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Randy S. Dessau

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A DEFINITION OF AGREEMENT: IDENTIFYING PURELY UNILATERAL CONDUCT IN VERTICAL PRICE RESTRICTION CASES

I. INTRODUCTION

Section 1 of the Sherman Antitrust Act¹ prohibits price agreements between a manufacturer and the distributors of its products. In particular, those agreements which attempt to fix the resale price² of the products are per se violations³ of the Act. Such agreements are frequently termed resale price maintenance (RPM).

RPM was one of the earliest activities designated by the Supreme Court as a per se violation of the Sherman Act. Per se characterization is often used to expedite a finding of illegal action. This approach is used when an activity over time has proven itself to be so anticompetitive that the courts will not entertain any procompetitive arguments made by the defendant.⁴ The probability that such activity

1. Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (1982). The appropriate portion reads: "Every contract, combination, . . . or conspiracy, in restraint of trade . . . is declared to be illegal." *Id.*

This note takes the traditional approach to interpreting the language of section 1 in saying that all three terms should be treated synonymously. See Handler, *Contract, Combination, or Conspiracy*, AN ANTITRUST HANDBOOK 119, 121-22 (1958). *Contra* Comment, *The Colgate Doctrine: Its Past and Present*, 12 HOUS. L. REV. 409 (1975) (treating the terms as disjunctive).

2. Resale price refers to the price a retailer charges the consumer for a manufacturer's product. For simplicity this note assumes a two-level system consisting of a manufacturer as the seller and a retailer as the buyer or reseller. In addition, the actions are called vertical price restrictions due to the vertical relation between manufacturer and retailer in the sale of a product. A horizontal relationship exists, for instance, between two retailers. This note stresses a single manufacturer achieving its desired resale price through a policy of refusing to deal or sell to retailers who do not resell the product at the desired price. The terms manufacturer and producer will be used synonymously as will the terms retailer and dealer. A price-cutter will be regarded as any retailer who sells below the suggested price. Other terms used synonymously in the text will be: unilateral action, *Colgate* methods, and refusal to deal; and motive, purpose, and intent. For a thorough discussion of vertical price-fixing, see M. HANDLER, *TRADE REGULATION* 417 (4th ed. 1967). For an economic discussion of the distribution process, see R. LIPSEY & P. STEINER, *ECONOMICS* 88 (5th Ed. 1978).

3. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 377 (1977).

4. *Id.* In contrast, the "rule of reason" approach is used to determine the illegality of behavior when the economic effects are not clearly understood. In rule of reason cases, evidence of both procompetitive and anticompetitive effects must be weighed. Where the anticompetitive effects are likely to outweigh the procompetitive, the conduct is deemed illegal. The process of presenting such evidence and weighing

will create and enhance competition is thought to be so slight that the courts refuse to waste time and resources listening to the defendant's cause. Such a procedure therefore expedites a finding of illegality by eliminating the need for plaintiffs to prove that actual anticompetitive effects took place. Once the activity, in this case RPM, is identified the inquiry is over. Section 1, as interpreted by the Supreme Court, therefore requires only that some sort of agreement to fix prices be proven before strict liability is imposed on a manufacturer and its distributors.⁵

In recent years strong attacks against this per se treatment of RPM have gained support. Critics of the approach argue that contrary to popular belief, many procompetitive effects can result from RPM.⁶ The treating of RPM as illegal per se, it is argued, ignores these effects and proscribes valid conduct.⁷ Opponents of the Supreme Court's present stance therefore seek the abandonment of per se characterization for RPM so that manufacturers can more freely engage in competitive behavior.⁸ A complete reversal of past case law is nevertheless unlikely because the Court as recently as 1984 reaffirmed its approach to RPM.⁹

Despite this per se approach, however, RPM might be legally and realistically attainable. A very old and narrow exception to a total ban on RPM still exists.¹⁰ As interpreted and reaffirmed by the Court,

it is, however, both time-consuming and said to be advantageous to the defendant. For a thorough history, see *id.* at 165-86. See also Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489-90 (1983). For a judicial definition, see *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (classic definition of the per se rule).

5. Vertical price-fixing was first found to be illegal in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Price-fixing was subsequently deemed a per se violation of section 1 in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

6. The attacks are premised on the notion that RPM is a beneficial device for the consumer. Proponents of RPM argue that case law lacks consistent or logical reasoning for RPM illegality. See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 147-67 (1976); R. BORK, *THE ANTITRUST PARADOX* 280-98 (1978).

7. See *supra* note 6.

8. R. BORK, *supra* note 6, at 344-46; R. POSNER, *supra* note 6, at 165 (would not grant complete legality but require concrete evidence of anticompetitive effect).

9. The Supreme Court reaffirmed the per se approach to vertical price restrictions in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1469-70 n.7 (1984) (parties chose not to press for abandonment of the per se approach though *amici* briefs sought it); see also *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977).

10. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). The unilateral action doctrine is still recognized although it has been narrowed. See *Russell Stover Candies*,

this exception allows manufacturers to create RPM by announcing a policy of terminating distributors who do not charge the manufacturer's desired resale price. Manufacturers are, under this exception, allowed to enforce such a policy by refusing to deal with distributors who charge an unacceptable price.¹¹ The only theoretical limitation on these manufacturer actions is that they must be free of any anticompetitive purpose.¹² Absent such a motive, the manufacturer's conduct is considered unilateral action and therefore not an agreement, as required by the Act.¹³ As a result, a manufacturer's desired resale price can be achieved due to distributors' fear that varying from the chosen price will result in a denial of resale opportunities. If, however, it can be established that the manufacturer implemented such a policy or refused to deal because of an anticompetitive or monopolistic purpose, the actions taken are no longer unilateral but instead become an illegal agreement.¹⁴

A problem with using unilateral action to establish RPM exists, however, due to confusion over the amount of evidence needed to infer a monopolistic purpose.¹⁵ When such a purpose is easily inferred,

Inc. v. Federal Trade Commission, 718 F.2d 256 (1983). However, dissatisfaction with the problems of defining illegal conduct due to *Colgate* also exists. See, e.g., Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258, 285; see also *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953) (*Colgate* allows "limited dispensation" for manufacturer attempts to control prices); *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960) (*Colgate* allows only a narrow channel through which the manufacturer may pass).

11. *Colgate*, 250 U.S. at 307. See also Pitofsky, *supra* note 4, at 1495. See Andersen, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality*, 54 WASH. L. REV. 763, 770-71 (1979).

12. Initially, one should note that disagreement exists as to what are the proper goals of antitrust. Two principle schools of thought have exchanged theories on this point. Briefly, the "Chicago School" espouses consumer welfare as the sole aim of antitrust. This goal is accomplished by distributional and allocative efficiency (*infra* note 131). In effect, the manufacturer's desire for efficiency will in turn promote consumer welfare through more and better products at a reduced price. The "Harvard School," however, does not limit itself to economic justifications but also includes in the goals of antitrust, decentralization of economic power, reduced private discretion in matters that materially affect the welfare of others, social preference for the small operation, and individual entrepreneurial autonomy. For a thorough discussion and comparison between the "schools," see L. SULLIVAN, *supra* note 3, at 1-13; see also Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Boczar & Welch, *The Purposes and Goals of Antitrust*, 27 ST. LOUIS U.L.J. 287 (1983).

13. See *supra* note 11.

14. *Colgate*, 250 U.S. at 307.

15. Confusion generally arises when a manufacturer terminates a price-cutting retailer after hearing complaints by the retailer's competition. The termination appears legal but if done to satisfy competitors' wishes, has been held to be monopolistic. See *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982) (termination at request of competing distributor is illegal). See also *infra* note 16. But

any refusal to deal might be construed as an antitrust violation. Recent examples of this problem and the uncertainty it breeds can be found in two Eighth Circuit holdings. On the same day, two Eighth Circuit panels reached divergent results in almost identical cases involving dealer termination;¹⁶ the manufacturer in each case refused to deal with distributors who were selling below the suggested resale price. In both situations the manufacturer apparently acted unilaterally after receiving complaints from some of the price-cutters' competitors.¹⁷ The manufacturers appear to have been properly seeking to establish RPM through the limited per se exception.¹⁸ Nevertheless, complaints from competitors of the terminated distributors led to an inference of anticompetitive purpose in one case.¹⁹ The manufacturer was held to be helping the obedient distributors prevent price competition through eliminating the price-cutter.²⁰ The other case, however, held that simple termination of resale rights after complaints by competing distributors did not constitute sufficient evidence to infer a monopolistic purpose behind the manufacturer's actions.²¹ In other words, unilateral action without a monopolistic purpose did not constitute an illegal RPM agreement.²² Divergent holdings therefore occurred even within the same circuit on the same day because of confusion over what amount of evidence is sufficient to allow an inference of anticompetitive purpose.²³

Such confusion naturally inhibits manufacturer conduct, even that which the Court has declared valid.²⁴ Inconsistent rulings on simple

see *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 *passim* (1984) (Court affirmed Seventh Circuit but used a different standard).

16. Compare *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982) (termination following competitor complaints indicates an illegal agreement) with *Roesch, Inc. v. Start Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982) (no agreement found when a dealer was terminated following competitors' complaints). For subsequent histories of these two cases, see *infra* note 168.

17. *Battle*, 673 F.2d at 986-87; *Roesch*, 671 F.2d at 1170-71.

18. See *supra* note 17.

19. See *supra* note 16.

20. The illegality of such action was proclaimed by the Court in *Dr. Miles*, 220 U.S. 373. The manufacturer is thought to be aiding a dealer cartel (*infra* note 136). These cartels are also per se violations, having little procompetitive justification. For a detailed analysis of the economic effects of a cartel, see P. AREEDA & D. TURNER, 2 ANTITRUST LAW 280-81 (1978). For a history of the per se treatment of dealer cartels, see L. SULLIVAN, *supra* note 3, at 213-19.

21. See *Roesch*, 671 F.2d at 1172 (mere complaints by customers that others are engaging in price-cutting is insufficient).

22. *Colgate*, 250 U.S. at 300.

23. See *supra* notes 15, 16.

24. See *infra* note 104 and accompanying text. William Andersen suggests that this lack of doctrinal clarity supports prohibiting even suggested retail prices.

dealer termination cases would presumably make manufacturers nervous about trying to establish RPM through the unilateral action exception. The ability to predict whether a refusal to deal is legal or illegal becomes severely hampered by such inconsistency. Recognizing this, the Supreme Court made a recent attempt in *Monsanto Co. v. Spray-Rite Service Corp.*²⁵ to clear up confusion surrounding what amount of evidence supports an inference. Unfortunately, the Court did little more than confirm what appeared self-evident, that termination following complaints by competitors was alone insufficient evidence to infer monopolistic purpose.²⁶ If unilateral termination is to become a safe method of attaining RPM, which it was designed to do, a clearer standard regarding when an inference of monopolistic purpose is appropriate must be invoked.²⁷ Doing so might not only protect valid manufacturer conduct, but also placate the growing opposition to the entire per se standard by allowing a safe method of attaining RPM and the procompetitive effects it can create.

In an effort to understand how the per se standard operates and where the unilateral exception fits in, this note will begin by examining the history of how permissible manufacturer conduct in RPM cases was narrowed. Next, the problem of inadequately drawn inferences of monopolistic purpose must be examined to identify why the confusion is leading to the extinction of the unilateral action doctrine. The development and confusing use of inferences will be examined. Thereafter, a brief examination of the arguments for and against the legality of possible manufacturer motives for using RPM will follow. An examination of these motives helps provide a clearer understanding as to why RPM should be allowed in restricted situations. Finally, a suggested standard for the use of inferences will be offered. Using economic theory accepted by the Court, this standard attempts to better define when an illegal agreement might really exist in seemingly unilateral termination cases.

II. LIMITATIONS ON PERMISSIBLE MANUFACTURER CONDUCT

A. A History of Limiting Conduct

Early in the history of the Sherman Act RPM was identified as a monopolistic practice.²⁸ In 1911, the Court in *Dr. Miles Medical*

Andersen, *supra* note 11, at 776-78. Although Andersen's position is opposed to that of this note, his analysis of the confusion surrounding "agreement" is helpful. *Id.* at 767-73.

25. 104 S. Ct. 1464 (1984).

26. *Id.* at 1471.

27. See *infra* notes 152-88 and accompanying text.

28. See *supra* note 5.

Co. v. John D. Park & Sons Co.,²⁹ held that two anticompetitive effects would be expected to result from RPM. The perceived effects can best be understood in the context of the facts in that case. *Dr. Miles* involved a manufacturer who fixed its resale prices by forcing retailers that sold its products to sign contracts agreeing to sell at a specified price.³⁰ Retailers who refused to sign the agreements were denied the opportunity to purchase goods for resale from the manufacturer. The case came before the Court on a plea from the manufacturer requesting an injunction and enforcement of the contracts.³¹ In refusing to enforce them, the Court declared that the contracts were illegal because of two perceived monopolistic effects they might create.³² First, the contracts might unreasonably restrain retailers' freedom to act independently.³³ Second, the agreements provided a method by which manufacturers could help their dealers create and maintain dealer cartels,³⁴ the most blatantly illegal form of an illegal agree-

29. 220 U.S. 373 (1911).

30. *Id.* The case involved a manufacturer who produced medicines by a secret process. *Id.* Park did not sign a contract but got the medicine by inducing others to break their contracts and sell to him. *Dr. Miles* sued to enjoin Park from inducing breaches by the distributors. *Id.*

31. *Id.* at 382-83.

32. "All interference with individual liberty of action in trading . . . [is] contrary to public policy. . . ." *Dr. Miles*, 220 U.S. at 406 (emphasis added) (trader freedom). "[T]he complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions. . . ." *Id.* at 408 (emphasis added) (dealer cartel).

The supremacy of *Dr. Miles* as the foundation for per se illegality of RPM was reestablished when Congress repealed those provisions of the Miller-Tydings and McGuire Acts which allowed fair-trade pricing at the option of the individual states. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a) (1976)).

33. Critics favoring consumer welfare as the ultimate goal of antitrust would condemn the protection of trader freedom as a goal and would support it presumably only when it serves to promote efficiency. See, e.g., R. BORK, *supra* note 6, at 81-89 (fails to recognize trader freedom as a goal); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 397-405 (1966) (refuses to acknowledge freedom as an antitrust concern).

Such assertions, however, appear to directly contradict the words of Justice McReynolds in *Colgate*, "The purpose of the Sherman Act is . . . in a word to preserve the right of freedom to trade." *Colgate*, 250 U.S. at 307. McReynold's words, however, may also be read as striking a blow to dealer freedom. See *infra* notes 35-40 and accompanying text. This note, although stressing the economic justifications for RPM, suggests an approach to the definition of agreement that remains within established case law. Both concerns of *Dr. Miles*, restraining freedom and promoting dealer cartels, must therefore be addressed. See *supra* note 32.

34. For a definition of dealer cartel, see *infra* note 136. The fear that a manufacturer might use fixed prices to establish a dealer cartel prompted many of the presumptions of illegality surrounding RPM. See, e.g., Pitofsky, *supra* note 4, at 1490-91 (ex-

ment. Following *Dr. Miles*, then, any attempt at RPM appeared to be illegal.

Soon after this ruling, however, the Court proclaimed manufacturer conduct to be legal when done alone and without a monopolistic purpose.³⁵ In *United States v. Colgate & Co.*,³⁶ the Court recognized a manufacturer's right of refusing to deal with distributors so long as such refusal was not done for an anticompetitive purpose.³⁷ In particular, *Colgate* announced two steps a manufacturer may use to create RPM: first, a policy of refusing to deal with price-cutters may be established; second, a manufacturer may terminate its relationship with dealers who fail to observe the suggested resale price.³⁸ Without the presence of an anticompetitive purpose, presumably regarding effects such as those delineated by *Dr. Miles*,³⁹ such actions are to be treated as merely unilateral conduct and therefore not an illegal RPM agreement.⁴⁰ Thus, the unilateral action exception, more commonly

perience shows manufacturer is organizing a dealer cartel); Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 830-31 (1955).

35. *Colgate*, 250 U.S. at 307. Some critics argue about whether the requirement is still valid. They also argue about its justification. See Pitofsky, *Is the Colgate Doctrine Dead? Affirmative of the Debate*, 37 ANTITRUST L.J. 772 (1968) (the exception has no rational explanation); Comment, *Unilateral Refusal to Deal: King Colgate is Dead!*, 30 OHIO ST. L.J. 537 (1969).

36. 250 U.S. 300 (1919). *Colgate* was a corporation engaged in selling and manufacturing soap and toilet articles. *Id.* at 302. The indictment against it alleged several actions taken for purposes of a price-fixing combination with its distributors: sending letters showing uniform prices to be charged; urging adherence to such prices; stating that no sales would be made to those who did not adhere; requesting information about price-cutters; placement of price-cutters on "suspended lists;" and uniformly refusing to sell to any dealers who did not promise to adhere or later failed to adhere, etc. *Id.* at 303.

37. *Id.* at 307. Justice McReynolds identified the right as follows: In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer . . . 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.

Id.

38. *Id.* A long history stretching back to 1880 tort law has been discovered regarding this principle of the single trader's right to freely choose his customers. *Colgate* simply acknowledged this right and clarified that the Sherman Act was not intended to eliminate it absent an attempt to monopolize. See Comment, *supra* note 1, at 409-14.

39. See *supra* note 32.

40. The philosophy of section 1 has, therefore, been said to respect individual freedom and initiative but regard collective action with suspicion. Pursuit of this philosophy by a manufacturer, however, can lead to results which restrict dealer freedom. See Fulda, *Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 LAW & CONTEMP. PROBS. 590, 593 (1965).

called the *Colgate* Doctrine, was initiated. Now, manufacturers were offered an opportunity to escape per se liability for engaging in RPM so long as they did not do so out of a desire to restrict dealer freedom or facilitate the forming or maintenance of dealer cartels.⁴¹ As a result, a purpose oriented approach to discovering illegality in RPM cases became necessary.

Shortly after *Colgate*, however, it became apparent that a finding of illegal purpose would often be inferred from the manufacturer's conduct. Only one year after anticompetitive purpose became a necessary element of proving illegal RPM arrangements, the Court began inferring such purpose when steps beyond those two delineated in *Colgate* took place.⁴² In *United States v. Schrader's Son, Inc.*,⁴³ a substantial number of steps were taken by a manufacturer in an effort to establish RPM.⁴⁴ These steps included extensive licensing contracts which dictated resale prices.⁴⁵ The manufacturer refused to deal with any retailers who did not sign one of the contracts.⁴⁶ Despite the absence of any evidence regarding intent, other than the conduct itself, only one year after *Colgate*, Justice McReynolds nevertheless said that these actions were "designed to take away dealers' control of their own affairs . . . destroy competition and restrain . . . trade amongst the States."⁴⁷ The manufacturer's conduct had gone sufficiently beyond that allowed by *Colgate* so that monopolistic purpose could be inferred from actions alone.⁴⁸ The manufacturer was not allowed to engage in such conduct because its actions were deemed coercive and therefore presumed to be designed at unreasonably restraining retailer freedom.⁴⁹ The licensing contracts, having been entered into with this

41. *Supra* note 32; see also *supra* notes 12, 33.

42. *United States v. Schrader's Son, Inc.*, 252 U.S. 85 (1920). A typical definition of coercion includes a notion that one party exerts influence over another party's actions and thereby restricts freedom. The likely result of such action is that the influenced party does something it would otherwise not do. BLACK'S LAW DICTIONARY 234 (5th ed. 1979). This definition can be broken down into two actions, those of the influencing party and those of the responding party. Breaking coercion down in this fashion suggests two methods of identifying it: examining the acts of the party accused of exerting force or examining the responding party's actions subsequent to the alleged force to see if they have been manipulated. Presumably, the Court, by looking at manufacturer conduct, was following the first method, examining the coerciveness of such conduct to decide if dealer freedom had been restrained. See *supra* note 32.

43. 252 U.S. 85 (1920).

44. *Id.* at 95-96.

45. *Id.*

46. *Id.* at 95, 99-100.

47. *Id.* at 100.

48. See *supra* note 37.

49. Evidence of widespread coercion can take the actions outside of the *Colgate* Doctrine. See, e.g., REFUSALS TO DEAL AND EXCLUSIVE DISTRIBUTORSHIPS 17 (ABA Antitrust Section, Monograph No. 9, 1983) [hereinafter cited as Monograph].

presumed purpose, constituted illegal RPM agreements.⁵⁰ Thus, the Court appeared to be retreating from its stance on requiring proof of intent, at least to the extent such intent was manifested in overt contractual arrangements.

However, limitations on the unilateral action concept did not stop with merely an inference of illegal intent when overt contracts were present. The Court went on to find that an inference of monopolistic purpose was also appropriate when based solely on manufacturer conduct. In *FTC v. Beech-Nut Packing Co.*,⁵¹ no contract was necessary for a manufacturer to establish RPM by other methods. Through actions alone this manufacturer induced retailers into refusing to make sales to their terminated competitors.⁵² Retailers also helped maintain the RPM by reporting price-cutters to the manufacturer, who took several steps to punish the dissidents.⁵³ The Court inferred from all of these actions that the manufacturer in reality implemented this RPM arrangement so as to coerce the retailers into anticompetitive positions. The sole purpose of such action was said to be the constraint and manipulation of retailer freedoms.⁵⁴ An illegal RPM agreement therefore existed between the manufacturer and its obedient retailers.⁵⁵ Given the numerous measures taken by the manufacturer in cooperation with its retailers, this holding would not appear terribly inconsistent with *Colgate* and *Dr. Miles*.

However, the Court did not limit its broadening of the inference notion to cases with such egregious facts. In 1960, an expanding approach allowed the presence of any affirmative acts, beyond a simple retailer termination, to constitute sufficient evidence to infer an illegal purpose in any RPM arrangement.⁵⁶ *United States v. Parke*,

50. *Schrader's Son*, 252 U.S. at 99-100; see also *id.* The reader should bear in mind that the term "coercion" is being used to identify acts of the manufacturer which go beyond *Colgate*.

51. 257 U.S. 441 (1922).

52. *Id.* at 447-51. Acts of the manufacturer used to secure cooperation were extensive. They included: (1) insisting that jobbers sell only to other approved retailers; (2) maintaining lists of "approved" retailers; and (3) using symbols on products to identify the distributors from whom such products were purchased.

53. *Id.* at 446-48.

54. *Id.* at 454. Justice Day noted that, "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition . . . which it has been the purpose of all the anti-trust acts to maintain . . . it necessarily constrains the trader. . . ." *Id.* "From this course of conduct a court may infer . . . that competition among retail distributors is practically suppressed. . . ." *Id.* at 455.

55. Although the Sherman Act was not involved in the case, the Court ruled that the same policies were being upheld. *Id.* at 453-54.

56. *United States v. Parke, Davis and Co.*, 362 U.S. 29 (1960). It should be noted that prior to this case another exception to *Colgate* was announced. *United States*

*Davis and Co.*⁵⁷ introduced this new standard. A manufacturer in that case established RPM by asking wholesalers to stop selling its products to price-cutting retailers. Additional compliance by retailers emanated from economic incentives and peer pressure; the manufacturer informed retailers of their competitors' adherence. Furthermore, price-cutters who indicated new willingness to comply with the suggested prices were reinstated into the distribution process. From these facts alone the Court inferred a monopolistic purpose, ignoring extensive measures well beyond a simple refusal to deal found in previous cases.⁵⁸ Instead, a new broad standard regarding the amount of evidence required to infer monopolistic purpose appeared.⁵⁹ Justice Brennan in enunciating this standard stated:

[I]f a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence . . . [but] 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. (emphasis added)⁶⁰

Such a standard appeared severely to restrict any attempt at RPM. Any "affirmative action," apparently defined as any acts taken beyond that of simple dealer termination, would be considered a coercion of dealers into relinquishing their freedom.⁶¹ As a result, submission to these practices constituted an illegal price fixing agreement between the manufacturer and adhering retailers.⁶²

v. General Electric Co., 272 U.S. 476 (1926), established that a *del credere* consignment arrangement did not unreasonably restrain the consignee's freedom. A *del credere* arrangement consists of a merchant guaranteeing performance by a third party to the principal. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 596 (1966). Apparently, in *General Electric*, title of the goods carried with it the right to make pricing decisions so that G.E. could, through these arrangements, require a guarantee that its products would be sold at the desired price. This exception, however, was later restricted. See *infra* note 65.

57. 362 U.S. 29 (1960).

58. *Id.* at 48-49. Justice Harlan noted in his dissent that the Court had misconstrued its holdings in *Beech-Nut* (257 U.S. 441) and *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). See *Parke, Davis*, 362 U.S. at 51-56.

59. Donald Turner suggests that the case reflected an aura of group boycott which accounted for the great lengths taken by the Court to find an agreement. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 686 (1962) (citing Levi, *infra* note 80, at 325).

60. *Parke, Davis*, 362 U.S. at 46-47.

61. *Id.*

62. *Id.* One author suggests that the concept of coercion did not appear as a separate analysis until *Parke, Davis*. In addition, this author argues that two steps

By acknowledging that simple termination was not illegal, this new broadened standard nevertheless reaffirmed that the unilateral action doctrine though very narrow remained a theoretical possibility. Had the seller in *Parke, Davis* used merely the two *Colgate* steps to achieve RPM, no "affirmative action" would have taken place. Justice Brennan's statement supports this notion when saying that a manufacturer may rely on the desirability of its product to gain adherence for the suggested resale price.⁶³ Presumably the manufacturer's right to choose its own customers at this point of pure unilateral action outweighs the concerns of antitrust laws regarding retailer freedom, defined as the freedom from having to decide whether to adhere to a fixed resale price or be terminated. Justice Brennan's statement might therefore be read as clearly identifying the only legal method of attaining RPM. Nevertheless, Justice Harlan in his dissent accurately predicted the confusion this new ambiguous standard would create in its attempt better to define what acts are sufficient to justify an inference of anticompetitive purpose.⁶⁴

Following *Parke, Davis*, the standard was broadened one more time. As the result of *Albrecht v. Herald Co.*,⁶⁵ conduct of independent agents, hired by a manufacturer, may also be considered when determining whether "affirmative action" has taken place. Therefore, acts of an independent agent may be evidence justifying an inference of monopolistic purpose for the manufacturer's actions.⁶⁶ In *Albrecht*, the manufacturer hired an independent agent to solicit customers of a terminated retailer (newspaper deliveryman). The manufacturer refused to deal with the retailer because the retailer was charging customers a price higher than that fixed by the manufacturer for its product. As a result, the independent agent was hired to cover the terminated deliveryman's route and charge customers the lower price fixed by the manufacturer.⁶⁷ The retailer was told, however, that if

are necessary to form an illegal RPM program: an agreement and coercion. See Comment, *supra* note 1, at 415-17.

63. *Parke, Davis*, 362 U.S. at 47.

64. *Id.* at 52-53. Justice Harlan argues that as a result of the majority opinion the manufacturer, by taking any affirmative action, has lost its privilege to choose its own customers.

Several authors argue that it was Harlan's dissent, however, which caused the confusion that followed *Parke, Davis*. See, e.g., M. HANDLER, 1 TWENTY-FIVE YEARS OF ANTITRUST 360-72 (1973).

65. 390 U.S. 145 (1968). As a result of the broadening inferences of coercion, the consignment exception (*supra* note 56) was limited prior to *Albrecht*. In *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), the Court suggested that a manufacturer's economic power coerced apparent consignees into accepting unfavorable contracts which included fixing price terms.

66. *Albrecht*, 390 U.S. at 147-50. See also *infra* note 71.

67. *Albrecht*, 390 U.S. at 147-50.

he complied with the fixed price, the agent would be dismissed.⁶⁸ The Court held that the agent was being used as a coercive device to achieve resale price adherence from the retailer.⁶⁹ Being such a device, use of the agent constituted an illegal method of obtaining RPM and therefore unduly restricted dealer freedom. An illegal agreement between the manufacturer, the agent, and adhering retailers was uncovered: the agent's agreement with the manufacturer illegally restricted dealer freedom, as did the agreement between the manufacturer and the obedient dealers. Such obedience was coerced through the "affirmative action" of the manufacturer as manifested in the agent's actions.⁷⁰

This holding went farther than any previous case in identifying manufacturer conduct sufficient to justify an inference of monopolistic purpose. In addition to the agent's conduct being imputed to the manufacturer, Justice White suggested another extraordinary possibility regarding how the manufacturer's conduct was coercive and therefore beyond the *Colgate* unilateral action exception.⁷¹ Justice White intimated that even the retailer's customers were a coercive device used against the retailer.⁷² By offering a lower resale price, the manufacturer sought to draw customers away from the retailer and thereby force him into submission.⁷³ Customers' acceptance of the

68. *Id.*

69. *Id.* at 149-50. Richard Posner suggests that *Albrecht* simply entailed a manufacturer seeking out the lowest bidder to deliver papers. He concludes that the manufacturer's actions were the type antitrust laws attempt to foster. See R. POSNER, *supra* note 6, at 157.

70. The jury held that no agreement existed but the Supreme Court disagreed. *Albrecht*, 390 U.S. at 146, 154. Handler finds the outcome consistent with antitrust rules but dislikes taking such rulings away from the trier of fact. See M. HANDLER, 2 TWENTY-FIVE YEARS OF ANTITRUST 749-62 (1973).

71. *Albrecht*, 390 U.S. at 150 n.6. Justice White suggested several possible combinations that could have occurred in the case: manufacturer and cut-off retailer; manufacturer and the retailer's competitors; and manufacturer and the consumer. *Id.* *Albrecht* is unique because the fixed price was a maximum level above which no distributor could sell. Seemingly, distributors were free to price-cut but had no incentive to do so because exclusive territories were delegated to each. No competition therefore existed in these territories. The fear that a dealer cartel could cut output and increase prices was not present. The other justification for the holding in *Dr. Miles*, restricting trader freedom, was therefore prevalent. Finding such a constraint was a problem, however, because the plaintiff had initially entered into the agreement voluntarily. The Court, however, resolved this problem by saying that the illegal agreement began "at least as of the day he unwillingly complied with [the manufacturer's] advertised price." *Id.* This resolution was confirmed in *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138-39 (1968).

72. *Albrecht*, 390 U.S. at 150 n.6.

73. *Id.* at 147-50.

lower resale price therefore supplied another indirect method by which the manufacturer could force adherence to its fixed resale price. Justice White's footnote proposed an incredible possibility; manufacturers could be held to have formed an illegal RPM arrangement if the manufacturer sought to impose a price ceiling and offered to sell directly to consumers at that price should any retailer attempt to sell above it. In effect, terminating a high-priced retailer and then offering a lower fixed resale price directly to consumers might constitute enough "affirmative action" by a manufacturer to infer a monopolistic purpose and subsequently an illegal agreement.⁷⁴

Taking the analysis in *Albrecht* to its logical extreme, the existence of any third party action before or after a dealer termination might be imputed to the manufacturer and might result in "affirmative action."⁷⁵ If a third party's actions can be characterized as coercing a dealer into compliance with a fixed resale price, the manufacturer runs a severe risk when terminating any nonconformers. The third party's actions might, under an *Albrecht* analysis, be seen as planned by the manufacturer as an enforcement device and therefore "affirmative action." If so, the manufacturer is presumed to be acting with a monopolistic purpose and in violation of the law.⁷⁶ This analysis explains the attempt in later cases to find an illegal purpose in situations where the only acts taken by a manufacturer were those allowed by *Colgate*. In these cases, the courts did not look at the acts of the manufacturer alone. Instead, dealers' and third parties' conduct was examined. The courts then treated the manufacturer as if it, rather than the dealers and third parties, had taken such actions. Affirmative action sufficient to justify the finding of an illegal agreement was imputed to the manufacturer. Confusion arose, therefore, as to what evidence was allowed to help decide whether unilateral action by the manufacturer was in fact all that took place in a dealer termination situation.

B. *The Historical/Conduct Approach to Predicting Illegality*

One basic assumption can be drawn from the history of the Court's narrowing of permissible manufacturer conduct in RPM situa-

74. For criticism of the unprecedented suggestions regarding possible combinations, see M. HANDLER, *supra* note 70, at 759-60. Handler suggests that *Parke, Davis* specifically refused to find such coercive tactics. *Id.*

75. See Comment, *supra* note 1, at 421 (interpreting *Albrecht* to say independent parties acting as agents can conspire with their principal, no matter what their motivations are).

76. See *Albrecht*, 390 U.S. at 150 n.6; see also *supra* note 71.

tions. Any actions taken directly by the manufacturer beyond establishing a refusal-to-deal policy and then terminating dissident dealers will undoubtedly constitute "affirmative action" and be illegal per se.⁷⁷ In such cases, lack of anticompetitive subjective intent on the part of the manufacturer is irrelevant; the manufacturer is presumed to intend the reasonably probable effects of its action.⁷⁸ Any conduct beyond the two *Colgate* steps is, according to the Court, inherently coercive and at a minimum unjustifiably restrains dealer freedom.⁷⁹ When such coercion exists, dealer adherence to the manufacturer's plan creates an illegal RPM agreement under section 1.⁸⁰

III. THE NEED FOR A PURPOSE-ORIENTED APPROACH

A. Proscribing Valid Conduct

A problem has developed in recent years, however, due to attacks upon manufacturer actions that were clearly confined to those allowed by *Colgate*.⁸¹ In these attacks, inferences of a monopolistic purpose were used to argue that the manufacturer's termination of a price-cutter evidenced an illegal agreement despite apparently valid conduct. As these attacks indicate, inferences regarding purpose can under present case law be used to threaten any manufacturer's attempt at establishing RPM. Following *Colgate* steps, under such circumstances, may not prevent charges of an illegal agreement.⁸² The need more critically to review the use of these "monopolistic purpose" inferences when *Colgate* steps alone are used is therefore vital. Without such a review, apparently valid RPM schemes, achieved through a manufacturer's right to unilateral action, may for all practical purposes be proscribed.

77. See *supra* text accompanying notes 28-76.

78. Defendants are said to have intended the reasonably probable effects of their conduct, even if they did not intend or expect those results. *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978). See also Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 706 (1979) (courts use "objective intent," what a reasonable observer would infer as the purpose of the conduct despite the defendant's justification). For a general examination, see M. HANDLER, *supra* note 70, at 773-80 (law by presumption).

79. *Supra* notes 54-55. The extreme position taken by *Albrecht* suggests that in some cases a directed verdict against the manufacturer is appropriate. See *supra* note 70.

80. A thorough history of RPM can be found in Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258.

81. See *infra* text accompanying notes 168-214.

82. See, e.g., *infra* notes 197-201 and accompanying text.

B. Allowing for Economic Motives When Inferring Purpose

Following the two *Colgate* steps does not alone constitute unilateral action. If taken to create or maintain a dealer cartel, such steps can be part of an illegal agreement.⁸³ The two anticompetitive concerns of RPM were enunciated in *Dr. Miles*: restraining dealer freedom and creating or maintaining dealer cartels. *Colgate* sought only to strike a balance regarding the first of these concerns. Dealer freedom is restricted in any RPM arrangement. The Court however recognized that at some point the manufacturer's right to choose its customers must become paramount; otherwise, each time a manufacturer terminates a retailer a section 1 violation might be found. Restraints on dealer freedom, therefore, should not be included in an analysis of whether an illegal agreement exists when a manufacturer simply announces a policy of terminating price-cutters and subsequently terminates one. In such a case, the concern of antitrust law is to discover whether the manufacturer is in fact so acting to preserve or create a dealer cartel. Purpose, however, is a difficult element to establish with direct evidence, particularly when the manufacturer's actions fall within *Colgate*. Consequently, courts have adopted the inference approach.⁸⁴

This approach is strongly influenced by the belief that most manufacturers have no incentive, other than establishing a dealer cartel, for wanting to enforce RPM.⁸⁵ Such a belief leads to easily adopting blanket inferences of monopolistic purpose in *Colgate* situations.⁸⁶ These facile inferences cause much confusion as to what, if any, manufacturer actions constitute valid unilateral action.⁸⁷

In view of the economic concepts adopted by the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,⁸⁸ the method by which inferences of monopolistic purpose are drawn should now be reexamined. *Continental* relied on many economic concepts which support arguments favoring the existence of valid manufacturer motives for

83. *Colgate*, 250 U.S. at 307.

84. See Bauer, *supra* note 78, at 706 (courts must operate in context of "objective intent," what a reasonable observer would infer as the purpose of the conduct in question).

85. See Pitofsky, *supra* note 4, at 1490 (experience shows manufacturers operate RPM for dealer cartels); Bowman, *supra* note 34, at 830-31 (unwilling manufacturers may be forced by dealers to protect dealer profit margins).

86. See, e.g., *Beech-Nut*, 257 U.S. at 446-48.

87. *Id.*

88. 433 U.S. 36 (1977); see *infra* notes 118-21 and accompanying text.

engaging in RPM.⁸⁹ The recognition of these concepts raises questions as to why blanket inferences regarding cartels should be allowed in unilateral action cases. *Colgate* recognizes the right of a manufacturer unilaterally to refuse to deal with price-cutters unless the purpose of such action is *proven* to be the formation or preservation of a cartel.⁹⁰ The continued use of blanket "dealer cartel inferences" in lieu of *Continental* therefore appears to be tantamount to denying the validity of *Colgate*. These inferences preserve the appearance, while denying the reality, of a right to unilateral action; judicially recognized manufacturer motives for pursuing RPM are given no practical consideration. Limited recognition of the economic arguments adopted in *Continental* can lead to better defining the standard for when sufficient evidence exists to infer that a high probability of monopolistic purpose exists.⁹¹

C. Monsanto Co. v. Spray-Rite Service Corp.

The Supreme Court has recognized the implications of these loosely drawn inferences, and it attempted to define a clearer evidentiary standard in *Monsanto Co. v. Spray-Rite Service Corp.*⁹² Monsanto terminated a price-cutting distributor after receiving complaints from the price-cutter's competitors. At trial, the court instructed the jury that Monsanto's actions were *per se* unlawful if they were done to further a price-fixing conspiracy. Through answers to interrogatories the jury found the termination to be part of a conspiracy.⁹³ On appeal, the Court of Appeals for the Seventh Circuit affirmed the verdict saying that evidence of a termination in response to or even simply following complaints of competitors is sufficient evidence to let a jury decide whether concerted action occurred.⁹⁴ This standard was declared improper by the Supreme Court which, after announcing a clearer standard, went on to affirm the holding against Monsanto.⁹⁵ In regard to the standard used by the Seventh Circuit, Justice Powell declared that allowing inferences to be drawn from ambiguous evidence threatens the doctrines enunciated in *Colgate* and *Continental*.⁹⁶ Such

89. *Continental*, 433 U.S. 36; see also *infra* notes 116-51 and accompanying text.

90. *Colgate*, 250 U.S. at 307.

91. See *infra* notes 156-66 and accompanying text.

92. 104 S. Ct. 1464 (1984).

93. *Id.* at 1467-68.

94. *Id.* at 1468.

95. *Id.* at 1471, 1473. For the standard enunciated by the Court, see *infra* note 105.

96. *Id.* at 1470. "If an inference of [a vertical price-fixing] agreement may be drawn from such ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded." *Id.*

lax inferences "penalize perfectly legitimate conduct."⁹⁷

A substantial portion of the *Monsanto* opinion is dedicated to reaffirming the validity of *Colgate*.⁹⁸ Unilateral action by a manufacturer is still permissible conduct.⁹⁹ Manufacturers are free to announce a policy of terminating price-cutters and then may terminate pursuant to that policy.¹⁰⁰ Distributors are free to acquiesce to the manufacturer's demands to avoid termination.¹⁰¹ Given such rights, the majority noted, it is not unusual to expect complaints about price-cutters; such complaints are natural and arise in the normal course of business.¹⁰² Contacts between a manufacturer and its distributors are also to be expected. These contacts are necessary to keep the distribution system efficient.¹⁰³ Allowing such acts alone to constitute evidence sufficient for an inference of illegal purpose is improper. To do so would destroy a manufacturer's ability to communicate and would likely result in irrational disallocations in the market due to lack of information regarding market conditions from the distributors.¹⁰⁴

The Court's new standard therefore attempts to exclude legitimate business conduct alone from being used to justify an inference of illegally motivated actions.¹⁰⁵ To avoid a directed verdict, the plaintiff must introduce evidence that either directly or circumstantially tends to prove that the manufacturer and distributors have a conscious commitment to a common scheme *designed to achieve an unlawful objective*.¹⁰⁶

These last words, however, allow the confusion over inferences to continue. Given *Colgate* and *Dr. Miles* it would appear that the evidence should tend to prove that the parties' purpose was either

97. *Id.*

98. *Id.* at 1469.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1470 ("[C]omplaints about price-cutters 'are natural—and from the manufacturer's perspective, unavoidable. . . .'").

103. *Id.*

104. *Id.* In addition, the Court added that allowing an inference of concerted action based on complaints alone would "inhibit management's exercise of independent business judgment and emasculate the terms of [section 1]." *Id.* at 1471, quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

105. *Monsanto*, 104 S. Ct. at 1471 ("There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.").

106. *Id.* The Court noted, when discussing the Seventh Circuit holding, that the evidentiary standard applied to directed verdicts. *Id.* at 1468.

to restrain dealer freedom or to establish and maintain a dealer cartel.¹⁰⁷ Nevertheless, in a footnote to the *Monsanto* opinion Justice Powell suggests that proof regarding a meeting of the minds between manufacturer and distributors will be sufficient.¹⁰⁸ An example demonstrates this proposition. A meeting of the minds is established by evidence tending to show that a manufacturer sought assurances of compliance and as a result, distributors gave them.¹⁰⁹ The problem with such an analysis of course is that it appears only to require that an agreement be sought without regard to the underlying purpose of the agreement. *Colgate* required that an illegal purpose be established.¹¹⁰ Such illegal purposes were identified by *Dr. Miles*.¹¹¹ Yet the new *Monsanto* standard fails to address the need for presenting evidence that tends to show the existence of one of these purposes. As in the past, the new standard appears to require only evidence of an agreement, a meeting of the minds.

The inadequacy of this new standard is particularly evident in view of the Court's adoption, in *Monsanto*, of economic theories relied on in *Continental*.¹¹² In effect, the Court announced that it now accepts the argument that many valid manufacturer motives exist for engaging in RPM.¹¹³ Not only does the manufacturer have a right to choose its own customers, as acknowledged in *Colgate*, it also has valid economic incentives for RPM which thus contradict the strong presumption regarding dealer cartels. Allowing a per se approach then in refusal-to-deal cases appears inappropriate absent evidence, beyond conduct alone, to establish that a dealer cartel is being pursued by both the manufacturer and its distributors. The new standard nevertheless falls short of requiring such evidence, particularly in view of

107. The Court cites both *Colgate* and *Dr. Miles* in distinguishing what types of actions can and cannot be taken. *Id.* at 1469. See also *supra* notes 83-84 and accompanying text.

108. *Monsanto*, 104 S. Ct. at 1471 n.9. The footnote reads as follows: The concept of 'a meeting of the minds' or 'a common scheme' in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Id.

109. *Id.*

110. See *supra* notes 36-39 and accompanying text.

111. See *supra* note 32 and accompanying text.

112. *Monsanto*, 104 S. Ct. at 1470. After a lengthy discussion of concepts adopted in *Continental*, the Court concluded, "Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows." *Id.*

113. *Id.*

Justice Stewart's footnote regarding a meeting of minds. The Court apparently failed to integrate fully its adoption of valid manufacturer motives into its new standard. Had it done so, strong evidence would be required in *Colgate*-type situations to prove that promoting a dealer cartel is *the* purpose of any "agreement." Foreshadowing the standard proposed below, only evidence regarding two situations could justify a per se violation in dealer termination cases: evidence of a dual distribution system or dealer threats against the manufacturer.¹¹⁴ In these two situations the probability of a dealer cartel being policed by *Colgate* methods might sufficiently outweigh the likelihood of legitimate manufacturer motives to justify an inference of illegal purpose and therein a per se violation of section 1. Interestingly, such evidence did in fact exist in *Monsanto*.¹¹⁵ Before proceeding further into this proposed standard, however, a review of arguments for and against the existence of valid manufacturer motives for RPM will promote an understanding of the RPM legality issue.

IV. ECONOMIC ARGUMENTS REGARDING PROCOMPETITIVE REASONS FOR MANUFACTURERS TO ENGAGE IN RPM

Whether RPM should remain per se illegal has been the subject of many sophisticated legal and economic arguments. The economics of RPM have become the focal point for arguing that the per se approach should be abandoned. Counterarguments relying on economic principles, however, have also developed. A brief discussion of each can facilitate a better understanding of these technical and complex arguments. The strength of both positions probably explains the Supreme Court's ambivalence toward complete elimination of per se analysis in vertical price restraint cases.¹¹⁶

114. See *infra* notes 152-88 and accompanying text.

115. A letter drafted by one of the acquiescing distributors identifies that Monsanto had a dual distribution system and that Monsanto's outlets would play the price game as would the independent distributors. The appropriate portions of the letter say,

[W]e are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. . . . [N]one interested in the retention of this arrangement is likely to risk being deleted. . . . [A]ll recognize the desirability of retaining Monsanto's favor on a continuing basis by . . . 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.*

Monsanto, 104 S. Ct. at 1471-72 (emphasis added). The final phrasing in this letter arguably hints at a dealer cartel situation.

116. *Continental*, 433 U.S. at 54-59. *Continental* involved a horizontal arrangement. The Court recognized that motives for dealer restraints should not carry the

The Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,¹¹⁷ adopted several economic theories which could be argued to recognize legal, procompetitive reasons for a manufacturer to pursue RPM. *Monsanto* specifically acknowledged that these notions apply in RPM situations and that manufacturer's motives cannot therefore be assumed monopolistic.¹¹⁸ The economic theories involved consist of "free rider"¹¹⁹ problems and the encouragement of dealer sales and product servicing efforts.¹²⁰ Furthermore, the Court recognized the concept of interbrand competition in *Continental* and proclaimed it to be the "primary concern of antitrust law."¹²¹ These notions form the founda-

same weight in vertical price restriction cases. *Id.* at 51 n.18. However, Justice Powell only suggested that price restraints "could easily justify different treatment." *Id.* The opinion does not prevent limited recognition of valid purposes for resale price maintenance. *Id.* In addition, the Court relied on an implicit approval by Congress of the per se approach. *Id.* The Court viewed the repeal of those provisions of the Miller-Tydings and McGuire Acts, which allowed price-fixing at the option of the states, as a mandate for continued per se treatment of price-fixing. *Id.*; Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a) (1976)).

117. 433 U.S. 36 (1977). The arguments presented in this note are meant to relate only to minimum resale price-fixing. This practice prevents retailers from charging a price below that specified by the manufacturer. For an analysis of maximum price-fixing, see Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

118. *Monsanto*, 104 S. Ct. at 1470; see also *supra* note 112 and accompanying text.

119. *Continental*, 433 U.S. at 55. "Free rider" refers to a discounter who provides few services (i.e., showrooms, repairs) with the product. This discounter allows the consumer to use other retailers' services after purchasing the product from the discounter. By doing so, the discounter keeps its costs low and can therefore charge a lower price for the product. The lower price, however, draws customers away from the retailers providing the services, and so eventually these retailers can no longer compete with their higher prices. As a result, the services are no longer offered because these other retailers must lower their price to stay in business. Thus, the discounter has taken a "free ride" by allowing other retailers to pay the expense of providing services that customers want. However, this will eventually lead to insufficient services. See Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 285 (1975) (cited in *Continental*, 433 U.S. at 55); P. SAMUELSON, *ECONOMICS* 506-07 (10th ed. 1976) (cited in *Continental*, 433 U.S. at 55). See also *infra* note 120. Supporting the notion that the "free rider" problem is a valid concern of RPM, is Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86 (1960).

120. *Continental*, 433 U.S. at 55. "Dealer Services" refers to advertising, promotion, showrooms, etc. provided by the retailer as an extra good that is given the consumer as part of the product. "Perhaps the product cannot be marketed effectively unless the dealer maintains a large, well-stocked showroom, displays a highly trained and motivated sales force, advertises the product extensively, or provides other costly presale services." R. POSNER, *supra* note 6, at 148; see also *supra* note 119.

121. *Continental*, 433 U.S. at 52 n.19. The Court held:

Interbrand competition is the competition among manufacturers of the same generic product—television sets [in *Continental*]*—*and is the primary concern of antitrust law. The extreme example of a deficiency of *inter-*

tion for the many detailed economic arguments about the purpose of RPM.

A. Procompetitive Arguments Regarding RPM

Proponents of RPM argue that manufacturers possess many non-monopolistic motives for fixing resale prices. Their arguments maintain that these motives will in turn benefit the consumer. The manufacturer's cost of distribution¹²² often forces it to set low resale prices. Manufacturer revenue¹²³ is determined by the price charged and the number of products sold. After the price charged to the retailer is set, the manufacturer's revenue increases only if additional products are sold. A low resale price encourages the public to buy more goods and in so doing increases the manufacturer's revenues.¹²⁴ Therefore,

brand competition is monopoly, where there is only one manufacturer. In contrast, *intra-brand* competition is the competition between the distributors—wholesale or retail—of the product of a particular manufacturer.

Id. (emphasis added).

If the manufacturer distributed its own product, it would not face intra-brand competition. Judge Bork argues, therefore, that the manufacturer should not have to give up this freedom from competition when using a retailer. Using retailers helps decrease the costs of distribution, so the net benefit goes to the consumer. These costs are not saved, however, if the manufacturer, expecting pricing complications, refuses to use retailers. Therefore, allowing vertical restrictions is advantageous to the consumer because it treats a manufacturer no different than if it distributed its own product. R. BORK, *supra* note 6, at 289-90; see also R. POSNER, *supra* note 6, at 147-51.

122. *Continental*, 433 U.S. at 56. First, distribution refers to the method by which the manufacturer gets its product from the factory to the consumer. In the present note, distribution includes the sale of a product to a retailer who in turn sells it to the consumer. "Cost of distribution" refers to anything that is lost by the manufacturer, in dollar terms, due to the distribution of his product. Thus, if less products are sold because a retailer overcharges for the product, then the loss of sales to the manufacturer is a cost of distribution; it was incurred in the process of getting the product to the consumer. See Note, 88 HARV. L. REV. 636, 641 (1975) (cited in *Continental*, 433 U.S. at 56 n.24). For a detailed review of how the theory of distribution is derived, see R. LIPSEY & P. STEINER, *supra* note 2, at 325-26.

123. Revenue refers to the total amount of earnings from the sale of a product. Revenue is described as the price of a good multiplied by the number of goods sold. R. LIPSEY & P. STEINER, *supra* note 2, at 216-17. Other types of revenue will not be discussed.

124. Demand for a product increases as the price is lowered, assuming a good is not perfectly inelastic (the quantity purchased of goods with a perfectly inelastic demand will not vary despite a price increase or decrease). Consequently, if RPM is set at a low price, the demand for the product will be high. Since the price the manufacturer charges the retailer for the product is constant, the manufacturer's revenues will be higher if, as a result of RPM, sales increase. See *supra* note 123; R. POSNER, *supra* note 6, at 147-48. For a more sophisticated economic approach to the theory of demand, see R. LIPSEY & P. STEINER, *supra* note 2, at 52-59.

incentive exists to fix low resale prices in an effort to increase revenues.

Conversely, high resale prices increase the manufacturer's costs.¹²⁵ Consumers purchase fewer products as prices get higher.¹²⁶ When a manufacturer sets its resale price above its competitors', the public buys fewer of its products.¹²⁷ As a result, manufacturer revenue falls. At the same time, the retailers receive the profits accrued due to their fixed buying price but increased selling price.¹²⁸ In other words, as Justice Powell commented, "[A] manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its 'cost of distribution'. . . ."¹²⁹ A high resale price results in low manufacturer revenues and so it has "cost" the producer more to "distribute" its product through retailers.

Advocates of RPM therefore maintain that a manufacturer needs the freedom unilaterally to determine with whom to deal.¹³⁰ This freedom allows the manufacturer to keep distribution costs down so that efficiency and competitiveness are maintained in regard to other manufacturers.¹³¹ Efficient distribution systems promote interbrand

125. See *supra* note 122.

126. See *supra* note 124. Fewer products are purchased at a higher price and as a result the manufacturer's revenues fall. The difference between the revenues a manufacturer could have made had the price been lower and what it did make are then the "costs" of the higher price. See *supra* notes 122-24. For a more elaborate economic discussion of the concept of costs, see R. LIPSEY & P. STEINER, *supra* note 2, at 177-91.

127. If competitors produce identical products, the consumer will seek out the cheapest price. If the goods are not identical, a substitute will be sought if prices go too high. See R. LIPSEY & P. STEINER, *supra* note 2, at 52-59.

128. The manufacturer sells the product at a specified (perhaps contract) price to the retailer. The retailer's profits are then derived by the price difference between what the manufacturer charged the retailer and what the retailer will charge the consumer. A higher resale price means that the retailer will still pay the manufacturer the same price but receive a higher price itself from the consumer.

Opponents argue that in the long run, however, the manufacturer will raise its price to the retailer, so that both will eventually benefit from a higher resale price. Pitofsky, *supra* note 4, at 1491-92.

129. *Continental*, 493 U.S. at 56 n.24. See also *supra* note 122.

130. Judge Bork argues that such a right is "appropriate to a free market economy," and that RPM only serves as an efficiency creating device. R. BORK, *supra* note 6, at 344; see also R. POSNER, *supra* note 6, at 165; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 CHI. L. REV. 6 (1981).

131. In relation to RPM's creating more efficiency and therefore more inter-brand competition, Judge Bork says, "No court is likely to make a more accurate assessment than does a businessman with both superior information and the depth of insight that only self-interest can supply." R. BORK, *supra* note 6, at 290.

competition.¹³² Since interbrand competition is the primary concern of antitrust,¹³³ a logical conclusion to be drawn from RPM is that the manufacturer's motive in fixing resale prices is procompetitive and legal.

Judge Posner takes this efficiency of distribution argument one step further. He argues *Colgate* assumed that the manufacturer is in the *best* position to know when it is efficient to allow distribution through price-cutters.¹³⁴ Therefore, manufacturers terminate price-cutters only when it is efficient to do so, that is, when consumer welfare is enhanced. Posner apparently relies on an assumption that manufacturers devote their entire attention to interbrand competition and will promote this competition better than the courts will. This position may be extreme,¹³⁵ but it supports the notion that confused inferences which find illegal purposes behind RPM proscribe efficient methods of attaining the primary concern of antitrust law, interbrand competition.

B. Monopolistic Arguments Against RPM

Critics of RPM reject the efficiency analysis and argue that the true effect of fixed resale prices is the creation of dealer and manufacturer cartels.¹³⁶ According to Robert Pitofsky, experience shows that

132. Two types of efficiency are stressed, allocative and operating. Allocative efficiency means all resources are being used in their best manner. See P. AREEDA & D. TURNER, *supra* note 20, at 269-70. Operating efficiency refers to the manufacturer producing at the least possible cost so its prices can remain low and competitive with other manufacturers. See *id.* at 270. The term "efficiency" will be used regarding both types mentioned.

133. *Supra* note 121.

134. *Colgate*, 250 U.S. at 307; R. POSNER, *supra* note 6, at 153-54 (manufacturer's decision regarding whether to use RPM should be honored, whether or not the action is viewed as an agreement with the retailer, as long as the manufacturer has no monopolistic purpose).

135. Judge Posner admits that restricted distribution might still be a problem when allowing manufacturers to have completely legal RPM systems. R. POSNER, *supra* note 6, at 165.

136. A cartel is an agreement between competing firms which in effect stops competition between them on designated things (*e.g.*, price). In RPM, a manufacturer cartel refers to manufacturers agreeing not to, for example, undercut each other's prices. A dealer cartel refers to the same type of arrangement between dealers. The major problem with maintaining a cartel is cheating. Monopoly profits that accrue from higher prices induce cartel members to price-cut in an effort to sell more surplus products, created by the artificially induced shortage, and to get a larger share of the market. Policing cartels to prevent cheating, price-cutting, is difficult to do and easy to detect. For a more thorough definition and review of a cartel's economic effects, see P. AREEDA & D. TURNER, *supra* note 20, at 280-81.

the manufacturer is often induced by threats or enticements to act as the organizer of a dealer cartel.¹³⁷ In addition, dealers can use RPM to make a manufacturer terminate price-cutters, thereby eliminating cheaters from the dealer group. RPM helps police dealer cartels while allowing the action to be hidden from the courts by offering other justifications for the manufacturer's actions.¹³⁸ RPM policies can also be used to create manufacturer cartels. The manufacturer's control over resale prices allows it greater opportunity to guarantee to other manufacturers that its prices will not fluctuate.¹³⁹ The result of either cartel is restricted output designed to drive prices up to those attainable under a monopoly.¹⁴⁰ As a result, less interbrand competition takes place and, due to RPM, the consumer is faced with higher prices and fewer products.

C. Procompetitive Response to the Cartel Argument

Proponents of RPM counter these cartel arguments with a more sophisticated efficiency analysis. This analysis contends that higher prices and fewer products are actually the result of prohibiting RPM. The principle behind this efficiency analysis lies in the concept of the "free riders"¹⁴¹ and the problems they cause for manufacturers who try to encourage both dealer sales efforts and product servicing (dealer services). Free riders, or discounters, encourage customers to use other retailers' services before and after purchasing the product at a discounted price. Eventually, such action results in these other retailers discontinuing their services so that their product price can be reduced to a level competitive with the discounter's. Without RPM then, "free riders" eventually destroy dealer incentives to offer services with their products.¹⁴² RPM prevents such an outcome.

In addition, proponents argue, monopoly profits do not accrue to retailers as a result of RPM and consumer freedom is not

137. See Pitofsky, *supra* note 4, at 1490. For additional arguments, see Bowman, *supra* note 34, at 830-31.

138. See *supra* notes 136-37.

139. Pitofsky, *supra* note 4, at 1490-91. *But see* R. POSNER, *supra* note 6, at 291-97 (RPM cannot prevent cheating in a manufacturer cartel); R. BORK, *supra* note 6, at 293-94.

140. See P. AREEDA & D. TURNER, *supra* note 20, at 280-81 (economic effects of a cartel). Judge Posner argues, however, that restricted distribution, when manufacturer-imposed, is more often than not an efficiency creating device. See R. POSNER, *supra* note 6, at 165.

141. See *supra* note 119 and accompanying text. See also R. POSNER, *supra* note 6, at 149. In addition, Judge Posner would add, "Dealers have a legitimate, non-monopolistic interest in seeking to overcome through joint action serious free-rider problems." *Id.* at 165.

142. R. POSNER, *supra* note 6, at 149-65.

constrained.¹⁴³ Hoping to increase sales, the rational retailer, having a fixed RPM price, spends any monopoly profits it would otherwise have on providing consumer services.¹⁴⁴ Additionally, consumers' free choice is preserved because interbrand competition results in different levels of services being offered with similar products produced by different manufacturers.¹⁴⁵ Thus, RPM prevents total homogeneity of products and creates choices for consumers.

D. Monopolistic Response to the Dealer Services Argument

The strong criticism directed at the dealer services theory is diminished by *Continental*.¹⁴⁶ Opponents of RPM argue that services such as advertising are encouraged only to serve the manufacturer's own monopolistic purpose.¹⁴⁷ Promotional efforts, under this theory, are used to create consumer preference for the manufacturer's product. Consumers pay more for goods they prefer. The manufacturer can, therefore, raise its retail price above competitive levels and secure monopoly profits.¹⁴⁸ Many sophisticated economic arguments center on such a consumer preference theory.¹⁴⁹ Nevertheless, Justice Powell

143. In economic terms, the retailer is assumed to spend more and more on service until its marginal cost of distribution equals its increased profits from the fixed resale price. See R. POSNER, *supra* note 6, at 148. Judge Posner also argues that consumer freedom to choose services remains intact. He says that the product differentiation in opposing manufacturer's goods will prevent manufacturer "free riders." Simply stated, each manufacturer will have to stimulate its own point-of-sale services. Interbrand competition between manufacturers will offer the consumer many levels of services to choose from. See *id.* at 149-50.

144. Pitofsky argues that "free riders" are discounters which offer a valid alternative to manufacturers who force unwanted services on the consumer. In addition, he argues that dealers cannot know what type of services the manufacturer is trying to induce. Allowing the producer, rather than the consumer, to decide what services the consumer wants is against the national commitment to competition. See Pitofsky, *supra* note 4, at 1493.

145. For additional support of the dealer services theory, see generally Telser, *supra* note 119.

146. 433 U.S. at 36. *Continental* not only recognized the dealer services motive for a vertical distribution process but discounted the arguments against it. See *id.* at 55-56.

147. See Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419, 1425-33 (1968). Comanor accepts the notion of free rider problems but argues that dealer services only promote consumer preference for a product. As a result, the manufacturer has more monopoly price leverage over the consumer. *Id.*

148. *Id.*

149. For a thorough and complex discussion of the theory, see the following exchange of articles: Bork, *The Rule of Reason and The Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966); *refuted by* Gould & Yamey, *Professor Bork on Vertical Price Fixing: A Rejoinder*, 77 YALE L.J. 936 (1968); *to which responded* Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950 (1968).

in *Continental* expressed doubt about the existence of this monopolistic motive. He noted that the argument has a major flaw; it necessarily assumes that these services contain no valid function such as "convey[ing] socially desirable information about product availability, price, quality and services."¹⁵⁰ Justice Powell, however, did not disregard the possibility that other illegal manufacturer motives for RPM might exist,¹⁵¹ presumably the creation of dealer cartels.

V. A STANDARD RECOGNIZING VALID MANUFACTURER MOTIVES

A. *The New Standard*

Although the procompetitive arguments for RPM at their extreme dictate that dealer cartels rarely underlie a manufacturer's refusal to deal, the continued vitality of *Dr. Miles* requires that any new standard take such a possibility into consideration.¹⁵² Looking at manufacturer conduct alone to see if affirmative acts took place would not address this need. If in fact a dealer cartel was being policed by a manufacturer, no "affirmative acts" would be necessary to gain most dealers' acquiescence to the scheme.¹⁵³ In such situations, dealers actively pursue RPM in an effort to attain monopoly profits. For instance, dealers would voluntarily accept fixed prices if they believed the reduced competition would result in higher profits.¹⁵⁴ Dealers might even force manufacturers to set up RPM for this reason.¹⁵⁵ Nevertheless, *Colgate* and *Dr. Miles* do not allow a manufacturer to act, even unilaterally, for this purpose.¹⁵⁶ If the purpose of a manufacturer's unilateral action is to produce monopoly profits for the retailers, their acceptance of the resale price constitutes an illegal agreement.¹⁵⁷ In

150. *Continental*, 433 U.S. at 56 n.25.

151. *Id.* at 51 n.18 (vertical price restrictions may deserve different treatment regarding per se rules than non-price restraints).

152. See *supra* note 20. As previously mentioned, restricting dealer freedom should not be a concern in unilateral situations because *Colgate* dictates that in such cases the manufacturer's right to choose its customers is more important. See *supra* notes 37-40 and accompanying text.

153. The reader should bear in mind that only unilateral action is discussed throughout the section. See *supra* notes 37-38 and accompanying text.

154. P. AREEDA & D. TURNER, *supra* note 20, at 280-81; L. SULLIVAN, *supra* note 3, at 203-04.

155. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (dealers forced distributors to set up RPM for a dealer cartel). See also *infra* text accompanying notes 189-96.

156. *Colgate*, 250 U.S. at 307 (illegal when done pursuant to monopolistic purpose).

157. Professor Handler argues that "[t]here must be a common understanding among the conspirators to achieve the unlawful object or to resort to unlawful means." M. HANDLER, *supra* note 1, at 119, 120. Such a definition describes a situation where

short, the dealers voluntarily accept the policy because of an "underlying understanding" that its monopolistic purpose is designed to benefit them. Such a purpose is illegal, so their accepting the resulting policy constitutes an illegal agreement.¹⁵⁸

If, as the economic arguments above would suggest, a dealer cartel benefits only the dealers, a manufacturer might want to create or maintain a cartel for two reasons. First, the manufacturer could be coerced by its retailers into setting up RPM for their illegal benefit.¹⁵⁹ RPM instituted for this purpose is of course illegal. Whether coerced or not, the manufacturer's purpose in acting unilaterally to achieve RPM would be to create a dealer cartel.¹⁶⁰ As stated above, when the dealers accept a fixed resale price instituted for this purpose, an illegal agreement is formed. Second, the manufacturer may have its own independent reasons for wanting to set up a dealer cartel. The only apparent situation where this incentive might exist is a dual distribution system.¹⁶¹ Such a system involves a manufacturer who owns outlet stores that compete with other independent retailers.¹⁶² A manufacturer could stop price competition between its outlet stores and other retailers by instituting RPM. Such a possibility suggests that the manufacturer would like to create a dealer cartel so that it could share in the cartel's monopoly profits through its own retail

dealers with an illegal dealer cartel purpose in mind accept the RPM unilateral offer of a manufacturer who is also pursuing that purpose.

158. See M. HANDLER, *supra* note 1, at 121. One must be careful to recognize that this note discusses only the vertical aspects of refusals to deal. Presumably, two types of similar purpose are possible: that between those on the same level (i.e., dealers) and that between those on different levels (i.e., dealer and manufacturer). This analysis is concerned only with finding that the dealers and manufacturers acted with a similar illegal purpose.

159. Courts have noted that dealer threats may be the impetus behind some unilateral terminations. See, e.g., *Engbrecht v. Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962); *Santa Clara Valley Distrib. Co. v. Pabst Brewing Co.*, 556 F.2d 942 (9th Cir. 1977).

160. The concept of coercion, through dealer threats, is said by some to be a substitute for the agreement requirement. See Monograph, *supra* note 49, at 14. Others argue that the plain meaning of a section 1 "agreement" is a voluntary and consensual arrangement. Coerced acquiescence is still consensual, so an agreement exists. *Id.* at 17.

161. For an argument that that procompetitive actions can be pursued by a dual distributor, see Recent Developments, *Dual Distribution Systems—Manufacturer Imposed Restraints on Distributors Require Rule of Reason Analysis*, *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th 1981), *cert. denied*, 102 S. Ct. 119 (1981), 60 WASH. U.L.Q. 293 (1982). For arguments on both sides of the legality of dual distributor's motives, see *Impact Upon Small Business of Dual Distribution and Related Vertical Integration: Hearings Before the Select Committee on Small Business of the House Committee on the Judiciary*, 88th Cong., 1st Sess. 1588 (1963) [hereinafter cited as *Hearings*].

162. See *supra* note 161.

outlets. When a manufacturer has a dual distribution system then, it does not need to be coerced by retailers to set up, by using RPM, a dealer cartel.¹⁶³ The manufacturer has its independent reasons for wanting to do so and retailers acquiesce hoping to reap their own monopoly profits.¹⁶⁴ Once again, however, the acceptance by retailers of this illegally motivated scheme constitutes a section 1 agreement.¹⁶⁵

In summary, manufacturers might be motivated to create a dealer cartel, through RPM, in two situations: where dealer coercion exists¹⁶⁶ and where the manufacturer has a dual distribution system.¹⁶⁷ In such situations, the probability that valid manufacturer motives exist is greatly diminished and true unilateral conduct should not be presumed.

Confusion in the application of inferences in unilateral cases arises when the courts fail to recognize that these two situations alone justify inferring a "dealer cartel" motive. A good example of the confusion caused by such a failure lies in two recent Eighth Circuit Court of Appeals cases.¹⁶⁸ On the same day two panels in nearly identical dealer termination cases reached different decisions on whether an illegal agreement existed.¹⁶⁹ The manufacturers' actions in these cases did not go beyond those allowed by *Colgate*; no coercive tactics were used to gain adherence to the fixed resale price.¹⁷⁰ Finding an agreement in these cases, therefore, should have required a showing that the manufacturer's purpose in terminating the plaintiff was to promote or maintain a dealer cartel¹⁷¹ since unilateral action, without such a purpose, is legal.¹⁷²

Requiring proof of either dealer coercion or a dual distribution system in these cases, before inferring a "dealer cartel" purpose, would

163. Unilateral methods can be more effective and less detectable than other ways of establishing and maintaining a dealer cartel. See *infra* text accompanying notes 215-24.

164. For a detailed explanation of the economic motivations to voluntarily accept, see P. AREEDA & D. TURNER, *supra* note 20, at 280-81.

165. See *supra* note 157 and accompanying text.

166. See *supra* notes 155-58 and accompanying text.

167. See *supra* notes 161-65 and accompanying text.

168. See *Battle*, 673 F.2d 984, *reh'g en banc*, 712 F.2d 1238 (1983) (reversing District Court); *Roesch*, 671 F.2d 1168, *reh'g en banc*, 712 F.2d 1235 (1983) (affirming District Court).

169. See *supra* note 16 and accompanying text.

170. *Battle*, 673 F.2d at 986-87; *Roesch*, 671 F.2d at 1170-71. For a synopsis of the cases, see 45 ANTITRUST & TRADE REG. REP. (BNA) 73-74.

171. Many cases have held that *Colgate* steps can still be achieved so long as an illegal purpose is not pursued. For an examination of such cases and their impact on the "purpose" requirement, see Fulda, *supra* note 40.

172. *Colgate*, 250 U.S. at 307.

have avoided the confusion. This type of evidence, as seen above,¹⁷³ would dispute economic arguments, adopted in *Continental* and *Monsanto*, that the manufacturer is just as likely acting with a procompetitive motive.¹⁷⁴ If the manufacturer is acting procompetitively, its actions would not be illegal because they are not designed to form a dealer cartel. Nevertheless, the panels did not require such evidence before adopting an inference approach, evidence sufficient to refute other valid economic justifications for the manufacturer's actions. As a result, one panel mistakenly held that evidence of dealer termination in response to competing dealers' complaints, when pursued for a price-related end, is sufficient to find an illegal agreement.¹⁷⁵

Such an evidentiary standard allows confusion to arise between valid and invalid manufacturer motives for terminating dealers, treating all terminations as illegal. This inadequate amount of evidence equally supports two explanations of why a manufacturer might invoke its right to terminate. One portion of the standard, "in response to" competing dealers' complaints,¹⁷⁶ might mean the manufacturer was threatened or otherwise coerced.¹⁷⁷ However, it might also mean the producer was acting independently from coercion. In addition, if the manufacturer is acting independently, it might be terminating dealers for one of two other reasons: first, to maintain a dealer cartel because the manufacturer has its own outlets on that level and wants to limit price competition to help those outlets accrue monopoly profits;¹⁷⁸ second, the manufacturer may be pursuing valid economic motives.¹⁷⁹

173. *Supra* note 159-67 and accompanying text.

174. The procompetitive reasons discussed previously include providing dealer services (*supra* note 120) and creating efficiency for better interbrand competition (*supra* notes 130-32). The major argument against the validity of these theories has to do with dealer cartels (*supra* note 136). If a manufacturer through unilateral action is creating RPM to maintain a dealer cartel, that cartel becomes more stable and less detectable. In addition, the vitality of *Dr. Miles*, 220 U.S. 373, gives the cartel argument continued strength.

175. *Battle*, 673 F.2d at 991-93.

176. *Id.* at 991-92.

177. A manufacturer coerced into setting up a dealer cartel still has an illegal purpose which, when combined with dealer acceptances, forms the foundation for an illegal agreement. See *supra* notes 160, 171.

178. One must bear in mind that by raising the retail price, the manufacturer raises its costs (*supra* note 122). Therefore, the manufacturer would have to perceive the monopoly profits accruing from its own outlet stores as being greater than the costs of raising its resale price to monopoly levels. For an example of such a cost analysis, see R. LIPSEY & P. STEINER, *supra* note 2, at 182-90.

179. Such motives include promoting dealer services (*supra* note 120) and pursuing efficiency, which leads to better interbrand competition (*supra* notes 130-32).

Another portion of the panel's standard, a "price-related" end,¹⁸⁰ besides indicating an illegal purpose also supports the notion of using RPM to promote dealer services. All RPM pursues fixed prices, but economic arguments for making it legal state that many effects other than a dealer cartel are being pursued.¹⁸¹ Therefore, evidence of termination at the request of competing dealers for a price-related end¹⁸² does not constitute sufficient evidence to infer that a "dealer cartel" purpose is behind the termination. Such evidence ignores the possibility of valid economic manufacturer motives.

Monsanto, for many of the reasons just mentioned, indirectly rejected this Eighth Circuit standard.¹⁸³ The Court noted that such a standard would lead to confusion and subsequently, to inhibiting valid manufacturer conduct and the demise of *Colgate*.¹⁸⁴ Of particular interest, though, was the Court's use of facts which identified a dual distribution system to satisfy the evidentiary requirements of its own new standard. Evidence regarding a dual distribution system appeared in a distributor's letter to Monsanto.¹⁸⁵ The distributor said in effect that it, like Monsanto's outlets and other independent distributors, would follow the fixed prices, assuming all were going to play the same "game" under the same "rules."¹⁸⁶ Such evidence certainly hints at the existence of a dealer cartel and establishes that Monsanto had an independent motivation for establishing this cartel, emanating from its ability to gain monopoly profits through its wholly-owned distributors.

In recognizing the importance of such evidence, perhaps the Court was silently adopting a standard similar to that proposed here. At the very least, the standard being proposed is consistent with the Court's most recent holding regarding inferences to be drawn from RPM. In *Monsanto*, evidence existed which significantly decreased the probability that the manufacturer was acting independently for competitive, consumer welfare, purposes.

Without evidence of either a dual distribution system or coercion by dealers, valid manufacturer motives for achieving RPM by

Since interbrand competition is the main interest of antitrust law (*supra* note 121), the manufacturer is pursuing valid antitrust goals.

180. *Battle*, 673 F.2d at 991-92.

181. *See supra* note 119-21; *Continental*, 433 U.S. at 46 *passim*.

182. *See Battle*, 673 F.2d at 991-93; *supra* text accompanying note 175.

183. *Monsanto*, 104 S. Ct. at 1468 & n.5 (rejects Seventh Circuit standard and notes that the Eighth Circuit standard was similar).

184. *See supra* notes 95-97 and accompanying text.

185. *See supra* note 115.

186. *Id.*

unilateral action are ignored. As a result, legitimate consumer-benefiting practices, such as the promotion of dealer services,¹⁸⁷ are lost. The confusion that exists regarding sufficiency of evidence for inferring a monopolistic purpose is the result of ignoring valid manufacturer purposes and trying to infer purpose from unilateral actions of the manufacturer accompanied by actions of a dealer, for example, termination following dealer complaints.¹⁸⁸

B. Threats by Dealers: *Interstate Circuit v. United States*

One major case might be viewed as creating a preoccupation with drawing inferences of illegal manufacturer purpose due to retailers' actions. In *Interstate Circuit, Inc. v. United States*,¹⁸⁹ a dealer cartel was evidenced by the fact that two dealers forced several manufacturers into implementing identical resale price policies.¹⁹⁰ The two dealers used their manufacturers (film distributors) to destroy retail price competition,¹⁹¹ a classic dealer cartel situation. Unexpectedly, a manufacturer cartel also emerged.¹⁹² Each film distributor established a similar resale price designed to benefit the two coercing retailers. The actions of the distributors apparently fell within *Colgate*; no "affirmative action" was mentioned.¹⁹³

In finding an illegal RPM agreement between the distributors and retailers, the Court relied on the similarity of the distributors'

187. *Continental* rejected the notion that promoting dealer services could be anticompetitive. *Continental*, 433 U.S. at 56 n.25. See also *supra* note 149 and accompanying text.

188. Many cases nevertheless find an illegal agreement from these actions alone. See *Spray-Rite Service Corp.*, 684 F.2d at 1234 (1983), *affirmed*, *Monsanto*, 104 S. Ct. at 1473 (1984) (using a different standard than the Seventh Circuit); *Contractor Utility Sales Co., Inc. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 & n.9 (7th Cir. 1981); *Alloy International Co. v. Hoover-NSK Bearing Co., Inc.*, 635 F.2d 1222, 1225-26 (7th Cir. 1980); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 992 (8th Cir. 1982); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 169-70 (3rd Cir. 1979).

189. 306 U.S. 208 (1939).

190. *Id.* at 215-19. This note refers to the theatre owners in *Interstate Circuit* as dealers and the owner/distributors of the films as manufacturers in an effort to preserve continuity in terms. The two defendant retailers in the case accounted for 74% of all fees paid to the manufacturer in their specific territories. In response to their demands for a minimum price, the manufacturer instituted a RPM system over all retailers. *Id.*

191. *Id.* at 219-20.

192. *Id.* at 221-27. The manufacturer cartel, initially coerced into existence by the two retailers' demands, went on to continue operations independent from the retailers. *Id.* at 225, 230.

193. The Court made statements about harsh and arbitrary restrictions but said nothing about coercive acts beyond those allowed by *Colgate*. *Id.* at 230-31.

responses to the retailers' coercive requests.¹⁹⁴ The Court held that the film distributors decided to cooperate knowing that all were expected to accept and that unanimity was necessary for the retailers' scheme to succeed.¹⁹⁵ Justice Stone labeled such compliance an "[a]cceptance by competitors . . . of an invitation to participate in a plan, the necessary consequence of which . . . is restraint of interstate commerce. . . ."¹⁹⁶ In so doing, Justice Stone appeared to be saying that an illegal RPM agreement can be found when competitors accept a price dictated to them, knowing that acceptance will end competition. Of course such a proposition ignores the need for establishing an illegal manufacturer motive. Instead, evidence of widespread dealer compliance alone becomes sufficient to establish a violation.

The FTC tried to establish such an argument in a unilateral action case. In *Russell Stover Candies v. Federal Trade Commission*,¹⁹⁷ the FTC argued that widespread compliance with a resale policy alone leads to an inference of unwilling compliance and thus, an illegal agreement.¹⁹⁸ The manufacturer's actions in *Russell Stover* were limited to those permitted by *Colgate*.¹⁹⁹ The FTC's claim, as it must in unilateral cases, failed.²⁰⁰ As *Monsanto* held, to allow such slim evidence to be sufficient for an inference of agreement could be the end of the *Colgate* Doctrine.²⁰¹

194. Inferences of agreement as to illegal purpose were made from the nature of the retailers' proposals, the manner in which they were made, and the unanimity of action that followed. *Id.* at 221.

195. *Id.* at 226-27. The decision to act in such a manner is often called "conscious parallelism." The term refers to acting similarly with knowledge, but not a direct agreement, that competitors will do likewise. Conscious parallelism becomes important to finding an agreement when competitors' decisions are made interdependently. The decisions are made, expecting that other competitors will act similarly. In addition, these decisions are made with the knowledge that similar actions by competitors are necessary for the scheme's success. *Interstate Circuit*, therefore, suggests that each distributor/manufacturer acted similarly because it knew that competitors would do likewise.

For an excellent discussion regarding the effects of conscious parallelism on finding an agreement, see generally Turner, *supra* note 59.

196. *Interstate Circuit*, 306 U.S. at 227.

197. 718 F.2d 256 (8th Cir. 1983).

198. *Id.* The Commission stressed the "unwilling compliance" language used in footnote 6 of *Albrecht* (390 U.S. at 150) and noted that the language was approved of in *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968). *Id.* at 259. The United States Court of Appeals for the Eighth Circuit, however, stressed the need for "affirmative action" (plus factors). *Id.* at 259-60.

199. *Russell Stover Candies*, 718 F.2d at 257.

200. *Id.* at 260. See also *Monsanto*, 104 S. Ct. at 1470-71 (to allow such an inference would endanger *Colgate* and emasculate the requirements of section 1).

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

Similarly, widespread compliance by retailers wanting to form a dealer cartel does not establish an illegal vertical agreement unless coercion exists. In unilateral action cases, a manufacturer must also have an illegal purpose to use RPM for dealer cartel reasons.²⁰² Absent evidence of dealer threats, inferring this purpose from the fact that dealers accept the policy for monopolistic reasons²⁰³ will not suffice in these cases.

An illegal RPM, vertical, agreement existed in *Interstate Circuit* because of its unique facts. The Court in *Interstate Circuit* examined the behavior of several manufacturers in an effort to establish the "agreement."²⁰⁴ These manufacturers were brought together by two dealers and coerced into dictating a fixed price.²⁰⁵ The purpose for the distributors acting similarly was therefore their need to create a successful dealer cartel.²⁰⁶ When the pricing policies were announced, acceptance by the retailers created an illegal vertical, RPM, agreement due to the *underlying understanding*²⁰⁷ between all the parties. Though the Court focused on the horizontal aspects of the case,²⁰⁸ the dealers' threats were actually vital evidence for inferring that the manufacturers had a "dealer cartel" purpose for their actions.

When unilateral action exists, an inference of illegal manufacturer purpose cannot be derived from dealer actions alone, except when dealer threats exist. Dealers may act similarly for many reasons and therefore dealer responses should not be allowed to indicate illegal manufacturer motives, especially given the existence of many valid manufacturer motives. *Colgate* guarantees the manufacturer a right to act unilaterally.²⁰⁹ *Continental* accepts the possibility of many valid purposes for why the manufacturer is pursuing RPM.²¹⁰ If, for instance,

202. See generally *Dr. Miles*, 220 U.S. 373; *Colgate*, 250 U.S. at 307.

203. Conscious parallelism does not mandate a finding of illegal intent. Such was the holding of *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). Turner argues, however, that interdependence of decision making between dealers should be required to prove that an illegal purpose existed when accepting the RPM. Turner, *supra* note 195, at 695-703. *Continental* suggests many valid reasons why a manufacturer may want to unilaterally impose RPM, and therefore even if the dealers have an illegal purpose, the manufacturer may not. Both are required to have such a purpose for an agreement to exist. See *supra* notes 116-51 and accompanying text.

204. *Interstate Circuit*, 306 U.S. at 221-27.

205. *Id.* at 215-16.

206. *Id.* at 226-27.

207. *Id.* (referring to what was later called conscious parallelism).

208. *Id.* at 230-32.

209. *Colgate*, 250 U.S. at 307.

210. The possibilities include pursuing efficiency in distribution, which enhances

the dealers all accept a fixed price knowing that the manufacturer's purpose is to promote dealer services and eliminate "free riders,"²¹¹ widespread compliance will not accurately identify an illegal "dealer cartel" purpose. However, if a dual distribution system²¹² or dealer threats²¹³ as in *Interstate Circuit* exist, the manufacturer's motive is more likely illegal, as previously argued.²¹⁴

C. Dual Distribution Justifies a "Dealer Cartel" Inference

A dual distribution system might create manufacturer motives different from those discussed in *Continental*. In such a system, the manufacturer not only sells to retailers but has outlets at the retail level itself.²¹⁵ The possibility of valid economic motives for RPM is therefore not as prevalent. The manufacturer can impose fixed resale prices in this situation to increase its own retail profits;²¹⁶ absent dual distribution, such a possibility does not exist.

These outlets also provide a method of pressuring retailers into compliance with a fixed resale price. The manufacturer's outlets can buy the manufacturer's products at a price lower than that charged the independent retailers.²¹⁷ Outlet stores can, therefore, cut prices to a level below that charged by independent retailers, should the independent retailers refuse to comply with the fixed price. Fearing this, dealers might comply with RPM without the need for a manufacturer to use more than *Colgate's* unilateral refusals to deal.²¹⁸ Evidence of

interbrand competition and the promotion of dealer services for the public. See *supra* notes 122-51 and accompanying text.

211. See *supra* notes 119, 141-51 and accompanying text.

212. See *supra* note 161.

213. See *supra* note 159.

214. Both dual distribution and dealer coercion give incentives for a manufacturer to pursue creating and maintaining a dealer cartel. See *supra* notes 159-67 and accompanying text.

215. For a brief description of the complexities that a dual distribution system presents for antitrust analysis, see Monograph, *supra* note 49, at 21-24.

216. If the manufacturer's perceived revenue outweighs the costs of fixing the resale price, an increase in net profit might be achieved by setting a higher than competitive resale price. See *supra* note 178.

217. See *Hearings*, *supra* note 161.

218. The historical/conduct approach, used to identify coercion (unreasonable restraints on trader freedom), looks only for affirmative acts beyond those allowed by *Colgate*. See *supra* text accompanying notes 28-80. The acts of an outlet store might escape such an analysis. The presence alone of outlet stores can intimidate independent retailers and frighten them into submission. See *supra* notes 152-88 and accompanying text. A dual distributor has individual incentives for setting up a dealer cartel; therefore, dealer threats are unnecessary. See *supra* note 161 and accompanying text; see *supra* text accompanying notes 162-65.

such fearful compliance arguably existed in *Monsanto* in the letter written by the independent distributor.

An inference of illegal purpose, to create a dealer cartel, is justified when widespread compliance occurs in dual distribution situations. Without this inference, either concern of *Dr. Miles*, a dealer cartel or restriction of dealer freedom beyond that level deemed acceptable by *Colgate*,²¹⁹ might be achieved through unilateral action. Outlet stores provide a manufacturer with added incentive and opportunity to pursue illegal motives in vertical price-fixing agreements. The historical/conduct approach might not find "affirmative action" in such situations.²²⁰ The purpose approach, modified to allow for valid manufacturer motives under *Continental* and *Monsanto*, would not find any threats by dealers.²²¹ The special position held by a dual distributor therefore demands a special inference of monopolistic purpose when a manufacturer engages in RPM. Widespread acceptance more likely reflects either restraint of dealer freedom²²² or dealer cartel effects²²³ in such cases and yet escapes detection under normal approaches. In unilateral situations as a whole then, retailer compliance combined with evidence of threats by dealers or the existence of a dual distribution system justifies inferring an illegal agreement.

VI. CONCLUSION

In reality, two approaches exist whereby an illegal agreement can be found in dealer termination cases. These approaches address concerns about resale pricing policies and how manufacturers might misuse them. The historical/conduct approach searches for an illegal agreement by examining what producer acts, beyond a specific level, took place and forced dealers into relinquishing their pricing freedoms. In contrast, the purpose approach identifies an illegal agreement in cases where a manufacturer may not need coercion to successfully create or maintain a dealer cartel.

The purpose behind a manufacturer's resale policy is only important when trying to identify a dealer cartel. Inferences developed to determine this purpose, however, are unfortunately being misapplied in light of the Court's recognition of valid manufacturer purposes and unilateral rights to pursue pricing policies. Although the Court attempted to clarify its standard regarding the appropriateness

219. See generally *supra* notes 33, 34 and accompanying text.

220. See *supra* note 218.

221. *Id.*

222. See *supra* note 218 and accompanying text.

223. See *supra* note 163 and accompanying text.

of such an inference, the newly enunciated standard still leaves ambiguity and uncertainty. As a result, confusion will continue to exist regarding what kind of evidence is sufficient to infer a "dealer cartel" purpose in unilateral termination cases. The definition of agreement under such circumstances needs clarification.

Allowing for the possibility of valid manufacturer motives suggests the following definition. Two methods of forming an agreement are possible. First, the manufacturer can form an illegal vertical agreement by attaining acquiescence in ways other than simply announcing its resale policy and terminating price-cutters. A manufacturer's *conduct* alone is examined for these "affirmative" acts. Second, when no affirmative acts exist, an illegal agreement can be found if a manufacturer's *purpose* in terminating dealers is to create or maintain a dealer cartel. An inference of agreement should be used under this *purpose* approach if dealers coerce a manufacturer into acting on their behalf. An inference should also be used, however, if a manufacturer has a dual distribution system and therefore a separate incentive for establishing a dealer cartel. Inferring an illegal manufacturer purpose is then justified due to widespread compliance by dealers with the producer's policy. This compliance evidences an underlying understanding or submerged fear of economic reprisals by the dual distributor's retail outlets. Such a definition is consistent with case law and policy. In addition, this definition of agreement provides manufacturers with a narrow but predictable method of obtaining RPM.

RANDY SCOT DESSAU