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Antitrust Law - Suggested Resale Price Policy - Limitations of Use of the Colgate Doctrine

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RECENT DECISIONS

ANTITRUST LAW—SUGGESTED RESALE PRICE POLICY—LIMITATIONS OF USE OF THE COLGATE DOCTRINE—The United States Government brought a civil action charging that Parke, Davis & Co., a large pharmaceutical manufacturer, violated sections 1 and 3 of the Sherman Act¹ by combining and conspiring with wholesalers and/or retailers to maintain the resale price of its products. Parke Davis, in marketing its products through both wholesale and retail channels of distribution, announced in its catalogues a suggested policy of resale prices at the wholesale and retail levels. In an effort to promote adherence to this policy, Parke Davis representatives visited wholesalers and retailers separately in non-fair trade areas.² The wholesalers were informed that Parke Davis would refuse them further sales if they, in turn, resold to retailers who cut prices or if they themselves cut prices. Emphasizing the same policy to retailers the representatives indicated that other Parke Davis retailers had been contacted. Despite these visits, some retailers continued to advertise and sell Parke Davis products below the suggested prices. As a result Parke Davis and the wholesalers refused to sell to these retailers. But advertising below the suggested prices continued. Additional visits were made to retailers in an attempt to control their pricing activities. These further visits having failed, Parke Davis abandoned all methods of promoting adherence to its policy. The district court dismissed the complaint after the government submitted its evidence.³ On appeal, *held*, reversed and remanded, one justice concurring,⁴ three justices dissenting;⁵ Parke Davis' suggested resale price policy created a combination or conspiracy in two different ways: first, through discussions with retailers to promote adherence to its announced policy, and second, by announcing a policy which involved the use of wholesalers to aid Parke Davis in the implementation of its policy applicable to retailers. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).⁶

Since the inception of federal antitrust laws there has been a need for accommodating the government's interest in prohibiting commercial price

¹ 26 Stat. 209 (1890), as amended by 50 Stat. 693 (1937) (commonly referred to as the Miller-Tydings Amendment), 15 U.S.C. (1958) §§1, 3 and 4.

² The 1937 Miller-Tydings Amendment to §1 of the Sherman Act, note 1 *supra*, validated specified types of minimum resale price maintenance agreements, provided that the commodities affected are resold in a state where the transaction is legal. However, this statute is inapplicable here because there was no Fair Trade Law in the District of Columbia or the State of Virginia when the violation was alleged to have occurred.

³ *United States v. Parke, Davis & Co.*, (D.C. D.C. 1958) 164 F. Supp. 827. See notes, 45 VA. L. REV. 119 (1959) and 27 GEO. WASH. L. REV. 260 (1958).

⁴ Justice Stewart concurred in the judgment and found "no occasion to question, even by innuendo, the continuing validity of the *Colgate* decision." Principal case at 49.

⁵ Justices Harlan, Frankfurter and Whittaker dissented, indicating that they thought the effect of the Court's decision was to "send to its demise" the long standing precedent of the *Colgate* doctrine. Principal case at 49.

⁶ Parke Davis' officers were acquitted in a separate criminal proceeding, because the government failed to prove a conspiracy. *United States v. Parke, Davis & Co.*, (D.C. D.C. 1958) 1958 CCH Trade Cas. ¶69,079.

fixing⁷ to the entrepreneur's right to select the customers with which it will deal.⁸ The broad doctrine that a seller may unilaterally institute and administer a suggested price policy by dealing only with those customers who elect not to cut the seller's suggested prices was established in the landmark decision of *United States v. Colgate & Co.*⁹ The *Colgate* doctrine as legally permissible economic behavior of a seller has been constantly reiterated; but the methods employed to effectuate a suggested resale price program through refusals to deal have been an area of major dispute since *Colgate* was handed down in 1919.¹⁰ Even prior to *Colgate* it was settled that agreements, combinations or conspiracies to maintain prices were in violation of section 1 of the Sherman Act.¹¹ Subsequent to *Colgate*, the Supreme Court began scrutinizing the methods by which a seller effectuated its program of selecting customers, when intimately tied to suggested resale price maintenance, with an eye to the prohibitions found in section 1 of the Sherman Act. As early as 1922 the Court ruled, in *FTC v. Beech-Nut*,¹² that it was unlawful for a manufacturer to secure the "co-operation" of any parties outside of its own enterprise for the purpose of obtaining information that would enable it effectively to carry out its policies of refusing to deal with customers who cut its suggested resale prices. The *Beech-Nut* doctrine, in effect, has acted as a counter-balance that has been used to preserve the policy of the Sherman Act against tacit agreements or conspiracies to fix prices by the selection of customers route. Although it has severely restricted the means by which one can effectively use the *Colgate* doctrine, *Beech-Nut* was not intended to limit the underlying theory that one may unilaterally refuse to deal with anyone else, even if the economic result is the maintenance of prices. The principal

⁷ See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

⁸ See, e.g., *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat*, (2d Cir. 1915) 227 F. 46.

⁹ 250 U.S. 300 (1919). See, generally, on individual refusals to deal, comments, 56 MICH. L. REV. 426 (1958); 36 TEX. L. REV. 799 (1958); Barber, "Refusals To Deal Under the Federal Antitrust Laws," 103 UNIV. PA. L. REV. 847 (1955); comment, 58 YALE L.J. 1121 (1949).

¹⁰ See, e.g., *Shakespeare Co. v. FTC*, (6th Cir. 1931) 50 F. (2d) 758 (unlawful actively to solicit assurance from the dealer that price cutting will be discontinued as a condition to filling future orders); *J. W. Kobi Co. v. FTC*, (2d Cir. 1927) 23 F. (2d) 41 (unlawful to inform dealers that reported price cutters have been refused sales); *Hills Bros. v. FTC*, (9th Cir. 1926) 9 F. (2d) 481 (unlawful to visit price cutting retailers who have been reported in an effort to obtain a promise to restore the suggested resale price); *Q.R.S. Music Co. v. FTC*, (7th Cir. 1926) 12 F. (2d) 730 (unlawful to request dealers to report price-cutting competitors and act on reports so obtained).

¹¹ *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911) (agreements between manufacturer and its wholesale and retail dealers). Cf. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951) (horizontal agreement between manufacturers).

¹² 257 U.S. 441 (1922). The finding of "co-operative methods" was based on the practice of reporting the names of price cutters by retailers, the soliciting of this information by the manufacturer's salesmen, the use of code numbers to aid in detecting resale cutters, and the recording of price cutters on "do-not-sell" lists discussed in Dunn, "Resale Price Maintenance," 32 YALE L.J. 676 at 696 (1923).

case assumes a role of major importance in defining the limitations governing the effective use of the *Colgate* doctrine, distinguishing practices within the prohibited and gray areas¹³ delineated in *Colgate* and *Beech-Nut*.¹⁴ First, the factual evidence of the repeated discussions between Parke Davis representatives and dealers, in an effort to secure adherence to the pricing program, disclosed practices within the prohibitions of the *Beech-Nut* case, despite the contrary holding of the trial court.¹⁵ Second, and of paramount importance, is the Court's proscription of Parke Davis' purported extension of its refusal to deal with wholesalers who in turn sold Parke Davis products to price-cutting retailers. Such conduct involves use by the seller of cooperation of his wholesalers as leverage in effectuating the suggested resale price policy on the retail level and the Court was correct in concluding that this supplied the element of combination beyond the permissible limits of *Colgate*. The Court expressly recognized that a seller may announce a suggested resale price policy at both the wholesale and retail levels and refuse to deal with either wholesalers or retailers who do not choose to observe the policy, provided the policy on one of these levels is not used as an instrumentality for achieving the policy on the other level. In the Court's words, Parke Davis' entire policy was tainted with the "vice of illegality" when it used its policy "as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices."¹⁶ This hardly throws "the *Colgate* doctrine into discard," as the dissenting opinion states.¹⁷ It merely serves notice that a seller who uses *Colgate* on both the wholesale and retail levels must exercise extreme caution in administering this policy separately on each of those levels in order to avoid the illegal element of the *Beech-Nut* type of factual situation.

While *Colgate* requires a seller to tread only the narrow path marked out by that doctrine, there is still much vitality left in it. The dissent's vigorous denunciation of the majority holding and rationale may well serve to alarm and deter business firms from embarking upon or continuing a suggested resale price policy to a greater extent than is justified by the majority holding itself. Certainly the Court has left the door open to effective use of *Colgate* if a seller carefully plans his program in good faith within the

¹³ Since the boundary line between *Colgate* and *Beech-Nut* is rather tenuous, it has been suggested that *Colgate* be overruled. See, particularly, comments by Judge Jerome Frank in *Adams-Mitchell Co. v. Cambridge Distributing Co.*, (2d Cir. 1950) 189 F. (2d) 913 at 924.

¹⁴ It should be noted that this case does not present a proper factual situation to question the validity of the *Colgate* theory, because there was no well designed effort made by Parke Davis to act unilaterally.

¹⁵ The majority of the Court did not rule that the findings of fact of the trial court were clearly erroneous. Instead, they found that the trial court had applied an improper legal standard in searching the record for evidence of a Sherman Act violation, and therefore the record reveals error as a matter of law. However, it should be recognized that this is not readily apparent from the trial court's findings, but rather appears to be a means used by the Court to achieve a broad scope of review so as to reach a desired result.

¹⁶ Principal case at 46.

¹⁷ *Id.* at 57.

confines of *Colgate*.¹⁸ It would be unfortunate if this decision is erroneously interpreted as limiting *Colgate* to manufacturers selling direct to retailers. There appears to be nothing in the Court's majority opinion that adds more fuel to marketing developments which have increasingly rendered more difficult the status and performance of the functions of the independent wholesaler in the current distribution pattern of our economy.

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¹⁸ See 15 A.B.A. SECTION OF ANTITRUST LAW 37 at 51 (1959), where Professor Oppenheim suggests that *Colgate* can be translated into a practical marketing program, presupposing the utmost good faith on the part of the manufacturer. This would require (1) a written announcement of the suggested prices to the trade, (2) written instructions to the sellers' internal organization explaining the meaning of *Colgate*, and (3) procedures disclaiming the authority of the seller's representatives to modify the suggested resale price policy and providing that all decisions regarding selection or cutting off customers will be made solely by the seller's home office.

It is also significant that the majority of the Court in *Parke Davis* saw no element of conspiracy or combination in "general voluntary acquiescence" of a seller's customers in the seller's suggested resale prices. Professor Oppenheim characterized as "grasping at straws" any contention that "*Colgate's* suggested resale price policy exemption should be considered applicable only if a few customers acquiesce in it, or if the seller exercises his right to discontinue selling to customers who do not so acquiesce only in isolated instances." *Id.* at 53.