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Vernon A. Mund

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REFUSAL TO SELL

VERNON A. MUND*

Today, the business practice of refusal to sell is one of the principal antitrust complaints. However, paradoxically, it is a complaint which receives practically the least amount of attention and relief. Typically, the antitrust agencies treat reports on refusal to sell with the generalized reply that "the seller has the right to choose his own customers." The very number of complaints, however, as well as an economic analysis of the practice itself, points to the need for a re-evaluation of this business practice and for a re-appraisal of the currently applicable judicial decisions.

As we shall see in the present study, the evidence on refusal to sell indicates that the practice exists mainly as a feature of our "big business" economy in which large corporations controlling a substantial part of the supply of certain goods are able to gain by refusing to sell *to some* buyers. To the extent that our business structure is not modified by dissolution, divorcement, and divestiture proceedings, it is possible that public policy will move more and more in the direction of scrutinizing and regulating this present-day business conduct in the public interest. Increasingly, therefore, it is suggested, attention will center on the economic problem of refusal to sell.

Refusal to Sell in Free and Open Markets

The economic basis or norm historically followed by the courts and Congress in regulating business is found in the kind of competition which prevails in central and primary markets. It is in these markets that competition typically operates openly and spontaneously. The very number of traders tends to prevent collusion. Market prices are not "administered," but are crystallized by a balancing of the forces of demand and supply. They are made impersonally by market forces. Market prices also are nondiscriminatory; each seller, as a rule, currently treats his customers alike. It is competition of this kind which Congress had in mind when it enacted the Sherman Act, as well as the Federal Trade Commission, Clayton, and Robinson-Patman Acts.[1] Such competition, it may be noted, is neither pure nor perfect. It is rather best described as "effective" or "workable" competition, a kind of practically-attainable competition which actually exists or which can, in fact, be brought into operation in many segments of our business economy by appropriate public policy.

* Professor of Economics, University of Washington, Seattle, Washington

[1] 21 CONG. REC. 3152 (daily ed. April 8, 1890); 51 *id.* 16145 (daily ed. Oct. 5, 1914); MUND, GOVERNMENT AND BUSINESS 88 (1955).

As a basis for appraising refusal to sell, we may ask, does this practice exist in our central and primary markets? Is it a common feature of competitive market selling? Is refusal to sell an attribute of "the free-market ideal," as is frequently declared in current legal literature?[2]

In order to determine the operation of refusal to sell as a business practice in genuinely competitive markets, the writer conducted an extensive survey of: (1) the principal exchange markets for wheat, corn, oats, rye, soybeans, flaxseed, grain sorghums, cotton, wool, wool tops, butter, eggs, potatoes, mill feeds, cottonseed oil, soybean oil, lard, cottonseed meal, and soybean meal; (2) the national securities markets; (3) the central markets for livestock; and (4) the principal shipping-point, central, and terminal markets for the major agricultural products.[3]

Upon the basis of personal investigations and questionnaire surveys, the following generalizations can be stated:

1. In central markets—such as the commodity exchanges, spot markets, and securities markets—sellers always stand ready to sell at a price whenever inventories are available and ready payment is offered.

2. Buyers always have a choice of sellers with the opportunity to buy at prices determined by the forces of supply and demand.

3. A seller treats all of his buyers equally at any given time. The only selection of customers is in regard to the financial standing of prospective buyers. Commodities move to the highest bidders on an impersonal basis.

4. As a general rule, there are no examples of refusal to sell if the price is satisfactory and if the buyer is financially responsible.

5. In rare situations, a seller may be motivated by reasons of sentiment and refuse to sell for non-economic, personal reasons. A prospective buyer in this situation is denied a *desired purchase,* but he is not typically denied access to market supplies.

6. Instances of refusal to sell in open, competitive central markets indicate that this business practice may develop, and has developed, as follows:

(a) On the commodity and securities exchanges, brokers (representing a principal) have sometimes sought to play favorites by refusing to sell to the highest bidder or by refusing to buy at the lowest price. To remedy this element of favoritism, all of the exchanges have adopted some rule providing that sales must be made competitively and that contracts cannot be held for a specific person.

[2] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 134 (1955).

[3] Mund, *The Right To Buy,* S. Doc. No. 32, 85th Cong., 1st Sess. 14-28 (1957).

The first and best bid, or the first bid at the asking price, must prevail. All orders to buy or sell must be executed competitively by open outcry.

(b) Arbitrary refusals to sell have been found to exist in central markets as a result of concerted action among sellers.[4] Here the practice operates not only to deny *some* buyers the opportunity to purchase, but also to deny them access to *market* supplies, either completely or partially.

7. In open markets, sellers have the right to hold for their asking prices. They have a right, also, to choose only those customers who offer ready and assured payment. But if there is a meeting of minds on price and if the terms of sale are met, refusal to sell does not occur among commercial sellers.

Refusal to Sell as a Business Practice

Refusal to sell, it should be noted, is not concerned with the right of a property owner as such, to sell or not to sell. It is rather a *market* phenomenon. It describes a form of business conduct which is sometimes practiced by a seller (or a unified group of sellers) controlling a large part of the total market supply of certain goods.

How, it may be asked, can a commercial seller enhance his profit returns by refusing to sell? Refusal to sell typically means a refusal to sell *to some buyers in the same market* offering to meet the terms of sale available to others. It is a practice of discriminating among buyers—by selling to some and at the same time not selling to others. The money gain which can be secured by this kind of treatment arises in the fact that the buyers denied the right to buy are, as a result, typically denied *market* supplies, either completely or partially, so that they are prevented or hindered in competition with other producers *who are able to buy.*

This aspect of refusal to sell flows from its exercise by a seller (or a unified group of sellers) which controls a large part of the total market supply, so that persons denied supplies have no realistic, sufficiently available, alternative sources of supply, completely interchangeable in use. Refusal to sell is thus an exclusive—or exclusionary —practice which compels some buyers in a given market to restrict their productive activity in relation to other buyers in that market. Competition is thereby lessened between those to whom the goods are sold and those denied supplies.

Some Concrete Examples of Refusal to Sell

A study of antitrust complaints on refusal to sell indicates that the practice arises in market situations in which one or a few producers

[4] See *In re* Alexander, Conover and Co., P. and S. Docket No. 300 (1931).

control all or a large part of the supply of certain goods. Its use rests upon (1) *unified* action among sellers in a given market, or (2) control of such a large fraction of the supply by one or a few sellers that a seller (or sellers) can refuse to sell to *some* buyers and thereby, in fact, deny them access to market supplies. The test on size is whether the refusal has the effect of compelling some would-be buyers to restrict their business activity, either partially or completely, in relation to others in the same market.

1. *Refusal to sell is practiced in the sale of certain basic standardized commodities such as steel, copper, lead, zinc, and cement—wherein the supply is controlled by a few large corporations which seek to strengthen their management of price by denying supplies to merchant-dealers, central distributors, and speculators.*

In American industry, the problem of refusal to sell had its origin in the markets for iron, steel, and the nonferrous metals. Until the latter part of the nineteenth century, independent dealers and distributors, operating warehouses at central points, largely performed the work of distributing metal products to the consuming industries. Primary producers sold freely to these middlemen who also served as a balance-wheel in buying when consumer demands were low for resale during periods of advancing demand. With the formation of mergers (1896-1903), and the adoption of delivered pricing systems, however, primary producers found these middlemen a source of troublesome competition. In order to curb "free" supplies, therefore, the primary producers adopted a policy of refusing to sell to independent merchants, speculators, and persons dealing on the metal exchanges. In large measure, the new policy became one of selling directly to consuming industries and to local dealers and jobbers for distribution to buyers desiring less than carload lots.[5]

2. *Refusal to sell is practiced by some large integrated corporations, producing both primary and fabricated products, in making preferences in sales to their own fabricating plants or subsidiaries, or to large consumers having long-term purchase commitments, thereby foreclosing the spot market in various degrees to nonintegrated fabricators, converters, and commercial users.*

An economic problem of growing importance is the extent to which first-hand producers should be permitted to control fabricating facili-

[5] A vivid picture of the revolutionary change in American marketing methods which occurred with the formation of mergers is found in the Annual Report of the New York Metal Exchange for 1922-23. For details on the exclusion of nonconsuming trade interests in the zinc and cement industries, see Engineering and Mining Journal, Aug. 11, 1928, p. 234. See also Transcript of Record, pp. 26622, 26626-27, Cement Institute v. FTC, 157 F.2d 533 (7th Cir. 1946).

ties which are in direct competition with their customers. Three evils in particular are widely reported. One is the complaint that during periods of short supply the large integrated mills refuse to sell supplies of raw material to non-integrated fabricators at *mill* (carload) prices. Another is the allegation that during periods of excess supply the integrated companies cut prices—and profit margins—on *fabricated* products without reducing prices on the primary materials which the nonintegrated fabricators must buy. Still another is the complaint that the continuing growth of vertical mergers, particularly in steel, is causing more and more of the basic products to move to captive fabricators. A problem facing independent fabricators in steel, it is reported, is that of being able to obtain steel at all.[6]

3. *Refusal to sell is practiced by some producers of basic standardized products in a plan of confining the resale market to dealers or industrial users classified as "legitimate," "ethical," "preferred," "selected," or "desirable."*

A policy of channeling the sale of basic standardized products through "selected" dealers or users is followed by producers in a number of industries. In such instances, prospective enterprisers are not free to follow an occupation of their own choice. They must be "good" or "ethical" in the eyes of the primary producer. In one case, for example, the president of a leading cement company was asked "Do you sell to everyone who represents himself to be a dealer?" He replied, "Well, we look into the situation and try to decide whether or not it would be a profitable outlet for us—a good distributor, a good dealer, a good connection—a great many things bear on the situation."[7]

4. *Refusal to sell arises in the control of all or a large part of the supply of a basic standardized product by a single producer and the foreclosure of the market to all others.*

Today, examples of market pre-emption and foreclosure usually arise when *local* plants producing basic products, such as steel or wood pulp, are acquired by large fabricating companies. In such cases local supplies may be completely denied to independent, nonintegrated fabricators.[8]

5. *A significant aspect of the economic problem of refusal to sell arises when an integrated producer or a unified group of producers*

[6] See Mund, *The Right to Buy*, S. Doc. No. 32, 85th Cong., 1st Sess. 49-53, 89-90 (1957); *Hearings Before the Senate Special Committee to Study Problems of American Small Business*, 80th Cong., 1st Sess., pt. 15, at 1744-45 (1947).

[7] Transcript of Record, p. 30148-49, Cement Institute v. FTC, 157 F.2d 533 (7th Cir. 1946).

[8] *Hearings, supra* note 6, pt. 6, at 840-42.

refuses to sell a basic product to independents during a sellers' market wherein price is managed and does not rise to exclude certain buyers.

A sellers' market is one in which demand exceeds supply at current prices. Ordinarily, competition among buyers operates to increase the price to a level at which all those wishing to buy at that price can do so. But when prices are administered, prices do not rise with buyers' competition. Instead, unfilled orders develop, and primary producers allocate short supplies by rationing, by refusing to sell, and by priority ratings of their own choice.

6. *Refusal to sell is used by some suppliers as a device for restricting entry or eliminating price competition in resale markets.*

Refusal to sell has been widely used by suppliers as a device for fixing prices in the resale market. Some manufacturers seek to peg final prices at higher levels to provide generous profits for distributors. This helps to reduce pressure on them for lower mill prices. It also serves to encourage a wide distribution of their products. In some instances high-markup dealers themselves bring pressure on suppliers to fix resale prices and to deny supplies to rivals who are or might be competitive on price. The range of examples of coercion by third parties to have supplies denied to rivals is wide and includes refusal to sell made by a supplier under pressure from a trade union to deny supplies to a prospective buyer.

7. *Refusal to sell may arise when a seller, controlling a substantial amount of the sales of a certain good in a given market area, seeks to exclude or hinder competitors in his line of business, by requiring customers to accept tie-in deals, exclusive dealing arrangements, and full-line forcing contracts.*

A common complaint received by the antitrust agencies is that a particular supplier refuses to sell, or has discontinued selling, because the dealer or retailer is handling a competing line of products or because he will not buy other lines or materials produced by the seller. Tie-in arrangements take many forms and refusal to sell serves as the main device for making them effective.

8. *Refusal to sell is sometimes employed in the sale of manufactured specialities: (a) in final form for consumer use (e.g., silverware), and (b) in form for sale to final customers (e.g., farm machinery) in a policy of selling only to "selected" dealers, franchised dealers, direct dealers or exclusive territorial dealers.*

Some manufacturers employ a policy of distributing their products through *selected* sales outlets rather than selling freely to all comers.

Their desire is to confine sales to the most profitable outlets, to provide standards for sales and service and to secure an observance of resale prices or exclusive-dealing arrangements. In selecting a distributor it is common practice to provide him with a franchise. Whenever a manufacturer believes that a selected dealer is failing to promote sales, is handling competing products, or is engaged in price cutting, he typically employs the disciplinary action of refusal to sell.

Summarizing the foregoing situations in which refusal to sell is found to prevail, it may be said that the practice reflects for the most part deliberate commercial action to gain profit by excluding *certain* buyers. It is not an expression of the free-market ideal in which a trader is free to sell or not to sell at the current market price. Its use as a commercial device rests upon control over all or a large part of the supply of a certain market good. With such control a seller is in a position to deny supplies to *some* persons and enhance profits in other outlets for the persons denied supplies are restrained in competition with the favored buyers.

Refusal to Sell in Anglo-Saxon Law

Our national economic policy of competition had its origin in the English common law on markets and freedom of enterprise.[9] In the English law, the right of a person to follow an occupation of his own choice, without interference or dictation by other producers or by government, was frequently declared.[10] As a concomitant right, the English judges also declared the right of all persons to come to a central market and buy, or sell, under the same conditions possible to others.[11]

The right to compete, which has become known as "freedom of enterprise" or "freedom of competition," stands today as a main pillar in our national economic policy. Neither the antitrust agencies nor the courts would act to stifle it. Yet, the right to compete is only a symbol unless an enterpriser is *capable* of competing—that is, able economically to have access to commodities in the same full measure as anyone else. The right to buy, as a market right superior to a commercial seller's right to deny supplies, is essential if the right to compete is to be made meaningful.

[9] In the debate on the Sherman Act (1890), Senator Hoar stated: "The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States." 21 Cong. Rec. 3152 (daily ed. April 8, 1890).

[10] Ipswich Tailors' Case, 11 Co. Rep. 53a, 77 Eng. Rep. 1218 (K.B. 1614); Colgate v. Bacheler, Cro. Eliz. 872, 78 Eng. Rep. 1079 (Q.B. 1601); Case of John Dyer, Y.B. 2 Henry V, f. 5, pl. 5b (1414); The Schoolmaster's Case, Y.B. Henry IV, f. 47, pl. 21 (1410).

[11] Mayor of Northampton v. Ward, 2 Strange 1239, 93 Eng. Rep. 1155 (K.B. 1745); Harrison v. Rock, 1 Benl. 160, 73 Eng. Rep. 1025 (K.B. 1626); Austin v. Whittred, Willes 623, 125 Eng. Rep. 1353 (C.P. 1746).

In making effective the early English law declaring the "liberty of buying and selling," the English courts repeatedly held that persons in business, holding themselves out to the public as sellers, had a positive obligation to serve all comers.[12]

A person engaged in a given trade, *as a business,* was held to be in a *common* employment and subject to the duty of serving all. It is frequently said that the term "common" in the early English law was applied only to *certain* trades—mainly those which had some degree of monopoly power—as those of innkeepers, ferrymen, and carriers. Available evidence, however, has given substantial support for the conclusion that the word "common" was used to designate not *certain* businesses but rather *all* which were conducted *as a business.*[13] A "private" blacksmith or tailor was one who worked privately for a *particular employer.* Such a person could not be called upon to serve all. But if any tradesmen—a merchant, dealer, barber, smith, or baker—held himself out to the public as a seller, he had a definite obligation to serve all. Cases on refusal to sell were specifically prosecuted as an illegal act.

Persons in business under the common law not only had the obligation to serve all comers but also in *some instances* had the *further* obligation to serve at reasonable prices. This additional obligation applied to situations in which fewness of sellers gave rise to monopolistic power. A ferry operated as a business, for example, was declared by Chief Justice Hale to be "a thing of public interest and use."[14] So, likewise, a public wharf was held to be "[a]ffected with a public interest," and was required to serve with reasonable tolls.[15]

As is well known, the doctrine of "affected with a public interest" was introduced into American law in the case of *Munn v. Illinois.*[16] The condition of "virtual monopoly" thereupon became the basis for imposing price control, as well as the obligation to serve all would-be customers. In the fields of manufacturing, mining and merchandising, the American courts did not use and apply the early English doctrine of common employments. The application of this doctrine in England, moreover, appears to have lost its significance with the removal of mercantile restrictions and the triumph of Adam Smith's "freedom of competition."[17]

[12] Adler, *Business Jurisprudence,* 28 HARV. L. REV. 135, 152-54 (1914).

[13] Mund, *The Right to Buy,* S. Doc. No. 32, 85th Cong., 1st Sess. 3-6 (1957).

[14] Hale, *De Jure Maris,* in 1 HARGRAVE LAW TRACTS 6 (1787).

[15] Hale, *De Portibus Maris,* in 1 HARGRAVE LAW TRACTS 77-78 (1787).

[16] 94 U.S. 113 (1877).

[17] As late as 1701, the English courts gave recognition to the doctrine that a person in business has the obligation to serve all comers. In Lane v. Cotton, 1 Ld. Raym. 646, 654, 91 Eng. Rep. 1332, 1336 (K.B. 1701), Chief Justice Holt declared: "If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an innkeeper refusing

The very number of enterprisers in the United States, as well as in England, and the general freedom of enterprise provided for a widespread freedom of access to goods and services. The spirit of laissez-faire became dominant in legal thought, and the American courts adopted the general view of a "hands off" policy toward business.[18] When cases of refusal to sell did arise, the courts, with their laissez-faire philosophy and without historical inquiry or market analysis, looked to the rights of private property and declared that "refusal to sell" in general business is an inherent right. Today the problem faced is that of re-examining this legal doctrine in light of the vast changes which have taken place in business structure and corporate organization.

Legislative Action to Curb Refusal to Sell

The formation of large mergers during the period 1900-1912, particularly in iron, steel, and the nonferrous metals, brought about many changes in the markets for these products. Open competitive selling to all comers in central markets was largely replaced by the making of direct sales to consuming industries at delivered prices only, with a denial of supplies to merchant-dealers, central distributors, and speculators. Complaints on refusal to sell, together with those of geographic price discrimination, brought demands in Congress for relief. In a bill introduced by Congressman Henry D. Clayton on April 14, 1914[19] condemning price discrimination, it was provided:

> It shall be unlawful for the owner or operator of any mine engaged in selling its product in commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase.

As reported by the House Committee on the Judiciary on May 6, 1914[20] this provision was changed to read as follows:

> Sec. 3. That it shall be unlawful for the owner or operator of any mine or for any person controlling the product of any mine engaged in selling its product in commerce to refuse arbitrarily to sell such product to a responsible person, firm, or corporation who applies to purchase such product for use, consumption, or resale within the United States or any Territory thereof . . . .

According to the Report of the Judiciary Committee, section 3 of the bill made it

a guest, when he has a room, against a carrier refusing to carry goods, when he has convenience, his wagon not being full."

[18] CORWIN, LIBERTY AGAINST GOVERNMENT 138 (1948).

[19] H.R. 15657, 63rd Cong., 1st Sess. (1914).

[20] H.R. REP. No. 627, 63rd Cong., 2d Sess. (1914).

> unlawful for the owner or operator of a mine, or the person controlling the sale of the product thereof in commerce, to arbitrarily refuse to sell such product to a responsible person who applies to purchase the same . . . . The section is based on the broad conservation idea that natural products such as iron, coal, and other minerals stored in the earth as a result of nature's laws should not be monopolized by the mere acquisition of the title to the lands which contain such resources.[21]

The House report noted that this provision was new,

> but in view of the fact that many railroad corporations, the United States Steel Corporation, and other corporations have acquired and own, either directly or indirectly, through the medium of subsidiary corporations, vast areas of land containing coal, iron, and copper and other minerals in common use, we feel that this legislation is needed and fully justified. By its enactment into law we make it impossible for mere ownership of mines to enable the owners or those disposing of the products thereof to direct the disposal of such products into monopolistic channels of trade . . . . The section expressly forbids the mine owner or person controlling the sale of the product of the mine to arbitrarily refuse to sell such product to any responsible purchaser, and thereby prevents the mine owner or operator from giving the preference to another and rival dealer in the disposal of such product.[22]

The minority view on the proposed compulsory-sales provision, as reported on May 12, 1914,[23] in the main was as follows:

> This is a new and important invasion of business liberty. By this section a mine owner is deprived of a natural right to sell his product where and to whom he may. The mine owner is put upon the same basis as a public-service corporation . . . under this law, a mine owner is forbidden to select his own customers, although this right is carefully preserved with regard to every other business by the language of the proposed law.

Further, on May 13, 1914,[24] the minority members of the Judiciary Committee declared:

> This bill apparently permits trusts arbitrarily to refuse to sell to persons whom they wish to crush, except in reference to the products of mines . . . . Why should the products of mines be thus singled out? If this is a sound principle, why should it not be applied generally as to all commodities, or at least as to all raw materials which are required in the production of other commodities?
>
> This section is open to the further criticism that the language employed is vague and indefinite. To convict an owner or operator of any mine, or any person controlling the product of any mine under this section, it is necessary to prove that he "arbitrarily" refused to sell such product "to a

[21] *Ibid.*

[22] *Ibid.*

[23] H.R. Rep. No. 627, 63rd Cong., 2d Sess., pt. 2 (1914).

[24] *Id.*, pt. 3.

> responsible person, firm, or corporation." The use of the words "arbitrarily" and "responsible" affords loopholes which may make it difficult to prosecute anyone successfully.

As agreed upon in the House on June 2, 1914, the proposed legislation was recast to read as follows:

> That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, except as provided in section three of this Act.
>
> Sec. 3. That it shall be unlawful for the owner, operator, or transporter of the product or products of any mine, oil or gas well, reduction works, refinery, or hydroelectric plant producing coal, oil, gas, or hydro-electric energy, or for any person controlling the products thereof, engaged in selling such product in commerce to refuse arbitrarily to sell such product to a responsible person, firm, or corporation who applies to purchase such product for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and any person violating this section shall be deemed guilty of a misdemeanor and shall be punished as provided in the preceding section.

The Senate Report of July 22, 1914,[25] stated that it was the proposed Senate amendment to strike out section 3 of the House bill

> because, in the opinion of the committee, it would be unwise to enact such legislation as is contained in it. It would, primarily, deny freedom of contract to one of the parties, and consequently would be of doubtful constitutional validity. Passing from this consideration, the Committee believe that such an enactment, which would practically compel owners of the products named to sell to anyone or else decline to do so at the peril of incurring heavy penalties, would project us into a field of legislation at once untried, complicated and dangerous.

As passed by the Senate on August 25, 1914, the Clayton bill did not contain a specific provision relating to arbitrary refusals in the sale of products of "any mine, oil or gas well, reduction works, refinery, or hydro-electric plant." Instead, the bill provided and became law with the general statement: "*And provided further,* that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."[26] In explaining this proviso, the Senate Committee on the Judiciary stated that "the limitation is made by amendment that the selection must be 'in bona fide transactions and not in restraint of trade,' which will enforce good faith and prevent restraint of trade by this method."[27]

[25] S. REP. No. 698, 63rd Cong., 2d Sess. (1914).

[26] 38 STAT. 730-31 (1914), 15 U.S.C. § 13a (1952).

[27] See note 25 *supra.*

Selection of Customers Condemned When in Restraint of Trade

The action taken by Congress in 1914 condemns refusal to sell when "in restraint of trade." The evidence at hand indicates that refusal to sell as a business practice and as widely and presently used is in restraint of trade. Its usual effect and result are to restrain the trade of the persons denied supplies in relation to those to whom goods are sold.

Basic questions for the antitrust agencies and injured persons to ask in using the Clayton Act[28] would appear to be: "Does a would-be buyer, denied essential supplies of a standard product, have realistic, sufficiently available, alternative supplies, interchangeable in use?" "Are some would-be buyers compelled to restrict their business activity partially or completely?" "Is the trade (the business) of the person denied supplies restrained in relation to those to whom goods are sold?"

The American Courts and Refusal To Sell

The doctrine on refusal to sell basically followed today in the United States is that a seller may refuse to sell to any person for any reason satisfactory to himself, so long as this is the result of his own independent judgment and is not in restraint of trade or otherwise in violation of law.

The foregoing interpretation of the law has been made by the United States Supreme Court in a series of cases beginning with *United States v. Colgate & Co.*,[29] and continuing through *FTC v. Raymond Bros.-Clark Co.*,[30] and *Times-Picayune Publishing Co. v. United States.*[31]

In the *Times-Picayune* case, the Court declared:

> Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1 [Sherman Act] . . . different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though "neither absolute nor exempt from regulation." *Lorain Journal* v. *United States*, 342 U.S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. *Lorain Journal* v. *United States, supra; United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721-723 (1944); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927); *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85, 99 (1920) . . . .[32]

[28] 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1952).

[29] 250 U.S. 300 (1919).

[30] 263 U.S. 565 (1924).

[31] 345 U.S. 594 (1953).

[32] *Id.* at 625.

In *United States v. Colgate & Co.*,[33] which serves as a landmark in the law on refusal to sell, Justice McReynolds stated:

> In the absence of any purpose to create or maintain a monopoly, the act [Sherman] 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.[34]

As authority for this rule, Justice McReynolds cited *United States v. Trans-Missouri Freight Ass'n*,[35] in which Justice Peckham commented that: "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases."[36] *Justice Peckham, it may be noted, gave no supporting reference for this statement.*

The doctrine that a seller can refuse to sell found recognition in the state courts as early as 1891. In *Delz v. Winfree*,[37] the court conceded that the following proposition made by the appellee was correct: "A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property."[38] Here again, no supporting reference or citation was given.

A leading state case on refusal to sell was that of *Locker v. American Tobacco Co.*[39] In this decision, the court said:

> It is the well-settled law of this state that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reasons whatever; and it is immaterial whether such refusal is based upon reason or is the result of mere caprice, prejudice, or malice. It is a part of the liberty of action which the Constitutions, state and federal, guarantee to the citizen. It is not within the power of the courts to compel an owner of property to sell or part with his title to it, without his consent, and against his wishes, to any particular persons.[40]

Again, it may be noted, the court gave no reference or supporting case for this opinion.

In the *Cream of Wheat* case[41] (1915), the court of appeals, in affirm-

[33] 250 U.S. 300 (1919).
[34] *Id.* at 307.
[35] 166 U.S. 290 (1897).
[36] *Id.* at 320.
[37] 80 Tex. 400, 16 S.W. 111 (1891).
[38] *Id.* at 112.
[39] 121 App. Div. 443, 106 N.Y. Supp 115 (2d Dep't 1907), 88 N.E. 289 (1909).
[40] 106 N.Y. Supp. at 121.
[41] Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2d Cir. 1915).

ing the right of the company to select its own customers, declared: "We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern."[42] As authority for this view, the Court cited "Cooley on Torts, p. 278."[43] At the reference given, Professor Cooley states, "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."[44]

An Appraisal of the Current Legal Doctrine on Refusal to Sell

The *Delz, Locker, Cream of Wheat,* and *Colgate* cases asserted the right of a trader to refuse to sell upon a consideration of the rights of private property and free citizens. Since the date of these decisions, the courts have come to regard refusal to sell as a basic feature of a free-enterprise economy. Mr. Charles F. Barber summarizes this view as follows:

> In a free economy, the seller's freedom not to sell and the buyer's freedom not to buy are both essential elements in the price-determining process. In this context, the seller's right to refuse to sell is unqualified. Deprived of this freedom, some other form of regulation would have to be provided to protect the seller's right in his property.[45]

It is unquestionably true that a person owning property has the legal right to sell it or keep it (subject to the principle of eminent domain) for any reason or for no stated reason at all. Refusal to sell, as a business practice, however, is not an attribute of private property rights. It is rather a power to discriminate which rests upon a substantial ownership of market supplies.

The basic market freedom of a seller is a freedom not to sell until he can get his *asking* price. A buyer's basic freedom, moreover, is a freedom not to buy except at his *bid* price. It is these freedoms which are essential in the price-determining process. The declaration that "The free market ideal long presupposed that a private merchant could develop business relationships with whom he pleased" is only partially true.[46] In a free market, traders may and do select customers: (1) by requiring cash or assured payment; (2) by stipulating the purchase of a stated quantity, as a carload; (3) by selling to those who offer the best bids; and (4) by refusing to sell except at their

[42] *Id.* at 48.
[43] *Id.* at 49.
[44] COOLEY, TORTS 278 (1880).
[45] Barber, *Refusals to Deal Under the Federal Antitrust Laws,* 103 U. PA. L. REV. 847, 849 (1955).
[46] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 134 (1955).

asking prices. Any other form of selection is not in accord with the features of open markets as they actually operate in the American economy.

Refusal to Sell and the Sherman Act

Section 1 of the Sherman Act[47] condemns every conspiracy in restraint of trade or commerce, and the courts have consistently frowned upon *concerted* refusals to sell. Collusion between a supplier and a group of distributors, or coercion on a supplier by an association of customers, to exclude or restrain a competitor, has also been typically condemned.[48]

In the *Times-Picayune* case,[49] the Court stated that "group boycotts, or concerted refusals to deal, clearly run afoul of § 1 . . . [of the Sherman Act]." And also in *United States v. Columbia Steel Co.*,[50] the Court declared that "[W]here a complaint charges that the defendants . . . have concertedly refused to deal with non-members of an association . . . then the amount of commerce involved is immaterial because such restraints are illegal *per se*."

Section 2 of the Sherman Act[51] is used mainly to condemn single-seller monopoly power based upon control over all or a large part of the supply of certain goods. Monopoly means the power to manage price or to exclude competitors.[52] It exists when a single seller of a distinctive category of goods, or a sufficient number of sellers acting as one on price, is able to establish or make the going price, or prices, which as an actual fact, are largely observed in the industry. When there is no rivalry *on price*, there is monopoly even though a dozen firms are "competing" in the field for orders.[53]

Private monopoly is a relative—not absolute—power. It is limited by the presence of substitute products, as well as by freight costs. In a broad sense, competition of some sort is universal and everywhere. Always there are limits to the willingness of customers to continue

[47] 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952).

[48] See, for example, decrees on refusal to sell in DECREES AND JUDGMENTS IN CIVIL FEDERAL ANTITRUST CASES, JUNE 2, 1890 TO JANUARY 1, 1949. (1950) (Compiled by Mathew Miller and Angelo J. Maggio, Attorneys, Legal Procedure Unit, Antitrust Division, Department of Justice, Washington, D.C.).

[49] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625 (1953).

[50] 334 U.S. 495, 522 (1948).

[51] 26 STAT. 209 (1890), 15 U.S.C. § 2 (1952).

[52] American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946); United States v. Aluminum Co., 91 F. Supp. 333 (S.D.N.Y. 1950).

[53] Justice McKenna in National Cotton Oil Co. v. Texas, 197 U.S. 115, 129 (1905), described monopoly as "the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them."

buying certain goods at higher prices. Substitute competition is an important moderating force. It does not, however, prevent the placing of undue burdens on the public. The presence of substitutes, therefore, should not be taken to mean that a would-be buyer denied supplies can, or must, find relief in substitute products.[54] If alternative supplies are not equally fit to meet a buyer's needs, completely interchangeable in use, there is not one market but two. The prohibition on monopoly should be applied to a given market.

Monopoly power, moreover, is always relative to distance. There is always an area of practical shipment, based upon mill prices and actual delivery costs. Buyers in this area will not ordinarily change their suppliers until local delivered costs are increased to the delivered cost from distant production points. In considering refusal to sell, therefore, it is essential to consider the alternatives of would-be buyers in their area of practical supply.[55]

Remedies Under the Sherman Act

When a dominant seller controlling all or a large part of the supply of certain goods engages in refusal to sell, the courts have provided relief through injunctions, treble-damage settlements, or compulsory selling decrees. The relief provided by compulsory-selling decrees warrants much more study and publicity than have so far been given in antitrust literature. Some of the more important decrees are listed in Table I.

Table I[56]

Some Antitrust Judgments Which Contain Compulsory-Selling Provisions

Name of Case	*Civil Action or Decree Number*	*Date Entered*
United States v. Automatic Sprinkler Co.	C.D. 46-C-1289 N.D. Ill.	2-20-48
United States v. General Electric Co.	C.A. 26012 N.D. Ohio	11-12-48
United States v. American Can Co.	C.A. 26345-H N.D. Calif.	6-22-50
United States v. Continental Can Co.	C.A. 26346 N.D. Calif.	6-26-50
United States v. Parke, Davis and Co.	C.A. 8940 E.D. Mich.	9-6-51

[54] See United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945).

[55] See Standard Oil Co. v. United States, 337 U.S. 293, 299 n. 5 (1949). Said Justice Frankfurter, "[T]he 'line of commerce' affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area."

[56] Source: Antitrust Division, Department of Justice, Washington, D.C.

United States v. United Shoe Machinery Corp.	C.A. 7198 D. Mass.	2-18-53
United States v. Western Newspaper Union	C.A. 87-60 S.D. N.Y.	8-18-53
United States v. Providence Fruit and Produce, Inc.	C.A. 1533 D. R.I.	2-6-53
United States v. Eastman Kodak Co.	C.A. 6450 W.D. N.Y.	12-21-54
United States v. R. L. Polk	C.A. 13135 E.D. Mich.	3-16-55
United States v. International Business Machines Corp.	C.A. 72-344 S.D. N.Y.	1-25-56

A study of cases in which final judgments provide the relief of compulsory selling indicates that this provision was granted (1) where there is local market dominance by a given seller; (2) whenever there are no realistic, alternative supplies of a standard product, interchangeable in use; (3) whenever the refusal to sell is being, or has been, used to further a market position of control.

From the standpoint of public policy, compulsory-selling decrees stand as a remedy not only for single-seller monopoly control, but also for situations in which several large companies dominate an industry and "act as one" on refusal to sell (oligopoly), allegedly without agreement. The condition of oligopoly, it would appear, can be attacked (a) on the principle of implied conspiracy; or (b) as a condition of monopoly under section 2 of the Sherman Act on the grounds that the larger companies jointly or collectively act to restrain trade in refusing to sell standard products to nonintegrated fabricators.

The Need for Supplemental Measures to Remedy the Economic Problem of Refusal to Sell

Section 2 of the Clayton Act and sections 1 and 2 of the Sherman Act, if vigorously enforced, undoubtedly would serve to clear up many instances of refusal to sell. Action to provide relief on a case-by-case basis for a complaint so widespread, however, would require far too much time and money. The tangled status of judicial decisions on refusal to sell also points to the need for legislation to reverse the action of the courts in granting large corporations the right to exercise the most aggravated form of discrimination by which small business is restrained in competition with favored buyers. Basically, the remedial measure needed is legislation by Congress requiring producers of standard products who hold themselves out as dealing with the public, and who control a substantial percentage of the output in their area of practical shipment, to sell to all comers offering to meet the publicly announced terms of sale. Such a statute, it is believed, would be unquestionably legal upon the basis of the decision in *Nebbia v. New York*,[57] which declared the power of Congress to regulate freedom on contract in the public interest.

In our present-day economy of large, integrated producers, acting in the dual capacity of suppliers and competitors to independent fabricators, and selling at prices administered by a market leader (or leaders), it is clear that many problems of refusal to sell would not be remedied by a general statute on compulsory selling. A common complaint is that primary, integrated producers channel supplies of basic products to their own fabricating subsidiaries in preference to independents, particularly during periods of short supply. The growing extent to which large integrated producers are presently expanding their own fabricating facilities also means that some independents are being faced—or have been faced—with a complete foreclosure of the market for basic products. One remedy which has been proposed for these present day forms of supply denial is the proposal that large, integrated producers shall be required to sell basic mill supplies, after defense priorities are met, with first preference to bona fide independent fabricators. The economic argument for such a proposal is that when price does not operate freely in a competitive market to allocate short supplies, some form of governmental intervention is necessary to prevent favoritism, discrimination, and extortion.[58]

In a free-enterprise economy, it is essential for government to maintain free and open markets for all standard commodities which are used in further manufacturing, processing, and fabricating. Freedom of enterprise is based upon freedom of access to market supplies. If specialized secondary, tertiary, and subsequent producers can be assured of basic market supplies, the economy will be provided with a wide choice of specialized products and a substantial measure of protection from extortion through substitute competition. To insure freedom of access to standard market supplies, it appears that fundamental studies also need to be made of the extent to which firsthand producers should be permitted to control fabricating facilities which are in competition with their customers. An inquiry which may find growing interest is whether Congress should restrict corporate powers to those which are essential for a single main purpose and kind of business.

Restrictions Imposed in the Terms of Sale

Some enterprises appear to stand ready to sell to all comers but at

[57] 291 U.S. 502 (1934).

[58] See, *e.g.*, *Hearings Before the Senate Special Committee to Study the Problems of American Small Business*, 80th Cong., 1st Sess., pt. 6, at 840-42 and pt. 15, at 1744-45 (1947); *Hearings Before the Senate Select Committee on Small Business to Study Monopolistic Practices and Small Business*, 82nd Cong., 1st Sess., 21-31 (1952); *House Select Committee on Small Business, Small Business and the Aluminum Industry*, H.R. Doc. No. 2954, 84th Cong., 2d. Sess., 44-46 (1956).

"terms of sale" which impose certain restraints. A condition frequently imposed is that of observing stipulated resale prices. Although the courts have curbed the practice of making *agreements* to maintain stated resale prices, they appear to be willing to allow suppliers to employ *refusal to sell* in disciplining distributors who act independently on price.[59]

The many complaints on supply denial by distributors who act independently on price, as well as the time and expense involved in attempting to learn the legal status of particular price-maintenance plans, provide support for the Canadian practice of making it illegal (a) to recommend minimum resale prices and (b) to refuse to sell, to withdraw a franchise, or to use related means, to enforce minimum resale prices.

A further economic problem which exists in relation to the terms of sale is the practice of requiring a buyer to deal exclusively in the supplier's line of products. Section 3 of the Clayton Act[60] condemns tying contracts and exclusive-dealing arrangements which require that a lessee or purchaser "shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The word "substantially," however, is not defined in the law, and the decisions of the courts provide no clear-cut rule on the degree of restraint which stands condemned.[61]

A number of recent decisions also indicate that section 3 of the Clayton Act can be evaded by the technique of refusing to sell. Instead of making outright contracts on exclusive-dealing arrangements, suppliers have been able to achieve the same results (1) by refusing to sell to dealers who handle competing lines of merchandise or (2) by cutting off dealers who refuse to accept an exclusive-dealer franchise. Thus, according to the majority opinion in the *Motorola* case, "a review of all the cases decided by the Supreme Court involving Section 3 of the Clayton Act, reveals that in each of them there was an agreement and not a mere refusal to deal. There is a real difference between the act of refusing to deal and the execution of a contract which prevents a person from dealing with another."[62]

Available evidence indicates that tying and exclusive-dealing arrangements are widely used in business to the detriment and disadvantage of small business.[63] It is quite possible that many of the

[59] See Adams-Mitchel Co. v. Cambridge Distributing Co., 189 F.2d 913, 916 (2d Cir. 1951). Note the dissenting opinion by Judge Frank, *id.* at 917.

[60] 38 STAT. 731 (1914), 15 U.S.C. § 13a (1952).

[61] See United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

[62] Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952). See also Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3d Cir. 1946); Camfield Mfg. Co. v. McGraw Elec. Co., 70 F. Supp. 477 (D. Del. 1947).

[63] See *House Select Committee on Small Business, Monopolistic and Unfair Trade Practices,* H.R. Doc. No. 2464, 80th Cong., 2d Sess. 4-9 (1948).

plans are illegal. The time and cost of prosecuting a supplier, however, are a serious barrier to relief. The courts themselves, moreover, give suppliers a considerable range of immunity in accepting refusals to sell. If the essential purpose of the Clayton Act is to be realized, it appears that it will be necessary for Congress to make it illegal per se for a seller controlling a substantial amount of the sales in his area of practical shipment, and holding himself out as selling to the public, (1) to use or employ tying and exclusive-dealing arrangements as a condition for selling, or continuing to sell, a given product; or (2) to refuse to sell, or threaten to refuse to sell, to dealers who handle competing lines of merchandise or who refuse to accept an exclusive-dealer franchise.

The Selection of Dealers and Refusal to Sell

A final problem which needs to be considered in formulating compulsory-selling legislation is the practice of some suppliers to select *certain* dealers and to refuse to sell to others. This practice exists mainly in the distribution of specialized products for sale to final consumers (*e.g.*, silverware) or for sale to final customers (*e.g.*, farm machinery). Criteria used for dealer selections include credit rating; the dealer's past behavior as a "price cutter"; "well-established" position in the trade; the dealer's willingness to deal exclusively with the supplier; and the financial ability to maintain a repair or service department.

Usually, a supplier formalizes his selection of a dealer by granting a franchise or other form of sales contract. Thereupon, if the supplying firm decides that a selected dealer is failing to comply with the pattern of distribution desired, it is likely to cancel the franchise and refuse to sell.

A sizable number of the complaints on refusal to sell arise in the practice of cancelling franchises and in refusing to grant franchises. It is recognized that suppliers may have a very proper interest in securing efficient distributors and in avoiding a proliferation of uneconomic outlets in particular sales areas. The complaints of many dealers reveal, however, that franchises are frequently cancelled because of favoritism, pressure from other dealers, or a failure to observe resale prices or exclusive-dealing arrangements.

As a remedial measure for the evils of discrimination, favoritism, and restraint of trade which sometimes arise in present-day franchise arrangements, it is proposed that legislation be enacted to provide basic conditions for use in franchise agreements. As a further feature, it is proposed that this legislation should contain a provision requiring any manufacturer of a given product in final form for consumer use, or for sale to final customers, who is a substantial producer of that product in his area of practical shipment, to sell to any dealer who meets the publicly-announced terms of sale.

Summary

In summary, it may be said that the business practice of refusal to sell is not a basic attribute of private property or the rights of free citizens. It is not, moreover, a free-market ideal nor an essential element in the price-making process. As used by persons in business, holding themselves out as dealing with the public, refusal to sell is a form of discrimination practiced by a seller (or unified group of sellers) having some degree of monopoly power. Refusal to sell typically means a refusal to sell *some* persons, offering to meet the terms of sale, at the same time that sales are being made in the same market to other buyers. Refusal to sell rests upon a control over such a large proportion of the market supply of certain goods that a net gain can be made by denying supplies to some persons. Since the would be buyers denied supplies do not have realistic, sufficiently available, alternative sources of supply, completely interchangeable in use, they are restrained in competition with those who are able to buy. The favored buyers thereupon gain by being able to sell at higher prices because some competition has been excluded. The usual effect and result of refusal to sell are to restrain the trade of the persons denied supplies in relation to those to whom the goods are sold.