**Fordham Law Review**

Volume 32 | Issue 3 Article 5

1964

# Refusals to Deal: The Aftermath of Parke, Davis and the Vitality of the Colgate Doctrine

# REFUSALS TO DEAL: THE AFTERMATH OF *PARKE, DAVIS* AND THE VITALITY OF THE *COLGATE* DOCTRINE

The extent to which an individual refusal to deal may be used as an economic weapon to enforce pricing policies, or otherwise to rebuke a dealer's actions, has long been a subject of controversy and uncertainty. The difficulty arises from the Sherman Act requirement of joint action through contract, combination, or conspiracy,[1] whereas most simple refusals to deal are unilateral.[2] Even if strictly unilateral, the refusal to deal is illegal under Section 2 of the Sherman Act if it is in furtherance of a monopoly or an attempt to monopolize.[3] While refusal to deal includes a buyer refusing to buy, the refusal of a seller to sell is far more common, and particularly important where a seller refuses to sell unless the buyer complies with an announced pricing plan.

The controversy revolves around the conflict between the seller's recognized right of choosing to whom he will sell[4] and the strong disfavor of price fixing or price maintenance schemes under the antitrust laws.[5] Except where a state fair-trade law exists, the unilateral refusal to sell is the sole remaining method of legally enforcing a price maintenance program. The extent to which such a plan may be implemented in light of recent cases, and the extent to which the refusal to deal may be employed for other purposes, is the subject of this discussion.

## I. Development of the Law—*Colgate* and *Parke, Davis*

It was early decided in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[6] that a contract to resell at stated prices was illegal. Such contracts, it was said, had the same effect as horizontal price-fixing agreements between dealers and, therefore, were unreasonable per se restraints of trade.[7] *United States v. Colgate & Co.*[8] presented similar circumstances, but the trial court dismissed because it construed the indictment as not charging any agreement between

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

2. Group boycotts, conspiratorial refusals to deal by two or more parties concurrently, are illegal per se. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

3. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958).

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

5. "[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

6. 220 U.S. 373 (1911).

7. Id. at 408.

8. 250 U.S. 300 (1919). Colgate had suggested prices, urged compliance, threatened to refuse to deal, requested information on price cutters, investigated requests and maintained suspended lists for offenders. Many retailers complied with the pricing scheme.

Colgate and the retailers to maintain prices. Bound by the trial court's construction of the indictment, the Supreme Court held that:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] 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.[9]

Thus, it was clear that a seller could announce in advance a pricing scheme, and refuse to deal with violators. What was not certain was how far the seller could go toward implementing the scheme, particularly in soliciting or requiring customer assistance. Subsequent decisions, in *United States v. A. Schrader's Son*,[10] and *Frey & Son v. Cudahy Packing Co.*,[11] held that the essential contract, combination, or conspiracy could be implied from a course of dealing or other circumstances.[12] The Court in *FTC v. Beech-Nut Packing Co.*[13] found illegal price maintenance accomplished by a refusal to deal with wholesalers who sold to price-cutting retailers. The pricing scheme included a system of code numbers on the products for detecting violations and a system of reporting violators. The Court found that the methods used by Beech-Nut in securing the cooperation of the wholesalers were as effectual as express or implied agreements.[14] Thus, the required joint action could be found in express or implied contracts or agreements, or in similar methods which were just as effective.

*United States v. Parke, Davis & Co.*[15] involved the efforts of Parke, Davis to stem widespread price cutting by retailers. Parke, Davis had announced a resale price maintenance policy which suggested minimum prices at which wholesalers and retailers could sell. The company announced the intention of continuing to deal only with those who complied and with those wholesalers who sold only to complying retailers. The wholesalers observed the prices but a rash of price cutting among retailers broke out. After their failure to give assurances of compliance, Parke, Davis furnished the names of these retailers to the wholesalers, who then refused to fill the retailers' orders. When five of the retailers continued selling at a discount, Parke, Davis modified its policy and agreed to sell to price cutters if they in turn forebore from advertising the discount prices. Each of the retailers was interviewed and given assurances that the others would cooperate. The retailers stopped advertising and Parke,

9. Id. at 307.

10. 252 U.S. 85 (1920).

11. 256 U.S. 208 (1921).

12. Id. at 210.

13. 257 U.S. 441 (1922).

14. Id. at 445.

15. 362 U.S. 29 (1960). For a comprehensive analysis see Levi, The Parke, Davis-Colgate Doctrine: The Ban on Retail Price Maintenance, 1960 Supreme Court Rev. 258.

Davis and the wholesalers resumed selling to them. The district court, relying on *Colgate*, found that Parke, Davis' conduct was properly unilateral and that no express or implied agreement or conspiracy to maintain prices existed.[10]

The Supreme Court reversed on the ground that the district court had misapplied the *Colgate* doctrine by assuming that a finding of an express or implied contractual arrangement to maintain prices was necessary.[17] The Supreme Court analyzed the decisions in *FTC v. Beech-Nut Packing Co.*,[18] and *United States v. Bausch & Lomb Optical Co.*,[19] to demonstrate that such contractual agreements were not necessary,[20] and that other methods, as effective as contractual agreements, could give rise to violations. To eliminate any lingering elements of the contractual agreement concept, the Court formulated a general test in terms of an illegal combination. The test provides that "when the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act."[21]

The Court applied this test to Parke, Davis' actions and found they exceeded the limits in at least two respects: (1) by the involvement of wholesalers in helping to gain retailer adherence, and (2) by the securing of assurances from the retailers before sales to them were renewed. Either of these grounds was sufficient to infer the joint action requisite for a violation of the Sherman Act. In result, then, *Parke, Davis* is consistent with prior concepts. Yet Mr. Justice Harlan, in his dissenting opinion, declared that a careful reading of the decision would reveal that it had sent the *Colgate* rule to its demise.[22] Such a view could also be derived from a reading of the Court's test as giving rise to a presumption of agreement or combination when a trader does more than announce policy and simply refuse to deal. At the very least, the "something more" is evidence of agreement, and may be sufficient evidence to make out a prima facie case. The extent and manner of use of this test is yet to be determined in the courts.

## II. The Agreement Requirement in Price Maintenance Schemes

Courts have had little difficulty in inferring agreements which satisfy the joint action requirement of Section 1 of the Sherman Act. Where several

16. 164 F. Supp. 827 (D.D.C. 1958).

17. 362 U.S. at 43-44.

18. 257 U.S. 441 (1922).

19. 321 U.S. 707 (1944).

20. As pointed out by Dean Levi, presumably the antitrust bar did not need to await the Parke, Davis decision to be appraised of the fact that agreements other than those strictly contractual were outside the protection of the Colgate doctrine. Levi, supra note 15, at 321-22.

21. 362 U.S. at 44.

22. Id. at 49 (dissenting opinion).

traders in a horizontal relationship respond uniformly to the demands of another, either vertically above or below, such activity[23] is of evidentiary value in indicating a conspiracy or combination. Turner[24] has suggested that acquiescence in suggested prices, with or even without a threatened refusal to deal, by a number of dealers gives rise to a series of tacit agreements.[25] Use of either of these theories would, of course, eradicate the *Colgate* doctrine. Although *Colgate* could truly be sent "to its demise" by an unrestrained use of the loose conspiracy concept derived from *United States v. Masonite Corp.*,[26] Mr. Justice Brennan's opinion for the Court in *Parke, Davis* and the courts applying it seem to indicate a milder solution which to some uncharted extent still defers to the right to select one's customers. If, however, the courts ever see fit to end the reign of *Colgate*, there would be no lack of theory to support the decision.

In the four years since *Parke, Davis*, courts have applied its test to a wide variety of situations with widely varying results. On balance, however, courts are examining the circumstances more closely, and, if anything, indicating more of a willingness to find implied agreements.

Two cases since *Parke, Davis* have held that an individual refusal to deal in aid of a price maintenance conspiracy is a basis for a private treble damage action. If the refusal to deal is part of an illegal price maintenance conspiracy, the dealer who is cut off may recover damages on the theory that his losses flowed from the price conspiracy.[27] *George W. Warner & Co. v. Black & Decker Mfg. Co.*[28] involved a price maintenance conspiracy between Black & Decker and competitors of Warner. It was alleged that Black & Decker had requested Warner to adhere to suggested prices and had threatened loss of distributorship, elimination of price discounts, surveillance of bids and the blacklisting and boycotting of nonconformers. While no allegation of action along this line was made, pricing combination was held to be a sufficient allegation of a violation. Similarly, in *A. C. Becken Co. v. Gemex Corp.*,[29]

23. See Theatre Enterprises Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); United States v. Masonite Corp., 316 U.S. 265 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

24. Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).

25. Id. at 688-89.

26. 316 U.S. 265 (1942).

27. See George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960); A. C. Becken Co. v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959), cert. denied, 362 U.S. 962 (1962). Professor Handler regards these two cases as going far beyond the Parke, Davis doctrine, in that they limit directly the right of customer selection. The price maintenance conspiracy and the refusals to deal are to be considered independently. See Handler, Annual Review of Antitrust Developments, 15 Record of N.Y.C.B.A. 362, 366-67 (1960).

28. 277 F.2d 787 (2d Cir. 1960).

29. 272 F.2d 1 (7th Cir. 1959), cert. denied, 362 U.S. 962 (1962).

Gemex announced its pricing policy and advised Becken of the compliance by two of its competitors. When Becken failed to comply, Gemex refused further sales. The district court found that the decision to refuse to deal was not the result of any agreement to do so between Gemex and the competitors and hence was not joint action. The court of appeals reversed, holding that the refusal to deal was part of an existing plan to fix prices, and hence the refusal itself was illegal.[30]

In *Simpson v. Union Oil Co.*, recently argued before the Supreme Court,[31] a station operator held a one-year lease and consignment agreement from Union Oil Company. The effect of both these, and of similar arrangements with other operators, was to control the prices at which the station operator sold gasoline. The operator cut prices and Union terminated the lease at the end of the term. If the lease and consignment agreement is found to be part of an illegal price-fixing scheme, the refusal to renew the lease, while strictly unilateral, would be clearly illegal as a constituent element in the scheme.

In *Klein v. American Luggage Works, Inc.*,[32] the district court held that a price maintenance conspiracy existed between American and two of Klein's competitors. The court found as fact, which was later reversed as error, that American engaged in soliciting assurances, preticketing the goods, and strongly advising customers of its pricing policy. Thus, this district court's holding went beyond the limits of *Colgate* as defined by the test of *Parke, Davis*, and supported an inference of joint action *as a matter of law*. The court apparently interpreted the *Parke, Davis* test as providing a conclusive presumption of agreement or combination.[33] The court of appeals, however, held that the lower court's findings of fact were "clearly erroneous" and that American's actions amounted to no more than announcement of policy.[34]

In what could have been a landmark decision, the district court had held the competitors of Klein liable as members of the price conspiracy. The competitors were found as a fact to have assisted by means of "tacit" agreements to maintain preticketed prices in enforcing the policy and by complaining of price cutting to American. The court of appeals held this finding also "clearly erroneous," and, that without such complaints, mere compliance on their part is not, by itself, sufficient to show a price conspiracy among Klein and its competitors. An argument based on conscious parallelism was rejected.[35]

30. Id. at 4.

31. 311 F.2d 764 (9th Cir.), cert. granted, 373 U.S. 901 (1963). For the argument before the Supreme Court, see 32 U.S.L. Week 3257 (U.S. Jan. 21, 1964).

32. 206 F. Supp. 924, 939 (D. Del. 1962), rev'd, 323 F.2d 787 (3d Cir. 1963).

33. "[C]onclusion of illegality obtains because the manufacturer's resort to means beyond a prior announcement of terms sanctioned by a refusal to deal creates coercive pressures which are deemed as a matter of law to induce concert of action among adherent customers." 206 F. Supp. 924, 939 (D. Del. 1962).

34. 323 F.2d at 790.

35. Id. at 791.

Virtually any customer involvement in the policing of a price maintenance program can be fatal. This is the most direct evidence of agreement and joint action. In *Girardi v. Gates Rubber Co. Sales Div., Inc.*,[36] complying customers complained of Girardi's price cutting and suggested that Gates "do something." Proof of these facts and of Gates' subsequent refusal to deal was sufficient to make out a prima facie case. In *Purity Stores, Inc. v. Blue Chip Stamp Co.*,[37] more active customer inducement coupled with a refusal to deal was similarly held to be a violation. In *Wholesale Auto Supply Co. v. Hickok Mfg. Co.*,[38] a simple allegation of conspiracy between a manufacturer and a wholesaler to sell to Wholesale Auto at discriminatory prices if Wholesale Auto failed to resell at suggested prices was sufficient. But *Tobman v. Cottage Woodcraft Shop*[39] held that an allegation that a customer complained of another's price cutting was not sufficient, and indicated that a contract, combination, or conspiracy had to be specifically alleged.

In these recent cases, decided under *Parke, Davis*, very little more than announcement of policy and simple refusal to deal is necessary for an inference of joint action.[40] *Black & Decker* indicated that a mere threat, because of its coercive effect, may be sufficient. Gemex demonstrated a rational approach in striking down a refusal to deal because it was in aid of a price-fixing conspiracy. *Klein v. American Luggage, Inc.*, on the other hand, indicates a tendency to proceed slowly in adopting the new standard.[41] Mere compliance by other retailers is not sufficient to show joint action. Customer involvement is, of course, very dangerous, and even acting on customer complaints may be sufficient. Similarly, the extraction of assurances of compliance will not be tolerated.

## III. Refusals To Deal for Purposes Other Than Price Maintenance

Closely allied to the law of price maintenance, and similarly unreasonable per se restraints of trade, are tying arrangements and group boycotts. In

36. 325 F.2d 196 (9th Cir. 1963).

37. 1963 Trade Cas. 78589 (N.D. Cal.). The action arose from a motion for a preliminary injunction by Purity. Purity claimed that Blue Chip's customers encouraged, induced or prevailed upon Blue Chip to refuse to deal with violators.

38. 221 F. Supp. 935 (D.N.J. 1963). Codefendants in the action were a manufacturer of seat belts, the exclusive sale and distribution agent, an authorized warehouse distributor of defendant manufacturer, and a distributor-competitor of plaintiff. The complaint alleged a conspiracy to fix resale prices by all four. Plaintiff claimed that his purchases from the warehouse were at a higher price than his competitor's purchases from the exclusive sales agent. Allegations of a violation of Section 2(a) of the Clayton Act, dealing with price discrimination, failed because plaintiff and his competitor were not purchasing from the same person.

39. 194 F. Supp. 83 (S.D. Cal. 1961).

40. See Halper, Individual Refusals to Deal: Customer Selection or Dealer Protection?, 22 A.B.A. Antitrust Section 49 (1963). The author, a trial attorney with the Antitrust Division of the Department of Justice, has summarized many of the actions which are considered objectionable.

41. 323 F.2d 787 (3d Cir. 1963).

*Osborn v. Sinclair Ref. Co.*,[42] Osborn was an independent gasoline station dealer operating under a lease and sales agreement from Sinclair. Since Sinclair received a commission from Goodyear for sales of Goodyear tires, batteries and accessories, Sinclair actively pressed the sale of these products to Osborn. Sinclair canceled Osborn's lease which had been granted upon his agreement to take such products from Goodyear, because he persistently carried similar goods made by Firestone as well. In reversing the district court, the court of appeals found that Sinclair's efforts went beyond persuasion and salesmanship and made acceptance of Goodyear's products an actual requirement for continuation of the lease.[43] With regard to the requirement of joint action, the court conceded that an otherwise unreasonable per se restraint of trade could be accomplished through a unilateral refusal to deal, but that here Sinclair's actions went beyond the mere announcement of policy and refusal to deal, and had constituted an illegal agreement, combination or arrangement with the plaintiff under Section 1 of the Sherman Act.[44] Thus, a refusal to deal in aid of a tying arrangement may be illegal if the trader oversells the tied article as a condition to continued dealing.

There can be no doubt as to the illegality of a refusal to deal which is part of a group boycott, as the latter involves, almost by definition, a conspiracy or combination in restraint of trade.[45] A recent example is sufficient. In *Airfix Corp. of America v. Aurora Plastics Corp.*,[46] Aurora refused to deal with distributors that continued to handle a competing product line, and solicited the support of other manufacturers in refusing to deal with the distributors. This blatant violation was readily held to constitute a concerted boycott of Airfix products.[47]

A series of cases has arisen in which a refusal to deal has been used as a sanction or rebuke to a customer who has initiated a private antitrust suit. During the litigation in *Parke, Davis*, that company refused any further sales to Dart Drug, the party which made the original complaint to the Department of Justice. The district court[48] held that this was nothing more than a simple refusal to deal. Dart Drug had argued that this refusal to deal should be taken as a product of the original combination. The court rejected this contention and considered the refusal as separate and distinct.[49] The same result was reached in *House of Materials, Inc. v. Simplicity Pattern Co.*[50] through a finding that

42. 286 F.2d 832 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961).

43. Id. at 836. The court held that the tying arrangement did not have to be exclusive to be an unreasonable per se restraint of trade.

44. Id. at 839.

45. See Fashion Originator's Guild of America v. FTC, 312 U.S. 457 (1941).

46. 222 F. Supp. 703 (E.D. Pa. 1963).

47. Id. at 706.

48. Dart Drug Corp. v. Parke, Davis & Co., 221 F. Supp. 948 (D.D.C. 1963)

49. Id. at 950.

50. 298 F.2d 867 (2d Cir. 1962). Simplicity had lost a suit brought by the Federal

there was neither joint action nor monopoly overtones, and that Simplicity did not go beyond mere announcement of policy and refusal to deal. The court noted, however, that even if Simplicity's conduct had amounted to a conspiracy or combination, "we cannot say that a refusal to deal under the circumstances present here amounts to an undue restraint of trade" and therefore would not have been a violation of Section 1 of the Sherman Act.[51]

A contrary result was reached in *Bergen Drug Co. v. Parke, Davis & Co.*[52] Bergen had started a private antitrust action against Parke, Davis charging discriminatory dealing and monopolizing. Parke, Davis refused to deal with Bergen because of the suit. In a separate suit to enjoin this refusal, the court of appeals ruled that the district court had, through its general equity jurisdiction, the power to issue an injunction to maintain the status quo pending a final adjudication of the matter. Since the main suit charged monopolization, a possible violation of the antitrust law, by way of furtherance of monopoly, was noted in the refusal to deal.

These three cases indicate that while a refusal to deal for the purpose of discouraging litigation is legal, it may be, under the rule of *Bergen Drug*, inequitable and perhaps also illegal if used to further the illegal purpose charged in the main suit. This latter holding is consistent with the *Black & Decker* and *Gemex* decisions, in that it looks to the purpose of the refusal to deal in its relation with the violation in the main litigation, and not merely to the refusal itself.

## IV. Conclusions

*Parke, Davis* laid down an essentially evidentiary test for inferring joint action whenever a dealer goes beyond announcement of policy and a simple refusal to deal. Almost anything more which is done to secure adherence to a price maintenance program is evidence of joint action. A threatened refusal to deal in itself may be sufficient,[53] and the extracting of assurances of future compliance is almost certain to be fatal. Virtually any degree of customer involvement in policing price cutters is sufficient.[54] However, mere customer adherence to a unilaterally determined pricing policy is not sufficient.[55] Other cases[56] have held illegal refusals to deal, since in aid of an illegal purpose.

---

Trade Commission charging unlawful discrimination. Several customers commenced a treble damage action. Simplicity then refused future sales to the suitors.

51. Id. at 870-71.

52. 307 F.2d 725 (3d Cir. 1962).

53. George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960).

54. See notes 36-39 supra and accompanying text.

55. Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963).

56. Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961); George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960); A. C. Becken & Co. v. Gemex Corp., 272 F.2d 1 (7th Cir 1959), cert. denied, 362 U.S. 962 (1962).

While the right to select customers as supported by *Colgate* is essential to a free economy, the limitations on that right have multiplied greatly in recent years. There is no longer any danger of the *Colgate* doctrine sheltering a vigorous price-fixing scheme. In fact, with the developing theory of implied agreement, the real danger now is that the right to select customers will be entirely eliminated in the rush to exclude any hints of price-fixing arrangements.