously with similar unilateral action . . .⁸²

The majority, in finding that there existed concerted action on the part of Parke, Davis and its wholesalers to exclude noncomplying retailers from dealing in its products could have reached the same result without modifying the prior case law concerning price-fixing agreements and the right to refuse to deal. By acting in concert with wholesalers in refusing to deal with noncomplying retailers, Parke, Davis and its wholesalers effectively boycotted those retailers from trading in Parke, Davis products. This was done in order to coerce the retailers into selling the Parke, Davis products at the suggested prices. This amounted to a per se violation of the Sherman Act under the authority of the group boycott cases.⁸³

Prior to the *Parke, Davis* case a manufacturer could proceed under an announced plan of refusing to deal with all who did not comply with his suggested resale prices and need only fear a finding of an implied agreement to fix prices and thereby a violation of the Sherman Act. Under the *Parke, Davis* ruling a manufacturer who proceeds upon such a course may be charged with violating the Sherman Act due to his actions alone, and not because such actions give rise to an inference of an agreement to fix resale prices. This has the practical effect of easing the burden of proof on the government in cases where the government alleges the existence of a combination to fix resale prices. The government need only show that the concerted action of the manufacturer and wholesalers resulted in the establishment of fixed resale prices, regardless of any agreement, express or implied.

On the other hand, the *Parke, Davis* decision seems to be a step toward the removal of a basic inconsistency concerning the effect of price

81. *Id.* at 49 (dissenting opinion). The dissent also argued that to overturn the lower court's findings of fact, *i.e.*, that no agreement to fix prices existed, would violate The Federal Rules of Civil Procedure and prior case law concerning the rules since in fact the lower court applied the proper legal standard. Fed. R. Civ. P. 52(a) (finding of fact to be set aside only if clearly erroneous). The majority countered this argument by concluding that the trial judge failed to apply the proper standard of law. The majority contended that a manufacturer could violate the Sherman Act due to the establishment of fixed resale prices without the necessity of finding an *agreement* to fix prices. *Id.* at 43.

82. *Id.* at 55 (dissenting opinion).

83. Cases cited note 31 *supra*.

fixing. Why should price fixing, which is a per se violation of the Sherman Act, be legal if accomplished solely through a refusal to deal? It would be consistent to say that price fixing brought about by any means is illegal. The Supreme Court, in allowing the *Colgate* doctrine to remain as a means to achieve fixed resale prices, had condoned an illegal result because of the means used to achieve such a result, *i.e.*, a refusal to deal. In so doing, the Court had failed to follow its own mandate: that the antitrust laws are concerned with economic realities, that they are aimed at "substance rather than form."⁸⁴

CONCLUSION

As a result of the *Parke, Davis* decision manufacturers who do not sell in states where fair trade laws are in effect and who wish to maintain resale prices of their products must proceed with great caution. Where a manufacturer deals through a distributorship sales program or through wholesalers it would seem impossible for him to control the resale prices of its product. In order to do so he would have to request that all wholesalers refuse to sell to retailers who were selling his product at cut rate prices. If the manufacturer actually stopped supplying those wholesalers who did not comply with his request and other wholesalers actually did comply, or all the wholesalers complied, the manufacturer may be charged with acting in concert with the complying wholesalers to boycott the non-complying retailers and wholesalers. Such concerted boycotting activity is considered a per se violation of the Sherman Act.⁸⁵ Although the manufacturer may intend to be exercising his right to choose whom he will deal with and announce in advance the circumstances under which he will refuse to deal and thereby fall within the protective graces of the *Colgate* doctrine, he may be thwarted in his efforts by the *Parke, Davis* case. *Parke, Davis* attempted to fall within the permissive *Colgate* doctrine and was faced with the following contention by the government, which contention the United States Supreme Court accepted.

[B]y entwining the wholesalers and retailers in a program to promote general compliance with its price maintenance policy [*Parke, Davis*] went beyond mere customer selection and created combinations or conspiracies to enforce resale price maintenance in violation of §§ 1 and 3 of the Sherman Act.⁸⁶

Therefore, as to a manufacturer who does not deal directly with retailers, a resale price maintenance plan designed to fall within the *Colgate* doctrine becomes practically impossible without violating the Sherman Act since such a policy can only be enforced with the cooperation of

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

85. Cases cited note 31 *supra*.

86. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 37-38 (1960).

the wholesalers who serve the retailers. A recent federal circuit court quite appropriately stated the effect the *Parke, Davis* decision had upon the *Colgate* doctrine:

The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise.⁸⁷

Where a manufacturer deals directly with retailers, a refusal to sell to such retailers, if they resell at other than the suggested prices, is still permissible in effectuating uniform resale prices.⁸⁸ The Supreme Court in the *Parke, Davis* case refused to overrule the *Colgate* doctrine⁸⁹ and the doctrine has continued to be recognized by the lower federal courts in cases after the *Parke, Davis* decision.⁹⁰

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87. *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960). The complaint of plaintiff, in a suit for treble damages, alleged that the defendant, the world's largest manufacturer of electrical power tools, for the purpose of fixing and controlling minimum sales prices on bids to government agencies, had directed plaintiff and other distributors of the defendant to adhere to the prices fixed by the defendant. It was further alleged that to enforce compliance, defendant threatened loss of distributorships, elimination of distributor discounts, surveillance of bids, boycotting of nonconformers, and had terminated plaintiff's distributorship for failure to conform to defendant's fixed bid prices. The court ruled that the allegations of the complaint were sufficient to bring the complaint within the *Beech-Nut* and *Parke, Davis* decisions.

A similar complaint was upheld in the case of *Banana Distributors, Inc. v. United Fruit Co.*, CCH Trade Reg. Rep. ¶ 69,733 (S.D.N.Y. 1960). In this treble-damage suit the plaintiff alleged that defendant and its sales subsidiary had monopolized and conspired to monopolize and to restrain importation and distribution of bananas in the United States and had abused their monopoly in various ways. The court noted that the gravamen of the plaintiff's action involved refusal to sell, price fixing and an allocation system involving both of the foregoing phases. Noting the warnings in *Black & Decker, supra*, that *Colgate* has left "a narrow channel" of safe legal passage, the court denied defendant's motion to dismiss the complaint. This is hardly surprising in view of the New York District Court's enumeration of the various factors relevant to a trial on the merits to determine whether the defendants "have passed through the narrow channel" left by *Colgate*. Neither this case nor *Black & Decker*, however, is limited merely to an adjudication of a seller's suggested resale price policy. See also *Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959).

88. *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960); *Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959); *Weir v. Chicago Plastering Institute*, 272 F.2d 883 (7th Cir. 1959); *McElhenney Co., Inc. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957); *Poller v. Columbia Broadcasting System, Inc.*, 174 F. Supp. 802 (D.D.C. 1959); *Orbo Theatre Corp. v. Loew's, Inc.*, 156 F. Supp. 770 (D.D.C. 1957), *aff'd*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959).

89. 362 U.S. 29, 45 (1960).

90. *Banana Distributors, Inc. v. United Fruit Co.*, CCH Trade Reg. Rep. ¶ 69,733 (S.D. N.Y. 1960).