RESALE PRICE MAINTENANCE AFTER *MONSANTO*: A DOCTRINE STILL AT WAR WITH ITSELF*

TERRY CALVANI** AND ANDREW G. BERG***

In this article, two enforcement officials at the Federal Trade Commission reexamine resale price maintenance in light of the Supreme Court's recent decision in Monsanto Co. v. Spray-Rite Service Corp. *Commissioner Calvani and Mr. Berg consider both antitrust law and economic policy in their review of the history of resale price maintenance; they point out the chronic inconsistencies to which this antitrust regime has been subject, and identify these same inconsistencies at work in* Monsanto. *The authors set forth three theses with respect to* Monsanto: *first, that the Court intimated a willingness to reconsider at some future time the per se standard of illegality for resale price maintenance; second, that the Court recognized the continuing vitality of the* Colgate *doctrine, which had been seriously questioned in recent years; and, third, that the* Monsanto *Court unsuccessfully attempted to delineate a workable evidentiary standard applicable to communications between sellers and resellers when it is alleged that such communications constitute an illegal contract, combination, or conspiracy under section one of the Sherman Act. The authors suggest that, taken together, these elements in* Monsanto *display a doctrine at war with itself. The authors conclude by examining the possible implications of the* Monsanto *decision for the future direction of the law of resale price maintenance.*

Typically, antitrust issues do not generate widespread public interest; there is, however, a considerable amount of such interest in resale price maintenance,[1] as evidenced by numerous articles on the subject in newspapers and periodicals of general circulation.[2] This high level of

---

* The views expressed in this article are those of the authors and do not necessarily reflect the views of the Federal Trade Commission.

** Commissioner, Federal Trade Commission. B.A., University of New Mexico, 1969; J.D., Cornell Law School, 1972.

*** Attorney Advisor to Commissioner Terry Calvani, Federal Trade Commission. A.B., Harvard College, 1977; J.D., Vanderbilt Law School, 1980.

1. "Resale price maintenance, or vertical price fixing, refers to agreements between persons at different levels of the market structure establishing the resale price or price ranges of products or services." ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (SECOND) 56 (1984) [hereinafter cited as DEVELOPMENTS].

2. *See, e.g., "We Harm the Economy If We Artificially Restrict Mergers,"* U.S. NEWS & WORLD REPORT, May 14, 1984, at 77 (interview with Assistant Attorney General (Antitrust Division) J. Paul McGrath); Jenkins, *Seller Beware: Do Manufacturers Have the Right to Set Prices for Retailers—And, Ultimately, Consumers?*, TWA AMBASSADOR, Feb. 1984, at 88; Pertschuk & Cor-

general interest[3] is perhaps explained by the fact that consumers may perceive a correlation between the practice of resale price maintenance and an undesirable market effect, that is, higher prices for certain goods and services. Such a clearly perceptible cause and effect relationship is not typical of behavior regulated by the antitrust laws. By pointing to the palpable effects of resale price maintenance, discount stores often can enlist their customers in letter-writing campaigns designed to step up enforcement of the existing prohibition.[4] But resale price maintenance does not present as clear-cut an antitrust violation as these market effects seem to suggest. The inconsistent case law[5] and the extensive scholarly debate[6] on this subject indicate both the need for and the difficulty of arriv-

---

reia, *Resale Price Maintenance—Why the* Per Se *Rule Should Be Enforced*, 19 NAT. J. 1201 (1983); Barmash, *Retailers Debate "Off-Price" Threat*, N.Y. Times, June 22, 1983, at D1, col. 4; Taylor, *Congress Objects as Administration Seeks Relaxing of "Vertical Price-Fixing" Ban*, Wall St. J., May 16, 1983, at 12, col. 1; Kleinfield, *Fair-Trade Laws Fall in State After State, But Impact Is Small*, Wall St. J., June 11, 1975, at 1, col. 6; *Business Brief, RPM—Four Years Later*, THE ECONOMIST, Mar. 29, 1969, at 56; Yeager & Stark, *Fair Trade's Future Faces Court Test*, NATION'S BUS., Mar. 1956, at 46; *Retreat of Fair Traders*, TIME MAG., Dec. 19, 1955, at 90; *How to Raise Prices*, TIME MAG., Oct. 10, 1955, at 108; Wolff & Holthausen, *The Control of Retail Prices Under the Fair Trade Laws*, DUN'S REV., July 1938, at 15.

3. Popular notoriety may have had the effect of exaggerating the significance of the practice. One commentator has concluded that resale price maintenance was not prevalent even in the heyday of fair trade. Fewer than one percent of manufacturers employed resale price maintenance in any one year from 1951 to 1956. Herman, *A Statistical Note on Fair Trade*, 4 ANTITRUST BULL. 583, 583-84 (1959). The total volume of goods sold subject to resale price maintenance was estimated at between four and ten percent of all retail sales. *Id.* at 586. Overstreet and Fisher conclude that resale price maintenance was only pervasive in drug and sundry items, liquor, and electrical appliances. Various market forces, such as trade-in sales (automobiles), "package" sales (stereo components), and rapidly fluctuating input costs (food and groceries) made the use of resale price maintenance impractical for many products. Overstreet & Fisher, Resale Price Maintenance and Distributional Efficiency: Some Lessons from the Past 15-16 (May 1984) (draft manuscript; on file with the authors). On the "fair trade" movement and resale price maintenance, see *infra* notes 39-53 and accompanying text.

This relatively insignificant but highly visible marketplace practice seems to give rise to an inordinate amount of antitrust litigation, however. *See infra* notes 102 & 142 and accompanying text. It is difficult not to conclude that popular conceptions about resale price maintenance have influenced the application of a much narrower technical antitrust concept and thus contributed to the prevalence of such litigation.

4. Several companies, such as K-Mart and Burlington Coat Factory, have from time to time and at several locations made position papers and post cards available to encourage their customers to protest to their representatives and senators about the lack of government enforcement efforts in the resale price maintenance area.

5. *See infra* notes 12-38, 54-56 & 142-67 and accompanying text.

6. This article does not attempt to review the plethora of legal and economic literature examining the law of resale price maintenance and vertical restraints that has appeared over the years. Instead, we list a selection of this literature for reference. The law journal commentary includes Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitors' Complaints*, 49 BROOKLYN L. REV. 677 (1983); Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487 (1983); Baxter, *Vertical Restraints and Resale Price Maintenance: A "Rule of Reason" Approach*, 14 ANTITRUST L. & ECON. REV. 13 (1982);

ing at a usable, yet not oversimplistic, synthesis of this antitrust concept.

The Supreme Court has struggled with resale price maintenance—especially the concerted activity requirement imposed under section one of the Sherman Act—ever since its 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons.*[7] This struggle is due in large measure to the Court's extension of the concerted activity requirement beyond the hori-

---

Liebeler, *Intraband "Cartels" Under* GTE Sylvania, 30 UCLA L. REV. 1 (1982); Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis,* 67 CORNELL L. REV. 297 (1982); Pollock, *Customer Restrictions and Refusals to Deal in the New Age of Reason,* 13 U. TOL. L. REV. 559 (1982); Meehan & Larner, *A Proposed Rule of Reason for Vertical Restraints on Competition,* 26 ANTITRUST BULL. 195 (1981); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. CHI. L. REV. 6 (1981); White, *Vertical Restraints in Antitrust Law: A Coherent Model,* 26 ANTITRUST BULL. 327 (1981); Andersen, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality,* 54 WASH. L. REV. 763 (1979); Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach,* 127 U. PA. L. REV. 953 (1979); Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision,* 45 U. CHI. L. REV. 1 (1977); Baker, *Vertical Restraints in Times of Change: From* White *to* Schwinn *to Where?,* 44 ANTITRUST L.J. 537 (1975); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 COLUM. L. REV. 282 (1975); Bork, *Resale Price Maintenance and Consumer Welfare,* 77 YALE L. J. 950 (1968); Gould & Yamey, *Professor Bork on Vertical Price Fixing: A Rejoinder,* 77 YALE L.J. 936 (1968); Pitofsky & Dam, *Is the Colgate Doctrine Dead?,* 37 ANTITRUST L.J. 772 (1968); Bork, *A Reply to Professors Gould and Yamey,* 76 YALE L. J. 731 (1967); Gould & Yamey, *Professor Bork on Vertical Price Fixing,* 76 YALE L.J. 722 (1967); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Pt. II,* 75 YALE L.J. 373 (1966); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Pt. I,* 74 YALE L.J. 775 (1965); Bork, *Control of Sales,* 7 ANTITRUST BULL. 225 (1962); Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance,* 1960 SUP. CT. REV. 258; Telser, *Why Should Manufacturers Want Fair Trade?,* 3 J.L. & ECON. 86 (1960); Herman, *Fair Trade: Origins, Purposes, and Competitive Effects,* 27 GEO. WASH. L. REV. 621 (1959); Adams, *Resale Price Maintenance: Fact and Fancy,* 64 YALE L.J. 967 (1955); Fulda, *Resale Price Maintenance,* 21 U. CHI. L. REV. 175 (1954).

For studies undertaken from an economist's point of view, see, for example, Mathewson & Winter, *The Incentives for Resale Price Maintenance Under Imperfect Information,* 21 ECON. INQUIRY 337 (1983); Barrett, *Restrictive Distribution and the Assault of the "Free Riders,"* 7 J. CORP. L. 467 (1982); Cady, *Reasonable Rules and Rules of Reason: Vertical Restrictions on Distributors,* 46 J. MARKETING 27 (1982); Holahan, *A Theoretical Analysis of Resale Price Maintenance,* 21 J. ECON. THEORY 411 (1979); Shepard, *The Economic Effects of Repealing Fair Trade Laws,* 12 J. CONSUMER AFF. 220 (1978); Spence, *Product Differentiation and Welfare,* 66 AMER. ECON. REV. 407 (1976); Pickering, *The Abolition of Resale Price Maintenance in Great Britain,* 261 OXFORD ECON. PAPERS 120 (1974); Gould & Preston, *Resale Price Maintenance and Retail Outlets,* 32 ECONOMICA 302 (1965); Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards,* 30 LAW & CONTEMP. PROBS. 506 (Summer 1965); Stern, *Approaches to Achieving Retail Price Stability,* 7 BUS. HORIZONS 75 (1964); Hollander, *Dealer Margins Under Resale Price Maintenance,* 3 Q. REV. ECON. & BUS. 25 (No. 3 1963); Frankel, *The Effects of Fair Trade: Fact and Fiction in the Statistical Findings,* 28 J. BUS. 182 (1955); Bowman, *Resale Price Maintenance—A Monopoly Problem,* 25 J. BUS. 141 (1952); Corey, *Fair Trade Pricing: A Reappraisal,* 30 HARV. BUS. REV. 47 (1952); Yamey, *The Origins of Resale Price Maintenance: A Study of Three Branches of Retail Trade,* 62 ECON. J. 522 (1952); FTC, REPORT OF THE FEDERAL TRADE COMMISSION ON RESALE PRICE MAINTENANCE (1945).

7. 220 U.S. 373 (1911).

zontal context, where competitors acting in concert usually have common economic interests, to the vertical context, where the economic interests of the manufacturer and the vendor may conflict. *Dr. Miles* and its progeny, especially the Supreme Court's decision in *United States v. Colgate & Co.*,[8] attempt to distinguish conduct that may be easily distinguishable in theory, but not in practice. *Monsanto Co. v. Spray-Rite Service Corp.*[9] is the Supreme Court's latest attempt to make coherent distinctions that provide some practical guidance to businesses and their counsel, to enforcement agencies such as the Federal Trade Commission (FTC) and the Justice Department, and to the courts.

Considerable attention had been focused on the pendency of *Monsanto Co. v. Spray-Rite Service Corp.* The planned appearance of the United States as amicus curiae on behalf of the appellant,[10] and the congressional ire that resulted, highlighted the litigation.[11] In March, 1984, the Supreme Court rendered its decision in *Monsanto.* The Court's opinion provides an opportunity to review the law and the policy of resale price maintenance, and—perhaps more importantly—to evaluate the legal standard now governing private litigation and federal enforcement in this area. In this article we will first review the historical development of the law of resale price maintenance; second, consider its policy ramifications; third, discuss the *Monsanto* case; and then conclude by examining the future implications for resale price maintenance. One of the central questions that invariably arises as a result of such analysis is

---

8. 250 U.S. 300 (1919).

9. 104 S. Ct. 1464 (1984).

10. Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464, 1466 (1984). *See infra* note 101.

11. The appearance by the United States as amicus curiae on behalf of appellants provoked considerable criticism in Congress. As a result, an amendment, introduced by Senator Warren Rudman, 129 CONG. REC. S14,430 (daily ed. Oct. 21, 1983), was included in an appropriations act. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-166, 97 Stat. 1071, 1102-03 (1983). The amendment prohibited the use of the funds appropriated for the Department of Commerce and related agencies (including the FTC) and the Department of Justice and related agencies for "any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws . . . ." *Id.* Although the government's brief had been prepared and submitted prior to the adoption of the resolution, Pub. L. NO. 98-166 precluded then-Assistant Attorney General William F. Baxter from addressing during oral argument before the Supreme Court the question of whether resale price maintenance should be evaluated under a rule of reason. *See* 129 CONG. REC. S14,430-33 (daily ed. Oct. 21, 1983) (remarks of Sens. Rudman, Weicker, Nunn and Kennedy). The Rudman provision has been interpreted narrowly to apply only to attempts to seek a reversal of the holdings of *Dr. Miles* and its progeny. *See* Presidential Statement on the Signing of H.R. 3222 into Law, 19 WEEKLY COMP. PRES. DOC. 1619 (Nov. 28, 1983); Letter from Senator Warren Rudman to President Ronald Reagan (Nov. 29, 1983) (acknowledging the validity of President Reagan's interpretation of the provision). Pub. Law No. 98-166 governed appropriations for federal fiscal year ended September 30, 1984, and the succeeding legislation, Departments of Commerce, Justice, and State, and Judiciary, and Related Agencies Appropriations Act, 1985, Pub. L. No. 98-411, 98 Stat. 1545 (1984), did not include a limitation similar to the Rudman provision.

whether the current per se prohibition against resale price maintenance should be discarded in favor of a rule of reason insofar as the latter allows for a factually based approach that can accomodate the many forms in which this antitrust issue arises.

I. THE HISTORY OF RESALE PRICE MAINTENANCE

A. Dr. Miles *and the "Demise" of the* Colgate *Doctrine.*

Traditionally, most discussions of resale price maintenance begin with the 1911 Supreme Court decision in *Dr. Miles Medical Co. v. John D. Park & Sons.*[12] Dr. Miles Medical Company, a manufacturer of proprietary medicine, brought an equitable action seeking to enjoin the defendant wholesaler from obtaining a Dr. Miles product from authorized distributors for the purpose of resale at "cut prices." Under its distribution plan, the plaintiff and its authorized distributors had entered into contracts that established resale prices, and the case turned on the validity of those contracts. The Court proceeded to analyze the question by asking whether the restraint upon alienation was valid. It concluded that it was not. Acknowledging that restraints upon alienation are analyzed under a rule of reason, the Court stated that "agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."[13]

12. 220 U.S. 373 (1911). In Fowle v. Park, 131 U.S. 88 (1889), the first case involving resale price maintenance reviewed by the Supreme Court, the Court held that a requirement imposed by a manufacturer that his patent medicine not be sold below a stated minimum price was not unreasonable or invalid as a restraint of trade. In so doing, the Court stated that the "vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, *and to prevent competition between purchasers*; and the purchasers were entitled to such protection as was reasonably necessary for their benefit." 131 U.S. at 97 (emphasis added).

In a case decided by the Supreme Court in 1908, the right to maintain resale prices with reference to copyrighted goods was denied. *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350 (1908); *see also* Scribner v. Straus, 210 U.S. 352, 354 (1908) (decided on jurisdictional grounds). The previous year, the Court of Appeals for the Sixth Circuit, in J.D. Park & Sons v. Hartman, 153 F. 24, 35 (6th Cir. 1907), had held that resale price maintenance was illegal under both the common law and the Sherman Act in the absence of evidence demonstrating the need for such a pricing policy. *See* T. OVERSTREET, RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 3 n.1 (1984); *see also* E. SELIGMAN & R. LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932). Other early cases in this area include Straus v. Victor Talking Mach. Co., 243 U.S. 490 (1917) (the monopoly granted under the patent law cannot be used to control prices of patented articles after they have effectively been paid for), and Bauer & Cie v. O'Donnell, 229 U.S. 1 (1913) (a patentee may not limit the price at which future retail sales of the patented article can be made).

13. 220 U.S. at 408. The Court specifically rejected Dr. Miles's contention that minimal resale prices were needed to prevent erosion of its dealer organization as a result of price cutting. *Id.* at 407. Justice Holmes, in dissent, was concerned with the interbrand effects of the resale price prohibition: "I cannot believe that in the long run the public will profit by . . . permitting [retailers] to cut

The Court's opinion in *Dr. Miles* rests upon its conclusion that the restraint upon alienation in question was *unreasonable under common law principles.*[14] Antitrust policy played a very minor role in the Court's decision.[15] Indeed, the brief mention of the Sherman Act in the opinion is dictum. Thus, the antitrust significance of the *Dr. Miles* decision has been greatly overestimated by subsequent courts and commentators.[16]

Supreme Court decisions following *Dr. Miles* have attempted to determine what type of conduct satisfies the concerted action requirement under the Sherman Act. These decisions, starting with the *Colgate* case, often rest on conduct that has economically ambiguous consequences and make distinctions that provide little practical guidance for future cases.

The Supreme Court appeared to carve out an exception to the *Dr. Miles* "rule" in *United States v. Colgate & Co.*,[17] in which the Court addressed the lawfulness of Colgate's unilateral refusal to sell to distributors that did not honor resale prices set by Colgate. The government did not allege, nor did it introduce evidence to establish, that there were

---

reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which . . . the public should be able to get." *Id.* at 412.

14. The Court stated:

> With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy.
>
> . . . .
>
> The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

Id. at 406, 408-09. The Antitrust Division of the Department of Justice has interpreted *Dr. Miles* similarly. *See* [Current Comment—1969-1983] TRADE REG. REP. (CCH) ¶ 50,442, at 56,010 (correspondence from then-Assistant Attorney General William F. Baxter to Representative Robert McClory dated June 18, 1982, setting forth the Antitrust Division's views on resale price maintenance) [hereinafter cited as Baxter Letter].

15. The Court made only two references to the Sherman Act, and in both instances there was also a reference to common law theories of liability. *See Dr. Miles*, 220 U.S. at 400, 409.

16. Citations for the proposition that *Dr. Miles holds* that minimum resale price maintenance is per se illegal are legion. *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386 (1951); Yentsch v. Texaco, Inc., 630 F.2d 46, 51 (2d Cir. 1980); *infra* note 106.

17. 250 U.S. 300 (1919).

agreements obligating distributors to maintain the minimum prices set by Colgate. The Court dismissed the indictment, finding that no violation of section one of the Sherman Act was charged absent any allegation of illegal agreement:

> In the absence of any purpose to create or maintain a monopoly, the [A]ct 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.[18]

Mr. Justice McReynolds distinguished the Court's decision in *Dr. Miles* on the ground that "[i]n *Dr. Miles* . . . the unlawful combination was effected *through contracts* which undertook to prevent dealers from freely exercising the right to sell."[19] The fact that the *Colgate* decision rested heavily on procedural aspects of the case—the government's failure to allege the existence of illegal agreements—made the Court's attempted distinction between unilateral action and concerted conduct of uncertain precedential value.

The distinction between unilateral and concerted activity, upon which the Court relied in *Colgate*, began to erode the following year in *United States v. A. Schrader's Son, Inc.*,[20] when the Court attempted for the first time to define the element of "agreement" in the context of a resale price maintenance case. *Schrader's* involved the criminal prosecution under section one of a tire valve and gauge manufacturer for entering into a series of price-fixing agreements with the jobbers and manufacturers that purchased its products. The trial court dismissed the indictment,[21] but the Supreme Court reversed. Mr. Justice McReynolds,

18. *Id.* at 307.

19. *Id.* at 307-08 (emphasis added).

20. 252 U.S. 85 (1920).

21. In so doing, the trial judge stated:

> Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between the Dr. Miles Medical Co. Case and the Colgate Co. Case. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement . . . .
>
> . . . .
>
> . . . Granting the fundamental proposition stated in the Colgate Case, that the manufacturer has an undoubted right to specify resale prices and refuse to deal with any one who fails to maintain the same, or, as further stated, the [A]ct does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal, and that he of course may announce in advance the circumstances under which he will refuse to sell, it seems to me that it is a distinction without a difference to say that he may do so by the subterfuges and devices set forth in the opinion and not violate the Sherman Anti-Trust Act, yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law. Manifestly, there-

writing for the majority, attempted to harmonize *Dr. Miles* and *Colgate* by emphasizing that, as in the case of horizontal restraints, an agreement can be inferred from a course of dealing:

> The court below misapprehended the meaning and effect of the opinion and judgment in [*Colgate*]. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated "as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same."
>
> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—*whether express or implied from a course of dealing or other circumstances*—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.[22]

The Court relied heavily upon its decision in *Schrader's* to affirm, one year later, the trial court's finding of treble damage liability in *Frey & Son v. Cudahy Packing Co.*[23] Frey alleged that Cudahy, the manufacturer of "Old Dutch Cleanser," conspired with jobbers to maintain resale prices in violation of section one. The Fourth Circuit Court of Appeals—which reviewed the case after the Supreme Court's decision in *Colgate* but before its decision in *Schrader's*—reversed a jury verdict on the authority of the Supreme Court's decision in *Colgate*, concluding that "[t]here was no formal written or oral agreement with jobbers for the maintenance of prices."[24] In reversing the court of appeals' decision, Mr. Justice McReynolds wrote for the Supreme Court:

> fore, the decision in the Dr. Miles Medical Case must rest upon some other ground than the mere fact that there were agreements between the manufacturer and the wholesalers.

United States v. A. Schrader's Son, Inc., 264 F. 175, 183-84 (N.D. Ohio 1919), *rev'd*, 252 U.S. 85 (1920).

22. 252 U.S. at 99-100 (emphasis added); *see also* United States v. Parke, Davis & Co., 362 U.S. 29, 38-39 (1960).

23. 256 U.S. 208 (1921).

24. Cudahy Packing Co. v. Frey & Son, Inc., 261 F. 65, 67 (4th Cir. 1919), *rev'd*, 256 U.S. 208 (1921).

> It is unnecessary to repeat what we said in *United States v. Colgate & Co.* and *United States v. A. Schrader's Son, Inc.* Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.[25]

The Supreme Court attempted to delineate further the distinction between the *Dr. Miles* and *Colgate* decisions in *FTC v. Beech-Nut Packing Co.*[26] Beech-Nut had adopted an elaborate system to maintain the resale prices of its food products. The company refused to sell its products to wholesalers or retailers that did not adhere to an announced schedule of resale prices; refused to sell to wholesalers that sold to retailers that discounted; reinstated a discounter after it gave Beech-Nut adequate assurances that it would adhere to the resale price policy; and implemented a detailed scheme that utilized code numbers on its products and reporting by cooperating wholesalers and retailers to detect violations of its resale policies. The FTC held that the so-called "Beech-Nut Plan" constituted an unfair method of competition within the meaning of section five of the Federal Trade Commission Act.[27] The Second Circuit Court of Appeals reversed this determination on the basis of *Colgate*.[28] After reviewing the Court's decisions in *Dr. Miles*, *Colgate*, *Schrader's*, and *Cudahy Packing*, Mr. Justice Day wrote for the Court:

> By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the [A]ct, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.
>
> . . . The facts found show that the Beech-Nut system goes 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.
>
> . . . .

25. 256 U.S. at 210.

26. 257 U.S. 441 (1922).

27. FTC v. Beech-Nut Packing Co., 1 F.T.C. 516, 528 (1919), *rev'd*, 264 F.885 (2d Cir. 1920), *rev'd*, 257 U.S. 441 (1922).

28. Beech-Nut Packing Co. v. FTC, 264 F. 885 (2d Cir. 1920), *rev'd*, 257 U.S. 441 (1922).

> . . . The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers which are quite as effectual as agreements express or implied intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.[29]

Accordingly, the Court reversed the court of appeals' reversal of the FTC's decision.

The Court's narrow reading of the *Colgate* decision in *Beech-Nut* was underscored in *United States v. Bausch & Lomb Optical Co.*,[30] in which the Court focused on whether Bausch & Lomb and Soft-Lite, the sole purchaser of its pink-tinted lenses, had entered into illicit contracts, express or implied, to maintain the resale price of the lenses. Soft-Lite sought to control the retail price charged for the lenses through such means as granting retailer licenses only if retailers bought lenses from "licensed" Soft-Lite distributors and resold them at prevailing local prices; allowing its wholesalers to sell only to licensed retailers; and indicating to its licensed wholesalers by means of published price lists the prices to be received by them from licensed retailers. It enforced compliance with the license requirements through the use of a "Protection Certificate" that allowed the wholesale source of Soft-Lite lenses found in the hands of unlicensed retailers to be traced; through surveillance by Soft-Lite's salesmen; through exclusion from Soft-Lite's list of designated wholesalers if a wholesaler did business with unapproved retailers; and through cancellation of a retailer's license if the terms of the license were violated. The trial court found that Soft-Lite had conspired with its wholesalers and retailers in violation of section one.[31] Appellants, predictably, argued that on the basis of *Colgate* the trial court's finding of a conspiracy was in error. The Court rejected this argument, noting that *Colgate* did not involve, "as the present case does, an agreement between the seller and purchaser to maintain resale prices."[32] The Supreme Court also rejected appellants' reliance on *Beech-Nut*, recognizing that

29. 257 U.S. at 452-55; *see also* United States v. Parke, Davis & Co., 362 U.S. 29, 42 (1960) ("However, because Beech-Nut's methods were as effective as agreements in producing the result that 'all who would deal in the company's products are constrained to sell at the suggested prices,' 257 U.S. at 455, the Court held that the securing of the customers' adherence by such methods constituted the creation of an unlawful combination to suppress price competition among the retailers.").

30. 321 U.S. 707 (1944).

31. 45 F. Supp. 387, 397 (S.D.N.Y. 1942), *aff'd*, 321 U.S. 707 (1944).

32. 321 U.S. at 721.

although *Beech-Nut* held that a simple refusal to sell to those who do not maintain the seller's resale prices was legal,

> "[the seller] may not, consistently with the [A]ct, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." . . .
>
> As in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers in Soft-Lite's published resale price list. The wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient. . . .
>
> . . . Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.[33]

The Court's opinion in *United States v. Parke, Davis & Co*[34] also reflects its narrowing of the *Colgate* doctrine. Parke Davis, a national drug manufacturer with a longstanding policy of resale price maintenance, had announced that it would refuse to sell to any wholesaler who supplied price-cutting retailers, and, more specifically, to five wholesalers, each of which knew that the others had been warned and had agreed to comply with Parke Davis's resale policy. In a further effort to implement this policy, Parke Davis assured retailers that their competitors would maintain prices if they would do likewise and permitted retailers who previously had been excluded to resume purchases of its products in return for promises by these retailers not to engage in future price-cutting. Although Parke Davis claimed to have exercised considerable effort to stay within the parameters of the *Colgate* doctrine, the Supreme Court, after engaging in an extensive review of *Dr. Miles* and subsequent decisions, found that Parke Davis's program to promote compliance with its suggested resale prices "plainly exceeded the limitations of the *Colgate* doctrine":

> Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. In thus involving the wholesalers to stop the flow of Parke Da-

33. *Id.* at 722-23 (quoting *Beech-Nut*, 257 U.S. at 453); *see also* United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960) (noting that, after *Beech-Nut*, the *Colgate* doctrine meant "no more than that a single refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act").

34. 362 U.S. 29 (1960). *See generally* Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258, 324 n.315 (quoting a Justice Department official's remark that *Parke, Davis* sounded the "death knell" for resale price maintenance).

> vis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act. Although Parke Davis' originally announced wholesalers' policy would not under *Colgate* have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' [resale price schedule,] that entire policy was tainted with the "vice of illegality," . . . when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.[35]

Moreover, the Court found that by obtaining assurances of compliance from the retailers, Parke Davis effected the illicit combination:

> [I]f a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.[36]

Summarizing the line of cases beginning with *Colgate*, the *Parke, Davis* Court held that

> [w]hen the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, [the] countervailing consideration [found in *Colgate*] is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used.[37]

In a potent dissent, Mr. Justice Harlan, along with Justices Frankfurter and Whitaker, argued that the majority had misread *Beech-Nut* and *Bausch & Lomb* and concluded that "[s]crutiny of the opinion [in *Parke, Davis*] will reveal that the Court has done no less than send to its demise the *Colgate* doctrine which has been a basic part of antitrust law concepts since it was first announced in 1919."[38]

---

35. 362 U.S. at 45-46.

36. *Id.* at 46-47.

37. *Id.* at 44.

38. *Id.* at 49 (Harlan, J., dissenting); *see also* George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 788-90 (2d Cir. 1960).

Given *Dr. Miles* and its progeny, one might wonder just what type of resale-price-related conduct is permissible under section one of the Sherman Act. Under *Colgate*, a manufacturer may

B. *The Rise and Fall of the Fair Trade Laws.*

The organization of the American Fair Trade League in 1913—two years after the Supreme Court's decision in *Dr. Miles*—initiated the movement to legalize resale price maintenance contracts. It was not until 1931, however, that California became the first state to enact fair trade legislation.[39] By 1950, forty-five states had passed fair trade legislation.[40]

Although bills to permit fair trade were introduced in each session of the Congress after 1914,[41] it was not until 1937 that Congress enacted

---

suggest list or resale prices to dealers and, provided that dealers have an actual right to decide independently whether to observe them, no antitrust violation will ensue. *See, e.g.*, Klein v. American Luggage Works, 323 F.2d 787, 790-91 (3d Cir. 1963); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 406 n.3, 411-12, 411 n.6 (5th Cir. 1962). Resale prices may be suggested by means of suggested price lists, *see, e.g.*, Susser v. Carvel Corp., 332 F.2d 505, 510 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965); United States v. O.M. Scott & Sons, 303 F. Supp. 141, 148, 153-55 (D.D.C. 1969), by price advertising, *see, e.g.*, Engbrecht v. Dairy Queen Co., 203 F. Supp. 714, 719 (D. Kan. 1962), and by price preticketing, *see, e.g.*, Klein v. American Luggage Works, 323 F.2d 787, 790-91 (3d Cir. 1963); Bailey's Bakery v. Continental Baking Co., 235 F. Supp. 705, 721-22 (D. Hawaii 1964); *see also* Impact of the Consumer Goods Pricing Act of 1975 on FTC's Position on Manufacturer Preticketing, 88 F.T.C. 1016 (1976) (advisory opinion requested by the National Outerwear & Sportswear Association). However, use of coercive tactics that interfere with independent pricing decisions by dealers may result in a finding of a violation of section one. Although "exposition, persuasion or argument," *see* DEVELOPMENTS, *supra* note 1, at 61, in an attempt to produce compliance with suggested prices is permissible, threats of sanctions for noncompliance, *see, e.g.*, Arnott v. American Oil Co., 609 F.2d 873, 885 (8th Cir. 1979); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 32-33 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972), or the use of sanctions, *see, e.g.*, Greene v. General Foods Corp., 517 F.2d 635, 644 n.5, 658 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), or tactics such as enlisting customer aid in policing, *see, e.g.*, United States v. General Motors Corp., 384 U.S. 127, 136-37, 142-43 (1966); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 716, 719 n.3 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969), are all violations of section one. Certain other conduct, such as requiring approval for deviations from list prices, responding with retaliatory wholesale price increases, placing dealers on probation, or using short-term leases and contracts, will likewise constitute a violation, *see* DEVELOPMENTS, *supra* note 1, at 61-62. The FTC has taken the position that denial of cooperative advertising reimbursement to dealers for advertisements that do not conform to the manufacturer's suggested resale price constitutes unlawful vertical price fixing. *See* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs, [Current Comment—1979-1984] TRADE REG. REP. (CCH) ¶ 39,057 (Oct. 26, 1981); *In re* Totes, Inc., 96 F.T.C. 335, 338 (1980). *But see In re* Nissan Antitrust Litigation, 577 F.2d 910, 914-17 (5th Cir. 1978) (not a per se violation of the Sherman Act). Because of the numerous restrictions imposed by decisions such as these on a manufacturer's right to terminate noncomplying vendors, it is generally acknowledged that *Colgate* has very limited utility as a guide to the implementation of a legal program of resale price maintenance. *See* ANTITRUST ADVISER § 2.31, at 132 (C. Hills ed. 2d ed. 1978); *cf. infra* notes 109-19 and accompanying text.

39. 1931 Cal. Stat. ch. 278 (repealed by 1975 Cal. Stat. chs. 402, 429). *See also* T. OVERSTREET, *supra* note 12, at 4.

40. *See* A. McLaughlin, An Economic Analysis of Resale Price Maintenance 7 (1979) (unpublished doctoral dissertation submitted to the Economics Department, UCLA; on file with the authors) [hereinafter cited as McLaughlin Dissertation]; *see also* T. OVERSTREET, *supra* note 12, at 4.

41. *See* McLaughlin Dissertation, *supra* note 40, at 1, 6.

the Miller-Tydings Amendment[42] to the Sherman Act.[43] One might question how the states could exempt resale price maintenance from the ambit of the Sherman Act after *Dr. Miles* and before the Miller-Tydings Amendment. There are two possible explanations. First, because the *Dr. Miles* decision rested on the common law of restraints on alienation, states could properly change that common law by statute. This explanation obviously assumes that the Sherman Act discussion in *Dr. Miles* was nothing more than dictum.[44] Second, whereas the jurisdiction of the Sherman Act is now held to be coextensive with the commerce powers under the Constitution,[45] the scope of those powers prior to the mid-twentieth century were thought to be much more circumscribed.[46] Thus, it may have been thought that states could properly exempt intrastate sales without posing a direct challenge to the supremacy clause of the Constitution.[47]

Many vendors enforced their price maintenance distribution policies against resalers with which they had no resale price maintenance agreements. These vendors argued that a contract containing a "nonsigner" clause valid under state law, when executed with one of their customers, would also cover customers with whom they had no such contracts. Thus, a contract with one reseller would bind all resellers.[48] The Supreme Court rejected this argument in *Schwegmann Brothers v. Calvert Distillers Corp.* in 1951.[49] The Court held that nonsigners were not

---

42. District of Columbia Revenue Act of 1937, ch. 690, tit. VIII, 50 Stat. 673, 693 (repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801). Professor Howard Marvel has observed that the Amendment was passed within a year of the Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936). *See generally* Marvel, How Fair is Fair Trade? (1984) (unpublished manuscript; on file with the authors). Query, then, whether the National Association of Retail Druggists, which was instrumental in the adoption of both laws, saw the objectives of both to be related. Overstreet conjectures that both laws were enacted to protect high-cost distributors from price-cutting competition. *See* T. OVERSTREET, *supra* note 12, at 5.

43. Proponents of the legislation were required to attach the Act to a District of Columbia revenue bill in order to escape a presidential veto. *See* McLaughlin Dissertation, *supra* note 40, at 1.

44. *See supra* notes 14-16 and accompanying text.

45. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); *see also* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 232a, at 228 (1978).

46. *See, e.g.,* United States v. E.C. Knight Co., 156 U.S. 1 (1895); *see generally* Eckinger, *Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement*, 32 VAND. L. REV. 1215 (1979).

47. U.S. CONST. art. VI, cl. 2.

48. Early state fair trade statutes, such as California's 1931 provision, 1931 Cal. Stat. ch. 278, were largely ineffective because vendors who had not signed contracts with fair trade manufacturers nonetheless obtained the latter's products and resold them at prices below the fair trade price. Manufacturers attempted to prevent this by including a nonsigner clause, which bound all subsequent vendors to maintain a minimum resale price so long as at least one vendor in the chain of distribution had signed a contract agreeing to do so. *See* McLaughlin Dissertation, *supra* note 40, at 7.

49. 341 U.S. 384 (1951). Maryland and Delaware distributors of liquor sought to enjoin a Louisiana retailer, who was not a party to the fair trade contract, from selling below the established

bound under principal contracts. Thus, enforcement of resale price maintenance against nonsigners was not only unauthorized, but also illegal. In response to the *Schwegmann* decision, Congress in 1952 enacted the McGuire Amendment to the Federal Trade Commission Act, which permitted manufacturers' sanctions against nonsigners of resale price maintenance agreements.[50]

Beginning as early as 1948, state fair trade legislation began to lose its effectiveness. Judicial decisions in large numbers of states reduced the ability of wholesale sellers to police resale price maintenance.[51] In other jurisdictions the legislation was held unconstitutional under state law.[52] State fair trade met its ultimate demise with the passage of the Consumer Goods Pricing Act of 1975,[53] which repealed both the Miller-Tydings

---

minimum price. Schwegmann defended, arguing that although the Louisiana fair trade statute contained a nonsigner clause, such clauses violated the Sherman Act because the Miller-Tydings Act did not authorize their use in interstate commerce. *Id.* at 387-88; *see also* Sunbeam Corp. v. Wentling, 185 F.2d 903 (3d Cir. 1950) (Pennsylvania Fair Trade Act held inapplicable to interstate sales and advertising).

50. Act of July 14, 1952, ch. 745, 66 Stat. 631 (repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801).

51. *See* Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 621 (1959). Mail order houses located in non-fair trade states began to sell products in fair trade states at discount prices. Courts held that the sales took place in the vendors' states, and thus were not actionable. *See, e.g.,* Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 240 F.2d 684, 687-88 (4th Cir. 1957); General Electric Co. v. Masters Mail Order Co., 244 F.2d 681, 684-85 (2d Cir. 1957); Revere Camera Co. v. Masters Mail Order Co., 128 F. Supp. 457, 463-64 (D. Md. 1955). Obviously, this opened a major loophole in effective resale price maintenance.

Trade-in allowances and, perhaps more importantly, the advent of trading stamps also undercut the effect of resale price maintenance policies. Indeed, the use of trading stamps to evade fair trade provoked a good deal of law review commentary on the subject. *See, e.g.,* Note, *Trading Stamps and Fair Trade Laws*, 58 NW. U.L. REV. 414 (1963); Note, *Trading Stamps*, 37 N.Y.U. L. REV. 1090 (1962).

52. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 9 (1975).

53. Pub. L. No. 94-145, 89 Stat. 801 (1975). The Antitrust Division has taken the position that Congress, through repeal of the Miller-Tydings and McGuire Acts, did not legislate a rule of per se illegality for resale price maintenance:

> There is . . . no necessary incongruity between the action of Congress in repealing the [Miller-Tydings and McGuire Acts] and a rule of reason treatment of [resale price maintenance] under the Sherman Act. The [federal] Fair Trade Laws were far too sweeping a determination of per se legality, and [the Antitrust Division] agree[s] that they ought to have been repealed. In [the Antitrust Division's] judgment, the action of Congress in 1976 [sic] does not preclude the Supreme Court from reaching a conclusion that, although [resale price maintenance] continues to be per se illegal in those contexts in which it might facilitate horizontal collusion, it should be treated under the rule of reason in other contexts. Although both the House and Senate reports indicate awareness that the Supreme Court had previously declared [resale price maintenance] illegal per se and no doubt expected that they were remitting [resale price maintenance] to that status by repealing the [Miller-Tydings and McGuire Acts], it is also true that there is nothing in the legislative history which indicates a congressional disposition to limit the power of the courts to continue, through interpretation, the evolution and adaptation of the Sherman Act in light of the continuing development of microeconomic analysis.

Baxter Letter, *supra* note 14, at 56,012 (footnote omitted). *See also* T. OVERSTREET, *supra* note 12, at 8; Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 SUP. CT. REV. 171, 191-92.

Amendment and the McGuire Act. Thus, today, the Sherman Act alone states the standard by which resale price maintenance is judged.

C. *Permissible Alternatives to Resale Price Maintenance.*

Faced with legal obstacles to resale price maintenance, companies desiring to police their customers' pricing policies employ other techniques. Vertical integration is an obvious example, but one that might be inefficient in many circumstances.[54] Vertical integration, assuming the absence of merger problems, eliminates the arguable presence of a contract, combination, or conspiracy because divisions of the same company and wholly-owned subsidiaries cannot conspire with each other.[55]

When vertical integration is either inefficient or presents legal problems, a firm may employ sales on consignment as an alternative. Because the retailer does not have title in the goods and sells them as an agent for the manufacturer, there can be no conspiracy. In *United States v. General Electric Co.*,[56] the Supreme Court rejected the government's contention that a seller who retained title to its products and consigned them to agents for sale at set prices employed illegal resale price maintenance. The Court observed that "genuine contracts of agency" are unobjectionable because the owner can properly fix the price at which his agents "transfer the title from him directly to such consumer."[57] In 1964, however, the Court reached a quite different conclusion in *Simpson v. Union Oil Co.*[58] There, the defendant's consignment of gasoline to independent dealers subject to a set retail price was found to be objectionable as an antitrust subterfuge. It must be noted, however, that the Court acknowledged that bona fide consignments might still be insulated from antitrust scrutiny. Because it is exceedingly difficult to reconcile the two decisions,[59] many have assumed that *Simpson* rejected, albeit sub silentio, the Court's earlier logic in *General Electric*.[60] This conclusion is given additional support by the fact that in 1973 the government successfully

54. *See* Mathewson & Winter, *An Economic Theory of Vertical Restraints*, 15 RAND J. ECON. 27, 29 (1984).

55. *See, e.g.*, Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2742 (1984); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); *see generally* DEVELOPMENTS, *supra* note 1, at 13 & n.92.

56. 272 U.S. 476 (1926).

57. *Id.* at 488.

58. 377 U.S. 13 (1964).

59. *See id.* at 26-28 & n.1 (Stewart, J., dissenting) ("The fact of the matter is, so far as the record now before us discloses, the two agreements are virtually indistinguishable. Instead of expressly overruling *General Electric*, however, the Court seeks to distinguish that case upon the specious ground that its underpinnings rest on patent law." (footnote omitted)).

60. *See, e.g.*, Note, *Antitrust—Resale Price Maintenance Through Coercive Consignment Agreement Is Illegal Under the Antitrust Laws*, 43 TEX. L. REV. 569, 574 (1965).

challenged General Electric's consignment system—the very one previously held to be legal.[61] Nonetheless, many lower courts have continued to uphold the establishment of resale prices in the context of a bona fide consignment.[62]

The enactment of state fair trade laws and the federal enabling legislation associated with them, taken together with consignment arrangements and the *Colgate* doctrine, indicate that the law has permitted resale price maintenance to exist in many contexts over the years. Since the Court's decision in *Continental T. V., Inc. v. GTE Sylvania Inc.*,[63] the availability of nonprice vertical restraints to accomplish many of the same objectives provides yet another illustration of judicial toleration of the practice. Although nonprice vertical restraints, such as customer or territorial restrictions, often have the same economic consequences as vertical price constraints, the Court in *GTE Sylvania* indicated that it would give nonprice vertical restraints more lenient scrutiny under a rule of reason analysis, by assessing their impact on intrabrand and interbrand competition. This approach has usually resulted in upholding the legality of nonprice vertical restraints.[64] Thus, the historical experience illustrates that the law has not been consistent in its treatment of resale price maintenance.

II. Antitrust Policy and Resale Price Maintenance

Although economists have often observed that resale price maintenance might have procompetitive effects under certain circumstances, Professor Lester Telser rekindled the debate by posing the important question of why manufacturers would want to impose a policy of resale

61. United States v. General Elec. Co., 358 F. Supp. 731, 743 (S.D.N.Y. 1973). *See generally* DEVELOPMENTS, *supra* note 1, at 58 n.400.

62. *See, e.g.*, Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339, 341-43 (9th Cir. 1983); Harmick v. Nu-Way Oil Co., 589 F.2d 806, 808-11 (5th Cir.), *cert. denied*, 444 U.S. 836 (1979); Pogue v. International Indus., 524 F.2d 342, 346 (6th Cir. 1975). *See generally* ABA ANTITRUST SECTION, MONOGRAPH NO. 2, VERTICAL RESTRICTIONS LIMITING INTRABRAND COMPETITION 74-76, 84 (1977).

63. 433 U.S. 36 (1977). In *Sylvania*, the defendant granted a limited number of retail franchises and required each franchisee to sell only from the location at which it was franchised. *Id.* at 38. Plaintiff, a disenfranchised retailer, claimed that the defendant's franchise plan established territorial restrictions on resale and was unlawful per se. *Id.* at 39-40. The Court held that the franchise arrangement fell within the per se rule established in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *Sylvania*, 433 U.S. at 45-47, but overturned the *Schwinn* per se rule. The Court reviewed several procompetitive justifications for territorial restrictions, and concluded that a per se rule was not appropriate. *Id.* at 51-58.

64. *See* DEVELOPMENTS, *supra* note 1, at 71 nn. 483-84 (citing cases).

price maintenance:[65]

> The manufacturers' interest seems to be best served when distributors resell their products under such competitive conditions as may exist at the level of distribution and at the lowest prices resulting from that competition. If manufacturers set a floor to the resale price, then they also set a ceiling to their sales and thus apparently support a policy that runs counter to their own self-interest. Let the manufacturers fix a price at the factory gate at which all distributors may buy the product. Would not the manufacturers' sales and profits be greater the lower is the price at which distributors resell their products to customers? If so, then what explains the strong desire of some manufacturers to prevent distributors from reselling their product at prices below the level set by the manufacturers?[66]

This question merits serious consideration. A desire to increase the resale price is no answer because a manufacturer could accomplish that simply by raising its price to its wholesale customers, and garner the higher revenues for itself. Generally, then, a manufacturer will benefit from keen competition among its resellers because it ensures the highest volume and the lowest distribution margin.

Professor Telser suggested two quite different reasons that might explain what appears to be perverse behavior by manufacturers: subsidizations of product-related services and maintenance of the optimum number of retail outlets. Both motives are legitimate, and neither pose an inevitable threat to consumer welfare. First, the volume of retail sales may depend on both the retail price *and* the product-related services pro-

---

65. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86 (1960); *see also* Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 832-43 (1955).

Three conditions must be met for resale price maintenance to be in the manufacturer's best interest:

> First, demand for the product must be a function of the service level as well as the price. Secondly, the service must be such that it is best provided by retailers, and not by the manufacturer. Finally, benefits from the service provision must not be fully appropriable by the providing retailer.

Oster, *The FTC v. Levi Strauss: An Analysis of the Economic Issues*, in IMPACT EVALUATION OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINT CASES 48, 60 (1984).

66. Telser, *supra* note 65, at 86-87. Former Assistant Attorney General William F. Baxter considered a similar question in his correspondence to Representative Robert McClory:

> If mere elevation of resale price were the purpose of [resale price maintenance], a manufacturer could achieve that result by raising its own price to the distributor and capture revenues commensurate with that higher price. Under resale price maintenance, he does not do that: he insists on a high retail price but permits the retailer to keep the revenues that derive from that higher price; and at the same time he accepts the consequence that a smaller quantity of his product will be sold because it is to be sold at a higher price. One cannot suppose that manufacturers, to their own detriment in terms of their sales volume, insist on conduct that can only fatten their distributors' profit margins and lessen their own. Plainly, manufacturers who wish to employ resale price maintenance, and who seek out distributors who are willing to enter contracts in which they promise to comply, have some other end in view.

Baxter Letter, *supra* note 14, at 56,007.

vided by retailers. Absent resale price maintenance, one might expect to see different types of retailers providing different levels of services at different prices to consumers. Those customers who desire greater service would pay more, while those desiring less would pay less. This all works well unless some buyers, and their vendors, are able to "free ride" on the product-related services provided by others.[67]

Although elimination of the "free ride" in the product services area is a plausible explanation of manufacturers' interest in resale price maintenance, some authorities dispute the reality of this concern. Federal Trade Commissioner Patricia P. Bailey has opined that the free-rider problem is like the Loch Ness Monster: nearly everyone has heard of it, but no one has ever really seen it.[68] Perhaps the problem is rather that the practice is so usual and widespread that it goes unnoticed.

Consider, for example, the law student who has received a $500 wedding gift with which to purchase a stereo system. Student and spouse visit a specialty stereo store to investigate various equipment. The store is pleasant, well-appointed, and has good acoustics. Patrons can sit comfortably and listen to demonstrations of the store's products. The salesperson is knowledgeable about all of the store's wares, their features, and comparative values. Student and spouse indicate that they have $500 to spend, but are unsure whether to invest more in the amplifier than in speakers. Should they purchase a tape deck, or forego a tape deck at this time and buy a better grade turntable? And so on. The salesperson helps them test numerous combinations of components. Student and spouse try all the various possibilities—taking good notes all the while—and tentatively decide on an expensive amplifier, a moderately priced turntable, and inexpensive speakers. A tape deck will have to wait. They then indicate to the salesperson that they would like to think about it for a couple of hours, and inquire as to the store's closing time. Student and spouse thank the salesperson, leave, and race to a local discount store. The discount store has no amenities, no opportunity to test the merchandise, no knowledgeable sales personnel. Rather, student and spouse simply fill out an order form reflecting their selections from a catalog and hand it to the sales clerk. The goods arrive via conveyor belt from the second floor.

Loch Ness Monster? Rather obviously the hypothetical consumers and their discount store retailer take a "free ride" on the services provided by the initial retailer. This phenomenon has been appropriately

67. Telser, *supra* note 65, at 89-96.

68. *Oversight of FTC Law Enforcement: Hearing Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 52 (1984) (statement of FTC Commissioner Patricia Bailey).

described as the "browse here, buy there" strategy.[69] A manufacturer, confronted with facts similar to those described above, might want to impose resale price maintenance in an effort to insure the appropriate level of point-of-sale service. It should be noted that, under these conditions, resale price maintenance would be output-enhancing; a manufacturer must believe that the quantity sold will increase as a result of dealer-provided services; otherwise the manufacturer would not utilize resale price maintenance. Given these circumstances, resale price maintenance would not pose anticompetitive consequences and therefore should not be condemned under an antitrust rubric.[70]

---

69. *See* Oster, *supra* note 65, at 61. The Antitrust Division has described this "browse here, buy there" strategy similarly:

> [I]f some distributors are incurring costs by [providing point-of-sale services] and are selling at a higher price which cover [sic] those costs, while other distributors are not doing so and sell at lower retail prices, then the free rider phenomenon will appear. A substantial number of customers will go to the higher price outlet, will consume the time of sales personnel there to obtain the appropriate counseling, but will then leave without buying and purchase from a low cost outlet instead. It will prove to be impossible for some retailers to afford expensive point of sale services for which it is not practicable to impose a separate charge if other distributors are not doing so and are selling at prices which reflect the cost savings of not doing so. If the manufacturer is to be successful in controlling the manner in which his product is sold and the quality of point of sale services afforded in conjunction with the sale of his product, he must be able to shelter the gross margins of those distributors who are complying with his wishes from the pricing pressure of distributors who are not.

Baxter Letter, *supra* note 14, at 56,008.

A very real example of the "browse here, buy there" strategy appeared in *Washingtonian* magazine, where the practice of browsing through Washington, D.C. furniture showrooms but buying from North Carolina discount furniture merchants was described. Sullivan, *Furniture Without Tears*, WASHINGTONIAN, Mar. 1974, at 80, 96. The personal computer market, with its necessary emphasis on some source of service and advice, provides yet another example of a nonillusory free-rider situation. *Cf. infra* notes 87 & 119; notes 154-61 and accompanying text.

70. Professor William Comanor has recently observed that Telser's analysis, while providing an answer in terms of descriptive economics, did not address the normative question of whether the additional dealer services justify the higher prices charged. Comanor, Vertical Price Fixing and Marketing Restrictions and the New Antitrnst Policy, Working Paper No. 235, Dept. of Econ., Univ. of Calif. at Santa Barbara (Apr. 1984) (on file with the authors).

Robert Bork first addressed this question nearly twenty years ago. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Pt. II*, 75 YALE L.J. 373 (1966) [hereinafter cited as *The Rule of Reason*]. Bork argued that, in order for a manufacturer to maximize its own output, it must not hinder competition among those who resell its products. Generally, resale restrictions are anticompetitive, and a rational manufacturer will never opt for them. Insofar as a manufacturer does impose such restrictions, it must be assumed that the goal is to increase output and so serve competitive goals that parallel the interests of consumers. *Id.* at 403.

But Comanor observes:

> While consumer prices are generally increased through the imposition of these restraints, more services are also provided. As a result, the normative question of whether the additional services are worth the increased cost is not answered by a simple test dealing with the quantity sold of the manufactured product.

Comanor, *supra*, at 10. Bork's critics question an assumption implicit in his analysis: that consumers who buy the product due to resale-price-maintenance-induced services are representative of all consumers who buy the product. If "marginal" consumers who will only buy the product when the services are included place a substantially higher value on those services than other consumers of the

The other procompetitive explanation for the employment of resale price maintenance is its potential for assuring an efficient number of retail outlets. Theoretically, resale price maintenance would be utilized when additional outlets produce gains that exceed the costs of reduced demand resulting from the higher prices of protected resale margins.[71] The first necessary condition under this explanation is that there must be at least two types of retail establishments, each with a different cost structure. Second, availability of the product through a variety of retailers must induce more demand than the lower unprotected prices of fewer outlets. Third, each type of outlet must have customers who regularly patronize it as well as customers who price-shop.[72] Under these circumstances, higher-cost retailers would lose sales to those price sensitive customers who overlap both high- and low-cost sellers. If higher-cost sellers would lose sufficient numbers of customers to warrant dropping the product, a manufacturer would have an efficiency-enhancing rationale for employing resale price maintenance. In other words, resale price maintenance may be employed to purchase display space in higher-cost outlets. As Overstreet has observed, "an astute manufacturer will em-

---

product, then it is possible that welfare will be reduced when vertical restraints are added, and Bork's rule would not hold. The intuition behind this is clear. To induce services, vertical restraints must be added. These restraints theoretically could raise or lower the price to consumers. With an increase in price, there will be consumers who, like those who previously purchased the product without the service, will not be better off because they value the service at less than the price increase. For those that would buy the product only when service is included, they might value the service by more than the price increase. Depending on the size of the price increase, and on which group of consumers is larger, net aggregate welfare may either increase or decrease.

Professors Gould and Yamey have noted that if all or most manufacturers, in an effort to insure brand support, employ resale price maintenance, "the competitive sales-increasing effect would be neutralized; and, other things being equal, total sales would be smaller." Gould & Yamey, *Professor Bork on Vertical Price Fixing*, 76 YALE L.J. 722, 724 (1967). Thus, while the *intent* behind implementation of resale price maintenance might be output-enhancing, the net effect might be output-reducing. Comanor explains that "actions of individual firms depend on the slope and position of the relevant firm demand curves, while normative conclusions rest on market demand curves." Comanor, *supra*, at 12. Bork later agreed that a manufacturer employing resale price maintenance adds "to his manufactured article the information and promotion supplied by the reseller." Bork, *A Reply to Professors Gould and Yamey*, 76 YALE L.J. 731, 733 (1967). But he responded to Gould and Yamey's output restriction observation by stating that such a situation could not remain stable: some manufacturers will abandon the services in order to obtain greater profits. *Id.* at 734-35. For an interesting critique of Bork's response, see Comanor, *supra*, at 13-16. *See also* Spence, *Monopoly, Quality, and Regulation*, 6 BELL J. ECON. 417 (1975).

71. *See* T. OVERSTREET, *supra* note 12, at 45; *see also* Gould & Preston, *Resale Price Maintenance and Retail Outlets*, 32 ECONOMICA 302, 303-11 (1965). One would not expect to see resale price maintenance where retailers were equally efficient because uniform mark-ups are characteristic of a competitive environment. *See* T. OVERSTREET, *supra* note 12, at 46.

72. Sellers face a distinct demand curve absent customer overlap; in that situation one would not expect to find resale price maintenance. On the other hand, if all sellers had common customers they would face the same demand curve, and one would expect that customers would purchase at the lowest price. *See* T. OVERSTREET, *supra* note 12, at 46.

ploy [resale price maintenance] only when on balance the gains from wider distribution more than offset the effects of higher margains."[73]

Of course, there are also anticompetitive explanations for resale price maintenance. Manufacturers can use resale price maintenance to police cheating by participants in a manufacturers' cartel.[74] The presence of a manufacturers' cartel does not necessarily dictate that resellers will employ uniform pricing. Where some retailers discount, it may simply reflect a local, individualized pricing policy harmless to the cartel; but, alternatively, it might indicate that the resellers' supplier has discounted to the reseller in violation of the illegal cartel agreement. Interpretation of retail discounting may be difficult, and while the imposition of resale price maintenance does not eliminate a cartel member's incentive to cheat, it does eliminate a variable that would otherwise complicate cartel surveillance.

Another improper use of resale price maintenance is as the "cat's paw" of a *dealers'* cartel.[75] Manufacturers may impose resale price maintenance in an effort to police cheating by recalcitrant cartel members. Manufacturers' agents or participating retailers could then monitor dealer adherence to the set price. Recalcitrant dealers can be disciplined by the manufacturer. Note that the manufacturer in this situation is coerced to establish and maintain as the set price the dealers' cartel monopoly price, rather than the price that yields the optimum distribution margin to the manufacturer. Overstreet aptly summarizes this scenario: "a detection and punishment mechanism, which it is hoped will deter price cutters, is set in place that uses the manufacturer (vertically) to police the [resale price maintenance] and stabilize the retailers' (horizontal) collusion."[76] There is some evidence of dealer utilization of resale price maintenance to enforce cartel behavior, but typically the resulting price maintenance policy does not serve the manufacturer's interests.[77] In any event, it is doubtful that resale price maintenance by a dealer

73. *Id.* at 47; *see also* Gould & Preston, *supra* note 71, at 303-11.

74. *See, e.g.*, Baxter Letter, *supra* note 14, at 56,009.

75. *See, e.g.*, *id.* at 56,009-10.

76. T. OVERSTREET, *supra* note 12, at 15.

77. For example, in 1935 Pepsodent refused to "fair trade" its toothpaste. Angry California retailers organized a boycott of Pepsodent that almost completely eliminated Pepsodent sales in that state. Not surprisingly, the toothpaste company changed its policy and implemented fair trade; indeed, it issued a public apology to the retailers, and donated $25,000 to the organization that organized the boycott. *See* McLaughlin Dissertation, *supra* note 40, at 14 (citing Gault, *Fair Trade—With Especial Reference to Cut-Rate Drug Prices in Michigan*, 9 MICH. BUS. STUD. 2 (1939)); *see also*, T. OVERSTREET, *supra* note 12, at 145-46 n.2 (citing FTC, REPORT OF THE FTC ON RESALE PRICE MAINTENANCE 143 (1945)); Overstreet & Fisher, *supra* note 3, at 12-13.

cartel is commonplace.[78]

From time to time observers focus on fact situations that do not seem to fit any of the proffered explanations for resale price maintenance.[79] The *Levi Strauss* case[80] is an often-cited example.[81] Indeed, one commentator has noted that resale price maintenance was not likely to have been in Levi Strauss's self-interest because the company seems to have fared better after it abandoned the policy.[82] However, it may be that what appears to be *minimum* resale price maintenance is really not that at all. Levi Strauss may have utilized *maximum* price setting in an effort to allocate a temporarily scarce product. Consider the following *possible* explanation.[83]

During the relevant period, Levi Strauss faced an unanticipated demand for its product. While its traditional customers were in large measure blue collar, agricultural, and construction workers, blue denim had become de rigueur for large numbers of people who had not worn blue denim since childhood. Jeans, high heels, and silk blouses were in vogue at cocktail parties. Demand for this new "high fashion" product rapidly exceeded available supply. Increased supply was not feasible in the short run. The production of denim requires a substantial capital investment. Fashion is fickle. It was not at all clear that blue denim would continue to find favor with the quiche and camembert crowd. Naturally, there would be some reluctance to make the necessary investment when the increased demand might be very short term. When demand exceeds sup-

78. The necessary conditions for successful horizontal price collusion will not often be present in resale price maintenance cases. *See* Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 142-43 (1984). For an empirical survey of conditions favorable to horizontal cartel behavior, see Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J. LAW & ECON. 13 (1974).

79. *See, e.g.*, Marvel & McCafferty, Resale Price Maintenance and Quality Certification (Apr. 1983) (describing Kellogg's cornflakes, Bon Ami cleanser, and Gillette safety razors as examples of products involving anomalous uses of resale price maintenance) (draft manuscript; on file with the authors).

80. On May 5, 1976, the FTC filed a complaint alleging that the Levi Strauss Company had engaged in illegal resale price maintenance. Levi Strauss & Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,135 (May 5, 1976). Numerous state attorneys general filed similar actions. *See, e.g.*, Tennessee *ex rel.* Leech v. Levi Strauss & Co., 1980-2 TRADE CAS. ¶ 63,558 (Tenn. Ch. Sept. 25, 1980); *cf.* Connecticut v. Levi Strauss & Co., 471 F. Supp. 363, 368 (D. Conn. 1979) (potential for "a series of what [Levi Strauss] term[ed] costly and duplicative suits in the courts of different states"). The FTC's action resulted in a cease and desist consent order in July, 1978. *In re* Levi Strauss & Co., 92 F.T.C. 171 (1978).

81. *See, e.g.*, Marvel, *supra* note 42.

82. *See* Oster, *supra* note 65, at 73-75, 82. Oster concluded that resale price maintenance made sense for Levi Strauss at one time, but was no longer in the company's interest when the FTC brought its case. *Id.* at 73-76.

83. It is not our intention to hypothesize about the actual case, but only to proffer an alternative explanation for a complex fact situation. For a contrary explanation of the ease, see *id.* at 62, 65, 81.

ply, it is usual to permit the price mechanism to allocate the product to those who value it most. But Levi Strauss might have feared that allowing the price to be bid up would result in purchases by its new customers, with its old customers turning elsewhere, perhaps to khaki. In a year or two its new customers might have found their fashion elsewhere and—more importantly—its old customers might have transferred their loyalty to another product. Faced with this situation, might not Levi Strauss have employed *maximum* pricing as a temporary policy to allocate its product until the short-run increase in demand lapsed or until the necessary capital investment could be justified and the supply increased? Thus, what may appear to be minimum resale price maintenance may in fact be nothing more than a policy that is benign and not anticompetitive.[84]

Yet another reason for manufacturers to enter into resale price maintenance programs is to obtain "quality certification" for their products.[85] Although there is some similarity to Professor Telser's classic "free rider" analysis,[86] the two scenarios are different.[87] Customers clearly regard some dealers as capable of certifying product quality; other dealers are less able to do so. Naturally, manufacturers prefer to see their merchandise sold in "leading stores" in order to obtain quality certification and thus increase demand for their product.[88] The sale of a

---

84. However, the Supreme Court's opinion in Albrecht v. Herald Co., 390 U.S. 145, 153 (1968), found *maximum* resale price maintenance to be *per se* illegal as well. *See also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-49 (1982); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951). Lower courts have generally applied the per se rule against maximum resale price maintenance. *See, e.g.,* Arnott v. American Oil Co., 609 F.2d 873, 885 (8th Cir. 1979) (citing *Albrecht*), *cert. denied,* 446 U.S. 918 (1980); *cf.* Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1981) (although maximum price fixing is per se illegal, preliminary injunctive relief is available only if it is shown that there is no adequate remedy at law), *cert. denied,* 455 U.S. 921 (1982).

85. *See generally* Marvel & McCafferty, *supra* note 79.

86. *See supra* note 67 and accompanying text.

87. Marvel and McCafferty have described this difference as follows:

> The Telser argument is that retailers are superior to manufacturers in providing services because they are capable of tailoring services to the particular needs of their customers. For example, the manufacturer of a personal computer could advertise the capabilities of its product and the requisite peripheral devices and software in general terms, but much of this information would be irrelevant to potential customers contemplating specialized uses. In contrast, the retailer could respond specifically to the user's needs. But to insure these services would be provided, the manufacturer would need to redirect competition among dealers from a price focus to a service focus. The remaining competition would nevertheless serve to prevent rents from being earned in equilibrium.
>
> The quality certification argument presented here does not require that the services be tailored to particular customers. The quality signals provided by stores offering the product do not require additional efforts by firms beyond an investigation of whether the product in question is of a quality level consonant with the retailer's reputation.

Marvel & McCafferty, *supra* note 79, at 7-8.

88. Sale of a manufacturer's goods by stores of assured quality contributes to consumers' perception of the quality of the goods. This does not involve the services or facilities provided to the

branded product to all types of dealers, however, provides some retailers an opportunity to free ride on those in the "leading stores" category. The solution is either to refuse to sell to discounters or to attempt to ensure the margin necessary to finance the desired ambiance. This explanation may have particular application to the apparel market. Unfortunately, the consumer welfare consequences of resale price maintenance in this setting are ambiguous.

Resale price maintenance can have both efficiency-enhancing and anticompetitive consequences, depending on the facts and circumstances. Recognition of the potential procompetitive effect of resale price maintenance is perhaps the most compelling argument for its treatment under the rule of reason. Of course some of the efficiency-enhancing attributes of resale price maintenance can be obtained by employing other vertical restraints, such as exclusive territories. That is not to say that other distribution policies are equally efficient substitutes.[89] Bork has observed that sellers will opt for resale price maintenance over locational restraints where the cost of shipment to the dealers' locations is low compared to the price of the goods. Exclusive territories, on the other hand, are attractive when transportation costs are large in relation to the total price of the product.[90] Thus, one would expect to see resale price maintenance with reference to watches, and exclusive territories for the sale of automobiles.[91]

III. THE *MONSANTO* CASE

Monsanto, a herbicide manufacturer, held a fifteen percent market share in the late 1960's, while its principal competitor, Ciba-Geigy, possessed seventy percent of the market.[92] In an effort to increase its market share, Monsanto sought to educate its distributors and their customers

---

consumer—pleasant changing rooms and patient sales personnel in the apparel trade, for example—but is a less tangible indicia of quality. *See* Oster, *supra* note 65, at 62-63.

89. See Baxter Letter, *supra* note 14, at 56,008-09 (footnote omitted):

> It is true, of course, that [resale price maintenance] is not the only vehicle available to a manufacturer to shelter his distributors' margins to the degree necessary to facilitate provision of point of sale services. He may engage in direct distribution by his own employees . . . . He may create geographic breathing room for his distributors by authorizing each to sell only from a designated location and maintaining adequate spatial separation of those locations, the practice that was upheld in *GTE-Sylvania*. He may create exclusive territorial distributorships, a practice that is economically indistinguishable from the practice involved in *GTE-Sylvania*, or he may use resale price maintenance. One technique will be more successful in some circumstances, another more successful in another; but all the techniques have essentially the same economic consequences.

See also T. OVERSTREET, *supra* note 12, at 167-68.

90. Bork, *The Rule of Reason*, *supra* note 70, at 429-464; *see also* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 9 (1981).

91. McLaughlin Dissertation, *supra* note 40, at 20.

92. Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464, 1466 (1984).

about the merits of its herbicides. In 1967 the company changed its distribution policy and announced that distributors would be reappointed for only one-year terms. It predicated renewal on whether a distributor's primary line of business was the marketing of Monsanto's products to dealers and whether the distributor employed trained personnel capable of developing educational programs for dealers and their customers. These changes, together with the introduction of new products, seemed to produce results. Indeed, Monsanto's market share almost doubled during a four-year period.[93] The focus on point-of-sale education was apparently successful.

In 1968 Monsanto informed Spray-Rite, a discount distributor of herbicide, that its contract would not be renewed. Approximately eighty percent of Spray-Rite's sales were of Ciba-Geigy herbicides, while only sixteen percent were of Monsanto products. Spray-Rite brought suit against Monsanto, alleging that Monsanto's decision not to renew the distributorship was based on a failure to abide by Monsanto's resale price maintenance policy, and that such a practice constituted vertical price-fixing under the Sherman Act.[94]

The trial court instructed the jury that Monsanto's conduct was per se unlawful if it was in furtherance of a conspiracy to fix prices. The jury, in answer to special interrogatories, found that the termination was pursuant to a conspiracy between Monsanto and one or more of its distributors to set resale prices.[95] The jury award of $3.5 million in damages to Spray-Rite was trebled to $10.5 million. The Court of Appeals for the Seventh Circuit affirmed.[96] That court held that "proof of termination following competitor complaints is sufficient to support an inference of concerted action."[97] As the Supreme Court later phrased the rule announced by the court of appeals, "an antitrust plaintiff can survive a motion for directed verdict if it shows that a manufacturer terminated a

93. *Id.* at 1467.

94. *Id.*

95. The special interrogatories, to each of which the jury answered "yes," were as follows:

> 1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with onc or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?
>
> 2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices of Monsanto herbicides?
>
> 3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?

Monsanto Co. v. Spray-Rite Serv. Corp., 684 F.2d, 1226, 1233 (7th Cir. 1982), *aff'd,* 104 S. Ct. 1464 (1984).

96. *Id.* at 1251.

97. *Id.* at 1238.

price-cutting distributor in response to or following complaints by other distributors."[98] Because that holding brought the Seventh Circuit into direct conflict with several other courts of appeals,[99] the Supreme Court granted certiorari.[100]

Monsanto is noteworthy for several reasons. First, the appearance by the United States as amicus curiae on behalf of Monsanto made it unusual. More importantly, then-Assistant Attorney General William F. Baxter sought to use the case as a vehicle for testing the per se illegality of resale price maintenance. Congressional reaction to the planned appearance by the Antitrust Division on the resale price maintenance question insured notoriety.[101] Second, the case afforded the Court an opportunity to discuss the vitality of the *Colgate* doctrine. And, third, the issue actually presented by the case—what quality of proof is necessary to give rise to an inference of a contract, combination, or conspiracy—was important because dealer termination cases account for such a large share of the antitrust case universe.[102]

---

98. *Monsanto*, 104 S. Ct. at 1468.

99. The Supreme Court summarized the state of the law as follows:

> The court below recognized that its standard was in conflict with that articulated in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-111 (CA3 1980), cert. denied, 451 U.S. 911 (1981). Other circuit courts also have rejected the standard adopted by the Court of Appeals for the Seventh Circuit. See *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 952-953 (CA2), cert. denied, 459 U.S. 1007 (1982); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1199 (CA6 1982), cert. pending, No. 82-848; *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 856-857 (CA1 1982); see also *Blankenship v. Herzfeld*, 661 F.2d 840, 845 (CA10 1981). The Court of Appeals for the Fourth Circuit has adopted the Seventh Circuit's standard. See *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1213-1215 (CA4 1983). One panel of the Court of Appeals for the Eighth Circuit also has adopted that standard, see *Battle v. Lubrizol Corp.*, 673 F.2d 984, 990-992 (CA8 1982), while another appears to have rejected it in an opinion issued the same day, see *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168, 1172 (CA8 1982). On rehearing en banc, the Court of Appeals was equally divided between the two positions. Compare *Battle v. Watson*, 712 F.2d 1238 (CA8 1983) (en banc); *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235 (CA8 1983) (en banc).

Id. at 1468 n.5.

100. 460 U.S. 1010 (1983).

101. *See supra* note 11. In its amicus brief the Department of Justice took the view that "[t]here is no sound basis for assuming, as courts have since *Dr. Miles* . . ., that resale price maintenance is so invariably anticompetitive as to justify *per se* condemnation." Brief for United States as Amicus Curiae in Support of Petitioner at 6, Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464 (1984). The Department concluded that "the logic of *Sylvania* compels the conclusion that resale price maintenance—like other vertical restrictions—is unsuitable for per se treatment." *Id.* at 19. *See also* Baxter Letter, *supra* note 14, at 56,012-13 (urging the Antitrust Division to seek judicial reconsideration of the per se rule against resale price maintenance).

102. *See* NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., A STATISTICAL ANALYSIS OF PRIVATE ANTITRUST LITIGATION: FINAL REPORT 27-31 (1979) (prepared for the ABA Section of Antitrust Law).

A. *The Per Se Quality of Resale Price Maintenance.*

Despite the arguments of the Antitrust Division in its briefs, the Supreme Court eschewed the opportunity to address squarely the per se issue. The Court, in a footnote, observed that the case did not present an "occasion to consider the merits of this argument."[103] The Court noted that neither party had argued the per se issue in the district court or raised it on appeal. Moreover, neither party pressed the argument advanced by the Antitrust Division in the Supreme Court. Accordingly, the Court "declin[ed] to reach the question."[104] The Court, however, did accept the Antitrust Division's argument that the distinction reflected in the case law between price and nonprice restrictions does not make economic sense.[105]

Despite some interpretations to the contrary,[106] *Monsanto* did not explicitly affirm the rule—if it can be called that—of *Dr. Miles.* As already noted, the Court went to some length to state that the case did not present an opportunity to consider the merits of the per se issue.[107] Justice Brennan's separate concurring opinion[108] underscores the Court's failure to affirm *Dr. Miles.* The existence of a separate concurring opinion might well reflect a perception that the Court's opinion, delivered by Justice Powell, fell short of the mark in paying obeisance to *Dr. Miles.* It may reasonably be presumed that Justice Brennan sought—unsuccessfully—to have *Dr. Miles* clearly affirmed in the opinion of the Court. Thus, the Court's opinion on this issue may be more interesting for what was *not* said than for what was said, and the issue of whether resale price maintenance ought to be treated under a per se rule is even more relevant

103. *Monsanto,* 104 S. Ct. at 1469 n.7.

104. *Id.* at 1470 n.7.

105. *Id.* at 1469-70 ("[T]he economic effect of all of the conduct described . . .—unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical." (citing United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960)).

106. *See, e.g.,* Glen Eden Hosp. v. Blue Cross & Blue Shield, 740 F.2d 423, 431 (6th Cir. 1984) (*Monsanto* "affirmed" the per se rule); Zeidman & Mullenix, *Distinctions in* Monsanto *Provide Little Guidance,* Leg. Times of Wash., Apr. 9, 1984, at 13, col. 1 ("[O]ne fact emerges as crystal-clear[:] . . . at least for the moment, *Dr. Miles* is alive and well."). *Cf.* Letter from Rep. James J. Florio to FTC Chairman James C. Miller, III (Apr. 10, 1984) (characterizing the *Monsanto* decision as a "reaffirmation" of the per se illegality of resale price maintenance. "Congress has spoken. The Supreme Court has spoken. I trust now that the Federal Trade Commission will do its duty."). *But see* Bender v. Southland Corp., 1984-2 TRADE CAS. (CCH) ¶ 66,307, at 67,337 n.3 (6th Cir. Dec. 7, 1984) (observing that the *Monsanto* Court refused to reconsider the per se rule "adopted in *Dr. Miles*" "*on the ground* that the defendants had not presented it either in the district court or on appeal," and noting that the defendant in the instant case also had not raised the issue (emphasis added)).

107. *See supra* notes 103-04 and accompanying text.

108. *Monsanto,* 104 S. Ct. at 1473 (Brennan, J., concurring).

after *Monsanto* than it was before. In some sense, the Court may be said to have invited future litigation on this issue.

B. *The* Colgate *Doctrine.*

Perhaps the most important feature of the Court's opinion was its rather clear reaffirmance of the *Colgate* doctrine. *Colgate*[109] held that a manufacturer may announce a resale price maintenance policy and thereafter refuse to deal with retailers who failed to comply with that policy.[110] In recent years many commentators have questioned the continuing vitality of *Colgate.*[111] Indeed, in *Russell Stover Candies, Inc.*,[112] the FTC, seeking to confirm the suspicions of many that *Colgate* was dead, brought what can only be described as a "test case" for the purpose of challenging the *Colgate* doctrine.[113] Not surprisingly, the

109. 250 U.S. 300 (1919).

110. *See supra* notes 17-38 and accompanying text.

111. Professor Lawrence Sullivan has queried "whether *Colgate* is not now more than outmoded, whether its shade has not at last been quietly dispatched." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 394 (1977). A good many courts have made similar observations. *See, e.g.*, George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960) ("[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."). Although some lower courts have continued to recognize the validity of *Colgate, see, e.g.*, Official Airlines Guides, Inc. v. FTC, 630 F.2d 920, 927-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981), other courts have narrowly restricted *Colgate* to its facts, *see, e.g.*, Greene v. General Foods Corp., 517 F.2d 635, 651-52 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), and have proscribed anything beyond the mere announcement of a policy of resale price maintenance, *see, e.g.*, Quinn v. Mobil Oil Co., 375 F.2d 273, 275-76 (1st Cir.), *cert. dismissed*, 389 U.S. 801 (1967).

112. 100 F.T.C. 1 (1982).

113. According to FTC documents obtained by the *Legal Times of Washington*, the *Russell Stover* case was the result of an effort by the Commission's Bureau of Competition to identify target respondents engaged in *Colgate*-type activities; the Bureau intended to establish as a per se violation of the antitrust laws the practice of suggesting resale prices, when such suggestions were combined with clearly communicated threats of termination for selling below those prices. *FTC Policy Briefing Book on Cooperative Advertising*, Colgate, Leg. Times of Wash., June 23, 1980, at 32, col. 1. The Bureau of Competition summarized its intentions in its case protocol:

> One may logically call upon the manufacturer who chooses to suggest resale prices to answer for any activity which implies that it is trying to secure adherence to those prices—including refusals to deal with noncomplaint [sic] distributors. Our objective is to make *Colgate* expressly unavailable to the manufacturer who elects to maintain resale prices by refusing to deal with or terminating discounters.

Id. at 33, col. 2. The Bureau of Competition identified three potential target companies—Russell Stover (candies), Rolex (watches), and Fieldcrest (bed and bath linens). The New York Regional Office identified another potential respondent—Jockey International (men's underwear, hosiery, and sportswear). *Id.* Commissioner Pertschuk was Chairman of the FTC when *Russell Stover* was in its formative stages. *See* Pertschuk, *Report from the Federal Trade Commission*, 48 ANTITRUST L.J. 629 (1979) (outlining his antitrust enforcement priorities aimed at enhancing competition). Then-Chairman Pertschuk noted in 1979 that "[a]lthough we will be attempting to define new approaches to vertical restraints, resale price maintenance will remain our top priority in this area." *Id.* at 636. Similarly, the FTC under Chairman Pertschuk attempted to expand per se applicability to nonprice

Commission found little, if anything, left of the doctrine,[114] but its administrative determination was reversed by the Court of Appeals for the Eighth Circuit.[115] Judge McMillian, writing for that court, concluded that any pronouncement on the continuing vitality of *Colgate* should be left to the Supreme Court.[116] Less than six months elapsed between the decision of the Eighth Circuit in *Russell Stover* and the holding of the Supreme Court in *Monsanto* that *Colgate* was in good health:

> Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturers and other distributors in order to establish a violation. . . . Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. . . . *Under* Colgate, *the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.*[117]

The *Monsanto* Court, in affirming the vitality of the *Colgate* doctrine,[118] noted that a manufacturer often has a legitimate interest in the

---

vertical restraints—contrary to Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)—and restrictive cooperative advertising programs—contrary to *In re* Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979)—and to limit the consignment exception beyond Simpson v. Union Oil of California, 377 U.S. 13 (1964).

114. Commissioner Pertschuk, writing for the Commission, found *Colgate* limited to the decision to sell to a particular customer in the first instance: "[W]e believe this right of *initial* customer selection is the meaning of *Colgate* as it stands today. . . . It does not mean that compliance with the pricing policy in order to avoid termination . . . does not give rise to an agreement." Russell Stover Candies, Inc., 100 F.T.C. 1, 46-47 (1982). The opinion made clear the Commission's view that *unwilling* compliance by dealers to adhere to a manufacturer's announced policy of price maintenance gives rise to an illicit agreement:

> An announced policy of terminating noncomplying 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, some dealers do act to avoid termination, their unwilling compliance does give rise to combinations. In short, an announced policy of terminating dealers for noncompliance 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.

Id. at 40-41 (emphasis in original; footnote omitted). Chairman Miller dissented from the Commission's opinion in *Russell Stover*, 100 F.T.C. at 50-53.

115. Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983).

116. "If *Colgate* no longer stands for the proposition that a 'simple refusal to sell to customers who will not sell at prices suggested by the seller is permissible under the Sherman Act,' . . . it is for the Supreme Court, not this court, to so declare." *Id.* at 260.

117. Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464, 1469 (1984) (emphasis added). The Eighth Circuit's opinion in *Russell Stover* was handed down on September 29, 1983; *Monsanto* was decided on March 20, 1984.

118. The Federal Trade Commission was severely criticized for its refusal to petition the Supreme Court for a writ of certiorari following the court of appeals' decision in *Russell Stover*. The critics contended that the Supreme Court would reverse the Eighth Circuit. *See, e.g.*, Letter from

price at which its goods are sold by dealers or distributors:

> A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, *and will want to see that "free-riders" do not interfere* [citing *Sylvania*]. *Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the* Colgate *doctrine allows.*[119]

Given that the Supreme Court has characterized per se illegal conduct as "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use,"[120] treating resale price maintenance as per se illegal and, at the same time, recognizing a manufacturer's legitimate interest in resale prices is not wholly immune from criticism.

C. *The Standard of Proof*

One of the most important aspects of the *Monsanto* decision is the Court's discussion of what a plaintiff must show in order to establish the existence of concerted action and so avoid *Colgate*. The Seventh Circuit had held that "proof of termination following competitor complaints is

---

Rep. James J. Florio to FTC Chairman James C. Miller, III (Dec. 2, 1983) (protesting that the Rudman amendment to the 1983 appropriations act affecting the FTC and the Justice Department, *see supra* note 11, was not a valid reason for refusing to appeal *Russell Stover*, because the case sought to "reconfirm" the FTC's "enforcement capability").

119. 104 S. Ct. at 1470 (emphasis added). Compare Baxter Letter, *supra* note 14, at 56,008:

> It is [the Antitrust Division's] judgment that manufacturers of certain types of products often have legitimate reasons for wishing to control the distribution environment in which those products are resold. If, for example, a product is technologically complex, its success in the marketplace may well depend upon the availability, at the point of sale, of technically trained sales personnel who are able both to instruct the consumer and to assist him in selecting the model, or the combination of components, that will best suit his individual needs.

See also supra notes 67-70 and accompanying text. The Court's opinion in *GTE Sylvania* recognizes additional legitimate reasons, other than preventing the free rider effect, for a manufacturer to exert control over the manner in which its products are sold and serviced. Specifically, the Court mentions new market entry, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977); *supra* notes 71-73 and accompanying text, and manufacturers' safety and warranty obligations under state and federal law, *GTE Sylvania*, 433 U.S. at 55 n.23.

120. Northeru Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). For a thorough discussion of the proper roles of the per se rule and the rule of reason in antitrust analysis, see Indiana Fed'n of Dentists v. FTC, 745 F.2d 1124, 1131 n.8, 1138-40 (7th Cir. 1984).

sufficient to support an inference of concerted action."[121] The Supreme Court rejected this standard but affirmed the judgment under a different standard. This new standard, however, was not clearly defined.

The Court made it clear that an antitrust plaintiff must present evidence sufficient to prove the existence of an *agreement*, and cautioned that inferences of agreement must not be drawn from "highly ambiguous evidence."[122] Further, an inference of an agreement *cannot* be derived from termination that follows dealer complaints. "[C]omplaints about price-cutters 'are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals.' Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, 'arise in the normal course of business and do not indicate illegal concerted action.' "[123] The Court observed that "distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their products will reach the consumer persuasively and efficiently."[124] Thus, a manufacturer may act on dealer complaints in a reasonable and legal exercise of business judgment.[125] In the Court's words, "something more than evidence of complaints is needed."[126] There must also be evidence "that tends to exclude" the possibility that the manufacturer and nonterminated distributors acted independently.[127] More specifically, the Court adopted the test employed by Judge Aldisert in *Edward J. Sweeney & Sons v. Texaco, Inc.*:[128] "The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that

121. *Monsanto*, 684 F.2d at 1238. The Supreme Court noted that the Seventh Circuit opinion, "later in the same paragraph, restated the standard of proof as follows: 'Proof of distributorship termination *in response to* competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action.' " *Monsanto*, 104 S. Ct. at 1468 n.4 (emphasis in original). The Court concluded that any difference in these formulations was of no importance in its analysis, *id.* *Cf. supra* note 98 and accompanying text.

122. 104 S. Ct. at 1470.

123. *Id.* (quoting Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168, 1172 (8th Cir. 1982)).

124. *Id.* at 1470-71.

125. "To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. In sum, '[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.' " *Id.* (quoting Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 n.2 (3d Cir. 1980)).

126. *Id.* In Gillette Tire Jobbers v. Appliance Indus., Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,231, at 66,231-32 (E.D. La. Oct. 3, 1984), a district court found that, under *Monsanto*, complaints by distributors followed by a reduction in the discount rate given plaintiff was insufficient to establish a conspiracy.

127. 104 S. Ct. at 1471.

128. 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' "[129]

In the context of the *Monsanto* case, the Court reasoned that there was sufficient evidence for the jury to have properly concluded that the defendant and some of its distributors had entered into an agreement sufficient to meet the contract, combination, or conspiracy requirement of section one of the Sherman Act. Most importantly, Monsanto had confronted a discounter and advised that termination would follow if the suggested resale price was ignored. When the discounter did not assent, Monsanto complained to the discounter's parent company which instructed its subsidiary to comply. Thereafter the discounter informed Monsanto that it would charge the suggested price.[130] The Court found that that evidence was both relevant and persuasive as to the agreement issue.[131] However, that incident, involving *another discounter*, not Spray-Rite, occurred *five months after* Spray-Rite had been terminated.[132] Thus, the evidence did not go directly to the issue of the termination of Spray-Rite.

Even more questionable was the Court's focus on a newsletter prepared by a distributor for the dealers it served. The newsletter reported that Monsanto officials had stated in a meeting with distributors that the company wanted to " 'get the market place in order' " and that, accordingly, " 'every effort [was going to] be made to maintain a minimum market price level.' "[133] The Court observed that a jury might reasonably interpret the newsletter as referring to an agreement on the part of distributors and retailers to adhere to Monsanto's resale price maintenance scheme.[134] On the other hand, a more reasonable interpretation of the newsletter is that it merely reports that Monsanto had a policy of sug-

---

129. *Monsanto*, 104 S. Ct. at 1471 (quoting Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3rd Cir. 1980)).

130. *Id.* at 1471.

131. *Id.*

132. *Id.*

133. *Id.* The newsletter further stated:

> "In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons. So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. Also, so far as the national accounts are concerned, they are sure to recognize the desirability of retaining Monsanto's favor on a continuing basis by respecting the wisdom of participating in the suggested program in a manner assuring order on the retail level 'playground' throughout the entire country. It is elementary that harmony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final."

Id. at 1471-72.

134. *Id.* at 1472.

gested retail prices and that it would terminate dealers who did not follow those prices. Thus, it can be argued that the newsletter reflected only that Monsanto had adopted and implemented a *Colgate* policy.

The Court then proceeded to discuss the nexus between evidence of an agreement with one or more distributors and the termination of Spray-Rite. The Court found that a jury could reasonably find the requisite connection since "it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated."[135] Unfortunately, the rationale of the Court's conclusion is not self-evident. One might conclude that the Court held that proof of a nexus is unnecessary. However, the Court did find "some circumstantial evidence of such a link."[136] Following Spray-Rite's termination, there was a meeting between officials of Spray-Rite and Monsanto during which Monsanto's representative opened the conversation by stating that Monsanto had received many complaints with reference to Spray-Rite's pricing policy. Monsanto urged that the reference may have been to complaints by Monsanto's own employees rather than competing distributors. But the Court found that the choice between two reasonable interpretations of the testimony was one most properly for the jury.[137]

It should be noted that there was no direct evidence of complaints from competing distributors about Spray-Rite's pricing policies during the fifteen months prior to termination.[138] Nevertheless, the Court found that a jury properly could have found that there were in fact such complaints from evidence that they continued *after* 1968.[139] It should also be noted that resale prices did not in fact stabilize as a result of Monsanto's policy. Evidently, discounting continued to characterize the industry.[140]

Thus, the evidence of concerted action in *Monsanto* was speculative. The only direct evidence of an agreement to maintain retail prices occurred five months after Spray-Rite was terminated and involved Monsanto and another distributor. There was no direct evidence linking that agreement with the termination of Spray-Rite. The strongest evidence that Spray-Rite was terminated pursuant to such an agreement took the form of a post-termination comment by one of Monsanto's executives that Monsanto had received many complaints about Spray-Rite's pricing policies. There was no evidence that the complaints referred to were

135. *Id.*
136. *Id.*
137. *Id.* at 1472-73 nn.11-14.
138. *Id.* at 1473 n.14.
139. *Id.*
140. *Id.*

made by distributors rather than by Monsanto's employees. Moreover, even if there had been *distributor* complaints, there was no direct evidence of a causal link between the complaints and termination unless one assumes the governing legal principle to be post hoc, ergo propter hoc.

The evidentiary standard established by the Court is problematic. Its practical effect appears to be the same as that of the court of appeals' presumptive standard, which was explicitly rejected.[141] Although termination following dealer complaints—indeed, *because* of dealer complaints—is insufficient to permit an inference of illegal agreement, it appears that a triable issue can be generated with little more. The Supreme Court's opinion is, in this respect, schizophrenic. It acknowledges the legality—indeed, the propriety—of dealer complaints about discounters. It assumes that a manufacturer can act on such information and that such action does not itself give rise to an inference of an agreement. Yet, it seems to conclude that such evidence, when coupled with evidence of an agreement with unrelated distributors at a later period of time, is sufficient to establish both an agreement for purposes of the terminated dealer and a causal connection with the latter's termination. Counsel advising clients need to appreciate that the Court's treatment of the facts in *Monsanto* was inconsistent with the tenor of its rhetoric.

IV. Implications for the Future

Monsanto is a significant decision.[142] The Court implicitly refused to reaffirm the per se illegality of resale price maintenance, and thus in-

141. *See supra* notes 121-29 and accompanying text.

142. *Monsanto* also must be assessed in terms of its implications for both public and private enforcement. The decision is not that significant in terms of federal enforcement standards, because there are few cases with sufficiently strong evidence of illegal resale price maintenance that can be brought by the FTC. The fact that the Commission felt a need to attempt to narrow the *Colgate* defense through *Russell Stover* is perhaps the strongest indication of this. *See supra* notes 111-17 and accompanying text. The vast majority of firms comply with the law and do not engage in practices that could easily be attacked as resale price maintenance. It would be surprising if it were otherwise. A firm cannot be expected to announce to its customers that it intends to violate a law which provides for treble damages and criminal sanctions. Moreover, manufacturers interested in resale price maintenance can obtain at least some of the benefits of the practice by employing nonprice restraints. Given the rule of reason analysis accorded nonprice vertical restraints under the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), firms typically utilize alternative modes of minimizing the free-rider problem. *See supra* notes 63-64 and accompanying text. Thus, the absence of large numbers of resale price maintenance enforcement actions does not necessarily mean that the law is not being enforced. Rather, it probably indicates that manufacturers are cognizant of the boundaries of permissible behavior and are acting accordingly.

A different set of circumstances characterizes private litigation, however, and in this arena the significance of *Monsanto* might well be great. Resale price maintenance claims typically accompany dealer termination litigation. Such suits are the traditional fare of private enforcement because the prospect of treble damages accompanied by attorney fees and costs are generally sufficient to interest a terminated dealer in raising any potential resale price maintenance issue. The existence of liberal vited future litigation to test that issue.[143] The Court also restored the luster to the *Colgate* doctrine.[144] This much is clear.

Unfortunately, the Court's treatment of the contract, combination, or conspiracy requirement is exceedingly difficult to assess. Although the Court recognizes the ambiguity of its past decisions and at least attempts to define the outer boundaries of permissible behavior,[145] it fails to do so in any coherent fashion. Termination following complaints from dealers is not enough to qualify as *Dr. Miles*-type conduct.[146] There must be evidence both "that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer."[147] Although the opinion noted that threatened termination and dealer newsletters were subject to differing interpretations, nevertheless they could qualify as the "something more"[148] needed to satisfy the concerted action requirement. Such a standard provides little notice or guidance to businesses, their counsel, or the courts.

---

standards that permit a plaintiff to present a colorable jury issue will probably promote additional litigation.

143. *"[U]nder present law* [price-fixing agreements] are subject to per se treatment and treble damages." *Monsanto,* 104 S. Ct. at 1470 (emphasis added). *See supra* notes 103-08 and accompanying text.

The Supreme Court may have an opportunity to consider this very issue in Buckingham Corp. v. Odom Corp. In an unpublished opinion, Buckingham Corp. v. Odom Corp., 703 F.2d 573 (9th Cir. 1983) (Nos. 81-6046 & 82-5241, reversing and remanding a case from the District of Arizona), the Court of Appeals for the Ninth Circuit held that a memorandum from a terminated liquor distributor that focused on pricing reasons for its termination by the supplier, combined with a letter from a competing distributor offering to make a resale price commitment to the supplier in return for an exclusive distributorship, was circumstantial evidence of concerted action sufficient to withstand the supplier's motion for a directed verdict. *See* Buckingham Corp. v. Odom Corp., 1984-1 TRADE CAS. (CCH) ¶ 65,918 (U.S. Apr. 2, 1984). On appeal, the Supreme Court vacated the decision and remanded it to the court of appeals for further consideration in light of *Monsanto.* Buckingham Corp. v. Odom Corp., 104 S. Ct. 1699 (1984). The Ninth Circuit's decision remained unchanged in an unpublished order filed August 7, 1984. The supplier then petitioned for certiorari, 53 U.S.L.W. 3419 (U.S. Nov. 16, 1984) (No. 84-806), asking, inter alia, whether in a dealer termination case such as this the rule of reason, rather than the per se rule, should be applied. *See* Buckingham Corp. v. Odom Corp., 5 TRADE REG. REP. (CCH) ¶ 60,021 at 65,112.

144. *See supra* notes 109-19 and accompanying text; *see also, e.g.,* Roland Mach. Co. v. Dresser Indus., Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,175, at 66,631 (7th Cir. Aug. 31, 1984) ("a classic example of the conduct permitted by . . . *Colgate* . . . , a decision whose continued vitality despite much criticism is attested to by the Supreme Court's approving reference to it in *Monsanto*").

145. *See supra* notes 99-100, 116-18 & 121-41 and accompanying text; *cf. supra* notes 17-39 and accompanying text.

146. *Monsanto,* 104 S. Ct. at 1464, 1471. But as to the probative value of dealer complaints, the Court cautioned that "[w]e do not suggest that evidence of complaints has no probative value at all, but only that the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy." *Id.* at 1471 n.8.

147. *Id.* at 1471 n.9.

148. *"[S]omething more* than evidence of complaints is needed." *Id.* at 1471 (emphasis added).

As the Court has recognized, sellers abiding by a resale price maintenance policy have a natural incentive to complain about competitors who do not.[149] And, again as the Court recognized, manufacturers, when confronted with information from complaining dealers, have an opportunity and a right to police their policy by terminating offending dealers.[150] The Court in *Monsanto* requires something more in order to prove a section one violation. What the Court did not do was to flesh out the additional requirement. To permit weak evidence to suffice, as the Court did in *Monsanto*, is implicitly to undercut the Court's explicit discussion of the propriety of manufacturer action predicated on dealer complaints. It allows such action, if accompanied by virtually anything else, to give rise to a triable issue of fact. *Monsanto* is a decision at war with itself.

The Court's reaffirmance of *Colgate* and its treatment of the evidence of concerted activity also demonstrates the internal inconsistency of the *Monsanto* decision. On the one hand, *Monsanto* says that a manufacturer can announce its resale prices in advance and refuse to deal with those refusing to comply. But, the Court then finds Monsanto's efforts to negotiate with its dealers with respect to adherence to that resale price and its threats to terminate dealers that did not comply to be evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy. Taken at face value, the application of this evidentiary standard to the facts of *Monsanto* undercuts much of the Court's discussion of *Colgate*.[151] As the *Monsanto* Court itself noted, "If an inference of [a price-fixing] agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded."[152]

Insufficient time has elapsed for there to be many reported decisions[153] applying the *Monsanto* Court's opinion. Nonetheless, Judge Or-

149. *Id.* at 1470. *See supra* notes 123-25 and accompanying text.

150. *Id.* at 1469.

151. *Cf. supra* note 38 and accompanying text.

152. *Monsanto*, 104 S. Ct. at 1470.

153. Several recent reported decisions appear to have relied upon *Monsanto* at least in part, not only to implement the evidentiary standard announced by the Court, but also to address issues raised by conduct arguably permissible under the *Colgate* exception. *See, e.g.*, National Indep. Theatre Exhibitors v. Charter Financial Group, 747 F.2d 1396, 1400, 1402 (11th Cir. 1984); Kartell v. Blue Shield of Mass., Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,300, at 67,302 (1st Cir. Nov. 28, 1984); Airweld, Inc. v. Airco, Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,197, at 66,747 (9th Cir. Sept. 11, 1984); Roland Mach. Co. v. Dresser Indus., 1984-2 TRADE CAS. (CCH) ¶ 66,175, at 66,631 (7th Cir. Aug. 31, 1984); Royal Drug Co. v. Group Life & Health Ins. Co., 737 F.2d 1433, 1438 (5th Cir. 1984); Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 1984-2 TRADE CAS. (CCH) ¶ 66,299, at 67,294-95 (S.D.N.Y. Nov. 16, 1984); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,258, at 67,126 (D.D.C. Nov. 9, 1984); Computer Place, Inc. v. Hewlett-Packard Co., 1984-2 TRADE CAS. (CCH) ¶ 66,254 (N.D. Cal. Oct. 22, 1984), *discussed supra* notes

rick's recent decision in *Computer Place, Inc. v. Hewlett-Packard Co.*[154] does provide some guidance as to the possible future effect of *Monsanto*. The plaintiff in *Computer Place*, a retailer selling principally by mail through one retail store, brought suit after the defendant manufacturer had determined not to provide mail order sellers with its new personal computer models. Plaintiff also sued another customer of defendant.

In granting defendant's motion for summary judgment, the court cited the Supreme Court's decision in *Monsanto* several times.[155] Defendant, not surprisingly, made frequent mention of the "free rider" problem in support of its decision not to supply mail order vendors with the product.[156] In support of its allegation of concerted action, plaintiff asserted that defendant retail competitor had complained about mail order discounting.[157] The court, however, observed that such complaints—read properly—were nothing more than legitimate objections about mail order vendors benefiting from the support services of conventional retailers.[158] Citing *Monsanto*, the court noted that such complaints were normal and to be anticipated; they hardly indicated concerted action.[159] Indeed, the court stated: "Concern about the 'free riding' problem is a legitimate dealer complaint."[160] The court concluded that the manufacturer had demonstrated an independent reason why it was in its own best interest to adopt a different marketing strategy with reference to its new line of personal computers for which point-of-sale service was deemed important to overall sales volume. Thus, the plaintiff "failed to produce 'evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors acted

---

154-63 and accompanying text; Gillette Tire Jobbers v. Appliance Indus., 596 F. Supp. 1277, 1279 (E.D. La. 1984); The Jeanery, Inc. v. James Jeans, Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,278, at 67,208 (D. Ore. Oct. 1, 1984); Advisory Information & Management Sys. v. Prime Computer, Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,237, at 67,013-14 (M.D. Tenn. Sept. 20, 1984); W. Goebel Porzellanfabrik v. Action Indus., Inc., 589 F. Supp. 763, 766 (S.D.N.Y. 1984); Reborn Enters., Inc. v. Fine Child, Inc., 590 F. Supp. 1423, 1436, 1438-39 (S.D.N.Y. 1984); Moffat v. The Lane Co., 1984-2 TRADE CAS. (CCH) ¶ 66,110, at 66,208-09 (D. Mass. June 13, 1984).

154. 1984-2 TRADE CAS. (CCH) ¶ 66,254 (N.D. Cal. Oct. 22, 1984).

155. *Id.* at 67,100-03.

156. Defendant had previously marketed its computers to engineers and scientists who were better acquainted with the competing products and their features. When defendant decided to enter the home computer market, it began to rely more heavily on dealer point-of-sale service to accommodate the relatively unsophisticated new customer base. *Id.* at 67,101-04.

157. *Id.* at 67,100-04.

158. *Id.* at 67,102-03.

159. *Id.* The complaints referred to by plaintiff were made by conventional sellers who pointed out that their store personnel would "presell" customers by demonstrating equipment and answering questions, only to have many of these same "customers" then purchase the equipment from mail order vendors. *Id.*

160. *Id.* at 67,103.

independently.' "[161]

A comparison between *Monsanto* and *Computer Place* illustrates the shortcomings of the current approach to the contract, combination, or conspiracy requirement. In both cases the manufacturer had an independent incentive to police its reselling program, i.e., elimination of the free rider problem. In *Computer Place* there was good evidence of nonterminated dealer complaints, indeed, much better evidence than in *Monsanto*. What then distinguished the two cases? Obviously one involved the refusal to provide a reseller with a particular product line, while the other was a more straightforward dealer termination case. But this distinction is not significant, because at the heart of both the refusal-to-deal and the dealer termination cases is the allegation that the "terminated" dealer priced at other than the "right price." The operative distinction appears instead to be that the court in *Computer Place* concluded that the plaintiff had failed to exclude the possibility that the manufacturer had an *independent* reason for taking action. Is it simply, then, that in *Computer Place* the defendant's counsel focused on the "free rider" problem as evidence of an independent rationale for conduct, whereas in *Monsanto* defense counsel did not? Perhaps.

These two cases demonstrate the tension within the case law. The *Monsanto* principle employed in *Computer Place*—that plaintiff must exclude the possibility that the manufacturer has an independent reason for taking action—severely undercuts the conventional wisdom since manufacturers almost always have an independent reason—such as elimination of the "free rider" problem—for implementing and policing resale price maintenance.[162] Under this principle, resale price maintenance would be actionable only where such an incentive was absent, as in the case where it is imposed by a manufacturer at the behest of a cartel.[163]

161. *Id.* (quoting *Monsanto*, 104 S. Ct. at 1471). "Viewed in a light most favorable to [plaintiff], the evidence shows that [defendants] were concerned about mail-order sellers. The concern demonstrated, however, was that mail-order sellers were taking advantage of and discouraging local dealers. The evidence also shows that the industry considered local dealer support essential to compete in the new personal computer market." *Id.* at 67,103-04.

162. *See supra* notes 65-73, 79-91 and accompanying text.

163. *Cf. supra* notes 74-78 and aceompanying text. A variant of this scenario is demonstrated in another recent case, The Jeanery, Inc. v. James Jeans, Inc., 1984-2 TRADE CAS. (CCH) ¶ 66,278 (D. Ore. Oct. 1, 1984), which also relied heavily upon the Court's *Monsanto* decision. There, in addition to evidence of complaints to James Jeans's sale representatives from competitor retailers about plaintiff's discounting and evidence that plaintiff's account was terminated in response to these complaints (which the court acknowledged "would be insufficient alone to support an inference of conspiracy under *Monsanto*," *id.* at 67,208), there was evidence that defendant had discussed plaintiff's pricing practices with one of plaintiff's competitors prior to plaintiff's termination and that the competitor had threatened to stop buying from defendant unless plaintiff was terminated. The court denied defendant's motion for summary judgment. Significantly, no discussion of the free-rider effect or any other efficiency justification appeared in the court's opinion. *But cf.* Burlington Coat Factory Ware-

Thus *Computer Place* may be a very important decision, not for any novel principle of law, but because it suggests a frame of reference within which the law of resale price maintenance is less inimical to efficiency considerations. Given this orientation, a defendant—or a respondent in a FTC proceeding—could negate the contract, combination, or conspiracy requirements by demonstrating an independent interest motivating its actions.

If the *Computer Place* mode of analysis is not employed, there appear to be three remaining alternatives. First, the Court might severely limit the *Colgate* doctrine, as the FTC attempted to do in *Russell Stover*, and thereby make the contract, combination, or conspiracy inquiry unnecessary. Given the Eighth Circuit's rejection of the Commission's position in *Russell Stover*[164] and the Supreme Court's affirmance of *Colgate's* vitality in *Monsanto*,[165] such a course seems highly unlikely. Second, the Court might require direct proof of a contract, combination, or conspiracy in a vertical price-fixing case. While what constitutes "direct evidence" obviously is open to dispute, the requirement of an express assent to a price maintenance policy would provide much greater certainty than presently exists. It would also reduce the number of resale price maintenance cases to almost zero because few well-advised manufacturers would solicit or accept such an express agreement. But, given the willingness to consider circumstantial evidence throughout the law, it is unlikely that the Court would create such a requirement in this narrow context. Third, the Court could reject the per se legal standard applied to resale price maintenance. Such a course would vastly reduce the universe of possible cases by requiring the plaintiff to demonstrate an anticompetitive impact.[166] A failure to adopt one of these alternatives will

house Corp. v. Esprit De Corp., 1984-2 TRADE CAS. (CCH) ¶ 66,299, at 67,292-93, 67,295 (S.D.N.Y. Nov. 16, 1984) (summary judgment granted in favor of defendant manufacturer in the context of a situation in which the plaintiff discounter did not engage in "conceptual" marketing); Moffat v. The Lane Co., 1984-2 TRADE CAS. (CCH) ¶ 66,110, at 66,207, 66,209 (D. Mass. June 13, 1984) (summary judgment for defendant manufacturer in the context of a situation in which the plaintiff discounter could free ride on the showroom facilities of a codefendant competitor).

164. *See supra* notes 112-16 and accompanying text.

165. *See supra* notes 109-11 & 117-19 and accompanying text.

166. Overstreet and Fisher suggest a fourth alternative: retaining the per se standard but with exceptions for some objective and easily determined fact situations. Overstreet and Fisher note that this approach might include exceptions for new entrants and firms with small market shares where the largest firms do not employ resale price maintenance. The advantage of this approach is that it would be consistent with current practice in the per se area, such as in tying cases where exceptions to the per se rule have been made for new entrants and for firms with no significant market power in the tying product. *See* Overstreet & Fisher, *supra* note 3, at 21-22. *See also* T. OVERSTREET, *supra* note 12, at 174-75. The principal disadvantage of this approach is that these exceptions would likely be either over-inclusive or under-inclusive (or both), thereby failing to capture some of the efficiency benefits of a rule of reason approach.

allow the continued bringing and litigation of cases that turn on insignificant—and often fortuitous—facts having little or nothing to do with the *antitrust* issue that is supposed to be the crux of the resale price maintenance controversy.[167]

V. CONCLUSION

Resale price maintenance has covered considerable distance since the Supreme Court first examined the practice in *Fowle v. Park*[168] in 1889. Until *Dr. Miles,* the Court analyzed the practice under a rule of reason. Thereafter, a rule of per se illegality took hold, although *Dr. Miles* was actually decided under common law principles. Over the next twenty-five years, while the courts struggled with the tension between the Court's decisions in *Dr. Miles* and *Colgate,* the growth of the chain store generated pressure on Congress for a legislative solution; this led to the passage of the Miller-Tydings Amendment in 1937 and the McGuire Act in 1952 which, in effect, created a rule of per se *legality.* Various loopholes soon appeared to the fair trade provisions, and judicial decisions joined in chipping away at these laws' effectiveness. The per se rule of legality was laid to rest with the repeal of the Miller-Tydings Amendment and the McGuire Act in 1975. Today, resale price maintenance is evaluated under a per se standard of *illegality.*

All the while, the Court has come to accept that, in practice, resale price maintenance has ambiguous economic consequences, and, in some instances, decidedly procompetitive effects. The dichotomy between price and nonprice restraints that the Court created in *GTE Sylvania,* coupled with recognition that many of the goals of resale price maintenance can be achieved through nonprice restraints, has led many observers to wonder whether the *Dr. Miles* rule of per se illegality is still appropriate. *Monsanto Co. v. Spray-Rite Service Corp.* can be viewed as an attempt by the Court to bring the *Dr. Miles* rule to terms with business realities, especially the exercise of *Colgate* rights.

---

167. The *Monsanto* Court noted that the principal flaw in the evidentiary standard adopted by the court of appeals is that it undercuts the standards employed in *Colgate* and *GTE Sylvania*:

> Nevertheless, it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.
>
> The flaw in the evidentiary standard adopted by the Court of Appeals in this case is that it disregards this danger.

Monsanto, 104 S. Ct. at 1470. *See also id.* at 1468 n.6.

168. 131 U.S. 88 (1889), *discussed supra* note 12.

Monsanto is the product of a doctrine at war with itself.[169] Although *Dr. Miles* and *Colgate* can coexist peacefully in the theoretical realm, the pressures of business conducted in a competitive marketplace have turned that relationship into something less than harmonious. The Court in *Monsanto* was lulled by the security of judicial precedent but needled by the demands of economic reality. The Court refused to choose between the two, deferring that task to some future time. In so doing, it produced a decision of limited longevity, but considerable utility. *Monsanto* is noteworthy not so much for what it does today but for what it signals on the horizon for tomorrow.

169. Doctrinal inconsistencies in other areas of antitrust law have suggested to other commentators the aptness of the metaphor of civil warfare. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7 (1978); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT xi (1962 & Supp. 1964). The phrase is equally descriptive of the past and present state of resale price maintenance.