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# Trade Regulation - Antitrust Laws - Manufacturer's Refusal to Deal Permitted against Retailer Charging Him with Antitrust Violation

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made to suffer in a general scheme of harassment. Assuming an injunction is granted when the merit of the government's claim is determined, in light of the factual situation in the present case, substantial policy reasons should outweigh the necessary disregard for principles of comity. Also, because of the obvious need for reform, it appears better to allow the question of one man's guilt or innocence to remain undetermined in the wake of necessary federal intervention than to let the situation worsen. Perhaps much of the harassment has already resulted and part will outlive the present decision. But, merely because one's hands are apt to become soiled again tomorrow does not preclude the need for washing them today. The decision in the instant case, if narrowly interpreted and applied, need not open a Pandora's box filled with federal injunctions.

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## TRADE REGULATION—ANTITRUST LAWS—MANUFACTURER'S REFUSAL TO DEAL PERMITTED AGAINST RETAILER CHARGING HIM WITH ANTITRUST VIOLATION.

*Bergen Drug Co., Inc. v. Parke, Davis & Co.* (D. N.J. 1961).

*House of Materials, Inc. v. Simplicity Pattern Co., Inc.* (2d Cir. 1962).

In 1959, the United States Supreme Court upheld a Federal Trade Commission's cease and desist order against the Simplicity Pattern Company[1] because of Simplicity's discrimination against several of its customers in violation of section 2(e) of the Clayton Antitrust Act.[2] As a result, several of the company's customers initiated treble damage suits against Simplicity to recover for the loss they had suffered because of the latter's unlawful policies.[3] Thereupon, the customers (the present plaintiffs) re-

1. Federal Trade Commission v. Simplicity Pattern Co., Inc., 360 U.S. 55, 79 S. Ct. 1005 (1959).

2. 38 Stat. 730 (1914), 15 U.S.C. § 13 (1958): "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . . That nothing contained in sections 12, 13, 14-21, and 22-27 of this title 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."

3. 38 Stat. 730 (1914), 15 U.S.C. § 15 (1958): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in

ceived notice that Simplicity was permanently suspending all dealings with them because of the legal action they had taken. Plaintiffs applied to the district court for a preliminary injunction against Simplicity, claiming that they were suffering irreparable damage[4] and that defendant's course of conduct was contrary to the policy enunciated by Congress in establishing private antitrust remedies as an essential part of the statutory scheme for the enforcement of the laws against monopoly.[5] Defendant relied "on 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."[6] The court granted the injunction declaring that public policy considerations outweighed one's right to deal with whomever he chooses.[7] The circuit court of appeals reversed, *holding* that "a customer could not compel a manufacturer to continue selling its products to the customer during the pendency of its antitrust action against the manufacturer even though the manufacturer's sole reason for refusing to deal was to retalitate for the suit brought against it and to discourage the customer from continuing the litigation."[8] *House of Materials, Inc. v. Simplicity Pattern Co., Inc.*, 298 F.2d 867 (2nd Cir. 1962).

In a similar case the district court of New Jersey reached the same result. The Bergen Drug Company, a distributor of pharmaceutical products, had filed a treble damage action against Parke, Davis Company, a leading drug manufacturer. Immediately, Parke-Davis dropped Bergen as a customer. In denying Bergen's application for injunctive relief, the court held that the sole cause for a manufacturer's refusal to deal may be a feeling of disapproval of its customer's pending litigation. *Bergen Drug Co., Inc. v. Parke, Davis & Co.*, ... F. Supp. ... (D. N.J. Oct. 18, 1961).

In *United States v. Colgate & Co.*,[9] the United States Supreme Court was concerned with Colgate's attempt to have its customers adhere to a set range of resale prices. The Court reasoned that the facts showed a complete sale by Colgate of its products and, hence, its customers were free to do whatever they wished with the goods.[10] The Court stated: ". . . in the absence of any purpose to create or maintain a monopoly,

which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

4. 38 Stat. 730 (1914), 15 U.S.C. § 26 (1958): "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue."

5. P. W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55, 59 (S.D. N.Y. 1961).

6. *Id.* at 59.

7. *Id.* at 62.

8. House of Materials, Inc. v. Simplicity Pattern Co., Inc., 298 F.2d 867 (2d Cir. 1962).

9. 250 U.S. 300, 39 S. Ct. 465 (1919).

10. Query whether this is correct in both theory and practice.

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 to parties with whom he will deal; and of course he may announce in advance the circumstances under which he will refuse to sell."[11] Although the *Colgate* doctrine has been limited by subsequent decisions,[12] its influence is still felt today.[13] In *Federal Trade Commission v. Beech-Nut,*[14] the manufacturer's right to refuse to deal was reaffirmed, but with the warning that any action which went beyond this would not be tolerated. There was even a suggestion that *Colgate* might have been decided differently if a better indictment had been drawn.[15] *Beech-Nut* can be distinguished from *Colgate* in that the Court in the former case looked upon the manufacturer's use of wholesalers to coerce retailers to conform to certain prices as a combination and not merely as unilateral action by the manufacturer. It was stated that ". . . the nonexistence of contracts covering the practices was irrelevant since the specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers which are quite as effective as agreements express or implied intended to accomplish the same purpose."[16] Although the Court in *Parke-Davis* might have been content to rest its decision on these words, it went on to condemn the manufacturer's attempt to achieve uniform adherence by inducing each customer to adhere to avoid such price competition.[17] Consequently, the present state of the law seems to be that a simple unilateral refusal to deal by a manufacturer will be upheld so long as no element of conspiracy or combination is present. It should be noted that proof of such a combination or conspiracy may be shown by mere inference from the factual situation. There appears to remain only "a narrow channel through which a manufacturer may pass even though the facts have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."[18]

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11. *Supra* note 9, at 307, 39 S. Ct. at 468.

12. United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503 (1960); Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181 (1951); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150 (1922); Warner v. Black & Decker Manufacturing Co., 277 F.2d 787 (2d Cir. 1960). Mr. Justice Harlan once said: ". . . the Court has done no less than send to its demise the Colgate doctrine." United States v. Parke, Davis & Co., 362 U.S. 29, 49, 80 S. Ct. 503, 514 (1960) (dissenting opinion).

13. Certainly, the courts in *Simplicity* and *Bergen Drug* seemed to consider *Colgate* very much alive, although perhaps without the vitality it once had.

14. Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150 (1922). Beech-Nut encouraged wholesalers not to resell to retailers who did not maintain certain prices. They specially marked their products to check on those who did not conform. A list of violators was circulated among their distributors who, in turn, refused to deal with those named thereon.

15. *Id.* at 452, 42 S. Ct. at 154.

16. *Id.* at 455, 42 S. Ct. at 155.

17. United States v. Parke, Davis & Co., *supra* note 12, at 47, 80 S. Ct. at 513.

18. Warner v. Black & Decker Manufacturing Co., 277 F.2d 787, 790 (2d Cir. 1960).

In light of the tests brought forth in *Colgate* and subsequent cases, it would seem that the courts' decisions in *Bergen Drug* and *Simplicity* were correct. In both there was unilateral action by the manufacturer in refusing to deal. It does not appear that defendant in either case had a monopoly and there was no evidence of any conspiracy or combination. There were no charges that either of the sellers solicited cooperation from any of its other customers. The cases definitely fit into the *Colgate* doctrine as first handed down and even as limited by subsequent decisions. Therefore, the whole problem revolves around the question of whether manufacturers with significant market power (but which power does not reach the monopoly stage) should be permitted to attain by indirection what is forbidden by direct action. The maxim of protecting "the much daunted principle of free enterprise,"[19] although theoretically sound, has been so propagandized that the court, in the present case, should have been more careful in applying this language so as to avoid reaching a decision the effect of which is contrary to the very proposition upon which it relies. By granting powerful manufacturers the right to choose their customers and then allowing them to pervert this right in using it as leverage, smaller dealers are forced to surrender their interest in the natural flow of competition and, at the same time, the will of Congress, as found in the antitrust laws,[20] is subverted.

The fact that Congress, in enacting a criminal statute, provided that violators be liable in a civil action and be subject to a treble damage penalty,[21] is also of significance. These provisions were aimed at accomplishing a dual result. First, Congress hoped that private individuals would be encouraged to aid government enforcement agencies in policing this area;[22] secondly, the prospect of a treble damage award was intended to act as a strong deterrent to anyone contemplating a violation of the antitrust laws.[23] It has been stated that without the aid of private suits the government's Antitrust division would require a budget four times as great as is now necessary if present enforcement standards are to be maintained.[24] Also, the fact that the later enactment of section 5 of the Clayton Act[25] allows a civil plaintiff to use a government conviction under

19. Bergen Drug Co. v. Parke, Davis & Co., .... F. Supp. .... (D. N.J. Oct. 18, 1962).

20. *Supra* note 3.

21. *Ibid.*

22. Quemos Theatre Co., Inc. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949 (D. N.J. 1940). See also Bicks, *The Department of Justice and Private Treble Damage Actions,* 4 ANTITRUST BULL. 5 (1959); Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement,* 40 A.B.A.J. 1061 (1954).

23. United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 171 (S.D. N.Y. 1955). The United States Supreme Court has consistently recognized these purposes as underlying the inclusion of the treble damage provision. Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S. Ct. 865 (1955); Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390 (1957).

24. Loevinger, *The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL. 167, 168 (1958).

25. 38 Stat. 730 (1914), 15 U.S.C. § 16: "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on

the antitrust laws as prima facie proof of defendant's civil liability seems to definitely indicate that Congress wishes to encourage such suits. The second aspect is of still greater importance. Government officials have readily acknowledged that the financial pinch on an antitrust defendant achieved through the treble damage action is a substantial deterrent.[26] Certainly, it can be inferred that Congress also intended to outlaw coercive action aimed at preventing a private party from enforcing his statutory right.

Just how much coercive power certain manufacturers possess in exercising their option to deal or not is enlightening indeed. A refusal to deal can easily be used as an economic weapon of persuasion and coercion to accomplish forbidden objectives.[27] Naturally not every manufacturer has this compulsive ability merely because he is a manufacturer. He needs that added factor of market power. "Of course the power to injure a buyer by refusing to deal implies the lack of alternative sources of supply 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."[28] It might be argued that there are many available substitutes for Simplicity and Parke-Davis products. But a close examination reveals that this is not the case, especially with regard to patterns. The industry is such that there are four main producers. Simplicity is the largest, having a sales volume greater than that of its three major competitors.[29] Each shop selling patterns keeps many books, each containing all the patterns of the major producers; practically, a store must stock *all* such books in order to attract the average customer. If a shop lacks a large producer's book the effect would almost certainly be devastating. Thus, a small retailer is nearly completely at the supplier's mercy. The situation in the drug field is similar, although Parke-Davis' power is more limited than Simplicity's. Since many people buy according to brand names, if a drug dealer is deprived of the products of one of the leading manufacturers, his business is bound to suffer seriously. Thus threatened, a small dealer can easily be drawn into a conspiracy to violate the antitrust laws.

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behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . . Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect to each and every private right of action arising under said laws and based in whole or part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

26. United States v. Standard Ultramarine & Color Co., *supra* note 23, at 172, 173.

27. Note, 7 How. L.J. 181 (1961).

28. Barber, *Refusals to Deal Under the Antitrust Laws,* 103 U. PA. L. REV. 847, 871 (1954-55).

29. Federal Trade Commission v. Simplicity Pattern Co., Inc., *supra* note 1, at 59, 79 S. Ct. at 1008.

Several possible solutions present themselves. Of course, the easiest answer would be to await Congressional action. However, this should not be necessary. Since the present antitrust laws appear sufficient to enable the courts to effectively handle the situation, there is no reason to delay. Certainly, it can be inferred from the purpose of the legislation that an indirect method of avoiding the law was not to be tolerated. "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 concerned?"[30] A decision, such as the present one, reduces the retailer's right to sue to a mere phrase on the statute books. Once this right is snuffed out, powerful companies will easily be able to force small dealers into future violations of the antitrust laws. Further, there would seem to remain little incentive to restrain Simplicity or Bergen Drug from continuing their previous illegal methods. Of course, the government could subject them to a fine; but, so long as their ledgers show a hearty profit, this will be a small deterrent. An express overruling of *Colgate* has been suggested;[31] this seems neither desirable nor necessary. Obviously there are situations wherein a seller has an unqualified right to refuse to deal, for example, when the party is a competitor or is a bad credit risk. Although the seller should not be deprived of his discretion in this limited area, he also cannot be permitted to pervert the very purpose of the antitrust laws. The solution lies in an appraisal of the manufacturer's intent in refusing to deal. If a valid business reason exists, the refusal should be allowed; if coercion is intended, it should be struck down. The argument that a manufacturer should not be made to deal with a party who has initiated proceedings against him has little weight in today's impersonal business world. Perhaps, as has been suggested, the Court, in declining to overrule *Colgate*, ". . . failed to follow its own mandate; that the antitrust laws are concerned with economic realities, that they are aimed at substance rather than form."[32] The better course is that of the district court in *Simplicity* and the Seventh Circuit in *Becken v. Gemex Corp.*[33] The latter case concerned the refusal of a manufacturer to deal with a wholesaler who would not conform to a certain resale price maintenance program. The elements of monopoly and combination were missing; nevertheless, the manufacturer's refusal to deal was struck down as an attempt to evade the antitrust laws. The court said: ". . . a wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can

30. Barber, *supra* note 28, at 880.

31. Note, 58 YALE L.J. 1121, 1129 (1948-49): "The Colgate case, still a symbol of special immunity for all refusals to sell, should be expressly overruled at the earliest opportunity." See also Note, 7 How L.J. 181, 186 (1961).

32. Rotatori, *The Right to Refuse to Deal*, 12 W. RES. L. REV. 759, 775 (1960-61).

33. Becken v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959). Here a watch manufacturer attempted to force a distributor to maintain a certain price scale; when the distributor refused, the manufacturer discontinued sales to him.