NOTE

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), the U.S. Supreme Court held that resale price maintenance (RPM) was unlawful *per se*. There, a manufacturer of "patent medicines" sued a wholesale discounter for tortious interference in contracts. The manufacturer, *Dr. Miles*, used RPM ("vertical price fixing") to set the retail prices of its products. To protect its RPM policies, the manufacturer required wholesalers to sell its drugs only to approved retailers, who committed to honor the manufacturer's RPM policies. The defendant, *John D. Park*, bought drugs from wholesalers and retailers who violated Dr. Miles' RPM policies. The defendant argued that Dr. Miles' policies constituted unreasonable restraint of trade in violation of Section 1 of the Sherman Act. RPM was a controversial practice because it protected the profitability of retailers at the expense of consumers. There was uncertainty whether the practice violated Section 1 of the Sherman Act. The Supreme Court used the dispute between Dr. Miles and John D. Park to answer the question.

Colgate circumvented the ban on RPM by refusing to deal with wholesalers and retailers that did not adhere to the company's MSRP. The Department of Justice challenged the legality of this strategy.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the U.S. Supreme Court overruled *Dr. Miles*, holding that RPM should be analyzed under the rule of reason.

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United States v. Colgate & Co.

250 U.S. 300 (1919)

Mr. Justice McREYNOLDS delivered the opinion of the Court.

We are confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language. . . . The indictment runs only against Colgate & Co., a corporation engaged in manufacturing soap and toilet articles and selling them throughout the Union. It makes no reference to monopoly, and proceeds solely upon the theory of an unlawful combination.

After setting out defendant's . . . general methods of selling and distributing products through wholesale and retail merchants, [the government] alleges that . . . "the defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers, . . . for the purpose and with the effect of procuring adherence on the part of such dealers . . . to resale prices fixed by the defendant, and of preventing such dealers from reselling such products at lower prices, thus suppressing competition amongst such wholesale dealers, and amongst such retail dealers, in [violation of the Sherman Act].

[To promote adherence to its suggested prices, Colgate implemented a manufacturer's suggested retail prices (MSRP) policy. Under this policy, Colgate terminated dealers who did not

comply with its MSRP, as well as dealers that sold its products to terminated dealers. To maintain this policy, Colgate implemented an elaborate system to detect and punish violators. Colgate apparently developed this policy unilaterally].

There [was] no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually.

[W]e are unable to accept the construction placed upon it by the government. . . .

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer . . . can sell to whom he pleases.' *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 320 (1897). 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 614 (1914). . . . In *Dr. Miles*, the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.

The judgment of the District Court must be *Affirmed*.