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Regulation of Business - Refusals to Deal - Use to Effectuate Resale Price Maintenance

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REGULATION OF BUSINESS—REFUSALS TO DEAL—USE TO EFFECTUATE RESALE PRICE MAINTENANCE—A manufacturer,¹ acting unilaterally² and in the absence of either a monopoly position or intent to monopolize,³ has a generally recognized right to refuse to deal with any person and for any reason he deems sufficient.⁴ A confusing yet important problem in the field of trade regulation is the extent to which a manufacturer may exercise this right to maintain resale prices by refusing to deal with customers who do not resell at his suggested prices. This difficulty does not arise in the numerous jurisdictions having fair trade laws since these statutes permit a manufacturer to enter into contracts specifying the minimum or stipulated prices at which his goods are to be resold. These statutes, together with federal enabling legislation,⁵ exempt from the sweep of the antitrust laws price fixing agreements otherwise illegal per se. In the past five years, however, there has been a gradual breakdown in the overall effectiveness of fair trade. A number of state courts have declared their fair trade laws unconstitutional in whole or in part for one or more of the following reasons: (a) the non-signer clause, binding those who do not contract with the manufacturer in addition to those who do, is a deprivation of property without due process of law; (b) fair trade laws result in an unlawful delegation of legislative power; (c) fair trade laws violate state constitutional provisions against monopoly or price fixing.⁶ As a result of this deterioration of

¹ For purposes of this comment, "manufacturer" is any vendor attempting to maintain resale prices by refusal to deal.

² For illustrations of concerted refusals to deal see *Eastern States Retail Lumber Dealers Assn. v. United States*, 234 U.S. 600 (1914); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). Compare *Flintkote Co. v. Lysfjord*, (9th Cir. 1957) 246 F. (2d) 368 with *Johnson v. Yost Lumber Co.*, (8th Cir. 1941) 117 F. (2d) 53. See generally Barber, "Refusals To Deal Under the Federal Antitrust Laws," 103 UNIV. PA. L. REV. 847 at 872-879 (1955). See also 55 MICH. L. REV. 1035 (1957), as to application of rule of reason to concerted refusals to deal.

³ *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*, (1st Cir. 1952) 194 F. (2d) 484, cert. den. 344 U.S. 817 (1952); *United States v. Klearflax Linen Looms*, (D.C. Minn. 1945) 63 F. Supp. 32.

⁴ *United States v. Colgate & Co.*, 250 U.S. 300 (1919). See also REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 137 (1955).

⁵ The Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. (1952) §1, and the McGuire Act, 66 Stat. 631 (1952), 15 U.S.C. (1952) §45.

⁶ See 42 CORN. L. Q. 407 (1957). As of the date of that note, courts in 14 states had invalidated their fair trade laws. Three states and the District of Columbia have never passed such statutes. See generally cases cited in 1 CCH TRADE REG. REP. ¶3085. Also, as of 1954, it was estimated that consumer purchases under fair trade laws amounted to only ten billion dollars, as compared with an estimated thirty billion dollars of consumer

price fixing systems legalized under fair trade acts, the alternative of maintaining resale prices by refusals to deal has become increasingly significant.

Renewed attention has been focused on the problems in this area with the recent dismissal of the government's criminal action against Parke, Davis and Co.⁷ Parke, Davis, a manufacturer of pharmaceutical products, had warned retailers in non-fair trade Virginia and the District of Columbia that it would refuse to deal with them should they continue to advertise⁸ Parke, Davis products below the suggested prices. The company had similarly advised wholesalers not to deal with offending retailers and had cut off the sources of supply of retailers who refused to comply. The indictment charged Parke, Davis with entering into agreements with wholesalers and retailers to fix resale prices in violation of sections 1 and 3 of the Sherman Act. Following presentation of the government's case the defendant's motion for judgment of acquittal was granted. The court found "a complete lack of evidence" indicating any conspiracy or agreement to maintain resale prices.⁹

This comment will examine the legal questions arising from a manufacturer's exercise of his right to maintain resale prices by refusing to deal with price cutters in an attempt to determine whether this exists only as an abstract right, or whether it can be translated into legally effective business practices.

I

In *United States v. Colgate & Co.*,¹⁰ the Supreme Court recognized that a manufacturer could lawfully refuse to deal with cus-

buying of goods, the resale price of which was maintained by other than fair trade laws. Adams, "Resale Price Maintenance: Fact and Fancy," 64 YALE L. J. 967 (1955).

⁷ *United States v. Parke, Davis and Co.*, (D.C. D.C. 1957) 1957 CCH TRADE CAS. ¶68,856. A civil action against the same company is pending.

⁸ Apparently, Parke, Davis was desirous only of halting advertising of their products at cut prices. There is no evidence that they attempted directly to restrain sales at prices below those suggested.

⁹ However, the record revealed uncontradicted testimony from retailers that they had "agreed" with Parke, Davis not to advertise at cut prices and from wholesalers that they had "agreed" not to sell to price cutting retailers. The opinion did not refer to *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911) or *FTC v. Beech-Nut Co.*, 257 U.S. 441 (1922), the court instead reconciling *United States v. Colgate & Co.*, 250 U.S. 300 (1919) with *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944). For discussion of these cases see *infra*.

¹⁰ 250 U.S. 300 (1919).

customers who failed to resell at the manufacturer's suggested prices. The following statement by the Court is the source of the legal right to maintain resale prices by refusal to deal:

"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 deal."¹¹

Vital to the decision in *Colgate* was the Court's assumption that the criminal indictment alleged no contract or agreement, since in an earlier case¹² the Court had invalidated a contract wherein a manufacturer had agreed with his retailers on the resale prices the retailers would charge, holding that the agreement was void as a restraint of trade. The language of cases decided after *Colgate*¹³ seemed so to limit the practices which a manufacturer could employ in exercising his right to refuse to deal that practical use of the "Colgate Doctrine" was seriously questioned.¹⁴ In particular, *FTC v. Beech-Nut Co.*, in condemning "methods in which the company secures the cooperation of its distributors and customers" to report price cutters, enjoined practices which under *Colgate* were seemingly legitimate and necessary methods in effectuating the basic right to refuse to deal.¹⁵ In 1944 the Court again had occasion to consider the application of the *Colgate* doctrine when it struck down the practices of a defendant who attempted to justify his distribution policies under *Colgate*.¹⁶ The court found more than mere acquiescence by the dealers, holding that there was cooperation on the part of the wholesalers in the plan of the manufacturer, thus bringing the case under the ban of *Beech-Nut*. More recently,

¹¹ *Id.* at 307.

¹² *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911).

¹³ *United States v. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *FTC v. Beech-Nut Co.*, 257 U.S. 441 (1922); *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944).

¹⁴ "The Beech-Nut case has virtually declared illegal all effective methods of exercising the right . . . approved in the *Colgate* case." Chafee, "Equitable Servitudes on Chattels," 41 *HARV. L. REV.* 945 at 991 (1928). "Of course, one would not advise a seller that he could effectively enforce resale price maintenance by cutting off price cutters." Barber, "Refusals To Deal Under the Federal Antitrust Laws," 103 *UNIV. PA. L. REV.* 847 at 856 (1955).

¹⁵ See text preceding note 25 *infra* for a list of these practices.

¹⁶ *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944).

however, the Court approved *Colgate* in recognizing a publishing company's right to refuse to deal.¹⁷ The Court stated that even though *Colgate* had been limited and qualified, it still provided protection for simple refusals to deal.

The general legal principles differentiating the *Colgate* doctrine from *Beech-Nut* can be readily stated. It is permissible for the dealer to "acquiesce in the policies of," "go along with," and "follow the practices of" the manufacturer; it is forbidden for the parties to "contract, agree, conspire or cooperate with" each other. Express agreement is seldom found; rather, agreement is usually inferred from the conduct and practices of the parties.¹⁸ An examination of the mere refusal alone is not sufficient; it is instead the factual business and market context in which the refusal is exercised that must be the focal point of the analysis.¹⁹

II

In considering the methods a manufacturer may utilize to effectuate resale price maintenance by exercising his right of refusal to deal, it is important to note that "the cases . . . indicate that the line between legality and illegality . . . is a fine one, and will in each case, depend upon the facts proved."²⁰ Though the warnings of the legal commentators are particularly discouraging,²¹ careful study of the cases serves to emphasize the narrowness of the area of permissible methods, rather than that there is no room for a plan to be both legal and effective.²² Additional

¹⁷ "This Court's decisions have recognized individual refusals to sell as a general right though 'neither absolute nor exempt from regulation.' . . . Although much hedged about by later cases, *Colgate's* principle protects defendant's simple refusal to sell. . . ." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 at 625 (1953). See also *Lorain Journal v. United States*, 342 U.S. 143 (1951).

¹⁸ *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208 (1921); *FTC v. Beech-Nut Co.*, 257 U.S. 441 (1922). Cf. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

¹⁹ *Flintkote Co. v. Lysfjord*, (9th Cir. 1957) 246 F. (2d) 368. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 137 (1955).

²⁰ *Judge Medina in Forstmann Woolen Co. v. Murray Sices Corp.*, (S.D. N.Y. 1950) 10 F.R.D. 367 at 371. See also *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944), and *Toledo Pipe-Threading Machine Co. v. FTC*, (6th Cir. 1926) 11 F. (2d) 337.

²¹ See note 13 *supra*. Compare *Timberg*, "Selection of Customers," in *HOW TO COMPLY WITH THE ANTITRUST LAWS* 117 (1954) with *Austern*, "Dealing with Uncertainties," *id.* at 343. See also 58 *YALE L. J.* 1121 (1949).

²² See especially *United States v. Bausch & Lomb Co.*, 321 U.S. 707 at 729 (1944): "The path is narrow between the permissible selection of customers under the decision in *Colgate and Co.* and unlawful arrangements as to prices under this decree, but we think *Soft-Lite* is entitled to traverse it. . . ."

encouragement is perhaps to be found in the recent *Parke, Davis* case²³ indicating that there is a workable area for the application of *Colgate* to the problem of the price cutter. In adopting a plan to effectuate resale price maintenance, there are four principal matters to be considered: (a) notifying customers of the manufacturer's pricing policies; (b) discovering violators; (c) warning such violators; (d) possible reinstatement of customers who have been cut off after ignoring repeated warnings. The legal problems present in each must be separately examined.

A. It is first necessary for a manufacturer to announce that he has a policy of insisting on resale price maintenance and that to effectuate this policy he will refuse to deal with any retailer who fails to observe his suggested resale prices and with any wholesaler who sells to offending retailers. His policy may be effectively communicated by such diverse means as trade journals, order blanks, individual announcements to dealers, or price lists. Though any of these means can probably be used safely, to avoid any taint of conspiratorial conduct beyond "conscious parallelism"²⁴ it would seem desirable to abstain from announcements to the trade generally and to make use of an individual notification to each customer, thus calling for a unilateral decision from him.

B. It is essential next to have an effective system for detecting price cutters. The *Beech-Nut* order prohibited a number of practices which would seem necessary to this end; specifically, use of symbols on the goods to trace offending dealers, use of salesmen and agents to detect violators, reporting of price cutters, and maintenance of a "Do Not Sell" list of such violators. However, in *Beech-Nut* "cooperation" between manufacturer and dealers was found; the dealers were encouraged to and did report violations by competitors, and it was in this context that the order was framed to prohibit such cooperative measures.²⁵ It is doubtful that such practices would be enjoined if presented as part of a plan where the element of agreement or cooperation was absent.²⁶ Since it is "agreement" that is illegal, it seems illogical

²³ Note 7 *supra*.

²⁴ Compare *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) with *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). See also 64 *YALE L. J.* 581 (1955).

²⁵ *FTC v. Beech-Nut Co.*, 257 U.S. 441 at 455-456 (1922).

²⁶ See Dunn, "Resale Price Maintenance," 32 *YALE L. J.* 676 at 704 (1923). See also 27 *COL. L. REV.* 183 at 187 (1927).

to refuse a manufacturer the right to use his own agents and employees to detect and report price cutters, and lower court decisions have almost without exception permitted him to do so.²⁷ Similarly, the seller should also be permitted to use symbols to identify the goods²⁸ and to trace them into the hands of price cutters. It would also appear highly unrealistic to permit the manufacturer to refuse to sell to certain customers and yet not allow him to maintain a list of such customers.²⁹ A different element exists when a manufacturer solicits the active assistance of dealers to detect and report price cutting competitors. Though it would not seem to be illegal for a manufacturer to receive and make use of reports gratuitously submitted by dealers,³⁰ agreement will be inferred when the manufacturer requests such assistance.³¹ Thus, it is clear that the manufacturer may employ only unilateral means, and must avoid any cooperative practices to detect price cutters.

C. As price cutters are discovered, a manufacturer may wish to issue warnings to attempt to bring them into line on their pricing policies.³² If such warnings take the form of requests for assurances or promises of future compliance, this will almost certainly bring the plan under the condemnation of *Beech-Nut*.³³ Instead, the dealer must be confronted with a choice in which he is advised of the alternatives of compliance or cessation of business relations, leaving the decision to his own independent judgment.³⁴ The cases indicate that a statement to

²⁷ *Toledo Pipe-Threading Machine Co. v. FTC*, (6th Cir. 1926) 11 F. (2d) 337; *Cream of Wheat Co. v. FTC*, (8th Cir. 1926) 14 F. (2d) 40. But see *Grebe & Co. v. Siegel*, (D.C. R.I. 1926) 14 F. (2d) 175.

²⁸ *Contra*, *Grebe & Co. v. Siegel*, (D.C. R.I. 1926) 14 F. (2d) 175.

²⁹ See Chafee "Equitable Servitudes on Chattels," 41 HARV. L. REV. 945 at 991 (1928).

³⁰ *Cream of Wheat v. FTC*, (8th Cir. 1926) 14 F. (2d) 40, and *Shakespeare Co. v. FTC*, (6th Cir. 1931) 50 F. (2d) 758.

³¹ *Hills Bros. v. FTC*, (9th Cir. 1926) 9 F. (2d) 481, and *J. W. Kobi Co. v. FTC*, (2d Cir. 1927) 23 F. (2d) 41.

³² This assumes, of course, that the manufacturer wishes to control the prices of this particular dealer. Possibly, the manufacturer would prefer not to antagonize an individual price cutter by using threats to cut off his source of supply. On the other hand, should the manufacturer wish to have no further dealings with a particular customer, it would seem that he could refuse absolutely to deal with him. This would be most likely to occur where there are other reasons for refusing to deal. But see Barber, "Refusals To Deal Under the Federal Antitrust Laws," 103 UNIV. PA. L. REV. 847 at 856, 857 (1955) for possible dangers in this area.

³³ *Oppenheim, Oberndorf & Co. v. FTC*, (4th Cir. 1925) 5 F. (2d) 574; *Moir v. FTC*, (1st Cir. 1926) 12 F. (2d) 22; *Armand Co. v. FTC*, (2d Cir. 1935) 78 F. (2d) 707.

³⁴ See *Rawleigh Co. v. Jones*, 39 N.M. 381 at 387, 47 P. (2d) 906 (1935): The dealers "maintained prices and territorial restrictions; not because of obligation voluntarily as-

offending dealers again drawing attention to the manufacturer's policy is permissible.³⁵ It is uncertain how far beyond this point the manufacturer may legally proceed, though there would seem to be no objection to a more pointed reminder that the manufacturer will not hesitate to cut off a particular dealer who fails to maintain the suggested resale prices. Should this prove unavailing, it would seem that additional reminders would be useless and more threatening warnings dangerous.³⁶ The seller must weigh the loss of business incurred in cutting off a particular customer against continuing negotiations with the risk of violating the law.

Since a finding of agreement is usually inferred, as an evidentiary matter it would seem advisable for a manufacturer to conduct negotiations with recalcitrant dealers entirely by correspondence, retaining a complete record of all transactions to rebut any claim that assurances and promises were demanded from the dealer. The original policy statement should warn that no agent of the manufacturer is authorized to make any statement beyond the scope of the formulated policy.³⁷ Should the manufacturer wish to have personal contact with the dealer, it would seem wise to assign this task to a person informed of the legal problems involved. It would be preferable that all matters be referred to, and all dealer contacts emanate from the home office, thus avoiding loose and perhaps damaging statements from salesmen understandably reluctant to lose profitable accounts.

D. If, despite repeated warnings, the dealer has continued to sell below the suggested resale price and the manufacturer has refused to have further dealings with him, the additional problem arises whether the dealer can be reinstated without violating the antitrust laws. There is a natural suspicion that when sales are resumed to a dealer who has been cut off because

sumed, but from fear of consequences if they should not. . . . [They] acquiesced, as Colgate's customers probably did, not because combined, but because their own interests seemed to lie in acquiescing." See also *Toledo Pipe-Threading Mach. Co. v. FTC*, (6th Cir. 1926) 11 F. (2d) 337.

³⁵ For samples of letters approved by the courts see *Harriet Hubbard Ayer, Inc. v. FTC*, (2d Cir. 1926) 15 F. (2d) 274, and *American Tobacco Co. v. FTC*, (2d Cir. 1925) 9 F. (2d) 570. Seemingly, there were objectionable features in the Ayer letter since it called for the cooperation of the dealer, but this was overlooked by the court.

³⁶ See *Flintkote Co. v. Lysfjord*, (9th Cir. 1957) 246 F. (2d) 368. "If the refusal [by defendant to sell] was not the result of the exercise of ordinary business judgment, but the result of threats made and pressure applied . . ." the refusal is illegal. See also *United States v. J. I. Case Co.*, (D.C. Minn. 1951) 101 F. Supp. 856.

³⁷ See *United States v. J. I. Case Co.*, (D.C. Minn. 1951) 101 F. Supp. 856.

of failure to sell at suggested prices, it is because the manufacturer has received assurances of future compliance as a condition of reinstatement. It is apparent that such assurances would invalidate any plan.³⁸ With this exception, the cases are silent on the problem of reinstatement, though again,³⁹ if the dealer takes the initiative and gratuitously states that he will comply and the manufacturer resumes shipments, this does not appear to be illegal. Perhaps an absolute refusal even to consider a resumption of trade with a chronic price cutter would be the best deterrent to others in that area, as indicative of the manufacturer's determination to secure observance of his policies. In general, it seems that, while refraining from coercion, the strongest efforts to bring the offender into line should be made before he is cut off and the refusal to deal should ordinarily be made as a final decision.

E. Though the foregoing discussion of the manufacturer's policy toward retail dealers has general applicability to wholesalers as well,⁴⁰ there is one significant legal distinction. Whereas *agreements* will invalidate a plan on the retail level, in dealing with wholesalers where the proposed course of action will affect a third party, the retailer, there is a danger that a *conspiracy* or *combination* to fix the retailer's resale prices may be found.⁴¹ The wholesaler, faced with alternative courses of action, must exercise independent business judgment in choosing not to deal with price cutters in order to free the plan from illegality under *Beech-Nut*.

III

Throughout this discussion, the *Colgate* doctrine has been examined only as a means of achieving resale price maintenance. The right of refusal to deal, however, has a much broader appli-

³⁸ See *Oppenheim, Oberndorf & Co. v. FTC*, (4th Cir. 1925) 5 F. (2d) 574.

³⁹ See note 30 *supra*.

⁴⁰ See *FTC v. Beech-Nut Co.*, 257 U.S. 441 (1922) and *Armand Co. v. FTC*, (2d Cir. 1935) 78 F. (2d) 707. In this connection it should be noted that when the channel of distribution finds the wholesaler as a middleman, in effectuating his own plan to control the prices of his retailers he must refrain from conduct from which agreement may be inferred. See *American Tobacco Co. v. FTC*, (2d Cir. 1925) 9 F. (2d) 570.

⁴¹ See *FTC v. Beech-Nut Co.*, 257 U.S. 441 at 455 (1922), which condemns "methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements. . . ." Seemingly, the evidence necessary to show conspiracy need not be as great as that showing actual agreement.

cation than this; its roots are in the common law which recognized the right of a private businessman to refuse to trade with anyone and for any reason he deemed fit.⁴² Absent a purpose to monopolize or a monopoly position, there are few areas in which the right of a single manufacturer to refuse to deal is challenged. This can best be understood by viewing the refusal to deal not as an end in itself,⁴³ but as a lever which can be used to bring about desired action by the buyer. However, it can prove to be an unwieldy tool and businessmen probably will not use it unless other means are unavailable. Thus, many of the objectives which a manufacturer seeks to accomplish may be legally dealt with by contract and need not be effected by means of refusal to deal.⁴⁴ It is only when refusals have as their objective that which the antitrust laws forbid to be done by contract that they are seriously challenged.⁴⁵ And they are challenged not so much because of the undesirable purpose, anti-trust-wise, but because the manufacturer must go beyond the rec-

⁴² See *Delz v. Winfree*, 80 Tex. 400, 16 S.W. 111 (1891); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, (2d Cir. 1915) 227 F. 46. See generally Dunn, "Resale Price Maintenance," 32 YALE L. J. 676 at 678 (1923). But see Mund, "The Right To Buy—And Its Denial to Small Business," S. Doc. 32, 85th Cong., 1st sess. 10-12, 68 (1957). Dr. Mund denies the basic premise that the right of a businessman to select his customers and refuse to deal was recognized at the early common law. The "language of the Colgate case . . . is without sound basis either in the history of the common law or in the economics of competitive markets." See also Adler, "Business Jurisprudence," 28 HARV. L. REV. 135 at 158 (1914).

⁴³ Of course, there are instances in which the manufacturer refuses absolutely to deal with certain customers. See *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, (2d Cir. 1915) 227 F. 46, wherein the defendant wished to maintain a policy of dealing only through wholesalers.

⁴⁴ The following cases illustrate a number of reasons why a manufacturer may prefer not to deal with a particular customer, and there is no serious antitrust objection to his decision: *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, (2d Cir. 1915) 227 F. 46 (defendant dealt only with wholesalers); *FTC v. Paramount Famous-Lasky Corp.*, (2d Cir. 1932) 57 F. (2d) 152 (respondent would not sell or lease films to theatres who would not take a certain amount); *Miller Motors v. Ford Motor Co.*, (D.C. N.C. 1957) 149 F. Supp. 790 (inefficient operator); *Brosious v. Pepsi-Cola Co.*, (3d Cir. 1946) 155 F. (2d) 99 (to protect product good will); *Schwing Motor Co. v. Hudson Sales Corp.*, (4th Cir. 1956) 239 F. (2d) 176, affirming (D.C. Md.) 138 F. Supp. 899, cert. den. 26 U.S. Law Week 3108 (1957) (to establish exclusive dealerships); *Johnson v. J. H. Yost Lumber Co.*, (8th Cir. 1941) 117 F. (2d) 53 (as an ordinary business judgment preferring one customer over another).

⁴⁵ This is, of course, especially true when the intent is to fix resale prices. A similar situation arises when a manufacturer wishes a dealer to sell only his products and cease dealing in competitor's products. A sale or lease on this condition will come under the terms of §3 of the Clayton Act. Compare *United States v. J. I. Case Co.*, (D.C. Minn. 1951) 101 F. Supp. 856 and *Nelson Radio & Supply Co. v. Motorola*, (5th Cir. 1952) 200 F. (2d) 911, cert. den. 345 U.S. 925 (1953), with *Carter Carburetor Corp. v. FTC*, (8th Cir. 1940) 112 F. (2d) 722.

ognized abstract right and engage in policing practices to effectuate his purpose.⁴⁶

Thus it can be seen that the *Colgate* doctrine involves, essentially, a balancing and resolving of the relative merits of two often competing policies.⁴⁷ One of these is the freedom of a manufacturer "to exercise his own independent discretion as to parties with whom he will deal."⁴⁸ The other is expressed in sections 1 and 2 of the Sherman Act forbidding "contract, combination . . . or conspiracy in restraint of" trade and attempts to monopolize and monopolization, and in section 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition" and "unfair . . . acts or practices." Conceptually, apologists of the *Colgate* doctrine would find it difficult to draw a distinction between the "acquiescence" of the dealer in the announced policies of the manufacturer as approved in *Colgate* and the "agreement" and "cooperation" condemned in *Beech-Nut*.⁴⁹ Certainly the effects of a successful plan under *Colgate* would be much the same as under an express contract to fix prices which is condemned as a per se violation under section 1 of the Sherman Act.⁵⁰ Yet, viewed in a business setting, there would appear to be a significant legal difference between the cases, and it is within this narrow area that the *Colgate* doctrine has application. In the absence of antitrust violation, no case has held that a manufacturer may not refuse to deal because of his motive, good or bad. It is only when in pursuance of such purpose, agreements are entered into or cooperation is found between manufacturer and dealers, that the plan is illegal. Thus

⁴⁶ Cf. Barber, "Refusals To Deal Under the Federal Antitrust Laws," 103 UNIV. PA. L. REV. 847 at 880. "The pattern of conduct of which it forms a part, not the refusal to deal, is the relevant object of antitrust inquiry."

⁴⁷ REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 136 (1955).

⁴⁸ *United States v. Colgate & Co.*, 250 U.S. 300 at 307 (1919).

⁴⁹ See especially Judge Frank's dissenting opinion in *Adams-Mitchell Co. v. Cambridge Distributing Co.*, (2d Cir. 1951) 189 F. (2d) 913. It is his belief that for any practical purposes, the *Colgate* doctrine is dead; that anything beyond the bare refusal should be struck down by the courts. "The difference, for practical purposes [between acquiescence and agreement] is shadowy." Other cases and commentators have also indicated their disapproval, though none of the cases have gone as far as Judge Frank would wish. See *Toledo Pipe-Threading Mach. Co. v. FTC*, (6th Cir. 1926) 11 F. (2d) 337 at 342. "Yet the difference between his express promise to observe the price hereafter and the implied promise which he quite obviously makes to the same effect, if he asks the acceptance of a further order, is not a sharp distinction."

⁵⁰ See Dunn, "Resale Price Maintenance," 32 YALE L. J. 676 at 693 (1923).

it is felt that the *Colgate* doctrine continues to provide a workable area outside the ambit of the antitrust laws as presently interpreted in which a manufacturer can maintain resale prices by means of refusal to deal.

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