

# FEDERAL TRADE COMMISSION DECISIONS

## Findings, Opinions and Orders

IN THE MATTER OF

RUSSELL STOVER CANDIES, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED  
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9140. Complaint, July 1, 1980—Final Order, July 1, 1982*

This order requires a Kansas City, Mo. manufacturer, seller and distributor of candy products to cease, among other things, entering into, maintaining, or enforcing any agreement, understanding or arrangement to fix resale prices for its products; suggesting resale prices, by any means, without clearly stating that they are merely suggested; and seeking information relating to recalcitrant retailers. The respondent is prohibited from terminating, suspending or taking any other adverse action against retailers who fail to conform to company's suggested prices; and required to reinstate those retailers who had been terminated for non-conformance to designated prices. The order additionally requires respondent to pay for a survey to ascertain what percentage of its products is sold at manufacturer-designated prices, and to cease suggesting resale prices if that percentage exceeds 87.4%.

### *Appearances*

For the Commission: *Eugene Kaplan, Jayma M. Meyer and Warren Josephson.*

For the respondent: *Lawrence R. Brown and David Everson, Stinson, Mag & Fizzell, Kansas City, Mo. and Tom Franklin, in-house counsel, Kansas City, Mo.*

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Russell Stover Candies, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri, with its offices and principal place of business located at 1004 Baltimore Ave., Kansas City, Missouri.

PAR. 2. Respondent is now and for some time has been engaged in the manufacture, advertising, offering for sale, sale and distribution of chocolates and other candies ("products") in and affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent's net sales for fiscal years 1978 and 1979 were in excess of \$117 and \$128 million, respectively.

PAR. 4. Respondent sells and distributes its products directly to more than 18,000 retail dealers, located throughout the United States, who in turn resell respondent's products to the general public.

PAR. 5. In connection with the sale and distribution of its products, respondent:

(a) designates resale prices for all of its products and communicates those prices to its retailers;

(b) has a policy of not dealing with retailers who sell its products at less than the designated resale prices; and

(c) communicates to retailers the policy set forth in subparagraph (b) of this paragraph. [2]

PAR. 6. As a result of the acts and practices set forth in Paragraph Five, respondent's products are sold, with few exceptions, at or above retail prices designated by respondent.

PAR. 7. Respondent has unlawfully contracted, combined or conspired with its retail dealers to fix resale prices and thereby unreasonably restrain trade in the resale of its products within the meaning of Section 1 of the Sherman Act and has, therefore, violated Section 5 of the Federal Trade Commission Act, as amended.

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

MARCH 16, 1981

I.

STATEMENT OF THE CASE

The complaint in this proceeding, which was issued on July 1, 1980, charges that Russell Stover Candies, Inc. (hereinafter

“Respondent” or “Russell Stover”) has violated Section 5 of the Federal Trade Commission Act, as amended, by (a) designating resale prices for its candies and communicating those prices to its retailers; (b) adopting a policy of refusing [2]to deal with retailers who sell its candies at less than the designated prices; and (c) communicating to retailers its policy of refusing to deal with those who sell its candies at less than the designated resale prices.<sup>1</sup> The complaint further alleges that as a result of these practices respondent’s candies are sold, with few exceptions, at or above resale prices designated by Russell Stover.<sup>2</sup> These practices are characterized as follows in the charging paragraph of the complaint:

Respondent has unlawfully contracted, combined or conspired with its retail dealers to fix resale prices and thereby unreasonably restrain trade in the resale of its products within the meaning of Section 1 of the Sherman Act and has, therefore, violated Section 5 of the Federal Trade Commission Act, as amended.<sup>3</sup>

Respondent’s answer, which was received by the Secretary of the Commission on August 7, 1980, admits certain jurisdictional facts but denies all of the substantive allegations of the complaint. Respondent asserts as an affirmative defense that the complaint fails to state facts upon which relief can be granted because it alleges a course of [3]conduct that has been approved by the Supreme Court of the United States.

At a prehearing conference held on September 12, 1980, the parties agreed to submit the case on the basis of a stipulated record. The factual stipulation was filed on November 12, 1980, accepted by the Administrative Law Judge, and the record was closed for the receipt of evidence. Thereafter, proposed findings and briefs were submitted. Oral argument on the briefs was heard on March 6, 1981.

The entire evidentiary record in this proceeding consists of Paragraphs 1 through 24 of the Stipulation,<sup>4</sup> which are incorporated below verbatim as the Findings of Fact: [4]

<sup>1</sup> Complaint, Paragraph Five.

<sup>2</sup> Complaint, Paragraph Six.

<sup>3</sup> Complaint, Paragraph Seven.

<sup>4</sup> The stipulation, which appears in the record as Joint Exhibit 1A through 1P, has 26 paragraphs. Paragraph 25 provides:

It is further stipulated and agreed that all stipulations set forth in paragraphs 1 through 24 hereof are for the purposes of this proceeding only and are not admissions by Russell Stover for any other purpose nor may they be used against Russell Stover in any other proceeding.

Paragraph 26 relates to the terms of a cease and desist order which Russell Stover would accept should it finally be determined that respondent’s practices are illegal.

## II.

## FINDINGS OF FACT

1. For the purpose of [these findings], the following definitions apply:

a. *Product* means any candy item which Russell Stover manufactures or sells to retailers.

b. *Retailer* means each location of any person, partnership or corporation, not owned by Russell Stover, which purchases candy directly from Russell Stover and resells it to the public.

c. *Designates* or *designated* means the selection by Russell Stover of the prices at which it desires that its retailers sell Russell Stover products.

d. *Retail price* and *resale price* are used interchangeably.

2. Russell Stover Candies, Inc. ("Russell Stover," "Stover" or "Respondent"), is a publicly held corporation organized, existing and doing business under the laws of the state of Missouri. Respondent's principal office and place of business is 1004 Baltimore Ave., Kansas City, Missouri.<sup>5</sup>

3. In fiscal years 1978 and 1979, Russell Stover had net sales of approximately 117.0 and 128.8 million dollars, respectively, and net incomes of 10.9 and 14.6 million dollars, respectively.<sup>6</sup>

4. Russell Stover's manufacturing plants are located in Lincoln, Nebraska; Marion, South Carolina; Clarksville, Virginia; Montrose, Colorado; and Cookeville, Tennessee. It has warehouse facilities at these five plants and at Allentown, Pennsylvania; Norcross, Georgia; Dallas, Texas; Aurora, Colorado; Indianapolis, Indiana; Olathe, Kansas; and North Sacramento, California. [5]

5. Russell Stover sells and ships its products from these factories and warehouses to more than 18,000 retailers. These stores, primarily drug, card and gift and department stores, are located in every state and the District of Columbia.<sup>7</sup>

6. Russell Stover is therefore engaged "in commerce" and its business activities "affect commerce" within the meaning of the Federal Trade Commission Act.<sup>8</sup>

7. Russell Stover is one of the major United States manufacturers of boxed chocolates.

8. Russell Stover competes with, among other companies, Whitman's, Schrafft Candy Company, Fanny Farmer Candy Shops, Inc.,

<sup>5</sup> See also Complaint and Answer, Paragraph One.

<sup>6</sup> See also Complaint and Answer, Paragraph Three.

<sup>7</sup> See also Complaint and Answer, Paragraph Four.

<sup>8</sup> See also Complaint and Answer, Paragraph Two.

Barton's Candy Corporation, Fannie May Candy Shops, Inc., M & M/Mars and E.J. Brach & Sons, some of which are also major United States manufacturers of boxed chocolates.

9. Russell Stover manufactures or sells to retailers more than sixty (60) seasonal and nonseasonal candy items, including boxed assortments, candy bars, hard candies, bulk candies and other confectionary items.

10. Russell Stover has more than 3,000 full-time employees.

11. Russell Stover employs approximately eighty field sales personnel.

12. The "agency division" manages the sale of Russell Stover candy to card and gift shops and drug stores. The "department store division" manages the sales of Russell Stover candy to department stores.

13. The agency division is organized into five geographic districts. Each district is serviced by a district manager and approximately fifteen sales representatives. The sales representatives report weekly to their district manager; and in turn the district managers report weekly to sales administrators located in Kansas City at the company's headquarters.

14. The sales representatives each service between 200 and 300 retailers and visit each retailer at least four times a year for normal, legitimate business purposes. [6]

15. The department store division is organized into two regions. Each region is serviced by a manager located in Kansas City, Missouri, and three district managers located in the region.

16. Russell Stover's corporate management supervises the sales personnel in order to assure implementation of all of the company's sales policies.

17. Russell Stover designates resale prices for all of its products. Stover communicates those prices to retailers by price lists, invoices, order forms and pre-ticketing all of its products.

18. All Russell Stover retailers are thus aware of the prices designated for each Stover product.

19. Russell Stover announces to each prospective retailer before an initial order is placed that among the circumstances under which Stover will refuse to sell are: whenever Stover reasonably believes that a prospective retailer will resell Stover products at less than designated prices; and whenever an existing retailer has resold Stover products at less than designated prices. These circumstances are widely and generally known to Stover retailers. Stover, however, neither requests nor accepts express assurances from prospective or existing retailers respecting resale prices. Other circumstances

under which Russell Stover refuses to sell are not related to resale prices and are not relevant for purposes of this case.

20. Consistent with the announced policy described in paragraph 19, Stover has refused to open retailers which it thought would sell its products at less than designated prices and has ceased selling to existing retailers because they sold Stover products at less than designated prices.

21. The practices and policies described in paragraphs 17, 18 and 19 existed for a period of at least five years before issuance of the complaint by the Federal Trade Commission in this matter. Refusals and terminations referred to in paragraph 20 have also occurred during this five year period.

22. Stover officers are aware that the vast majority of retailers regularly sell and have sold Russell Stover candy at or above prices designated by Stover. However, the company has not collected or received data from which to accurately determine the degree of adherence to its designated prices. Therefore, the Federal Trade Commission contracted with Louis Harris and Associates, Inc., ("Louis Harris") to conduct a survey to ascertain retail prices and related information concerning Stover candy sold by Stover's retailers. Louis Harris is qualified to conduct this type of survey. [7]

23. The Louis Harris official responsible for the conduct of the survey would be qualified as an expert witness in the field of statistics and survey research and would testify:

a. That the survey was conducted in April 1980, in accordance with accepted and established procedures and techniques designed to insure accuracy, reliability and statistical validity and using a random sample of 819 retailers;

b. That Louis Harris collected data on which 47 specified nonseasonal products were available for sale at each retailer;

c. That Louis Harris collected data on the price at which each product was available for sale at each retailer; and

d. That based on the data collected, 97.4% of the products available were priced at or above the price designated for each product.

Respondent would not offer evidence to rebut that testimony.

24. A number of witnesses would testify that they represent a substantial number of retail locations in which Russell Stover products are currently sold, that they desire regularly or occasionally to sell Stover products in those locations at less than designated prices, and that they do not do so because of the price-related refusal to sell announcement referred to in paragraph 19. Respondent would not offer any evidence to rebut that testimony. [8]

## Initial Decision

## III.

## DISCUSSION

Over 60 years ago in *Colgate*, the Supreme Court upheld a district court decision quashing a criminal price-fixing indictment which merely alleged that a manufacturer refused to sell to dealers who sold below the manufacturer's suggested retail prices. In the course of sustaining the lower court determination that the indictment had failed properly to charge an illegal agreement, the Supreme Court said:

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.<sup>9</sup>

*Colgate* itself involved resale price maintenance or vertical price-fixing, and subsequently the case has been followed in those rare instances in which a nonmonopolistic manufacturer did no more than announce in advance its suggested prices, and dealers either acquiesced in the manufacturer's policy, or were cut off if they did not. Thus relying on *Colgate*, it has been held that if all that is involved is an announcement of pricing policy and compliance with that policy, the essential element of a conspiracy case is missing, namely, [9]there is no *agreement* between manufacturer and dealer which obligates the dealer to resell at prices suggested by the manufacturer. *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967); *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173 (D.C. Cir. 1965); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963).

Complaint counsel have come up with a test case which has as its purpose a direct challenge to the continued viability of *Colgate*.<sup>10</sup> According to the stipulated record, Russell Stover, a manufacturer of boxed chocolates and other candies, announces in advance that it will refuse to deal with retailers who resell below designated prices appearing on lists, invoices, order forms, and respondent's boxed candy which is all preticketed. In carrying out this policy, respondent does not sell initially to retailers who it believes will sell at less than designated prices, and eliminates established retailers whenever it becomes apparent that they have sold Russell Stover products

<sup>9</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

<sup>10</sup> Address by Benjamin S. Sharp, Assistant Director for Regional Operations of FTC Bureau of Competition, Vertical Restraints And the FTC: Finding Pro-Competitive Answers to Today's Enigmas, at 4, ALI-ABA Course of Study, "The FTC After The Storm" (Washington, D.C., Nov. 21, 1980) ("The *Russell Stover* case was pleaded as a Sherman Act § 1 violation alleging the existence of an agreement, so as to confront directly the *Colgate* doctrine").

at less than designated prices. This policy is effective in accomplishing respondent's objective. A reliable survey shows [10]that Russell Stover candy is almost universally sold at respondent's designated prices.

While Russell Stover's announcement accomplishes its purpose—to assure sales at designated prices—and respondent's volume of business is not insubstantial, there is nothing in the record about the size of respondent's market share, or the uniqueness of its products, or the importance of the products to retailers who stock the Russell Stover line along with a large variety of other products. In effect, *Colgate* notwithstanding, complaint counsel are pressing the proposition that respondent's practices are illegal *per se* under the Sherman Act on the theory that respondent's announcement and the subsequent acquiescence of the dealers constitutes a vertical agreement to fix retail prices.<sup>11</sup>

Complaint counsel's effort to dispose of the *Colgate* doctrine, which says the exact opposite, that is, that no agreement or conspiracy may be inferred solely from an announcement of a pricing policy followed by compliance with that policy, proceeds on several grounds. First, complaint counsel make much ado about the procedural provenance of *Colgate*, especially the purported difference between the holding and the dictum of the [11]case. According to complaint counsel, the Supreme Court never directly ruled that the manufacturer and the dealers had not engaged in a conspiracy; the Court merely upheld a district court decision sustaining a motion to quash an indictment for failure properly to charge an agreement. But even if complaint counsel are correct, and the Court's limited responsibility under the Criminal Appeals Act could have been discharged without promulgating the *Colgate* doctrine, the significance of these humble beginnings is obscure. That there is a body of law known as the *Colgate* doctrine ("a basic part of antitrust law concepts since it was first announced in 1919" and "part of the economic regime of the country upon which the commercial community and the lawyers who advise it have justifiably relied"<sup>12</sup>) cannot be gainsaid—the very point of this case is to have the doctrine thrown out.

Second, complaint counsel cite a string of cases which have held that the express agreement, which apparently both lower and upper courts were looking for in *Colgate*, is not now required in order to establish a conspiracy. As complaint counsel would have it, since it is well-accepted under modern conspiracy law that no explicit agree-

<sup>11</sup> Section 1 of the Sherman Act prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." 15 U.S.C.A. 1.

<sup>12</sup> *United States v. Parke, Davis & Co.*, 362 U.S. 29, 49, 57 (1960) (Harlan, J., dissenting).

ment is necessary, a tacit conspiracy should be inferred from Russell Stover's prior [12]announcement of its policy, and the subsequent acquiescence in that policy by retailers.

While complaint counsel are undoubtedly right about the ability of the courts and the Commission to draw inferences of conspiracy from interdependent conduct implicating competitors, this argument overlooks the point that since *Colgate* a vertical price-fixing agreement (an agreement between non-competing supplier and customer) is exactly what may not be inferred if all that the record shows is a manufacturer's announcement of a refusal to deal with non-complying dealers. Moreover, contrary to the position of complaint counsel, *Colgate* has not been interpreted as applying only to those instances in which there is no express agreement. Almost from the time the doctrine was first announced, it has been the rule that a unilateral announcement standing alone cannot be used to establish *any* agreement, implied or express. *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921).

Since this gap in the law relating to inferential evidence of conspiracy is premised on the right of traders to pick and choose their customers at will, by definition it applies only to policies originating with a manufacturer, as alleged in the instant complaint. There is nothing in the doctrine which shelters any form of horizontal pricing arrangement among competing dealers, no matter how such an arrangement may have come about. Undoubtedly with this limitation in mind, [13]complaint counsel argue next that Russell Stover has put together a horizontal combination by extending to its dealers an invitation to sell at designated prices. According to complaint counsel, this horizontal combination is consummated when the dealers signal (by compliance) acceptance of the invitation in contemplation that similarly situated retailers will do the same. Putting aside some obvious difficulties with the application of this theory to this case—there is no horizontal conspiracy at any level alleged in the complaint, and the pricing policy at issue here did not originate with the dealers, *see, e.g., Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939)—no court has yet invoked the rationale of "invitation and acceptance" to hold that a declaration of pricing policy initiated by the manufacturer represents an invitation to dealers to participate in either a vertical or horizontal price-fixing agreement forbidden by the Sherman Act. To the contrary, when a similar argument was last presented to the Third Circuit, the court concluded that there was neither an agreement nor an invitation to agree. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963).

*Klein* is consistent with the Supreme Court's ruling in *Parke, Davis* that a seller's pricing announcement which engenders "confidence in each customer that if he complies his competitors will also" is not a basis for inferring agreement if the manufacturer takes no affirmative coercive action to achieve [14]compliance. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46 (1960). As for *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944), which relies on both *Interstate Circuit and Colgate*, more was involved there than just acquiescence of wholesalers in Soft-Lite's published resale price list. At issue was a multi-level system and a combination which arose when "[t]he wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." 321 U.S. at 723.<sup>13</sup>

Turning from its misplaced reliance on conspiracy cases which either included horizontal activity or did not involve mere unilateral announcements originating with manufacturers, complaint counsel say that the *Colgate* doctrine itself has been whittled down, or as complaint counsel would have it, overruled, by a series of cases in which the courts have held that from coercive conduct which goes beyond *Colgate* [15]it will be inferred that the retailers did not act independently, but instead were compelled to agree to resell at the manufacturer's prices. While the Supreme Court has never satisfactorily explained why coercion which induces acquiescence is stronger evidence of agreement than just acquiescence itself, the post-*Colgate* cases have largely evolved into an exercise in finding some element of coercion, however slight it may be, which can be identified as the triggering device for an agreement.<sup>14</sup> Under this line of cases, the doctrine is not available if the manufacturer threatens a price-cutter, and then resumes selling subject to the tacit or implied understanding that the reformed dealer will toe the pricing line. *Parke, Davis & Co.*, 362 U.S. at 34-35, 45 n.6. Nor is the doctrine available if the manufacturer sets up a policing mechanism to uncover violations, and then reinstates price-cutters who satisfactorily demonstrate a willingness to comply with designated prices in the future. *FTC v. Beech-Nut Co.*, 257 U.S. 441, 450-451 (1922). Similarly, if the manufacturer uses customers at one level of distribution to coerce price compliance by dealers at another level of

<sup>13</sup> The *Interstate Circuit* rationale may apply if the manufacturer solicits compliance in the form of an understanding from retailers that they will not discount if others likewise agree. In those circumstances, however, the "invitation-acceptance" concept seems hardly necessary since there exists an agreement between manufacturer and retailer although expressed in conditional terms. See *Parke, Davis* 362 U.S. at 35-36, 46-47. As I indicate later in this discussion, the "unfairness" jurisdiction of the Commission under Section 5 might have been invoked to charge respondent with using an invitation and acceptance in putting together an anti-competitive arrangement among retailers without regard to whether a Sherman Act "agreement" was proven. See discussion, *infra*, at n.24.

<sup>14</sup> *Simpson v. Union Oil*, 377 U.S. 13, 16 (1964) ("... it matters not what the coercive device is.")

distribution, *Parke, Davis*, 362 U.S. 29 at 45-46, or if the manufacturer uses the threat of its own direct competition or retaliation from others [16] to obtain compliance, *Colgate* does not apply. *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968). The results in the "coercion" cases are also supportable on the alternative theory that in a multi-level distribution system the wholesaler or jobber who either cooperates by informing on price-cutting retailers, or refuses to resell to such retailers, should be considered as forming the requisite combination with the manufacturer. *Beech-Nut*, 257 U.S. at 454-455; *Bausch & Lomb*, 321 U.S. at 723; *Parke, Davis*, 362 U.S. at 45-46.<sup>15</sup>

Going beyond coerced acquiescence or inferences of combinations following multi-level coercion or cooperation, several cases have suggested that the business setting alone may create a coercive environment which induces an agreement or combination and thereby shuts off recourse to *Colgate*. To illustrate, if a car muffler or newspaper franchisee who for all practical purposes is dependent for his livelihood on one source which cannot be easily substituted, and after investing money and effort in developing a market is given to understand that his supplier is firm and resolute in its insistence on observance of stated prices (say, by evidence of a strict policy [17] of cancellations), it is doubtful that the dealer's "independence" is very real, and under these circumstances, too, the *Colgate* doctrine may not apply. See, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968); *Albrecht*, 390 U.S. at 150 n.6.<sup>16</sup>

The cases discussed above have the effect of severely limiting the *Colgate* doctrine to its precise terms. Not content with this result, complaint counsel settle on *Parke, Davis* as purportedly overruling *Colgate*, "de facto". Given the language in *Parke, Davis* which explicitly discourages such an interpretation ("So long as *Colgate* is not overruled . . ." 362 U.S. at 44),<sup>17</sup> complaint counsel might have argued more persuasively that the following discussion in footnote 6 of *Albrecht*, rather than *Parke, Davis*, accomplished the deed: [18]

Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had

<sup>15</sup> See also *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), which held that a combination may be found in a single-level distribution system on the basis of a refusal to deal following complaints from the competitor of a discounter. This activity was characterized as primarily horizontal in nature as contrasted with a manufacturer's unilateral refusal to deal protected by *Colgate*. 595 F.2d at 167 n.12.

<sup>16</sup> In *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980), it was held that a jury could reasonably infer a combination from the following facts indicative of a coercive environment: the dealer's business was subject to a one year lease with Texaco; the dealer was threatened with cancellation unless prices were maintained; and surveillance was undertaken to determine what prices were being charged.

<sup>17</sup> Complaint counsel explain away this "troublesome dictum" as indicative of the Supreme Court's hesitancy "to expressly overrule its past decisions." (Brief for Complaint Counsel at 45). See, however, *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)

combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967).<sup>18</sup>

While footnote 6 comes perilously close to overruling *Colgate*, the citations to *Parke, Davis* and *Schwinn*, both of which expressly affirmed *Colgate*, indicate that this is not what the Supreme Court intended. The Court seems, instead, to have carved out the barest sliver of permissible conduct—a simple, unadorned, unilateral announcement followed by a refusal—while indicating that the doctrine is not available if compliance is brought about by any affirmative action exceeding an announcement, such as the coerced agreements and multi-level threats in *Parke, Davis*, or the coercive pressures brought to bear on franchisees who are especially vulnerable to the danger of termination, as in *Albrecht* itself and *Schwinn*.<sup>19</sup> This [19]reading of footnote 6 is also consistent with the recent action of the Court in again turning to *Colgate* to reaffirm the right of a trader “freely to exercise his own independent discretion as to parties with whom he will deal.” *Reeves, Inc. v. William Stake*, 48 U.S.L.W. 4746, 4749 (U.S. June 19, 1980).

While the exercise of the discretion “as to parties with whom he will deal” may take the form of an announcement of a refusal to deal with price-cutters, there is now so little left of *Colgate*, that the doctrine might not even apply to the actual facts of the *Colgate* case itself. There, coerced acquiescence or an agreement could have been inferred from use of “suspended lists,” and requests to offending dealers for assurances or promises of future adherence to prices. *Colgate*, 250 U.S. at 303. In contrast, the instant stipulation tracks [20]the precise terms of the doctrine, rather than the facts of the earlier case, and avoids any mention of tactics (surveillance, investigations, suspended lists, wholesaler boycotts, threats to non-compliers, or solicitation of promises of future adherence), or

<sup>18</sup> *Albrecht*, 390 U.S. at 150 n.6.

<sup>19</sup> By the time it reached the Supreme Court *Schwinn* did not involve resale price maintenance; however, the case has been cited for the proposition that vertical agreements (there customer and territorial restraints) may be grounded upon “the communicated danger of termination” and a “firm and resolute” insistence upon observance of the manufacturer’s policies. 388 U.S. at 372. The concurring and dissenting opinion of Mr. Justice Stewart takes issue with this formulation because on its face it offends *Colgate*. 388 U.S. at 391 n.12. Since the majority reaffirmed *Colgate*, it must be assumed that the Court believed that *Schwinn* had gone beyond a mere unilateral announcement of policy. As it happens, there is some evidence that *Schwinn* obtained actual agreements, or at least explicit approval, from the distributors. 237 F. Supp. 323, 340–342 (N.D. Ill. 1965). But even without this evidence, *Schwinn*’s announcement of its territorialization policies may have been deemed to be coercive in the context of its cancellation of thousands of dealers and its decision to concentrate distribution among a relatively small group of franchisees. Those who remained on *Schwinn*’s dealer rolls stood to gain enormously from the bicycle boom, and although the Supreme Court may believe that all bicycles are interchangeable, many dealers may have been reluctant to lose the *Schwinn* brand which they had promoted extensively. 388 U.S. at 365. While the Court does not dwell in *Schwinn* on the coercive element implicit in some franchising situations, it is significant that just one year later it expressed deep skepticism about how “perfectly free” franchised dealers are to reject the demands of a supplier when their very livelihood is at stake. *FTC v. Texaco*, 393 U.S. 223, 229 (1968).

economic facts (such as unique or even significant contribution of respondent's candy to profitable drug store, department store, greeting card shop, or gift shop management) from which it might have been possible to infer coercion or even a coercive atmosphere.

Having failed to present an adequate factual background respecting the product or the market from which an element of coercion may have been inferred, complaint counsel then attempt to resurrect the coercion point by asking that an inference of coercion be drawn from the announcement itself plus the evidence of compliance, which in the case of some dealers would not have occurred except for the existence of the announcement. But the very point of the cases which have followed *Colgate* is that a mere announcement of pricing policy followed by compliance does not constitute a coerced agreement. And although *Schwinn*, *Albrecht*, and *Perma Life* may signal a further erosion of the *Colgate* doctrine in the peculiarly coercive atmosphere of a franchise relationship revolving around a retailer's essential product, the burden is still on complaint counsel to supply, at the very least, the elements of such an environment. If, on the other hand, all that is provided is a [21]stipulation saying that retailers were induced to comply "because of the price-related refusal to sell announcement"<sup>20</sup> there is simply no Sherman Act agreement under *Colgate*, irrespective of how whimsical it may be to have the presence or absence of an agreement turn on whether there was an announcement (or, if you will, an exhortation) followed by compliance, or coercion (or a coercive atmosphere) followed by compliance, or an explicit or tacit contract (either coerced or induced) which requires no showing of compliance at all. See *Parke, Davis*, 362 U.S. at 44.<sup>21</sup>

From the foregoing discussion, it is plain that in order to bring respondent's practices within *Colgate* not only did it require a stipulation which limited the reason for dealer compliance to "the announcement," but some suspicious gaps [22](in addition to the dearth of hard facts about the importance of respondent's product to dealers) were necessary to keep it there. For without such gaps it is doubtful that in the real world even a single-level resale price maintenance program implemented merely by an announcement can be carried out without running afoul of the *Colgate* exceptions.

<sup>20</sup> Finding 24 (emphasis added).

<sup>21</sup> See also *Gray v. Shell Oil Corp.*, 469 F.2d 742, 748 (9th Cir. 1972) ("The distinction . . . between coercion on the one hand and exposition, persuasion, and argument on the other is firmly embedded in the decisional law on vertical price fixing"). Irrational as this formula may be for distinguishing agreement from unilateral conduct, it has a grain of pragmatic justification: the exceptions to *Colgate* are all grounded on external facts which are susceptible to objective proofs (what the manufacturer actually did, and market conditions); in contrast, *Colgate* still protects a manufacturer against a contentious or cancelled dealer who could always claim in a treble damage suit that the unilateral announcement itself was enough to fix prices, a claim which inevitably would involve the trier of the facts in considering elusive, subjective evidence of what went through the dealer's mind before he decided to charge the suggested price.

Pitfalls may exist, for example, in any attempt to deal with the problem of dealer cancellation. If cancelled dealers are replaced by newcomers who know that they are substituting for mavericks, and these substitutes in turn comply with Russell Stover's designated prices, it may be proper to infer that the replacements have agreed, minimally, not to repeat the transgressions of their banished predecessors. *See, e.g., Albrecht*, 390 U.S. at 147-148, 150. The stipulation does not address the issue of substitutes, and I have decided not to draw the necessary inference because the case has been submitted and accepted on the clear understanding that the stipulated facts would constitute the entire evidentiary record.<sup>22</sup> Besides, the complaint and stipulation are directed at the mere announcement and subsequent compliance without regard to any complications which may arise from cancellation and replacement of those who do not comply. [23]

Even more egregious than the omission respecting replacements is the absence from the stipulation of certain essential facts concerning respondent's method of doing business. This became apparent during oral argument when complaint counsel acknowledged that Russell Stover operates company-owned stores, a point never mentioned in the stipulation.<sup>23</sup> There is, of course, nothing in *Colgate* which condones the use of any device which contributes to horizontal price-fixing, including an announcement by a manufacturer-retailer which may be said, at the very minimum, to tamper with competition from retail competitors. This omission suggests that a record which *accurately* reflected respondent's business may never have reached the issue of the continued viability of *Colgate*. It also suggests that the importance of the survival or demise of *Colgate* may have been overstated by complaint counsel since apparently it requires a fanciful setting, unrelated to business reality, in order to be able to test the doctrine. In any event, as I have indicated earlier, I am bound by the stipulation, although I recognize that the result in this case may have been different had the complaint attacked respondent's actual method of doing business, rather than the stipulated lawyer's construct which has been lovingly nurtured like a hothouse flower, but which has little to do with the real world. [24]

My decision is further limited by the way in which the complaint scrupulously avoids any of the rubrics associated with the unfairness

<sup>22</sup> Order Receiving Stipulation And Closing The Record (Nov. 14, 1980). *See Verkouteren v. District of Columbia*, 346 F.2d 842 (D.C. Cir. 1965) for binding effect of factual stipulations.

<sup>23</sup> Tr. 36.

jurisdiction of the Commission. Conceivably, Section 5 of the Federal Trade Commission Act<sup>24</sup> might have been invoked to charge that even apart from any Sherman 1 agreement, Russell Stover's practices have the effect of putting together an anti-competitive arrangement among retailers which may be in violation of the spirit of the Sherman Act, *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965), or may be an incipient violation of the letter of the Sherman Act, *FTC v. Motion Picture Advtg. Serv. Co.*, 344 U.S. 392 (1953), *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941), or may be an unfair method of competition, irrespective of any violation of the letter or spirit of the Sherman Act, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). But all that the complaint alleges is that respondent's announced pricing policy and compliance with that policy is a *per se* Sherman 1 contract, combination, or conspiracy "and therefore" violates Section 5 of the Federal Trade Commission Act. That complaint counsel want no part of Section 5 is made plain in the following disclaimer: [25]

The complaint makes no charge that, in the alternative Russell Stover's conduct is an unfair method of competition in violation of § 5 independent of the Sherman Act. If this court finds that Russell Stover's conduct does not meet the Sherman Act's requisite elements, it should not find a violation based on the more lenient § 5 standards.<sup>25</sup>

In sum, it required a wittingly incomplete stipulation and a skeletal complaint to set this case into such a mold that (a) it would directly confront *Colgate*, and (b) it could not be decided on any other basis except *Colgate*. Further controlling the disposition of this case, at least at the present stage, is the modest mandate of an administrative law judge: I am confined to setting out the record facts and applying existing precedent to those facts in light of the complaint. This mandate does not include changing the rules of conspiracy law even if the law contains a curiosity which disallows an inference of agreement on grounds that are neither logically convincing to most lawyers nor especially useful to most businessmen. In other words, my reservations about the doctrine notwithstanding, a case which is forced into the four corners of the *Colgate* doctrine, and charges a Sherman 1 violation, is governed by *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

In reaching this result, I have not adopted the argument advanced by respondent that *Colgate*, the one possible exception to the general ban on resale price maintenance, should [26]be treated with renewed

<sup>24</sup> Section 5 of the Federal Trade Commission Act prohibits "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices affecting commerce. . . ." 15 U.S.C.A. 45.

<sup>25</sup> Comp. Counsel Brief at 30 n.95.

deference because of recent academic comment celebrating the virtues of vertical price-fixing as a means of shielding "retailers from intrabrand competition so that they can provide desirable services and advertising and thereby increase interbrand competition." (Brief for Respondent at 33). But for *Colgate*, respondent's practices, *even as stipulated*, would be a *per se* violation of the antitrust laws without regard to alleged justifications such as the "free rider" rationalization, efficiencies, effects, or the assumed identity of interests between manufacturers and retailers. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

#### IV.

##### CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over respondent and the subject matter of this complaint.

2. According to the stipulated record, respondent does no more than exercise its own independent discretion as to parties with whom it will deal, announce in advance the circumstances relating to price under which it will refuse to sell, and cancel those who do not comply with the announcement. [27]

3. Although respondent's practices produce compliance with its designated prices, under *Colgate*, the stipulated facts do not establish that respondent has unlawfully agreed, contracted, combined, or conspired with its retail dealers to fix resale prices, and thereby unreasonably restrained trade in the sale of its products within the meaning of Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act, to the extent that Section 5 merely registers violations of the Sherman Act.

Accordingly, the following order should be issued:

##### ORDER

The complaint is dismissed.

##### OPINION OF THE COMMISSION

By PERTSCHUK, *Commissioner*:

The complaint in this matter alleges that Russell Stover Candies, Inc. ("Stover") combined with its retail dealers to fix retail prices in violation of Section 5 of the Federal Trade Commission Act. The

Administrative Law Judge ("ALJ") found that the complaint should be dismissed on the grounds that, under *United States v. Colgate*,<sup>1</sup> the respondent had not combined with its dealers. For the reasons discussed below, we reverse the decision of the ALJ [2] and find that Stover has violated Section 5. In accord with the stipulation of the parties, we have entered the order appended to our opinion with one modification.

#### I. THE FACTUAL RECORD

The entire evidentiary record in this case consists of Paragraphs 1 through 24 of a stipulation by respondent's and complaint counsel. (JX #1A-1P, IDF 1-24)<sup>2</sup> These are restated in full in the initial decision. (ID 4-7) We adopt these as the conclusions of fact of the Commission. In summary, the essential stipulated facts established that Stover is a manufacturer of candy which distributes its products through over 18,000 retail dealers located in every state and the District of Columbia. Stover is one of the largest United States manufacturers of boxed chocolates with sales of approximately \$117 million in fiscal year 1978 and 125.8 million in fiscal 1979.

Stover designates resale prices for its products through price lists, invoices, order forms and pre-ticketing.<sup>3</sup> All of its dealers are aware of the designated prices. [3] Stover announces to prospective retailers before an initial order is placed that, among the circumstances under which it will refuse to sell, are whenever it reasonably believes that a prospective retailer will sell the company's products at less than designated prices and whenever an existing retailer has resold the company's products at less than designated prices. These circumstances are widely and generally known to Russell Stover retailers. The company neither requests nor accepts express assurances from prospective or existing retailers respecting retail prices. Consistent with this policy, Russell Stover has refused to begin dealing with retailers it thought would sell at less than designated prices and it has stopped selling to existing retailers because they sold at less than

<sup>1</sup> 250 U.S. 300 (1919).

<sup>2</sup> See JX-126.

The following abbreviations are used in this opinion:

- I.D. - Initial Decision Page No.
- I.D.F. - Initial Decision Finding of Fact No.
- CAB - Complaint Counsel's Appeal Brief Page No.
- RAB - Respondent's Appeal Brief Page No.
- CRB - Complaint Counsel's Reply Brief Page No.
- JX - Joint Exhibit

<sup>3</sup> The term "designating" was used in the stipulation rather than "suggesting" in order to reflect Russell Stover's pricing policies. (CAB 2) This pricing policy is discussed further below.

designated prices. The practices described above concerning Stover's pricing and distribution policies have existed for at least five years prior to issuance of the complaint in this matter. Refusals and terminations, as described above, have occurred during this period.

Counsel for both sides also stipulated that a survey was conducted in order to determine the degree of compliance with Stover's pricing policies by its dealers. Because of the agreement to submit the case to the ALJ as a stipulated record, no witnesses were called to describe the procedures or results of this survey. However, based on the parties stipulations about the testimony that would have been offered concerning this survey, including that it was conducted in [4] accordance with accepted and reliable methods, (see IDF 23), we find that approximately 94.4% of Stover products at the retail level were priced at or above the designated prices. From this finding we infer that there is widespread compliance with Stover's pricing policy.

The parties also stipulated that witnesses would testify that they represent a substantial number of retail locations at which Stover products are sold, that they desire regularly or occasionally to sell Stover products at less than designated prices, and that they do not do so because of the company's announced policy that it will not continue to deal with a retailer who sells for less than designated prices. (IDF 24) From this finding, we infer that there are some dealers who comply with Stover's designated prices solely in order to avoid termination and that, in the absence of Stover's threat of termination, these dealers would sell at lower prices.

## II. ELEMENTS OF A VIOLATION

Based on the factual record described above, we must determine whether Stover's practices have violated the Sherman Act and, therefore, the Federal Trade Commission Act.<sup>4</sup> Because the complaint alleges that Stover's conduct violates the FTC Act because it violates the Sherman Act, we [5]do not consider whether such conduct violates the FTC Act because it violates the spirit or policy of the antitrust laws,<sup>5</sup> constitutes an incipient violation of the antitrust laws,<sup>6</sup> or otherwise may be an unfair method of competition even though it does not violate the letter or the spirit of the antitrust laws.<sup>7</sup>

In determining whether Stover has violated the Sherman Act and

<sup>4</sup> It is well established that violations of the Sherman Act are, *a fortiori*, a violation of the FTC Act. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1962).

<sup>5</sup> See *Atlantic Ref. Co.*, 381 U.S. 357 (1965).

<sup>6</sup> See *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

<sup>7</sup> See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

the FTC Act as alleged, we turn to the elements of a violation. First, the conduct must be in or affecting commerce, as commerce is defined in the FTC Act. Second, there must be a contract, combination, or conspiracy. Finally, the conduct at issue must be one in "restraint of trade" within the meaning of the Sherman Act. We review each of these elements in turn.

#### A. Commerce

The FTC Act prohibits only practices "in or affecting commerce."<sup>8</sup> There is no controversy concerning this issue since the parties have stipulated that Stover is engaged "in commerce" within the meaning of the FTC Act and its business activities "affect commerce" within the [6]meaning of the Act. (IDF 6) In addition, the challenged distribution and pricing policies affect retail dealers who sell in every state and the District of Columbia. (IDF 5) See also IDF 2, 4 and 5. Based on these stipulations, the ALJ found that the Commission has jurisdiction over respondent and the subject matter of this complaint. (ID 26) We affirm this finding.

#### B. Contract, Combination, or Conspiracy

The central question in this case is whether a "contract, combination, or conspiracy" has been demonstrated by the factual record. On this point the parties differ, and the ALJ, siding with respondent, found an agreement was not present.<sup>9</sup> The ALJ's conclusion was based upon his interpretation of *United States v. Colgate*,<sup>10</sup> and the "Colgate doctrine" that has evolved since that case was decided. The correct interpretation of the *Colgate* doctrine, we agree, is at the heart of the dispute over the existence of an agreement.

Stover argues forcefully that its distribution and pricing policies do not violate the Sherman Act because there are no agreements between Stover and its distributors [7]as to resale prices. For this conclusion, they clearly rely on *Colgate* and argue the following interpretation of the case: "*Colgate* permits a manufacturer to advise retailers that it will refuse to sell to any retailer that violates a policy, and then to refuse to sell to a retailer that does violate an announced policy." (RAB 1) Stover argues that, because it only threatens termination of dealers who do not comply with its pricing policies and terminates those who do not, widespread compliance by

<sup>8</sup> 15 U.S.C. 45(a)(2).

<sup>9</sup> For purposes of our discussion, we use the term "agreement" as synonymous with a "contract," "combination," or "conspiracy." While complaint counsel suggest these three latter terms may have different meanings (CAB 7), we do not deal with that possibility.

<sup>10</sup> 250 U.S. 300 (1919).

Stover dealers with Stover's wishes is unilateral conduct by Stover and by its dealers. Stover argues this conclusion is sound even though there are dealers who comply *solely in order to avoid termination*. (See IDF 24) As Stover's brief states, "[T]he whole point of *Colgate* is that this conduct—announcement of a price-related, refusal to sell policy and refusals to sell pursuant to that policy—is unilateral as a matter of law." (RAB 11)

Complaint counsel, on the other hand, argue that Stover's pricing and distribution policies result in agreements between Stover and its dealers. They, too, recognize that the interpretation of the *Colgate* doctrine is at the core of [8]their dispute with Stover.<sup>11</sup> Complaint counsel offer a number of lines of argument, but essentially rest their case on two propositions. First, they say the *Colgate* doctrine, at least as it stands today, does not prohibit the finding of an agreement in a case where a manufacturer's announced policy of terminating non-complying dealers leads to widespread compliance and some dealers comply solely in order to avoid termination. In such a case, *unwilling* compliance by dealers to avoid termination by a manufacturer, complaint counsel argue, is bilateral conduct and, thus, an agreement for purposes of the Sherman Act. Second, complaint counsel argue that *willing* compliance with a manufacturer's pricing policies by the great majority of dealers, knowing that competitor dealers are being "invited" by the manufacturer to charge the same prices, and knowing that the manufacturer is making continued dealing contingent upon compliance, amounts to a series of vertical agreements between the manufacturer and the dealers.

In order to assess these competing arguments, we turn to the *Colgate* case and subsequent cases interpreting it. [9]

### 1. *The Colgate Doctrine*

The *Colgate* case was one of the earliest vertical price-fixing cases considered by the Supreme Court. It followed by nine years the first such case reviewed by the Court, *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*<sup>12</sup> In *Dr. Miles*, the manufacturer instituted a distribution program involving jobbers and wholesalers. The contracts between Dr. Miles and these distributors purported to establish a consignment system, requiring each distributor to sell only at prices established by Dr. Miles. When Dr. Miles sued to

<sup>11</sup> It is clear that complaint counsel framed the proof of their case to require a decision dealing squarely with the meaning of the *Colgate* doctrine. In order to achieve this objective, complaint counsel and respondent stipulated to a factual record which included the facts relevant to such a decision. We do not believe such an approach to litigation is inappropriate. The stipulation of facts results in economy in litigation by focusing the real dispute in this matter, which is one of determining the applicability of a legal standard to a narrow and clear set of facts. In addition, it allows for Commission and judicial review which may provide useful clarification in an area of the law which has been the source of much confusion.

<sup>12</sup> 220 U.S. 373 (1911).

enforce this contract against a price-cutting distributor, the Court found the consignment provision to be a sham and the price fixing provision to be a restraint of trade in violation of the Sherman Act.

In *Colgate*, the Court faced allegations of vertical price-fixing as in *Dr. Miles*. However, unlike *Dr. Miles*, there were no express written agreements in *Colgate* which required dealers to charge designated prices. Instead, there were allegations that Colgate had engaged in a number of steps to assure compliance without entering into express contracts with distributors. The Court's consideration of *Colgate* was limited to a review of the district court's dismissal of the government's indictment against the manufacturer. That indictment charged *Colgate* with, *inter alia*, [10]urging its distributors to adhere to suggested prices, requesting information about non-complying dealers, compiling lists of dealers suspended for not complying, and obtaining promises of future compliance from certain dealers.<sup>13</sup> The district court interpreted this indictment as failing to allege a contract or agreement to charge certain prices.<sup>14</sup>

The Supreme Court upheld the district court's quashing of the indictment. It is not entirely clear whether the Court took it upon itself to interpret the indictment, or whether the Court accepted without question the lower court's finding that no agreement was alleged.<sup>15</sup> Complaint counsel argue vigorously that the holding of *Colgate* was limited to a determination that, absent an *allegation* of agreement, a charge of violating Section 1 of the Sherman Act could not stand. (See CAB 29-31) Whatever the precise holding of *Colgate* (and we see no need to make our own determination) it is clear that it is the doctrine that emerged from the case, rather than its holding, that has greatly influenced subsequent antitrust analysis of manufacturer-distributor [11]agreements.<sup>16</sup> Consequently, it is the meaning of this doctrine, as it stands today, with which we are concerned in evaluating Stover's pricing program.

The dilemma faced in *Colgate*, and by the Supreme Court and other courts in subsequent cases, is distinguishing between unilateral and bilateral (or multilateral) conduct where "unilateral" refers to the absence of agreement for purposes of Sherman Act analysis. Applying this distinction to arrangements between suppliers and

<sup>13</sup> 220 U.S. at 303.

<sup>14</sup> 253 F. 522, 527 (E.D. Va. 1918).

<sup>15</sup> "And we must conclude that as interpreted below, the indictment does not charge Colgate . . . with selling its products to dealers under agreements which obligate the latter not to resell except at prices fixed by the company." (emphasis added) 220 U.S. at 306-307. See also, *U.S. v. Parke, Davis & Co.*, 362 U.S. 29 (1960). "[T]he District Court's interpretation of the indictment [in *Colgate*] was binding and . . . without an allegation of agreement there was no Sherman Act violation charged." *Id.* at 36-37.

<sup>16</sup> There is little doubt that the facts alleged in the indictment would, based on subsequent decisions, violate the Sherman Act. See pages 49-54, *infra*.

distributors is particularly troublesome since the very nature of the supplier-distributor relationship calls for some long-term "agreed to" conduct on both sides. Moreover, in conveying suggested prices to distributors, conduct which is not prohibited by the Sherman Act, sellers are conveying their preferences to distributors as to resale prices. Determining when the suggested prices are followed pursuant to an "agreement" between buyer and seller, rather than because of unilateral behavior which is merely consistent with the seller's preferences, raises subtle and difficult questions.

The *Colgate* case attempted to reconcile the prohibition on agreements between manufacturers and distributors to fix prices with the freedom of a manufacturer to sell to whom it chooses. Although the practices actually alleged to have been followed by *Colgate* would have violated subsequent interpretations of the *Colgate* doctrine, the Court addressed the right of a seller to choose its buyers in the now well-known passage: [12]

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 sell.* (emphasis added)<sup>17</sup>

The second, underscored sentence of this passage has created difficult problems of interpretation, because it suggests that a manufacturer may announce that he will deal only with those who will comply with his pricing policies. Later cases, in addition to restating this passage from *Colgate*, make clear *Colgate* was intended to apply to the manufacturer's freedom to stop dealing with distributors who begin to discount.<sup>18</sup> Thus, under the initial formulation of the *Colgate* doctrine, it appeared that a manufacturer could announce a pricing policy and threaten to terminate those who did not comply with it, even though the threats in themselves were the cause of adherence, rather than a result of voluntary, unilateral behavior on the part of the distributor. Thus, while unwilling compliance under the threat of termination appears to be the antithesis of unilateral behavior, this language suggests that the Court's early approach to identifying agreements accepted the anomalous result of placing coerced compliance outside the proscription of the Sherman Act.

Early Supreme Court decisions after *Colgate* made clear that the Sherman Act prohibition of vertical price-fixing arrangements was not limited to agreements embodied in [13]express contracts between

<sup>17</sup> 250 U.S. at 307.

<sup>18</sup> See, e.g., *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 452-53 (1922).

manufacturers and distributors. In *Frey & Son v. Cudahy Packing Co.*,<sup>19</sup> the government alleged that a manufacturer had engaged in vertical price-fixing in the absence of express agreements. The Court of Appeals reversed the district court's judgment against the defendant on the ground that there was no express agreement to fix prices. The Supreme Court reversed, emphasizing that no express contract to fix prices was required to violate the Act but that the "essential agreement, combination, or conspiracy might be implied from a course of dealing or other circumstances."<sup>20</sup>

The seemingly straightforward proposition that agreements may be implied from a course of dealing provides a useful basis for distinguishing unilateral from bilateral behavior in many situations. This type of analysis is frequently employed, of course, in contract law. However, later vertical price-fixing cases illustrate the application of the Sherman Act to conduct engaged in by the manufacturer which had the effect of "pressuring" the dealer into compliance and some of the difficulties in determining when an implied agreement was present in such circumstances.

For example, in *FTC v. Beech-Nut Packing Co.*,<sup>21</sup> the Court considered a distribution program whereby the manufacturer distributed both wholesale and retail suggested price lists, announced that it would refuse to continue to [14]sell to any distributor who failed to charge these prices, refused to sell to wholesalers who sold to retailers who did not comply with suggested prices, and engaged in active price surveillance of its distributors. In addition, if a non-complying distributor was terminated, it would be reinstated by promising future compliance. The Court found that, despite the absence of express contracts, Beech-Nut's methods were effective in achieving the desired result. The Court concluded that these practices, pursued vigorously by Beech-Nut to insure that its pricing program was implemented, went "far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* case, was held to be within the legal right of the producer."<sup>22</sup>

While the *Beech-Nut* fact situation included reinstatement of terminated distributors based on assurances of compliance, conduct which is surely bilateral, the Court also seemed to find agreements on the basis of the involvement of wholesalers in the scheme, who also were subject only to termination for failure to comply, and on the basis of the use of an active price monitoring system. While these practices by Beech-Nut surely increased the likelihood of compliance

<sup>19</sup> 256 U.S. 208 (1921).

<sup>20</sup> *Id.* at 210.

<sup>21</sup> 257 U.S. 441 (1922).

<sup>22</sup> 257 U.S. at 454.

by dealers, the logic of finding "agreements," in light of the original *Colgate* pronouncement concerning the right to threaten termination, is not apparent. In later comments about *Beech-Nut*, the Court indicated that the case went beyond [15]earlier cases by making clear that an agreement did not have to rise to the level of an express or implied contract<sup>23</sup> but that a combination would be found if the seller secured adherence to his pricing policy by any means which go beyond a "mere declination to sell."<sup>24</sup>

Cases after *Beech-Nut* allowed for the finding of an agreement based upon manufacturers' "pressuring" or other activities which increased the likelihood that dealers would comply with the manufacturer's pricing policies. In *U.S. v. Bausch & Lomb*,<sup>25</sup> the manufacturer established a two-tier distribution program in which wholesalers were not to sell to retailers who did not charge suggested prices. Eligible retailers were required to have obtained "licenses" from Bausch & Lomb, and one of the requirements for doing so was agreeing to charge certain prices.<sup>26</sup> This agreement [16]with retailers would surely be analyzed as bilateral. However, the Court also indicated that the wholesalers' participation in the plan violated the Sherman Act and that such a combination between Bausch & Lomb and its wholesalers could be found on the basis of acquiescence of the wholesalers:

Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.<sup>27</sup>

It is difficult to reconcile the Court's view that participation of wholesalers, even by acquiescence, allows for the finding of an agreement with the early statement of the *Colgate* doctrine. Under the *Bausch & Lomb* view of an agreement, neither the wholesaler nor the retailer needed to have given any express or implied assurances that they would comply with the manufacturer's preferences. Thus, the agreement in *Bausch & Lomb* appears to turn only upon the fact that wholesalers added something "extra" to Bausch & Lomb's efforts to obtain compliance from its retailers. That is, even

<sup>23</sup> See *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 43-44. "In the cases decided before *Beech-Nut* the Court's inquiry was directed to whether the manufacturer had entered into illicit contracts express or implied. . . . The [*U.S. v. Bausch & Lomb*, 321 U.S. 707 (1944)] and *Beech-Nut* decisions cannot be read as merely limited to particular fact complexes justifying the inference of an agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements."

<sup>24</sup> 362 U.S. at 43. The *Beech-Nut* case was decided on the basis of Section 5 of the FTC Act, rather than the Sherman Act. The Court's opinion indicates that it viewed the manufacturer's practices as violating the Sherman Act as well. 257 U.S. at 454. Thus, we do not believe the Court's review of the case under the FTC Act, as opposed to the Sherman Act, was significant to its decision.

<sup>25</sup> 321 U.S. 707 (1943).

<sup>26</sup> *Id.* at 719.

<sup>27</sup> *Id.* at 723.

though neither wholesalers nor retailers necessarily provided explicit or implicit assurances of compliance, and the manufacturer's only recourse was to decline further dealings, the extra factor of involving wholesalers in the scheme in obtaining retailer compliance went beyond the manufacturer's mere threat of terminating future dealing.<sup>28</sup> [17]

In 1960, the Court decided *U.S. v. Parke, Davis & Co.*<sup>29</sup> Parke, Davis, the manufacturer, had implemented a distribution and pricing policy in which it 1) announced a policy of refusing to deal with retailers who did not comply with suggested prices; 2) terminated dealers who did not comply; 3) announced a policy of refusing to sell to wholesalers who sold to non-complying retailers; 4) induced retailers to comply with suggested prices by telling each retailer that others would go along if it did; and 5) reinstated non-complying dealers after assurances that they would comply in the future. The district court found no liability on the ground that these practices were unilateral and, thus, no agreement was present.

The Court in *Parke, Davis*, in finding liability, reiterated that there was no requirement for a Sherman Act violation to find an express or implied agreement.<sup>30</sup> In addressing the district court's finding that there was no agreement between Parke, Davis and its distributors, the Court pointed, as in *Bausch & Lomb*, to the involvement of [18]wholesalers in the program.<sup>31</sup> It is clear from the opinion that involvement of wholesalers alone, aside from whether the wholesalers participated only in order to avoid termination or had given assurances to the manufacturer, was enough to go beyond the "limited dispensation" of *Colgate*.<sup>32</sup> The Court went on, however, to restate the *Colgate* pronouncement that a manufacturer could achieve adherence to a pricing policy by threatening termination.<sup>33</sup>

*Parke, Davis* appeared to mean that engaging in any conduct, even that which is not logically related to finding an agreement and which in itself is consistent with a right to threaten termination, but which goes beyond a refusal to continue dealing on the grounds of non-compliance, is enough to allow a finding of agreement:

<sup>28</sup> Alternatively, *Bausch & Lomb* could be interpreted to mean that wholesalers who acquiesce in the scheme in order to avoid termination by the manufacturer give rise to a combination between the manufacturer and the wholesalers, a result which would be inconsistent with the Court's early pronouncement of the *Colgate* doctrine. However, the Court cited *Colgate* with approval. 321 U.S. at 722.

<sup>29</sup> 362 U.S. 29 (1960).

<sup>30</sup> 362 U.S. at 43.

<sup>31</sup> "In thus involving the wholesalers to stop the flow of Parke, Davis products to the retailers, thereby inducing retailers' adherence to its suggested prices, Parke, Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." 362 U.S. at 45.

<sup>32</sup> *Id.* at 46. The Court indicated that Parke, Davis had also given rise to an agreement by securing assurances of compliance from at least one distributor, conduct which can be readily identified as bilateral. *Id.* at 46. However, this was an *additional* ground for finding a combination.

<sup>33</sup> *Id.* at 44.

. . . an unlawful combination is not just such as arises from a price maintenance agreement express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.<sup>34</sup> [19]

However, as Justice Harlan stated in his dissent, "I cannot see how such unilateral action [refusal to sell to wholesalers] permissible in itself, becomes any less unilateral because it is taken simultaneously with similar unilateral action at the retail level."<sup>35</sup> The *Parke, Davis* opinion has been the subject of much scholarly comment and criticism.<sup>36</sup> While *Parke, Davis* did not expressly overrule the *Colgate* doctrine, it left it in problematic form. There is an inherent conflict between recognizing a combination among manufacturers, wholesalers, and retailers (because both wholesalers and retailers could be terminated for refusing to comply) yet refusing to recognize a combination when retailers alone comply in order to avoid termination.

Dean Levi commented about the development of *Colgate* through *Parke, Davis*:

. . . it is a matter of concern that the law should have failed to provide itself with a meaningful structure of theory. Beyond this, it is a matter of [20]concern also that in an area involving important commercial practice the law should have developed so as to appear to put a premium on the avoidance of words which describe what the parties clearly intend. This must seem strange and degrading to men who take pride in their given word, and it fosters a caricatured view of the law.<sup>37</sup>

We believe the cases subsequent to *Parke, Davis* indicate a shift in the Court's reasoning in order to deal with the form in which the *Colgate* doctrine was preserved in the *Parke, Davis* opinion.

In *Simpson v. Union Oil Co.*,<sup>38</sup> the Court found that a manufacturer had fixed retail prices by entering into agreements with its distributors which were found to be sham consignment arrangements. While the case dealt with express agreements between the manufacturer and the distributors, the Court emphasized the presence of coercion would result in a violation of the Sherman Act:

We made clear in [*Parke, Davis*] that a supplier may not use coercion on its retail

<sup>34</sup> *Id.* at 43.

<sup>35</sup> *Id.* at 55. Justice Harlan expressed his view in dissent that the initial statement of the *Colgate* doctrine had been overruled by the majority opinion. *Id.* See, however, his dissent in *Albrecht v. Herald*, 390 U.S. at 163, fn. 7, in which he said his conclusion "was overdrawn."

<sup>36</sup> See, e.g., Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962) (hereafter, "Turner"); Fulda, *Individual Refusals to Deal: When Does Single Firm Conduct Become Vertical Restraint?* 30 Law & Contemp. Prob. 590 (1965); Patvin, *Choosing and Dropping Distributors*, 26 A.B.A. Antitrust Section 99 (1964); Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, The Supreme Court Review (1960) (hereafter, "Levi").

<sup>37</sup> Levi, *supra*, at 326.

<sup>38</sup> 377 U.S. 13 (1964).

outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is.<sup>39</sup>

It is true that there were express contracts between the manufacturer and the dealers in *Simpson* and that the contracts required the dealers to follow fixed prices. [21]The sanction imposed by the supplier in *Simpson*, however, was termination of future dealing by cancelling the dealer's lease. The basis for the violation found by the Court appeared to be the coercion resulting from a threat of lease cancellation, not any contractual duty by the dealer to charge a fixed price.

Finally, *Albrecht v. Herald Co.*<sup>40</sup> appears to signify a culmination of the Court's trend toward recognizing coercion from threatened termination and resulting unwilling compliance as sufficient for a finding of agreement for purposes of the Sherman Act. In *Albrecht*, a distributor failed to comply with the seller's designated resale price. In order to induce the distributor to comply, the seller hired an agent to solicit the distributor's customers and a second distributor to sell part of the product that had been supplied to the non-complying retailer. Eventually, the non-complying retailer was terminated. The Court found a violation of the Sherman Act. There clearly were two combinations to which the Court pointed, between the seller and the soliciting agent and between the seller and the second distributor. In addition to these combinations, however, the Court referred to two other theories of agreement. [22]

Under *Parke, Davis*, petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it.<sup>41</sup>

It is possible to limit the significance of *Albrecht* to the narrow facts of a combination between the seller and the replacement distributors. Nevertheless, the Court's statement about a combination between the manufacturer and the carrier, which would come into existence upon unwilling compliance by the carrier, convinces us, particularly in light of statements by the Court in other cases discussed below, that the Court wished to clarify that there was no right to secure unwilling compliance through the threat of termination.

Moreover, the Court also referred to its *Parke, Davis* opinion

<sup>39</sup> *Id.* at 17.

<sup>40</sup> 390 U.S. 145 (1968).

<sup>41</sup> *Id.* at 150, n.6.

apparently in an effort to make clear that compliance resulting from a threat of termination resulted in a finding of an agreement:

Parke, Davis had specified resale prices for both wholesalers and retailers and had required wholesalers to refuse to deal with non-complying retailers. It was found to have created a combination "with the retailers and the wholesalers to maintain retail prices . . ." (citation omitted) The combination with retailers arose *because their acquiescence in the suggested prices was secured by threats of termination*; the combination with wholesalers [23] arose because they cooperated in terminating price-cutting retailers. (emphasis added).<sup>42</sup>

The ALJ concluded that the Court's statements in *Albrecht* were premised on the fact that the franchisee was especially vulnerable to the danger of termination. (ID 18) While it is conceivable that the Court's holding turns on this qualification, there is no discussion of it in the opinion sufficient to indicate this factor was determinative. Consequently, we do not read *Albrecht* to say that threatened termination is only adequate to allow a finding of agreement when combined with substantial economic leverage.<sup>43</sup>

Two other Supreme Court cases, *U.S. v. Arnold, Schwinn & Co.*,<sup>44</sup> and *Perma Life Mufflers v. International Parts*,<sup>45</sup> aid in interpreting the Court's statements in *Albrecht*. [24]

In *Schwinn*, the Court considered allegations of combinations between the manufacturer and its dealers which restricted the dealer's sales practices. The district court had rejected a finding that dealers had been terminated for failing to comply with Schwinn's restrictions. The Court found there was no need to find actual termination because Schwinn had been "'firm and resolute' in insisting upon observance of territorial and customer limitations . . . and Schwinn's 'firmness' in these respects was grounded upon the communicated danger of termination."<sup>46</sup> It is not clear whether the Court was relying on a "communicated danger of termination" to find a combination or only to indicate this was sufficient to show that the agreements were actually enforced.<sup>47</sup> However, in *Perma Life*, the Court appeared to use this language as justifying a finding of combination between a seller and its distributors.

In *Perma Life*, the plaintiffs were distributors who had entered

<sup>42</sup> *Id.* at 149.

<sup>43</sup> Moreover, as we discuss further below, focusing on the degree of economic leverage in assessing whether an agreement is present would again introduce a factor that is not logically related to distinguishing bilateral and unilateral conduct. If a dealer is said to have "agreed" to comply with a manufacturer's designated prices in order to avoid termination of his franchise, it seems hardly logical to conclude there is no agreement if he complies to avoid termination of only some portion of the supplies he resells.

<sup>44</sup> 388 U.S. 365 (1967).

<sup>45</sup> 392 U.S. 134 (1968).

<sup>46</sup> 388 U.S. at 372.

<sup>47</sup> There is some evidence that Schwinn obtained actual contractual agreements with its distributors and retailers. 237 F. Supp. 323, 340-342 (N.D. Ill. 1965).

into sales agreements with the defendants. The principal issue before the Court was determining whether the plaintiffs were barred from suing defendants because they were *in para delicto*. The Court held the plaintiffs were not barred. As in *Albrecht*, the Court indicated there were alternative theories for charging a combination: [25]

[P]etitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, [citing *Albrecht* and *Simpson*], or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restrictions was induced by "the communicated danger of termination." [citing *Schwinn* and *Parke, Davis*]<sup>48</sup>

As respondent points out (RAB 26, 28–29) the *Perma Life* supplier-distributor agreements were express. Thus, the Court's statements that the combinations were formed by the "communicated danger of termination" are technically dictum. Nevertheless, these statements in both cases, it seems clear, were meant to make a separate point—that acquiescence induced by a communicated danger of termination gives rise to a combination.<sup>49</sup> Thus, after *Albrecht* and *Perma Life*, the Court appears to have interpreted *Colgate* to allow a finding of agreement when compliance with the manufacturer's wishes is coerced through threatened termination.

We do not believe that the statements in *Albrecht* and *Schwinn* regarding combinations arising because of the "communicated danger of termination" turned, as the ALJ believed (ID 18), on the franchise relationship. First, [26]nowhere in *Albrecht* or *Schwinn* did the Court state that this theory of combination turned upon the franchise relationship or the presence of economic leverage generally. Second, distinguishing between agreements arising because of the degree of economic leverage inherent in the franchise situation and compliance resulting from a threat of termination of the supply of products for resale is unsound in theory. In both situations, the manufacturer is able to induce the dealer to act contrary to his own pricing preferences in order to avoid economic loss. For example, a supplier who has the right to cancel a distributor's lease may not have extracted an express assurance of compliance with his pricing policy. Similarly, a supplier who may decide to cease supplying a dealer, may not have extracted a promise of compliance. In both cases, there is no contractual obligation for the supplier to continue

<sup>48</sup> 392 U.S. at 142.

<sup>49</sup> See also, *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1315 (5th Cir. 1976). "Reliance on *Schwinn* makes it clear that the firm and resolute language in that opinion was meant to show the existence of an agreement."; *Yentsch v. Texaco*, 1980-2 Trade Cas. ¶63,349 at 75,785 (2d Cir. 1980). Professors Pitofsky and Dam disagree over the meaning of this language in *Schwinn*. Pitofsky and Dam, *Is the Colgate Doctrine Dead?* 37 Antitr. L.J. 772, 776-777, 785 (1968) (hereafter "Pitofsky and Dam").

to deal or for the dealer to charge certain prices. However, in both cases, the supplier can make continued dealing contingent upon the dealer's performance of some condition. Unwilling compliance with the supplier's pricing policies to avoid termination necessarily implies at least some economic leverage over the dealer, just as does unwilling compliance in order to avoid lease cancellation. The successful use of such leverage is the essence of coercion.

Lower court cases after *Albrecht* and *Perma Life* have rarely dealt with factual circumstances closely analogous to those presented here. For example, several cases cited by respondent (see RAB 32) do not deal with threatened termination [27] for failure to abide by suggested prices.<sup>50</sup> Another involved conduct by the manufacturer which clearly exceeds such threatened termination.<sup>51</sup> While these cases cite *Colgate* they are not particularly helpful in articulating the precise meaning of the *Colgate* doctrine, at least for purposes of analyzing Stover's policies. Some cases, however, do present a closer factual picture and one which is more helpful in illustrating the lower court's views concerning the *Colgate* doctrine.

In *Broussard v. Socony Mobil Oil Co.*,<sup>52</sup> the court of appeals reviewed a claim by a distributor plaintiff whose lease had been cancelled by the defendant manufacturer when plaintiff refused to abide by the defendant's pricing policies. The court found that the defendant's failure to renew the lease was not a unilateral refusal to deal protected by *Colgate* because the defendant exercised the power, not only to terminate the supply of product to the distributor, but also to terminate the plaintiff's "entire service station operation." A combination was created between the [28] manufacturer and the distributor during the period of his compliance.<sup>53</sup>

*Quinn v. Mobil Oil Company*<sup>54</sup> was similar to *Broussard* in that the plaintiff's lease was cancelled after he failed to comply with the supplier's pricing policies. The court of appeals found no agreement was formed on two grounds. First, the plaintiff never complied with the defendant's pricing policy.<sup>55</sup> Second, there was no allegation that the defendant's pricing policy was "part of a general price mainte-

<sup>50</sup> See e.g., *Alladin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978) (*en banc*), *cert. denied*, 439 U.S. 946 (1978); *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 380 F.2d 112 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968).

<sup>51</sup> *Adolph Coors Co. v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974).

<sup>52</sup> 350 F.2d 346 (5th Cir. 1965).

<sup>53</sup> *Id.* at 350.

<sup>54</sup> 375 F.2d 273 (1st Cir. 1967), *cert. denied*, 389 U.S. 801 (1967).

<sup>55</sup> *Id.* at 276.

nance scheme or policy or that any other dealer reduced his retail price as a result of defenant's insistence . . . ."<sup>56</sup> In *Butera v. Sun Oil Co., Inc.*,<sup>57</sup> the distributor sued his supplier alleging a resale price maintenance scheme. The court found no liability on the grounds that the supplier had not threatened any action [29]contingent upon the dealer's compliance with suggested prices:

. . . a case of illegal price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric "coercion," but it must involve making a meaningful event depend upon compliance or non-compliance with the "suggested" or stated price.<sup>58</sup>

In *Gray v. Shell Oil Co.*,<sup>59</sup> the Ninth Circuit Court of Appeals drew a distinction between "coercion" and "exposition, persuasion and argument" in stating the permissible limits of the *Colgate* doctrine. The Ninth Circuit commented on this standard in reviewing a claim of resale price maintenance in *Hanson v. Shell Oil Co.*,<sup>60</sup> in 1976. *Hanson* dealt with allegations of resale price-fixing by a distributor. The court did not find that the distributor had been coerced sufficiently to deprive him of his free choice. However the court stated that:

If the agreement between the supplier and his buyer is reached because of coercive conduct toward non-complying buyers, *such as refusals to deal*, a violation is . . . made out. [Citing *Simpson*, supra.] (emphasis added) [30]

A significant case in assessing the meaning of *Colgate*, and one upon which complaint counsel rely heavily, is *Yentsch v. Texaco, Inc.*<sup>61</sup> In *Yentsch* a terminated distributor alleged vertical price-fixing by the manufacturer. The plaintiff claimed that Texaco had threatened him with termination and, after he had continued to fail to comply with Texaco's pricing policy, terminated his lease. In finding that Texaco had gone beyond *Colgate* protection, the court found:

there was sufficient evidence here, although just barely, to find an illegal combination to maintain resale prices between Texaco and . . . other dealers, and between Texaco and [the plaintiff]. Texaco went beyond *Colgate's* safe harbor of announcement plus mere refusal to deal by creating a coercive business climate in which dealers knew of

<sup>56</sup> *Id.*

<sup>57</sup> 496 F.2d 434 (1st Cir. 1974).

<sup>58</sup> *Id.* at 437. The court's reasoning is consistent with the proposition that a threat of termination contingent upon non-compliance would be sufficient for a finding of agreement. However, in a footnote, the court indicated its understanding of *Colgate* to be that making continued dealing contingent upon compliance was protected. *Id.* at 437, fn. 7.

<sup>59</sup> 469 F. 2d 742, 748 (9th Cir. 1972).

<sup>60</sup> 541 F.2d 1354 (9th Cir. 1976).

<sup>61</sup> 1980-2 Trade Cas. ¶ 63,349 (2d Cir. 1980).

the low price policy, understood the consequences of failure to comply and thus generally complied.<sup>62</sup>

At several points the court stated that threats of termination were sufficient to go beyond a mere refusal to deal.

Texaco's threats of termination to enforce its price policy were sufficient to satisfy the *Parke, Davis - Albrecht* standards of "means beyond mere refusal to deal" and "firm enforcement."<sup>63</sup> [31]

While evidence of exposition, persuasion, argument or pressure alone is insufficient to establish coercion [citations omitted], threats of termination, as long as they secure adherence to the fixed price, have been deemed to trespass beyond the boundaries of *Colgate*, thereby triggering a finding of an illegal combination. [citing *Albrecht*.]<sup>64</sup>

Respondent argues (RAB 32-33) that *Yentsch* should not be read to mean that compliance resulting from the threat of termination is sufficient to constitute an agreement. Respondent distinguishes *Yentsch* on the grounds that the defendant supplier had repeatedly warned the defendant that he would be terminated unless he followed the supplier's pricing policies. The ALJ, siding with respondent in his interpretation of *Yentsch*, distinguished the case on the basis of the existence of a short-term lease with the supplier, the threats of lease-cancellation and price surveillance. (ID 17, n.16) However, the court's finding of an agreement does not appear to require the presence of price-monitoring.<sup>65</sup> In addition, as we discuss further below, we do not believe there is a significant distinction between a threat to cancel a lease and a threat to terminate dealing.

Respondent relies heavily upon *Klein v. American Luggage Works, Inc.*<sup>66</sup> In *Klein*, the defendant manufacturer suggested resale prices to retailers. Salesmen were [32]instructed to advise new accounts that full compliance with suggested prices was mandatory. There was some evidence of price-monitoring by the manufacturer. Representatives of the manufacturer visited plaintiff Klein's store and discovered he was discounting. Klein was given notice of termination. At a subsequent meeting, Klein was informed that resumption of his account was conditional upon compliance with suggested prices, but he refused.

The district court found that the defendant had formed combinations with competitors of Klein on the basis of conduct which exceeded an announced policy of termination, including frequently

<sup>62</sup> *Id.* at 75,784.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 75,784-85. The court cited, as support, *Albrecht and Bowen v. New York News, Inc.*, 522 F.2d 1242, 1254 (2d Cir. 1975).

<sup>65</sup> "The coercive atmosphere may have been enhanced by a policy of price surveillance." (emphasis added) *Id.*

<sup>66</sup> 323 F.2d 787 (3d Cir. 1963).

sending price literature to the dealers and using solicitation practices that were “tantamount to an implied promise to comply with ticketed prices.”<sup>67</sup> In particular, the court found that “[i]n the face of an advance announcement by the manufacturer that price cutters will be denied supply, a seller’s compliance with prices suggested strongly infers a tacit or implied resale price maintenance agreement.”<sup>68</sup> The court found the arrangement to be indistinguishable from a horizontal price-fixing conspiracy among the dealers.<sup>69</sup> The court of appeals found no horizontal conspiracy and held, based on *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*,<sup>70</sup> that there was at most conscious parallelism of action between the department [33]stores.<sup>71</sup> The court of appeals rejected the proposition that “retailers who adhere to suggested retail prices, knowing that compliance by competitors is expected by the manufacturer in consonance with his price maintenance policy, thereby, without more, become co-conspirators with the manufacturer.”<sup>72</sup>

We read this case to hold that willing compliance with a pricing program by multiple distributors who know compliance is expected by the manufacturer as a condition of continued dealing, does not, without more, create a vertical-horizontal combination involving the supplier and the dealers. We discuss this theory of a vertical-horizontal combination below and whether it is applicable to the factual record presented here. However, the *Klein* court did not deal specifically with the question of whether unwilling compliance resulting from fear of termination constitutes an agreement. Nevertheless, even if the *Klein* court would not have found a vertical agreement based upon unwilling compliance and threatened termination, we note this case was decided before *Albrecht* and *Perma Life*.

In addition to *Quinn* and *Klein*, discussed above, the ALJ relied upon *Dart Drug Corp. v. Parke, Davis*<sup>73</sup> in finding no agreement was present in this case. In *Dart Drug* [34]the plaintiff attempted to rely upon a prior government judgment to support a vertical price-fixing action against *Parke, Davis*. The court found that Dart has relied upon facts proved in the government’s case to support its claim of a conspiracy occurring in a later time period and, therefore, the

<sup>67</sup> 206 F. Supp. 924 (D. Del. 1962).

<sup>68</sup> *Id.* at 937.

<sup>69</sup> *Id.* at 937-8.

<sup>70</sup> 346 U.S. 537 (1954).

<sup>71</sup> 323 F.2d at 791.

<sup>72</sup> *Id.*

<sup>73</sup> 344 F.2d 173 (D.C. Cir. 1963).

plaintiff had failed to present evidence of an agreement in the relevant time period.<sup>74</sup> While the plaintiff had demonstrated it had been terminated by the defendant, it had not shown whether the motivation was for discounting or for presenting testimony against it in the government case.<sup>75</sup> The court specifically did not address the limits of the *Colgate* doctrine,<sup>76</sup> nor did it decide whether or not coerced compliance as a result of threatened termination constitutes an agreement. Moreover, this case, like *Klein*, was decided before *Albrecht* and *Perma Life*.

## 2. Agreement Based Upon Threatened Termination

Our review of Supreme Court and lower court cases convinces us that, despite the Court's original pronouncement concerning the right of a manufacturer to threaten termination for failing to comply with pricing policies, that right has been circumscribed by a prohibition on the securing of unwilling compliance through the coercion [35]inherent in threatened termination. We recognize that our interpretation is not free from doubt. Despite the strong language in a number of opinions, e.g., *Albrecht*, *Schwinn*, *Hanson* and *Yentsch*, that coercion from threatened termination which leads to unwilling compliance is sufficient for finding an agreement, there are other factors which could be relied upon as distinguishing it from the case presented here. For example, in *Albrecht*, the supplier hired a substitute distributor. In *Schwinn* the manufacturer could be said to have exercised substantial economic leverage over the distributors. In *Yentsch*, the manufacturer apparently threatened termination a number of times rather than just once and, as in *Hanson*, the supplier had the right to terminate the dealer's lease.

However, we do not believe that these cases should be read to compel the conclusion that they should be limited to their precise facts. Such an interpretation, we believe, elevates form over substance by focusing on factors which are actually tangential to the real ongoing relationship between suppliers and distributors. No doubt, there has been a tendency for some "extra" factor, beyond threatened termination, though not necessarily significant in itself, to be present in the evidentiary record when courts have analyzed a claim that a dealer has been coerced into compliance with the manufacturer's pricing policies. The presence of this "extra" factor seems to have provided at least an arguable rationale, though doing some theoretical damage in the process, for maintaining the Court's

<sup>74</sup> "What must be proved is that the act occurred in a contemporaneous framework of the combination, conspiracy, or agreement forbidden by the statute. And that proof may not be supplied by a judgment which establishes no more than that such a framework did exist at an earlier point in time." 344 F.2d at 186.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

original [36]statement of the *Colgate* doctrine. *Parke, Davis*, in fact, appeared to sanction this very type of analysis. However, the logic of the Court's statements in *Albrecht, Perma Life*, and other post-*Parke, Davis* opinions convinces us that the *Parke, Davis* "plus factor" requirement for an agreement to be found was not intended to be essential where unwilling compliance resulting from threatened termination is present.<sup>77</sup> While it is true that there is no Supreme Court holding to this effect, we must interpret *Colgate* in light of a history of an evolving standard and a series of clarifying cases. In effect, the "plus factor" requirement has evolved to serve as a device for the courts to infer the presence of coercion, a concept that the Court has utilized to connote bilateral behavior.<sup>78</sup> Here, coercion is clearly present and provides direct evidence that bilateral behavior, and hence agreements, [37]existed. Consequently, we believe that, were the Court faced with the factual record presented here, an agreement would be found.

We conclude, therefore, that there is no sound legal distinction between coercion resulting from the threat of cancelling a lease or terminating a franchise and coercion resulting from a communicated policy of terminating supply of products for resale to dealers who fail to comply with the manufacturer's pricing policies. In both sets of situations the distributor is induced to act contrary to its preferences in order to avoid termination or other sanctions. It is important to note that we are not dealing here with mere parallel behavior, that is, where dealers decide independently to charge the same prices suggested by manufacturers. Rather, we are faced with an unambiguous factual record establishing that a number of dealers comply with Stover's pricing policy in order to avoid termination. (IDF 24) Absent the threat of termination, they would charge lower prices. This conduct—a threatened action of refusal to continue dealing, followed by unwilling compliance in order to avoid the threatened sanction, followed by continued dealing—is the antithesis of unilateral behavior.<sup>79</sup>

<sup>77</sup> In 1968, this Commission issued an advisory opinion stating the Commission's view that a "seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy." 16 C.F.R. 15.163 (1968). That opinion, which disapproved a proposal by a supplier to refuse dealing with retailers who used the term "sale" or similar words in advertisements, preceded *Albrecht* and *Perma Life*. Thus, to the extent that advisory opinion differs from our conclusions, we decline to follow it.

<sup>78</sup> Coercion, as used here and in prior court cases, means that dealers are constrained in a practical commercial sense. Consequently, we disagree that coercion can only exist if no other suppliers stand ready to sell comparable products to the distributor as Chairman Miller's dissent proposes. Using "coercion" in that sense would describe only a handful of real-life situations and would represent a marked departure from prior cases.

<sup>79</sup> "The short of the matter is that a distinction between a program of resale price maintenance effected by contracts and 'agreements,' and one effected by threats of refusal to deal, is wholly untenable as a practical or logical matter unless 'agreement' is defined to exclude tacit or implied agreements." Turner, *supra*, at 686-687.

### 3. *Agreement Based Upon Invitation and Acceptance*

Complaint counsel present a second theory of vertical agreement between Stover and its dealers based upon Stover's [38] invitation to its dealers to participate in a plan and the dealers' acquiescence. (CAB 9-14) The complaint in this matter did not allege a horizontal combination among the dealers as the ALJ recognized. (ID 13) Complaint counsel argue, however, based on *Interstate Circuit, Inc. v. U.S.*<sup>80</sup> that the record shows vertical agreements have been created because the manufacturer has invited a series of distributors to participate in a scheme to charge particular prices and each distributor has expressed his assent and participated in the scheme. Complaint counsel urge us to adopt this theory of agreement by adherence to the manufacturer's pricing program, motivated by the prospect of uniformly higher prices and lack of price competition among their competitor distributors, in addition to a theory of agreement based on unwilling compliance by distributors wishing to avoid termination. The ALJ rejected this theory on the ground that:

no court has yet invoked the rationale of "invitation and acceptance" to hold that a declaration of pricing policy initiated by the manufacturer represents an invitation to dealers to participate in either a vertical or horizontal price-fixing agreement forbidden by the Sherman Act. (ID 13)

For reasons we discuss below, we also decline to adopt this theory as a basis for liability.

*Interstate Circuit* involved a movie theatre chain's inducement of its distributors to enter into identical contracts regarding pricing and exhibition of films. In particular, the chain sent letters to the distributors, disclosing the names of the other addressees, demanding that [39]the distributors refuse to supply first run films to theatres which did not charge specified prices or which showed their films as part of a double feature. The Court found a conspiracy among the distributors and between the distributors and the theatre chain. The Court pointed to the fact that "[e]ach distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan."<sup>81</sup> Under these circumstances:

Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of trade, is sufficient to establish an unlawful conspiracy under the Sherman Act.<sup>82</sup>

<sup>80</sup> 306 U.S. 208 (1939).

<sup>81</sup> *Id.* at 226.

<sup>82</sup> *Id.* at 227.

Subsequently, the Court applied a similar analysis in *U.S. v. Masonite Corp.*<sup>83</sup> In *Masonite* a manufacturer fixed resale prices by entering into a series of vertical agreements with its distributors. The Court in finding a vertical-horizontal combination including the manufacturer and the dealers, repeated the statement made in *Interstate Circuit*, “[I]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.”<sup>84</sup>

In effect, complaint counsel argue that the *Interstate Circuit* analysis is applicable here because Stover dealers acquiesce in the designated prices only because they are [40]highly confident their competitor dealers will as well.<sup>85</sup> This confidence is engendered by the general knowledge that non-compliance results in termination.

Professor Turner, in a 1962 article, endorsed applying the *Interstate Circuit* analysis to a manufacturer’s invitation to dealers to acquiesce in his pricing policies.

To apply *Interstate Circuit* language, a manufacturer’s stated policy of dealing only with distributors who sell at not less than a stipulated price is inevitably, in his approach to each and all distributors, “an invitation to participate in a plan, the necessary consequence of which [in light of *Dr. Miles*] is restraint of interstate commerce.” Moreover, each distributor knows “that concerted action is contemplated and invited”; each gives his adherence to and participates in it. A fortiori such a program falls within the minimal elements held to be a vertical-horizontal conspiracy in *Masonite*.<sup>86</sup>

Professor Turner cautioned, however, that this approach might lead to unsatisfactory results in analyzing other types of manufacturer-dealer agreements, e.g., territorial restrictions.<sup>87</sup>

It is no doubt true that conditioning future dealing upon compliance is a significant factor in inducing many dealers to adhere to the manufacturer’s pricing policies. [41]First, it may have the coercive effect of obtaining compliance by threatening termination. Second, it may make the manufacturer’s pricing policies more attractive because it engenders confidence that other dealers will follow these policies as well. Some dealers may prefer that the manufacturer implement such a policy so that the possibility of price competition is

<sup>83</sup> 316 U.S. 265 (1942).

<sup>84</sup> *Id.* at 274-275.

<sup>85</sup> Complaint counsel make clear that they rely on *Interstate Circuit* only for “its reliance on circumstantial factors from which it inferred a vertical agreement.” (CAB 11) However, the vertical agreements in both *Interstate Circuit* and *Masonite* were express. We understand complaint counsel’s analysis, therefore, to turn on the economic incentives to dealers to pursue uniform pricing policies stemming from the manufacturer’s solicitation of such common action. (See CAB at 10-11) As we discuss further below, *Interstate Circuit* does suggest such an analysis would be appropriate, under some circumstances, with or without express vertical agreements.

<sup>86</sup> Turner, *supra*, at 696.

<sup>87</sup> *Id.* at 696-703.

eliminated and the dealer may pursue a policy of charging designated prices without fear of competing discounts.

We do not adopt, however, the proposition that a vertical-horizontal combination, as described in *Interstate Circuit*, has been demonstrated on the basis of this factual record. The significant analytical problem in *Interstate Circuit* was determining whether there was a horizontal combination among distributors. The vertical agreements on the other hand, were express. Consequently, *Interstate Circuit* presented the problem of classifying restraints as vertical, horizontal, or both. Because of the sufficient interdependence among the distributors, the Court found the restraints were horizontal as well as vertical.<sup>88</sup> In *Schwinn*, the Supreme Court also dealt with classifying restraints as vertical or horizontal. The Court gave some guidance for classifying restraints:

. . . we are here confronted with challenged vertical restrictions as to territory and dealers. The source of the restriction is the manufacturer. These are not horizontal restraints in which the actors are distributors with or without the manufacturer's participation.<sup>89</sup> [42]

Later in the opinion the Court emphasized that it was:

. . . dealing here with a vertical restraint embodying the unilateral program of a single manufacturer. We are not dealing with a combination of manufacturers . . . or of distributors . . . We are not dealing with a "division" of territory in the sense of allocation by and among distributors . . . or an agreement among distributors to restrict their competition . . . We are concerned here with a truly vertical arrangement . . . (citations omitted)<sup>90</sup>

In *Coca-Cola Co.*,<sup>91</sup> we considered whether express territorial restrictions on bottlers were vertical only or both horizontal and vertical. There, we considered the history of the territorial restrictions, the essential relationships among the bottlers and the manufacturer, the degree of competition between the manufacturer and the bottlers, and the role of the bottlers in the institution of the restrictions in determining whether they could fairly be characterized as horizontal.<sup>92</sup>

A manufacturer's pronouncement that continued dealing is contingent upon compliance with designated prices, followed by widespread compliance, without more, is insufficient for a finding of such

<sup>88</sup> In addition to the other factors present in *Interstate Circuit*, there was an absence of testimony on the part of the defendants to rebut the claim of a conspiracy. On the basis of all these factors, the Court held a jury could infer a conspiracy.

<sup>89</sup> *Schwinn*, 388 U.S. at 372.

<sup>90</sup> *Id.* at 378.

<sup>91</sup> 81 F.T.C. 517 (1978).

<sup>92</sup> *Id.* at 610-614. The Commission found that restraints at issue in *Coca Cola* to be more fairly characterized as vertical.

vertical-horizontal combination. In such a situation, there is no evidence that the dealers themselves played a role in initiating the plan, that the manufacturer wishes to avoid horizontal competition [43]between itself and one or more of its dealers, or any other factor suggesting interdependence among horizontal competitors other than the knowledge that other dealers are in the same situation and that, because of the manufacturer's policies, price competition is unlikely. To find a vertical-horizontal combination on those facts alone would call into question the lawfulness of any vertical agreements, express or implied, between suppliers and dealers, by raising an inference of a horizontal combination among dealers.

Moreover, to find such a vertical-horizontal combination on the basis of this "invitation and acceptance" analysis, without other factors suggesting the restraints can be characterized as horizontal, would also cast doubt on the freedom of the manufacturer's initial selection of dealers. An announced policy of initial selection of dealers based on likely pricing policies also creates a degree of confidence on the part of dealers that suggested prices will be followed. As we state further below, however, our interpretation of *Colgate* does not lead to the conclusion that an *initial* decision to distribute through particular dealers, even if made on the basis of their likely pricing policies, is sufficient for a finding of an agreement between the manufacturer and the dealer or among the dealers. In the case of initial customer selection, where there are no express or implied assurances concerning future pricing policies given by the dealer, there is only an expectation that the manufacturer's preferences will be followed. While dealers will have some basis for expecting other distributors, [44]similarly chosen, to follow the manufacturer's pricing policies, there is substantially less ground for this expectation than when the coercion of threatened termination is present. Each dealer is aware that competitor dealers are free to change their pricing practices, permanently or temporarily, without fear of termination. In a relatively unconcentrated market with many sellers, if individual sellers can expand sales and profits by reducing prices, some are likely to do so. Under these market conditions, a high degree of price uniformity is much less likely than if non-complying dealers may be terminated.

As we have stated, when dealers' pricing policies are constrained because of the threat of termination, there is coercion and an agreement is present. Thus, when a manufacturer "invites" a dealer to deal under the condition that continued dealing depends upon compliance with his pricing policies, and, as a result, the dealer follows pricing policies he would not otherwise follow in order to

avoid termination, there is bilateral conduct. On the other hand, when the dealer's pricing policies are unaffected by the threat of termination or other sanctions, such conduct is more appropriately characterized as unilateral, though consistent (or "parallel") with the manufacturer's preferences.<sup>93</sup> [45]

Thus, in the situation where dealers follow manufacturer's pricing policies solely because they are confident others will do so and this confidence is based only on the manufacturer's initial customer selection policy, we conclude there is no vertical agreement between the manufacturer and the dealer, nor a horizontal agreement among the dealers.

Similarly, *suggested* prices followed by widespread compliance, without more, does not constitute "invitation and acceptance" sufficient for a finding of vertical-horizontal combinations described in *Interstate Circuit* and *Masonite*. In such a situation, there is insufficient interdependence among the dealers to conclude that they are participants in a horizontal price-fixing scheme; nor is there sufficient bilateral conduct by the supplier and its dealers to find vertical agreements between them. We also agree with respondent that exchanges of market-price information between a manufacturer and its distributors, standing alone, do not imply agreements as to resale prices. (See RAB 51)

#### 4. *Additional Policy Considerations*

Any interpretation of the *Colgate* doctrine carries with it a number of ramifications for manufacturer-supplier dealings and, thus, raises certain significant policy considerations. We address in this section the most important of these considerations, including a number of arguments raised by respondent. [46]

##### (i) *Proof of Agreements*

If, as is our view, an agreement is created when there is unwilling compliance resulting from a threat of termination, it follows that a pricing program which includes an announced threat of termination would likely result in the creation of unlawful agreements. This result follows because manufacturers presumably threaten termination, at least in part, to discourage deviations from their pricing policies. An announced policy of terminating non-complying dealers, *standing alone*, does not *automatically* create a combination because such a policy *standing alone* does not necessarily imply any dealers act to avoid the carrying out of the threat. However, if, as is likely,

<sup>93</sup> Of course, any express or implied assurances or other course of dealing which would create an implied contract has long been held to result in an agreement. See, e.g., *Frey & Sons v. Cudahy Packing Co.*, 256 U.S. 208 (1921). We refer here only to the situation where there is no such implied contract or other behavior by the manufacturer recognized in previous cases to allow for the finding of an agreement.

some dealers do act to avoid termination, their unwilling compliance does give rise to combinations. In short, an announced policy of terminating dealers for non-compliance would not lead to agreements only if it had no effect in influencing dealer behavior, a principal reason for announcing the policy in the first place. Thus, an announced policy of terminating discounters, coupled with widespread compliance, with or without actual terminations, should be adequate to support an inference that there is unwilling compliance and, hence, that there are agreements.<sup>94</sup>

Complaint counsel argue that an *unannounced* policy of termination could be pursued by a manufacturer without necessarily resulting in combinations. (CAB 45) They make [47]the theoretical point that an unannounced policy of termination does not necessarily influence dealers' behavior if they remain unaware of it. While this proposition is true in theory, it is likely that any terminations, once they were actually carried out, would be quickly known to other dealers. Thus, while there would be no formally announced policy, the practice of terminating dealers for non-compliance would be well-known through informal communication. As a consequence, there would still be a "communicated danger of termination" and unwilling compliance resulting from dealers' wishing to avoid termination.

Suits claiming vertical price-fixing typically occur after a non-complying distributor has been terminated. The courts have indicated that a party (whether the terminated distributor himself or others) could allege three types of agreements as the basis of a Sherman Act Section 1-type claim. First, he could allege a combination between the supplier and the terminated distributor.<sup>95</sup> The *in pari delicto* doctrine does not bar a claim based on such an agreement. Second, he could claim combinations between the manufacturer and other dealers who have not been terminated.<sup>96</sup> [48]Third, he could claim a combination between the supplier and others, e.g., an agent who solicits sales away from a non-complying distributor.

In our view, a distributor who unwillingly complies with a supplier's pricing policies in order to avoid termination, but who is

<sup>94</sup> *Albrecht v. Herald*, 390 U.S. at 150, n.6; See also, *Yentsch v. Texaco*, 1980-2 Trade Cases at 75,783-84.

<sup>95</sup> *Perma Life Mufflers v. International Parts*, *supra*; *Simpson v. Union Oil Co.*, *supra*.

<sup>96</sup> See, e.g., *Perma Life*, 392 U.S. at 142. If a claim of vertical price-fixing could be based only upon an agreement between a supplier and a distributor coerced into compliance, the ironic result would be to deny recovery to a terminated distributor who resists coercion until the supplier stops dealing with him. As Justice Harlan observed, "Obviously it makes no sense to deny recovery to a pressured retailer who resists temptation to the last and grant it to one who momentarily yields but is restored to virtue by the vision of treble damages. It is not the momentary acquiescence but the punishment for refusing to acquiesce that does the damage on which recovery is based." *Albrecht v. Herald*, 390 U.S. at 162.

subsequently terminated after failing to comply, has entered into an agreement with the supplier. Respondent argues (RAB 51-52) that this interpretation would make the crucial evidence of liability turn only on the dealer's state of mind. We disagree. In the absence of an announced policy of terminating discounters and obvious termination on those grounds, a terminated dealer would still have to show that his compliance with the supplier's policies took place in the presence of some indicia of coercion, e.g., termination of other dealers for discounting, monitoring of prices by the manufacturer, etc. Second, he would have to show that the termination was related to his non-compliance.

Similarly, in the case where a terminated dealer relies upon the existence of combinations between the supplier and other distributors, and there is no announced policy of terminating discounters, inference of agreements would have to be established by other credible evidence. As we have stated, *Albrecht* indicates that such an inference is established if there is an announced policy of terminating non-complying dealers, enforcement of the policy, and widespread compliance. In a case where there is no such announced policy, a party [49]attempting to show an agreement would be obliged to demonstrate that the supplier had implemented an unannounced policy of terminating non-complying dealers (which inherently creates a threat of termination) or had engaged in other conduct sufficient to create a coercive climate likely to lead to unwilling compliance.<sup>97</sup>

#### (ii) *Commercial Adherence*

Respondent argues (RAB 51-52) that interpreting the *Colgate* doctrine so as to preclude finding an agreement where there is unwilling compliance based upon threatened termination creates a standard of liability based upon objective factors—the presence of any conduct by a seller beyond an announced threat of termination and actual terminations. In effect, respondent argues that an interpretation of *Colgate* which carves out certain allowable conduct, even though it may be illogical when compared with other condemned conduct, is at least capable of practical [50]adherence and proof when challenged. As we have discussed above, however, dealers who claim agreements because of coercion resulting from

<sup>97</sup> See, e.g., *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967), cert. denied, 389 U.S. 801 (1967). "The allegation that defendant terminated the lease, despite the fact that plaintiff's business had increased substantially, perhaps came close to raising an inference that defendant was policing a general scheme to fix prices for the area. But this court should not be required to so speculate. Nor is it too much to require this plaintiff, absent the showing of an agreement, to allege . . . that the acts took place within the larger framework of a pricing program, policy, or conspiracy . . . Id. at 276. (emphasis added); See also, *Isaac, Unilateral Refusal to Deal: Colgate is Dead*, 30 Ohio State L.J. 537, 546 (1969) (hereafter "Isaac"); Turner, *supra*.

threatened termination are required to present evidence beyond testimony as to their state of mind. An additional flaw in respondents' argument, however, is that it is very difficult in a real life business setting to adhere to the narrow sliver of permissible conduct which respondent would allow under *Colgate*, and, rather than aid in reaching correct results in litigation, such a standard may often act as a shield, complicating proof problems and leading to arbitrary results.

As we have seen, the series of decisions interpreting *Colgate* have consistently narrowed the conduct which is arguably permissible under the doctrine. In addition to prohibitions on any written or verbal contractual agreements, there are severe restrictions on implementing any pricing policy which includes a policy of termination for non-compliance. First, it is clear that a manufacturer may not seek express assurances of compliance from distributors that they will comply with the manufacturer's pricing policies.<sup>98</sup> Doing so would surely give rise to an implied agreement. Reinstatement of a previously non-complying distributor would raise a similar inference.<sup>99</sup> Second, involvement of wholesalers or others in implementing a [51]pricing program will be held to have gone beyond a mere refusal to sell.<sup>100</sup> Third, the implementation of a monitoring program to determine if dealers are complying will lead to a finding of coercion and, consequently, a finding of agreement.<sup>101</sup> If a manufacturer goes into competition with a non-complying dealer or arranges with another dealer to do so, in order to induce compliance, it will have created a combination for purposes of the Sherman Act.<sup>102</sup> [52]

In addition to these practical problems in implementing a pricing policy, recent cases suggest that significant economic leverage by the supplier over a distributor creates an additional factor, one going beyond a mere refusal to sell, that may give rise to an agreement. As noted above, the ALJ interpreted the Court's statements in *Albrecht*

<sup>98</sup> *U.S. v. Parke, Davis & Co.*, 362 U.S. at 45-48.

<sup>99</sup> *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); See also Sullivan, Handbook of the Law of Antitrust 393 (1977) (hereafter "Sullivan").

<sup>100</sup> *Parke, Davis, supra*. Consequently, it has been suggested that manufacturers who distribute through both a one-tier and two-tiered distribution system could not rely on *Colgate* to implement a policy of terminating discounting distributors who buy directly. Since the manufacturer could not control pricing policies of the indirect buyers, it would be obliged to allow direct buyers to compete with them by lowering their prices as well. See Pitofsky and Dam, *supra*, at 778-779.

<sup>101</sup> *Parke, Davis*, 362 U.S. at 43; *FTC v. Beech Nut, supra*; *U.S. v. Bausch & Lomb, supra*. If other distributors act as informers, there is likely to be found a combination between the manufacturer and the monitoring distributor. If the supplier itself engages in monitoring, the "extra" factor of price monitoring will be said to go beyond a mere refusal to deal under *Parke, Davis*. See Pitofsky and Dam, *supra*, at 779. If a competing distributor complains and termination follows, an inference of a horizontal combination may be raised. See *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). See also, *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 458 F.2d 127 (3d Cir. 1978).

<sup>102</sup> *Albrecht v. Herald, supra*.

as turning on the particular economic vulnerability of the franchisee to termination. (ID 16-18). Some scholarly commentary also argues that the economic power of the manufacturer over the dealer creates another exception to any *Colgate*-created right of a manufacturer to enforce a pricing policy through threats of termination.<sup>103</sup>

We believe such a distinction based upon the presence of economic leverage over the distributor is unsound in theory and inconsistent with case precedent. As we discussed above, cases in which the supplier has a lease with a short-term cancellation right is no different from a supplier who decides whether to continue dealing with a distributor. In both cases, there is not necessarily a contractual obligation for the supplier to continue to deal. However, making continuation of dealing contingent upon the dealer's [53] performance of some condition leads to bilateral conduct if the dealer's policies are thereby affected. Moreover, unwilling compliance with the supplier's pricing policies to avoid termination necessarily implies some leverage over the dealer. In any event, adopting a theory of leverage as an "extra" factor would add an additional element of ambiguity and uncertainty in adhering to the interpretation of the *Colgate* doctrine advocated by respondent.

As the ALJ commented, it is doubtful that in the real world a pricing policy could be implemented which included an announced threat of termination without running afoul of one of the *Colgate* exceptions. (ID 22) And as one court commented, even before the *Schwinn*, *Albrecht*, and *Perma Life* decisions, "[t]he Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."<sup>104</sup> Antitrust scholars appear to be in general agreement that the ability to implement an announced policy of terminating discounters without engaging in any additional conduct that [54] could be said to go beyond a "mere declination to sell" is unlikely.<sup>105</sup> Finally, antitrust counseling and business planning generally do not rely upon the Court's original statement of the *Colgate* doctrine to protect a policy of terminating discounters from antitrust liability.<sup>106</sup>

<sup>103</sup> Isaac, *supra*, at 542-550; Sullivan, *supra*, at 394.

<sup>104</sup> *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960).

<sup>105</sup> Pitofsky and Dam, *supra*, at 778-781; Halper, 22 *Antitrust L.J.* 49 (1963); Sullivan, *supra*, at 394-395.

<sup>106</sup> See, e.g., Sullivan, *supra*, at 394-395. "*Colgate* . . . may often suggest itself to a defendant as a small sheet to windward, but it is quite useless as a planning device or as a basis for counseling. No firm may with any confidence plan to execute a program for maintaining resale prices through policy announcement and exercise of its right to refuse to deal." *Id.* at 395.

See also a hypothetical colloquy created as a practical guide to commercial practice appearing in a reprint of the proceedings of the National Institute on Antitrust Counseling and the Marketing Process, 49 *Antitr. L.J.* 415, 483 (1981).

These considerations, we believe, strongly support our interpretation of the *Colgate* doctrine. We are reluctant to interpret any legal doctrine in a way that makes practical adherence to it so difficult.

(iii) *Imposing Liability on Coerced Dealers*

It can be argued that interpreting the *Colgate* doctrine so as to find agreements when dealers are coerced into compliance through threatened termination unfairly subjects [55]dealers to liability for their participation in a vertical price-fixing conspiracy. We disagree. Sherman Act analysis has, for the most part, not distinguished between parties based upon whether they were more or less culpable as long as they were found to be parties to an unlawful combination. Consequently, a dealer would theoretically be liable under respondent's interpretation of *Colgate* in cases where the dealers are coerced into compliance by price-monitoring or by explicit threats from sales representatives, or are persuaded to give express assurances of future compliance, written or verbal, to the manufacturer. Under all these situations, combinations have been found and, at least in theory, the coerced dealers were party to a vertical price-fixing conspiracy, despite the fact that they were coerced by the manufacturer into sacrificing pricing freedom they would prefer to retain.<sup>107</sup> The same result of dealer liability occurs if a non-complying distributor is reinstated on the understanding that he will comply in the future or if a supplier coerces compliance by temporarily reducing the amount of supplies furnished to the dealer for resale. Thus, we do not understand how an interpretation of *Colgate* which finds agreements on the basis of compliance coerced by threatened termination is any more or less fair to dealers [56]than finding agreements on the basis of other types of coercive devices.<sup>108</sup> In practice, of course, the defendant in resale price-fixing cases is the manufacturer who instituted and enforced the policy.

5. *Conclusion*

We conclude that the *Colgate* doctrine, as it stands today, does not

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[The businessman]: Am I going to get in trouble if I just terminate the discounters when I find out about them?

[The lawyer]: There's an old case called *Colgate* and some other decisions that followed it under which it is theoretically, and I emphasize the word "theoretically," possible for a manufacturer like yourself to announce the suggested resale price and thereafter unilaterally terminate customers who don't observe them. As a matter of practice, however, it is almost impossible to find, or for the courts to find, such pure unilateral conduct.

<sup>107</sup> A theory of agreement based upon combinations between the supplier and dealers who are coerced into compliance by a threat of termination does not result in the conclusion that all dealers who comply with the manufacturer's pricing policies are parties to an agreement. Dealers who comply based on their own preferences and without regard to a fear of sanctions are not engaging in bilateral conduct with the supplier.

<sup>108</sup> See Turner, *supra*, at 688. "It is not tacit agreement for a distributor to resell at the price suggested by the manufacturer when, but for the manufacturer's declaration of policy, he would sell for less? One might argue that it is not "agreement" when the distributor is coerced into following the minimum price, but the same thing could be said of the case where the distributor is coerced into a contractual commitment to do so."

preclude, as a matter of law, a finding of agreement when a buyer unwillingly complies with a supplier's pricing policies in order to avoid termination. There is no sound basis, either in legal precedent or theory, for reaching the illogical result that this conduct is only unilateral.

Our interpretation of the *Colgate* doctrine, we believe, is consistent with the Supreme Court's most recent statements. Fundamentally, the concern of Section 1 of the Sherman Act is with agreements, in which one or more parties have sacrificed some element of their commercial freedom in return for express or implied assurances of other parties to the arrangement. In the case of vertical price-fixing, the Sherman Act's prohibition is aimed at agreements limiting [57] the freedom of the dealer to set prices. We see no logical basis for concluding that a dealer who restricts his pricing policies in return for some assurance of continued dealing has not entered into an agreement with the supplier. An announced policy of terminating non-complying dealers is the practical equivalent of providing some assurances of future dealing in return for the dealer's restricting his pricing policies.

We emphasize that our view of the *Colgate* doctrine does not restrict the discretion of a seller in deciding with whom he will deal initially. An initial decision to distribute only through non-discounters, for example, would not give rise to a finding of bilateral conduct. Initial customer selection, standing alone, does not raise an inference of unwilling compliance on the part of the distributor because there is no conduct required of the distributor for future dealing. Conditioning *continuing* dealing on any particular conduct, e.g., charging particular prices, on the other hand, is the equivalent of a communicated threat of termination.

We believe this right of *initial* customer selection is the meaning of *Colgate* as it stands today. Thus, we agree with respondent that there continues to be a *Colgate* doctrine and that it can be stated in terms of 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 [58]deal."<sup>109</sup> This language was recently cited with approval by the Supreme Court.<sup>110</sup> However, this phrase, as we have seen, has been much qualified as the Court has continually refined its meaning. It does not mean that compliance with a pricing policy in order to avoid

<sup>109</sup> *U.S. v. Colgate*, 250 U.S. 300, 307 (1919).

<sup>110</sup> *Reeves, Inc. v. Stake*, 100 S. Ct. 2271, 2278 (1980). See also, *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).

termination, as is presented in this case, does not give rise to an agreement.

We also emphasize that our interpretation of *Colgate* does not effect the right of a seller to suggest resale prices. The very term "suggested" prices implies that the dealer is free to follow them if he wishes. Compliance with suggested prices, entirely based on the dealer's own preferences and without influence of a threat of termination or other sanctions, does not lead to a finding of combination between the dealer and the manufacturer.

#### IV. RESTRAINT OF TRADE

To violate the Sherman Act, an agreement must constitute a "restraint of trade" within the meaning of the Act. It has long been held that the Act prohibits certain undue [59]restraints which, because of their inherent nature or effect and because of their anticompetitive purpose harm competition.<sup>111</sup> Some types of agreements are conclusively presumed to be unreasonable, that is unreasonable *per se*, and therefore unlawful without the necessity of inquiring about their effect in a particular case.<sup>112</sup> Since *Dr. Miles*, vertical price-fixing has been found to be unlawful under the Sherman Act. In 1951, the Court held in *Kiefer-Stewart Co. v. Joseph Seagram & Sons, Inc.*<sup>113</sup> that vertical price-fixing is illegal *per se*. In 1977, the Supreme Court in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*,<sup>114</sup> restated that the vertical price restrictions were *per se* unlawful.<sup>115</sup> [60]

Applying the *per se* standard of illegality to respondent's practices, we find that they violate the Sherman Act and the FTC Act. Respondent has entered into agreements with dealers which have the purpose and effect of fixing or stabilizing resale prices. But for these agreements, some dealers would sell at less than Stover's designated prices.

We are, of course, aware of the important debate among antitrust scholars, economists and others concerning the proper standard to be applied in analyzing resale price maintenance agreements.<sup>116</sup> How-

<sup>111</sup> *U.S. v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1911).

<sup>112</sup> *Northern Pac. R. Co. v. U.S.*, 356 U.S. 1 (1958).

<sup>113</sup> 340 U.S. 211, 213 (1951).

<sup>114</sup> 433 U.S. 36 (1977).

<sup>115</sup> *Id.* at 51, n.18. The Court noted that ". . . Congress has recently expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and the McGuire Acts allowing fair-trade pricing at the option of the individual states." *Id.* See, also, *California Retail Liquor Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

<sup>116</sup> See, e.g., Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977); Bork, *Vertical Restraints; Schwinn Overruled*, 1977 Supreme Court Review 177 (1977); Anderson, *The Antitrust Consequences of Manufacturer - Suggested Retail Prices - The Case for Presumptive Illegality*, 54 Wash. L.R. 763 (1979).

ever, we do not believe the issue of *per se* legality of resale price restrictions is open to serious legal dispute given the recent pronouncements of the Court in *Sylvania* and *Midcal*. Consequently, we believe the factual record in this case is clearly sufficient to demonstrate that there has been a "restraint of trade" within the meaning of the Sherman Act.

We disagree with respondent that our interpretation of the permissible limits of manufacturer conduct under *Colgate* should be affected by the current debate over the proper standard of analysis to be applied in assessing the anti-competitive effect of resale price restrictions. Whether a *per se* standard, or "rule of reason," approach is applied in evaluating these restrictions, the question of what constitutes [61]bilateral conduct under the Act remains. In any event, we believe our application of the *per se* standard of illegality to resale price restrictions comports squarely with the Supreme Court's most recent opinions.

#### V. THE APPROPRIATE REMEDY

The parties have stipulated to the entry of certain order provisions if Stover is found to have violated the Sherman Act and the FTC Act as alleged in the Complaint. (JX ¶26). This stipulated order has four parts. Part I prohibits Stover from engaging in certain conduct which may have the effect of fixing or establishing resale prices. Part II requires Stover to add new retailers, equivalent to 10% of the number of Stover retailers existing on the date the order becomes final. These new retailers are required to be stores which generally price below manufacturers' suggested prices and must be distributed in proportion to population throughout SMSA's. Part II also requires Stover to communicate the provisions of Part I to retailers who were terminated for discounting any time after January 1, 1976, to current retailers and, for five years, to new retailers. Further, Part II requires Stover to advertise the terms of the order in trade publications and inform certain officers and sales personnel of its terms. Finally, Part II requires Stover to offer to reinstate dealers terminated since January 1, 1976, in whole or in part because of the price at which it advertised or sold Stover products. [62]Stover may refuse to reinstate these retailers only if its reasons are wholly unrelated to resale price.

Part III of the stipulated order requires Stover to pay for a survey of resale prices of Stover products in the second year after this order becomes final. If the results of the survey establish that more than 87.4% of Stover's products are sold at Stover's suggested prices, then

Stover must stop suggesting resale prices for three years. However, if less than 87.4% of Stover items are being sold at suggested prices, Stover's obligation to solicit new dealers who are discounters will terminate. Moreover, Stover may request a comparable survey within one year after the final date of the order. If less than 87.4% of Stover items are sold at designated prices, Stover need not continue to add discounters or pay for the above-described survey.

Part IV includes standard reporting and compliance provisions.

We believe this is, in general, an appropriate order and one likely to "restore . . . competitive conditions to at least the state of health which they might have expected to enjoy but for the unlawful conduct."<sup>117</sup> It is well-settled that the Commission has broad discretion in fashioning appropriate relief as long as it is reasonably related to [63]the offense.<sup>118</sup> Moreover, the fact that the parties stipulated to this order, if liability should be found, indicates that the practical implementation of the order, should it be entered, was the subject of discussion and negotiation by both sides.

Part I of the order should prevent further agreements between Stover and its dealers, and, in particular, make clear to dealers they no longer are under threat of termination for failure to comply with suggested prices. Part II is clearly intended to restore price competition to Stover's dealer network. The addition of previously terminated dealers likely to sell at below suggested prices will help eliminate the effects of Stover's prior policy of terminating those who did not comply with its pricing policies. The survey provisions of Part III represent a creative effort to provide a strong incentive to Stover to comply with the other order provisions.

Despite the fact the parties have stipulated to an order, we do not feel it is appropriate to include in our order all these provisions under the circumstances of this case. Consequently, we modify the order in the following respects. Paragraph I(F) of the order prohibits Stover from "[r]efusing to deal with any retailer because of the resale price at which Russell Stover believes that retailer will advertise, [64]offer for sale or sell any Russell Stover product or because of the resale price at which that retailer advertises, offers for sale or sells any other merchandise." As we have stated, our view of the *Colgate* doctrine does not prohibit a manufacturer from *initial* selection of customers, even if such selection is based upon the seller's belief about the pricing policies the customer is likely to follow. While such a provision, perhaps limited in duration, may be appropriate under

<sup>117</sup> *Ecko Products Co.*, 65 F.T.C. 1163, 1216 (1964).

<sup>118</sup> See *FTC v. Ruberoid Co.*, 343 U.S. 470, 423 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *Corning Glass Works v. FTC*, 509 F.2d 293, 303 (1975).

some circumstances, either as a curative device or a "fencing-in" provision, we do not feel it is appropriate here. Consequently, we have eliminated I(F) from our order. Similarly, we have eliminated any requirement that Stover add additional retailers other than those previously terminated. On the other hand, a temporary prohibition on suggested resale prices is a conventional remedy for resale price agreements.<sup>119</sup> Consequently, we retain the survey requirement and the prohibition on suggested prices which is contingent upon a survey finding of high price uniformity. Because these modifications have the effect of eliminating restrictions on Stover's pricing policies, we do not believe Stover is prejudiced by these modifications of the order to which it has stipulated. Nevertheless, should respondent object to these modifications, it may raise its objection upon a petition for reconsideration.

#### DISSENTING STATEMENT OF CHAIRMAN MILLER

The evolution of rules governing vertical restraints has not been a proud chapter in the history of antitrust. This case involves one such restraint—resale price maintenance (RPM). It also involves the closely-related *Colgate* doctrine,<sup>1</sup> which carves out a narrow area of legality for manufacturers wishing to employ RPM. Today, the Commission "reinterprets" the *Colgate* doctrine in a manner that shrinks the scope of *Colgate*'s protection by expanding the reach of a second, far more questionable, antitrust rule—the *per se* condemnation of RPM.

In a nutshell, the majority holds that where distributors' "unwilling compliance" with a manufacturer's RPM program results from the manufacturer's announced policy of termination, there is sufficient "coercion" to satisfy the combination element of Section 1 of the Sherman Act. Perceiving this holding to be inconsistent with the *Colgate* doctrine, the majority decides the doctrine must yield. The majority indicates that manufacturers remain free under *Colgate* to state a policy of terminating dealers who do not abide by the manufacturers' pricing policies. It is clear from the opinion, however, that such conduct is "protected" only if the dealers pay no attention to it. (Majority Opinion at 46.) Thus, under the majority's interpretation the *Colgate* doctrine is applicable only in situations where it is irrational and futile for a manufacturer to make the "protected threat" in the first place. As the [2]majority concedes elsewhere, all that it really believes remains of *Colgate* is the

<sup>119</sup> See, e.g., *Amway Corporation*, 93 F.T.C. 618, 725 n. 25 (1979).

<sup>1</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

manufacturer's right to choose its dealers in the first instance, a right I had not thought required a "doctrine" of its own. (Majority Opinion at 57.)

I do not disagree with the majority that an antitrust "combination" can be established on the basis of the stipulated record here. I do not disagree that the challenged practices are therefore subject to antitrust scrutiny under Section 1 of the Sherman Act (and hence Section 5 of the FTC Act). Rather, I part company with the majority because of the automatic condemnation of the RPM combination found here, especially on the basis of the very sparse record, which the Administrative Law Judge found may inaccurately reflect the true facts in this case. (ID 23.) I also disagree with the theory of agreement upon which they rely to trigger the Sherman Act Section 1 analysis. Therefore, I must respectfully dissent.

The *Colgate* doctrine has, from its inception, been based in part upon a recognition by the Supreme Court that manufacturers must be allowed *some* flexibility in organizing distribution systems for their products. In fashioning and subsequently refining the doctrine, the Supreme Court has, I believe, implicitly recognized that the rule of *per se* illegality adopted by the Court in 1911<sup>2</sup> sweeps too broadly as applied to RPM. Hence, the Court subsequently devised a safety valve in the form [3]of the *Colgate* doctrine.<sup>3</sup> In my reading of the *Colgate* doctrine, distribution systems such as Russell Stover's would be permitted as a matter of antitrust policy. While far from satisfying, the doctrine has avoided some of the mischief that results from application of the *per se* rule.

Not surprisingly, the stipulated facts show no competitive harm resulting from Russell Stover's distribution system. Every manufacturer, Stover included, has the incentive to distribute its product in a cost-effective, pro-competitive manner. Nevertheless, the majority condemns Stover's distribution system because, they say, it violates the *per se* rule. The rationale for *per se* rules is to save judicial resources by obviating the need for economic analysis of practices that impose costs and create virtually no benefits. But the *per se* rule against RPM automatically prohibits practices that, depending on circumstances, may generate substantial benefits to competition and impose virtually no costs.

In this case, rather than examining the competitive impact of the respondent's distribution system cum RPM, the Commission's resources have been devoted to developing a "coercion" theory under

<sup>2</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>3</sup> See Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?* 67 Va. L. Rev. 1457 (1981).

which distributors who "unwillingly" adhere to a suppliers pricing policy are deemed to be "coerced" into doing so, thereby establishing a vertical agreement to fix prices. But just as a legal matter, the majority's preoccupation with "coercion" [4] suffers from two principal defects: first, the theory broadens the notion of "coercion" beyond the more appropriate economic concept of a response to true market power; and second, it displaces the more principled analysis of "combination" that has developed in horizontal restraint cases under the Sherman and FTC Acts.

The majority appears to say that "coercion" exists whenever a manufacturer induces its distributor to act in a way contrary to the distributor's own preferences. (Majority opinion at 36-37.) But the preferences of independent distributors will rarely, if ever, be identical to those of their suppliers. Distributors will always prefer to deal on terms more advantageous to themselves, to the detriment of their supplier. For example, a retailer has strong incentives to have the manufacturer bear the costs of servicing, promoting or delivering the products. The manufacturer, in turn, has the incentive to ensure, by establishing obligations or inducements, that the retailer market its product effectively. Especially where other manufacturers stand ready to distribute comparable products to the retailer, I believe little case can be made for economic coercion simply because one or more manufacturers attach such conditions to the sale of their products.

The stipulated record states that Stover competes with seven named, well-known candy manufacturers "among other companies." (Stipulated Finding 8.) While this record makes it difficult to determine with certainty that Stover's competitors stood ready to supply those dealers terminated by Stover for non-adherence to [5] its designated resale prices, I believe we must presume so, absent evidence to the contrary. Thus, contrary to establishing "coercion," I believe the only inference to be drawn safely from this sparse record is that the terms offered by Stover—including the policy on resale prices—are viewed by its distributors as marginally superior and preferable to those that could be obtained from Stover's competitors.

The majority asserts that an "invitation-acceptance" test for agreement would sweep too broadly. (Majority Opinion at 43.) However, use of the broad "coercion" standard as reinterpreted by the majority today may have that very effect. I cannot see how the majority's loose standard for "coercion" in finding combinations can be limited any more than an "invitation-acceptance" approach. More fundamentally, even if the majority's concern were warranted, the problem would result not because agreements would be found when

none actually existed, but because of the severe consequences that flow from the finding of an RPM agreement. To find such an agreement is to declare it automatically unlawful. I believe a more prudent approach would be to adopt a consistent definition of "contract, combination, or conspiracy" for both vertical and horizontal arrangements, and to base the resulting antitrust conclusions on analysis of their competitive effects.

To avoid harsh (and in many cases anticompetitive) results, adjudicators must now resort to legal contortions of the type found in the majority's opinion to accomplish one of two objectives: to find no vertical "combination" where one clearly [6]exists; or to find some boycott, surveillance or "coercion" that is sufficiently distasteful to justify invoking *per se* condemnation. More importantly, today's decision does nothing to address the underlying problem in the area of vertical price restraints—namely, the inappropriateness of the prevailing rule of *per se* illegality. The result in this case—the automatic prohibition of a distribution system previously considered permissible—dramatically emphasizes the need to analyze vertical price restraints, like vertical customer and territorial restrictions, under the rule of reason. Until that happens, we can expect to continue seeing lengthy opinions that shed little light on the actual competitive effects of the RPM arrangements under scrutiny.

#### CONCURRING STATEMENT OF COMMISSIONER CLANTON

With respect to the continued treatment of resale price maintenance as *per se* illegal, I do not believe this case provides the appropriate vehicle for an extensive reevaluation of the present legal distinction between price and nonprice vertical restraints. While I am not averse to further examination of this issue, I would do so only in the context of the kind of thorough review that is now underway at the Commission. In the meantime, in light of the distinct competitive concerns associated with RPM<sup>1</sup> and the current judicial treatment of this practice, I continue to support a *per se* approach.

#### FINAL ORDER

This matter having been heard by the Commission upon the

<sup>1</sup> The *per se* treatment of resale price maintenance is premised on the likelihood that such agreements may facilitate price monitoring and coordination at the interbrand level. It has also been argued that resale price maintenance results in distributional inefficiency by encouraging proliferation of outlets without regard to economies of scale or other cost considerations. See Fair Trade Laws: Hearings on S. 408 (Consumer Goods Pricing Act of 1975) Before the Subcommittee on Antitrust and Monopolies of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 49 (1975) (Statement of Thomas Gale Moore); B.S. Yamey, ed., *Resale Price Maintenance* 96 (Aldine, Chicago, 1966); Report of the Federal Trade Commission on Resale Price Maintenance (1945).

appeal of Complaint Counsel from the initial decision, and upon briefs and oral argument in support thereof, and in opposition thereto, and the Commission, for reasons stated in the accompanying opinion, having granted the appeal:

*It is ordered*, That the order dismissing the complaint entered by the administrative law judge is vacated, and the following cease and desist order is entered.

#### ORDER

For purposes of this Order, the following definitions shall apply:

*Product* means any candy items which Russell Stover manufactures or sells to retailers.

*Retailer* means each location of any person, partnership or corporation, not owned by Russell Stover, which purchases candy directly from Russell Stover for resale to the public. [2]

*Prospective retailer* means each location of any person, partnership or corporation, not owned by Russell Stover, which requests or indicates a desire to purchase any product from Russell Stover for resale to the public.

*Resale price* means any price, price floor, price ceiling, price range, or any mark-up, formula, margin of profit or any other technique for pricing any product at retail.

*Designates* or *designated* means the selection by Russell Stover of the prices at which it desires that its retailers sell Russell Stover products.

#### I.

*It is ordered*, That Russell Stover Candies, Inc. ("Russell Stover"), a corporation, through its successors, assigns, officers, directors, employees, agents, representatives, licensees, subsidiaries, divisions or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist directly or indirectly from:

A. Entering into, establishing, exacting assurances to comply with, continuing, enforcing or announcing the terms of any contract, combination, agreement, understanding or arrangement to fix, establish, control, maintain or enforce the resale price at which any retailer or prospective retailer may advertise, offer for sale or sell any product.

1

## Final Order

B. Communicating, publishing, circulating, disseminating, or providing by any means, not intended for and not likely to be seen by consumers, any resale price unless it is clearly and conspicuously stated on each page of any list, advertisement, or other document or communication where any resale price appears: [3]

THIS [THESE] RETAIL PRICE[S] IS [ARE] SUGGESTED ONLY. YOU ARE COMPLETELY FREE TO DETERMINE YOUR OWN PRICE.

C. Communicating, publishing, circulating, disseminating, or providing by any means, intended for or likely to be seen by consumers, any resale price, unless it is clearly and conspicuously stated:

SUGGESTED PRICE OPTIONAL WITH RETAILER.

except that any resale price communicated by preticketing a product by tag, ticket, label, sticker, or other comparable marking must clearly and conspicuously state:

SUGGESTED PRICE ONLY.

D. Representing that any action may or will be taken against any retailer because of the resale price at which that retailer has advertised, offered for sale or sold any Russell Stover product, or because of the resale price at which that retailer may advertise, offer for sale or sell any Russell Stover product.

E. Terminating, suspending, delaying shipments to, or taking any other action against any retailer because of the resale price at which that retailer has advertised, offered for sale or sold any Russell Stover product.

F. Soliciting, gathering or transmitting data concerning the resale price at which any specific retailer has, or was alleged to have, advertised, offered for sale or sold any Russell Stover product.

## II.

*It is further ordered,* That Russell Stover shall:

A. Within sixty (60) days from the date on which this Order becomes final, mail or deliver to every Russell Stover retailer and obtain a receipt for, an appropriate notice approved in advance by the Bureau of Competition explaining the provisions imposed by Part I of this Order. [4]

B. For five (5) years from the date on which this Order becomes

final, mail or deliver and obtain a receipt for an appropriate notice, approved in advance by the Bureau of Competition, explaining the provisions imposed by Part I of this Order to any new retailer that purchases any product from Russell Stover. The mailing or delivery required by this paragraph shall occur before the first purchase by the retailer.

C. Within ninety (90) days from the date on which this Order becomes final, have printed an advertisement containing an appropriate notice explaining the provisions imposed by Part I of this Order in two successive issues of trade publications that are generally circulated to Russell Stover retailers. The advertisements shall be no less than one-half page. The contents of the advertisements and the trade publications in which they appear shall both be approved in advance by the Bureau of Competition.

D. Within sixty (60) days from the date on which this Order becomes final, mail or deliver and obtain a receipt for an appropriate notice and an offer of reinstatement, both approved in advance by the Bureau of Competition, to each retailer that was terminated by Russell Stover and to each retailer with whom Russell Stover refused to deal, at any time after January 1, 1976, in whole or in part because of the resale price at which it advertised, offered for sale or sold any Russell Stover product or at which Russell Stover believed its products would be advertised, offered for sale or sold. Russell Stover may refuse to open these retailers that request reinstatement only if the refusal is wholly for reasons not related to resale price.

E. Provide copies of this Order to all present and future Russell Stover officers and sales personnel. [5]

### III.

A. *It is further ordered*, That Russell Stover shall pay for a survey to ascertain the percentage of Russell Stover products sold at resale prices designated by Russell Stover. The survey will be conducted by Louis Harris & Associates, Inc., or a similarly qualified organization chosen by the Bureau of Competition, using the same procedures and techniques utilized in the Louis Harris survey conducted in April 1980, referred to in paragraph 23 of the stipulated record in this matter. Upon request from the Bureau of Competition, Russell Stover shall submit within ten (10) days a printed list of the names and addresses of its current retailers. The survey will be conducted during the second year following the date upon which this Order becomes final at a time not known in advance by Russell Stover and chosen at the sole discretion of the Bureau of

Competition. If the results of the survey establish that more than 87.4% of Russell Stover products are sold by retailers at Russell Stover's designated resale prices, then the following provision shall take effect immediately upon receipt by Russell Stover of written notice from the Bureau of Competition and shall expire three (3) years thereafter:

*It is ordered,* That Russell Stover, through its successors, assigns, officers, directors, employees, agents, representatives, licensees, subsidiaries, divisions or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist directly or indirectly from designating and communicating any resale price to any person by price list, discount schedule, invoicing procedure, advertisement, promotional material, preticketing or other prepricing of products, or by any other means. [6]

B. At any time within one year from the date on which this Order becomes final, Russell Stover may request that the Bureau of Competition direct that a survey identical to that specified in paragraph III(A) be conducted, to be paid for by Russell Stover. The Bureau of Competition shall cause the survey to be conducted within six (6) months after receipt of the request. If the results of the survey establish that 87.4% or less of Russell Stover products are sold by retailers at Russell Stover's designated resale prices, Russell Stover need not comply further with paragraph III(A) of this Order.

#### IV.

*It is further ordered,* That Russell Stover shall:

A. Notify the Commission at least thirty (30) days prior to any proposed change in Russell Stover such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of this Order.

B. Within sixty (60) days from the date on which this Order becomes final, and annually each year for five (5) years thereafter, file with the Commission a written report setting forth in detail the manner in which Russell Stover has complied with each of the provisions of this Order; and include with its annual reports or as

supplements thereto such documentation as may be required in writing by the Bureau of Competition.

Chairman Miller dissented.

IN THE MATTER OF  
ONKYO U.S.A. CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3092. Complaint, July 2, 1982—Decision, July 2, 1982*

This consent order requires a Ramsey, New Jersey manufacturer and seller of audio components to cease, among other things, attempting to fix the resale prices at which its products are advertised or sold, through coercion or otherwise. The firm is also barred from restricting the lawful use of its trademarks and brand names; seeking the identity of dealers who deviate from suggested resale prices; and disseminating suggested resale prices for a period of two years, unless such prices are accompanied by a specified disclosure statement. The order further requires the firm to send a copy of the order to all sales and advertising personnel and, for a three-year period, to mail to all present and future accounts, a letter describing the order.

Appearances

For the Commission: *Jeffrey A. Klurfeld.*

For the respondent: *Richard R. Lury, Seki, Jarvis & Lynch, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Onkyo U.S.A. Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

*Product* is defined as any audio component, including but not limited to any tuner, amplifier, tape deck, receiver, speaker, changer, turntable or headphone, or any related product, which is manufactured, offered for sale or sold by respondent Onkyo U.S.A. Corporation.

*Dealer* is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

*Resale Price* is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

PARAGRAPH 1. Respondent Onkyo U.S.A. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 200 Williams Drive, Ramsey, New Jersey.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of products as hereinabove defined.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Respondent sells and distributes its products directly to retail dealers located throughout the United States who resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale or distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold or distributed by respondent.

PAR. 6. By various means and methods, respondent has effectuated and enforced a practice and policy in various States of the United States by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by certain of its dealers.

PAR. 7. By means of the aforesaid acts and practices and more, respondent, by agreement or understanding, express or implied, with certain of its dealers has established, maintained and pursued a planned course of action to fix and maintain the resale prices at which its products will be resold.

PAR. 8. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and

practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

STATEMENT REGARDING MODIFICATION OF CONSENT AGREEMENT  
WITH ONKYO U.S.A. CORPORATION

The Federal Trade Commission provisionally accepted and sought public comment on a consent agreement negotiated by its staff and Onkyo U.S.A. Corporation. That agreement was entered to settle proposed charges that Onkyo engaged in resale price maintenance in the sale of audio components. As originally presented to the Commission, the proposed consent order contained a two-year ban on Onkyo's use of suggested resale prices, as well as a prohibition against Onkyo's restriction of dealers' prices. Upon final consideration, the Commission has determined that the moratorium on suggested resale prices constitutes relief that is inappropriate under the circumstances of this particular case. Therefore, the Commission has removed the prohibition on the use of suggested resale prices from the order.\* In modifying the proposed consent order in this fashion, the Commission continues to recognize that, in some circumstances, the use of suggested resale prices may serve procompetitive purposes. For example, suggested resale prices may be especially beneficial to manufacturers seeking to enter markets in which essential information about products—such as relative quality and value—is complex. Thus, the Commission will continue to evaluate the need for a ban on suggested resale prices as a remedy on a case-by-case basis.

In prohibiting Onkyo from restricting its dealers' prices, the Commission intends to prohibit only those actions that are aimed at maintaining specific resale prices (or maintaining prices within a particular range). However, the order does not preclude Onkyo from initially selecting its dealers and establishing performance criteria that are otherwise reasonable under the antitrust laws. The fact that a dealer who failed to live up to those criteria might also be a discounter would not necessarily preclude Onkyo from taking corrective action against the dealer, so long as the termination was undertaken for legitimate reasons related to those criteria and not as a means of coercing resale price maintenance.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation

\* Under the order, Onkyo will still be required clearly and conspicuously to label any suggested resale prices as such.

of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Onkyo U.S.A. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 200 Williams Drive, in the City of Ramsey, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

For the purposes of this Order, the following definitions shall apply:

*Product* is defined as any audio component, including but not limited to any tuner, amplifier, tape deck, receiver, speaker, changer, turntable or headphone, or any related product, which is manufactured, offered for sale or sold by respondent Onkyo U.S.A. Corporation.

*Dealer* is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

*Resale Price.* is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

*It is ordered* That respondent Onkyo U.S.A. Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.
2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price.
3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.
4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.
5. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.
6. Terminating, coercing or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.
7. Taking any action to hinder or preclude the lawful use by any dealer of any of respondent's trademarks in conjunction with the sale or advertising of any product.

## II

*It is further ordered,* That respondent shall clearly and conspicuously state the following on each page of any list, advertising, book, catalogue or promotional material where respondent has suggested any resale price to any dealer:

THE RESALE PRICES QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN RESALE PRICES.

## III

*It is further ordered,* That respondent shall:

1. Within thirty (30) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new account within three (3) years after service of this Order.

## IV

*It is further ordered,* That respondent shall forthwith distribute a copy of this Order to all operating divisions of said corporation, and to present or future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this Order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

## V

*It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the Order.

## VI

*It is further ordered,* That respondent shall within sixty (60) days after service upon it of this Order, file with the Commission a report,

in writing, setting forth in detail the manner and form in which it has complied with this Order.

EXHIBIT A

Dear Dealer:

Onkyo U.S.A. Corporation has agreed with the Federal Trade Commission to the entry of an order concerning certain distribution practices. Our agreement was solely for the purpose of settling a dispute with the Commission, and does not constitute any admission on our part that we have violated any law. The agreed-to order provides, among other things, as follows:

With respect to resale prices:

1. You are free to charge whatever retail prices you deem appropriate for any Onkyo audio component or related product, and you may advertise those prices as you see fit.
2. You can be assured that Onkyo will not take any action against you for any prices which you may charge or advertise.

If you wish a copy of the full text of the agreed-to order, or if you have any questions concerning it, please call [name of Onkyo official].

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for Onkyo U.S.A. Corporation