COMMENTS

THE PARKE, DAVIS CASE: REFUSAL TO DEAL AND THE SHERMAN ACT

THE CAPSTONE of our economic system is the theory of free enterprise. In accordance with this ideal, it has long been recognized that the entrepreneur has the right to exercise independent discretion in choosing the customers or class of customers with whom he will deal.[1] In exercising this right, the trader or manufacturer who indicates the prices at which his commodities should be resold may make it clear that he will refuse to deal with those who do not adhere to the "suggested" resale prices.[2] The actual enforcement of this right to choose one's customers, however, has been carefully circumscribed by the courts, and while refusal to sell is not expressly governed by specific statutory provision,[3] the manufacturer may not by express[4] or implied contracts,[5] monopolization, or combinations in restraint of trade, "unduly hinder or obstruct the free and natural flow of interstate commerce."[6] A recent consideration of this doctrine of refusal to sell by the Supreme Court, in *United States v. Parke, Davis & Co.*,[7] has led

[1] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Colgate & Co., 250 U.S. 300 (1919).

[2] United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922).

[3] ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 137 (1955).

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

[5] United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).

[6] FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452 (1922). Section I of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958) provides in part:

"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 declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor . . . ." This provision has been construed by the courts "as precluding only those contracts or combinations which 'unreasonably' restrain combination." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918).

[7] 362 U.S. 29 (1960).

many to speculate that the traditional right of customer selection, first given judicial expression in *United States v. Colgate & Co.*,[8] has finally been rendered impotent.[9]

THE *Parke, Davis* CASE

In the *Parke, Davis* case, civil suit was brought by the United States, seeking an injunction under Section 4 of the Sherman Act,[10] charging that Parke, Davis, a manufacturer of pharmaceutical products, had violated sections 1 and 3 of the act.[11] Specifically, it was alleged that Parke, Davis took the following measures to prevent price cutting by retail outlets in Virginia and the District of Columbia where, at the time, no "fair-trade" laws were in effect:[12] Representatives of the company called upon retailers who were advertising discount prices and engaging in price cutting, informing them that, unless the "suggested" minimum retail prices were observed, Parke, Davis would refuse to deal with them; agreements were induced with wholesale distributors to cut off supplies of all company products to offending retailers; retailers who refused to observe the announced resale prices were cut off both on direct purchases from Parke, Davis and on purchases from the wholesale distributors; Parke, Davis resumed sales to such retailers, or permitted the wholesalers to do so, only after the retailers ceased price cutting or, in some instances, undertook to stop cut-rate advertising.

The Government contended that Parke, Davis, by inducing and compelling the wholesalers and retailers to promote compliance with its price maintenance policy, went beyond mere customer selection and thereby unlawfully entered into combinations or conspiracies to enforce

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[8] 250 U.S. 300 (1919).

[9] The dissenting opinion of Justice Harlan contends that the effect of the *Parke, Davis* decision is "to throw the *Colgate* doctrine into discard." 362 U.S. at 57. *Compare* Note, *Resale Price Maintenance and the Parke, Davis Case*, 46 VA. L. REV. 976 (1960) *with* 58 MICH. L. REV. 920 (1960).

[10] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958).

[11] The pertinent provisions of Section I of the Act are quoted in note 6 *supra*. Section 3 of the Act, 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955) 15 U.S.C. § 3 (1958), provides in part:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District of Columbia . . . or in restraint of trade or commerce . . . between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor . . . ."

[12] A "Fair Trade Act" has since been reenacted in Virginia. VA. CODE ANN. §§ 59-8.1 to -8.9 (Supp. 1960).

the resale price of its products. At the conclusion of the Government's evidence, the district court granted defendant's motion to dismiss, stating that the practices complained of constituted merely unilateral action on the part of Parke, Davis in selecting its customers and, as such, were sanctioned by the rule of the *Colgate* case.[13] As an alternative ground for dismissing the complaint, the district court further held that no relief was necessary since there was "no reason to believe, or even surmise," that the defendant would resume its efforts to maintain resale prices.[14] The Government appealed directly to the Supreme Court under Section 2 of the Expediting Act,[15] assigning as error the district court's determination that the conduct of Parke, Davis was in fact unilateral rather than conspiratorial.

On appeal, the Supreme Court reversed and remanded, finding that Parke, Davis's program to promote general compliance with "suggested" resale prices went beyond "the limited dispensation which [*Colgate*] confers."[16] The *Colgate* rule does not mean, said Justice Brennan in speaking for the majority, that the Government must prove an actual agreement to fix prices to show a Sherman Act violation.[17] In noting that pressures of various kinds by the manufacturer may take a case outside the *Colgate* exemption, Justice Brennan stated:[18]

> [I]f a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition and takes affirmative action to achieve uniform adherence . . . the customer's acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product.

Dissenting, Justice Harlan claimed that the Court's holding reduced the *Colgate* rule to a hollow shell, leaving the manufacturer with a theoretical right that was not legally enforceable.[19]

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[13] 164 F. Supp. 827, 829 (D.D.C. 1958).

[14] *Id.* at 830.

[15] 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1958).

[16] 362 U.S. at 46.

[17] In United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99 (1920) the Court inferred the unlawful agreement from a course of dealing. See also United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 (1944); Interstate Circuit v. United States, 306 U.S. 208 (1939); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921).

[18] 362 U.S. at 46-47.

[19] Justice Harlan stated: "It is surely the emptiest of formalisms to profess respect for *Colgate* and eviscerate it in application." *Id.* at 57 (dissenting opinion).

The Colgate Rule in Application

The effect of the *Parke, Davis* decision upon the right of a manufacturer freely to exercise discretion as to the parties with whom he will deal is best understood by a brief discussion of the development of this concept from its initial pronouncement in the *Colgate* case.[20] In that case, the indictment charged that the defendant violated the Sherman Act by unlawfully engaging in a combination with wholesale and retail dealers to obtain compliance with resale prices previously announced by the defendant company. Colgate attempted to accomplish this by:[21]

> . . . distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended lists'; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc.

The trial court quashed the indictment on the ground that it failed to allege any contract or agreement whereby the parties concerned were bound to maintain fixed prices. In affirming the lower court's holding, the Supreme Court stated:[22]

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

The manufacturer's right to select his customers as a means of accomplishing resale price maintenance was further explicated by the Court in *United States v. A. Schrader's Son, Inc.*,[23] decided nine months after *Colgate*. In that case a manufacturer was charged with selling goods

[20] 250 U.S. 300 (1919). Prior to the *Colgate* decision, the Supreme Court held, in Dr. Miles Medical Co. v. John Park & Sous Co., 220 U.S. 373 (1911), that formal resale price maintenance agreements were in violation of Section I of the Sherman Act.

[21] 250 U.S. at 303.

[22] *Id.* at 307.

[23] 252 U.S. 85 (1920).

under agreements that bound the purchaser to comply with the resale price policies set by the seller. In holding the practice to be in violation of the Sherman Act, the Court pointed out that its decision in *Colgate* merely involved the lower court's interpretation of an indictment that "failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated 'as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.'"[24] Thus, the Court spelled out in unmistakable terms that the *Colgate* decision was not intended to provide a blanket sanction, under the aegis of "refusal to sell," of the individual's discretionary right to select his customers. Moreover, an unlawful agreement or conspiracy attempting to compel customers or a class of customers to adhere to fixed resale prices may be inferred "from a course of dealing or other circumstances."[25] The rationale of *Schrader* was reaffirmed shortly thereafter in *Frey & Son, Inc. v. Cudahy Packing Co.*,[26] where the Supreme Court again had before it a resale price maintenance scheme between jobbers and manufacturers.

Nevertheless, the lower courts continued to misconstrue the *Colgate* doctrine to such an extent that the Supreme Court once again endeavored to clarify it in the case of *FTC v. Beech-Nut Packing Co.*,[27] where the *Colgate* rule was applied in proceedings under section 5 of the Federal Trade Commission Act,[28] which forbids unfair methods of competition. In that case the vendor maintained a continuing policy, similar to that of Parke, Davis, of refusing to sell to wholesalers or retailers who did not comply with its resale prices, thereby suppressing

[24] *Id.* at 99.

[25] See note 17 *supra*.

[26] 256 U.S. 208 (1921).

[27] 257 U.S. 441 (1922).

[28] 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958). Since the essential purpose of this act is to safeguard the economy from unfair practices that would tend to lessen competition or create monopolies, it is possible that efforts by a seller to maintain resale prices may be attacked under § 5 of the Federal Trade Commission Act as well as sections 1 and 3 of the Sherman Act.

Moreover, where a delivered pricing system is involved such conduct may fall within the prohibitions of § 2(a) of the Clayton Act as being an unfair method of competition.

In this regard, the Supreme Court has stated in FTC v. Cement Institute, 333 U.S. 683, 693 (1948) that: "The [Federal Trade] Commission has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act." See also Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945).

competition by procuring the cooperation of distributors in keeping its product from price cutters. The Court rejected the defendant's contention that such activities were sanctioned by the *Colgate* doctrine, holding that the practices in question went "far beyond a simple refusal to sell to customers who would not resell at stated prices,"[29] and thus constituted an unfair method of competition in violation of the Federal Trade Commission Act.

In assessing the effect of *Beech-Nut* on the *Colgate* rule, the posture in which the latter case went up to the Supreme Court is of paramount importance. As noted earlier, the Court in *Colgate* held that the interpretation of the indictment by the district court, to the effect that the complaint failed to allege an unlawful agreement, was binding on the Supreme Court and the indictment was treated as alleging only that Colgate had refused to sell to anyone who failed to maintain the specified retail prices. In short, there is a factual distinction between the two cases in that Colgate's refusal to sell, as narrowly presented in the pleadings, was an individual action, whereas the evidence tended to indicate that Beech-Nut's conduct went beyond individually conceived refusals to deal. Beech-Nut's establishment of an elaborate and comprehensive system devoted to the enforcement of its resale price policies and the policing of retail prices, in effect, amounted to a combination in restraint of trade.

Furthermore, the issues posed in the two cases differed. Section 3 of the Sherman Act,[30] under which the *Colgate* case arose, requires that some agreement be shown before a violation of the act can be charged, for the essential purpose of the act is to provide sanctions against actual restraints of trade. However, the *Beech-Nut* case was before the Court under Section 5 of the Federal Trade Commission Act.[31] While the public policy reflected in the Sherman Act is to be considered in determining what constitutes a violation of the Federal Trade Commission

[29] United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944). In Adams-Mitchell Co. v. Cambridge Distrib. Co., 189 F.2d 913 (2d Cir. 1950), Judge Frank took the position that, on the basis of *Beech-Nut* and subsequent decisions, *Colgate* was overruled. He stated: "Considering the course of Supreme Court anti-trust decisions on the subject of price-fixing since *Colgate* was decided, it seems to me that, although that doctrine may not be wholly dead, yet, by distinctions stopping short of extinction, it has been reduced to almost imperceptible proportions." *Id.* at 924 (dissenting opinion).

[30] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 3 (1958).

[31] 38 Stat. 818 (1914), as amended, 15 U.S.C. §§ 41-58 (1958).

Act, nevertheless, the latter is designed primarily to quash incipient restraints of trade; all that is required for conduct to come within the ambit of its proscriptions is that there be a "dangerous tendency" of the merchandising plan unduly to hinder competition.

The dimensions of the *Colgate* rule were further clarified by the Supreme Court in *United States v. Bausch & Lomb Optical Co.*,[32] which involved an action brought by the Government to restrain alleged violations of Sections 1 and 3 of the Sherman Act. In holding that the activities engaged in by the distributor, Soft-lite Lens Company, amounted to a combination and conspiracy with wholesalers to maintain resale prices in violation of the Sherman Act, the Court stated that "whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial."[33] Thus, the decision would seem to indicate that, where the vendor and the distributor cooperate in a joint policing effort to obtain adherence to a fixed resale price, the courts will look to the business setting as a whole to determine whether such individual refusals to sell inferentially spell out an agreement violative of the Sherman Act.[34]

In all cases in which the Supreme Court has considered the question of a price fixing conspiracy involving a refusal to sell, it has pointedly reaffirmed the vendor's right freely to exercise discretion as to the parties with whom he will deal.[35] Nevertheless, the manufacturer who undertakes by affirmative action to achieve uniform adherence to his pricing policies through a systematic program of refusing to sell to uncooperative dealers runs the risk that such conduct might give rise to an inference that the customer's acquiescence was not simply a matter of "individual free choice prompted alone by the desirability of the product,"[36] but rather was the result of concerted action on the part of the manufacturer in derogation of the antitrust laws.

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[32] 321 U.S. 707 (1944).

[33] *Id.* at 723.

[34] See note 17 *supra.*

[35] Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); Times-Picayune Publishing Co. v. United States, 354 U.S. 594 (1953); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 457 (1940).

[36] United States v. Parke, Davis & Co., 362 U.S. 29, 47 (1960).

PARKE, DAVIS REEXAMINED

A. Retail Maintenance Program

It is submitted that the dissenter's contention that the *Parke, Davis* decision has emasculated and nullified the *Colgate* rule is unwarranted, for it would appear from the facts adduced in the lower court that Parke, Davis's activities to maintain retail resale prices went far beyond any rights it had under the doctrine. The advance announcement of "suggested" resale prices, via the retail catalogue, is not in itself sufficient to support an inference of impropriety,[37] for a mere warning that there will be a refusal to sell if a pre-established price is not complied with is neither against public policy at common law nor prohibited by the Sherman Act. However, the company did not stop there, for representatives of Parke, Davis made it unmistakably clear to the retailers that their competitors were being similarly approached, impressing upon them that such negotiations were part of a concerted program to put an end to both price cutting and discount advertising. When one retailer complained that a competitor was cutting prices on Parke, Davis products, he was told that the offending retailer would be visited in an attempt to "get him in line." Thus, while each retailer was individually visited and informed of the resale policies, Parke, Davis attempted to carry out its program on the basis of a common understanding among the retailers that all would adhere to such a policy.[38] The fact that these systematic efforts to halt the price-cutting advertising eventually proved unsuccessful cannot effectively be invoked as a defense, for Section 1 of the Sherman Act strikes down such concerted activities, whether successful or abortive. In any event, there apparently was full compliance with the policy for a period of approximately three months.

In order for a resale price maintenance program to be successful all channels of distribution have to be controlled. Consequently, in attempting to institute and administer the recommended pricing policy,

[37] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[38] The courts have consistently held price-fixing schemes of this type to be in violation of § 1 of the Sherman Act. See, *e.g.*, United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911); *cf.* Connecticut Importing Co. v. Continental Distilling Corp., 129 F.2d 651 (2d Cir. 1942); Shakespear Co. v. FTC, 50 F.2d 758 (6th Cir. 1931); Moir v. FTC, 12 F.2d 22 (1st Cir. 1926); Q. R. S. Music Co. v. FTC, 12 F.2d 730 (7th Cir. 1926); Toledo Pipe-Threading Machine Co. v. FTC, 11 F.2d 337 (6th Cir. 1926).

Parke, Davis engaged in a concerted campaign, actively enlisting—indeed compelling—the cooperation of its wholesalers in the accomplishment of this program. The company, in addition to halting all direct sales to price-cutting retailers, induced wholesalers to refuse to sell to offending retailers by threatening to discontinue supplying them. It is clear that such refusals to sell did not stem from an exercise of independent business judgment, since the evidence indicated that they did not resume sales to the offending retailers until authorized by Parke, Davis. Full cooperation of the wholesalers in the area was essential if retailers were to be effectively coerced, and only by enlisting the aid of the wholesalers in boycotting the uncooperative retailers was Parke, Davis able to implement its price policy. The natural and predictable consequence of such activity is the restraint of trade or commerce. It was precisely this sort of restrictive conduct at which the Sherman Act was aimed. To the extent that the resale price of the commodity was insulated from the natural interplay of economic forces in a competitive market, such practices where inimical to the best interests of the public and clearly contravened the basic objectives of the national antitrust laws.[39]

B. Wholesale Maintenance Program

As with the retail price maintenance plan, Parke, Davis's program to maintain its suggested wholesale prices clearly went beyond the seller's right to refuse "to sell to customers who will not resell at prices fixed by the seller."[40] Once again, it would appear that compliance by the wholesale distributors was prompted, not by independent discre-

[39] Congressional expression of our national antitrust philosophy against restraints of trade and monopoly is embodied in three basic statutes: 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958) (Sherman Act); 38 Stat. 717 (1914) as amended, 15 U.S.C. §§ 41-58 (1958) (Federal Trade Commission Act); 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958) (Clayton Act). See note 28 *supra*. Our immediate concern, however, is with the Sherman Act. As to the fundamental objectives of this act, the Supreme Court stated, in Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958), per Black, J.:

"[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is *competition*. And to this end it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.'" [Emphasis added].

[40] United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944).

tion, but rather by a community of purpose between Parke, Davis and its wholesalers. While such cooperation often stems from compelling economic influences rather than from an express agreement or understanding, the "Damocles Sword" that apparently induced such acquiescence was awareness that the consequence of non-compliance was the cutting off of further supplies of Parke, Davis's products. As the Supreme Court stated in *Bausch & Lomb*:[41] "A distributor of a trademarked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act."

C. Effect on Distributees

It would appear, contrary to the finding of the district court, that the individual visits by representatives of Parke, Davis to wholesalers and retailers were not "to each of them separate and apart from all others," but were an integral part of a concerted campaign by the company to put an end to the retail price cutting and cut-rate advertising. Under these circumstances, where both retailers and wholesalers were well aware that the cooperation of competitors was similarly being solicited, their compliance with the Parke, Davis program supports the inference that an illegal price fixing conspiracy had been entered into. While the dictates of business judgment may sometimes require adherence to the manufacturer's general pronouncement of its price policies, the circumstances of the instant case justifiably give rise to the presumption that such uniformity of action was not simply a case of unilateral response to individual visits but was instead the result of collusion and coercive influence.[42]

[41] *Ibid.* The Miller-Tydings Act amended § 1 of the Sherman Act validating specific types of resale price maintenance agreements in states where contracts of that description are legitimized by state statute or policy. 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1958).

[42] In Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939), the Supreme Court affirmed the finding of the lower court that an illegal conspiracy in violation of the Sherman Act had been entered into, stating:

"It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that coöperation was essential to successful operation of the plan. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy. . . ." See also FTC v. Cement Institute, 333 U.S. 683, 716 n.17 (1948); United States v. Masonite Corp., 316 U.S. 265, 274-75 (1942).

The prohibitions of the Sherman Act are limited to restraints of trade accomplished by contract or combinations and do not extend to practices which, while equally reprehensible, do not involve the element of agreement. However, price fixing in violation of Section I of the Sherman Act need not be accomplished by express contract, for the same result may be achieved through mere understandings or implied agreements;[43] there need be no meetings or exchanges of firm commitments for the practice to take root. In the instant case, the necessary consequence of such a wholesale price maintenance plan could only be the suppression of competition among wholesale distributors so as not to compete price-wise with the manufacturer, "for all who would deal in the company's products are constrained to sell at the suggested prices."[44] As in the case of direct price fixing agreements, the object and effect of the activities complained of, when carried to fruition, is the establishment of a noncompetive market price.

Parke, Davis AND THE *Colgate* RULE

The test of legality in this situation is whether the resale price maintenance policy in question has been effectuated through unilateral action or through an express or implied agreement of the parties. While parallel conduct of this type is frequently the result of market pressures, evidence of such uniform business behavior is relevant to proof of agreement.[45] The implementation of such a pricing policy which, as in the instant case, involves not only a systematic refusal to sell but, in addition, seeks the active assistance of dealers in enforcing it may well give rise to facts sufficient to support the inference that there was something more than "mere acquiescence" on the part of the wholesalers and retailers. The court must be sensitive to the cumulative effect of such conduct, determining its validity in light of the atmosphere as a whole as well as the business context in which it is used. If the consequences of a resale price policy are evil when accomplished through direct price fixing agreements, they are equally harmful when

[43] Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921).

[44] FTC v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922).

[45] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. Masonite Corp., 316 U.S. 265 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

However, parallel business behavior alone does not conclusively establish an agreement. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

carried out by tacit acceptance or submission to economic pressures. Thus, the market price of Parke, Davis pharmaceutical products was determined, not by the individual responses of buyers and sellers in an unrestricted market, but rather through the pronouncement of a coercive program of resale price maintenance. From a practical standpoint, the Parke, Davis plan had precisely the same purpose and economic consequence as those activities prohibited in the *Miles* case, *i.e.*, an express contractual agreement whereby one endeavors to sell his product and yet attempts by contract to restrict the title conveyed. Thus, as where the parties enter into an agreement, the activities complained of not only were designed to maintain prices after the manufacturer had parted with title to the article, but, in addition, they were intended to suppress competition among those who trade in such articles. Although the right to select one's customers is fundamental to free enterprise and should be preserved,[46] the legitimizing of such activities as were conducted by Parke, Davis would enable a manufacturer to enforce a resale price fixing policy by indirection. Assuming that a free competitive order is desirable, practices of the sort employed by Parke, Davis, which clearly go beyond mere selection of particular customers, can only serve to stifle the market price structure and deprive it of the flexibility and resiliency essential to a healthy economy.

While many critics espouse the view that *Parke, Davis* has brought about the final demise of the *Colgate* rule, in actuality, the right of refusal to deal, as such, has remained relatively unqualified since its original pronouncement in 1919.[47] Admittedly, there is some difficulty in determining the bounds of the *Colgate* doctrine. However, much of the confusion surrounding application of this rule stems from the unwarranted inference that the Court, in pronouncing the decision, thereby conferred on the manufacturer an unqualified privilege of "refusal to deal." Decisions subsequent to the *Colgate* case have delineated the manner in which the refusal to deal may be lawfully exercised. As a result, the relevant subject of inquiry has become not the refusals themselves, since they are legally protected, but rather the business context in which such refusals appear. Merely attaching the label "refusal to deal" on price maintenance policies does not, in itself,

[46] United States v. Colgate & Co., 250 U.S. 300, 306, 307 (1919); Dunn, *Resale Price Maintenance*, 32 YALE L.J. 676, 705 (1923).

[47] See Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 363 (1960).

impose an exceptional or extraordinary restriction upon the general operation of the antitrust laws.

Conclusion

In summary, rather than overruling the *Colgate* decision, *Parke, Davis* serves only to delimit it further. When dealing with customers unwilling to comply with his price maintenance program, the manufacturer continues to enjoy the right of refusal to sell, so long as he relies solely on the vendee's individual self-interest to prompt voluntary adherence to the stated price list. However, a manufacturer who attempts to control resale prices in this manner is put on notice that such activity may constitute an undue restraint of trade in violation of the Sherman Act.

A thorough factual analysis of the resale price policies pursued by the manufacturer is essential to any decision concerning the legality of such a program. Although there may be economic justification for such activities by the trader or manufacturer, nevertheless, they are proscribed because of their actual or potential threat to the economy. Thus, the courts must attempt to accommodate the businessman's freedom in selecting his customers with the public's vital interest in prohibiting unreasonable restraints on the free flow of commerce.