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The Resale Price Maintenance Compromise:A Presumption of Illegality

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NOTE

The Resale Price Maintenance Compromise: A Presumption of Illegality

I. INTRODUCTION

Few areas of current law are as controversial and incoherent as the field of vertical price restrictions, or resale price maintenance (RPM).[1] The United States Supreme Court began to develop this body of law in 1911 with *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[2] In *Dr. Miles* the Court declared that RPM is a per se violation of section 1 of the Sherman Act.[3] Even though subsequent decisions have whittled away at the logical underpinnings of *Dr. Miles*,[4] it remains a strong limitation on manufacturer and wholesaler vertical price fixing.

In *United States v. Colgate & Co.*[5] the Court developed a major exception to *Dr. Miles*. The *Colgate* doctrine allows a weak form of RPM by manufacturers or wholesalers that have attempted unilaterally to set prices.[6] Although the *Colgate* doctrine has lost much of its vitality due to years of restrictive interpretation, in *Russell Stover Candies, Inc. v. FTC*[7] the United States Court of Appeals for the Eighth Circuit upheld *Colgate* against a challenge by the Federal Trade Commission. In addition, the Su-

1. Manufacturers employ RPM to control the price at which wholesalers and retailers sell the manufacturer's product. The manufacturer, therefore, retains some control over goods and product services even after they leave his hands.

2. 220 U.S. 373 (1911).

3. Even though *Dr. Miles* did not use the term "per se rule," the case is the genesis of the rule.

Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

4. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

5. 250 U.S. 300 (1919).

6. The *Colgate* exception represents judicial recognition of a distributor's right to do business with dealers and retailers of his choosing, or alternatively, the exception is a legislative loophole to allow purely independent business strategies to operate freely.

7. 718 F.2d 256 (8th Cir. 1983).

preme Court, in *Monsanto Co. v. Spray-Rite Service Corp.*,[8] recently intimated new-found support for the *Colgate* doctrine and a possible willingness to reconsider the *Dr. Miles* per se prohibition against RPM.[9]

The outcome of vertical pricing cases under section 1 has depended upon the perceived effects of RPM on competition. Current RPM decisions, however, rest on the principles of stare decisis and, therefore, do not depend upon political and economic theories that have developed since *Dr. Miles*.[10] Early courts denounced vertical restraints as analogous to horizontal price fixing, which courts have assumed the drafters of the Sherman Act intended to prohibit per se.[11] Later cases, however, illustrate that the analogy between vertical and horizontal trade restrictions is not analytically sound, and the Supreme Court's attempt to maintain the per se approach to RPM has led to serious theoretical and practical problems.[12]

This Note explores several problems with recent RPM decisions: (1) the effect of the per se rule on producers' rights to control their marketing strategies; (2) inconsistent use of the plural action requirement as a foil for avoiding or invoking the per se rule; (3) the suppression of benign or procompetitive activities because of the rule; (4) the difficulties with free rider marketing; and (5) the obstacles to advice and planning that recent decisions have created. This Note contends that a new standard, a rebuttable presumption[13] against legality, would alleviate most, if not all,

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8. 104 S. Ct. 1464 (1984), *aff'g* 684 F.2d 1226 (7th Cir. 1981).

9. The Court, exerting considerable effort to emphasize the difficulty of distinguishing between RPM and nonprice restraints, implied that courts must consider every possibility that *Colgate* may apply before finding a manufacturer's plan illegal. *See id.* at 1470-71.

10. F.M. Scberer, Professor of Economics at Swarthmore College, avers that even today the theory of vertical restraints is immature:

> The tbeory is at something like the state of celestial mechanics at the time of Ptolemy before Copernicus, Galileo, Kepler and Tycho Brahe made their contributions, i.e., everything revolved around the earth. That is essentially where economic theory is today with respect to vertical restrictions. Law is some distance behind.

Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 687 (1983).

11. *See, e.g., Dr. Miles*, 220 U.S. at 405-08.

12. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). Although the *Sylvania* Court limited its study to nonprice vertical restrictions, the Court's logic clearly demonstrates that the differences between horizontal and vertical restraints mandate independent analyses.

13. A rebuttable presumption is "[a] presumption that can be overturned upon the showing of sufficient proof . . . . Once evidence tending to rebut the presumption is introduced, the force of the presumption is entirely dissipated and the party with the burden of proof must come forward with evidence to avoid a directed verdict." BLACK'S LAW DICTION-

problems that the inflexible per se rule causes.

A rebuttable presumption, followed by rule of reason analysis[14] in cases in which the defendant satisfies the threshold inquiry,[15] would restore certainty and intellectual honesty to RPM cases. The rebuttable presumption would eliminate the need to reconcile contrary cases and the need to consider issues that parties now must address under the rule of reason. While the rebuttable presumption does not require that courts maintain or reject the *Colgate* doctrine,[16] this Note argues that the Court could retain *Colgate* but primarily rely upon the guidelines and safeguards of the rebuttable presumption. This new line of inquiry would retain the benefits of the per se rule—efficiency and certainty—and would remain flexible enough to accommodate special cases in which RPM may be beneficial to the market. In many cases, the rebuttable presumption also would save society, courts, and litigants the protracted costs of rule of reason analysis.

Part II of this Note considers major RPM cases since the early 1900s, with special focus on *Russell Stover* and *Filco v. Amana Refrigeration, Inc.*,[17] cases which protect the defendant under the *Colgate* doctrine. Part III analyzes the weaknesses of the per se rule and the benefits that could inure to manufacturers and the marketplace under the rebuttable presumption. Part IV examines the strengths and weaknesses of the rule of reason and offers an improved rule of reason approach as the second part of the rebuttable presumption standard. Finally, Part V outlines a suggested analysis for RPM disputes using a rebuttable presumption of illegality. Part V also considers the effects of the presumption on federal antitrust laws.

ARY 1068 (5th ed. 1979).

14. Under the rule of reason "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Sylvania*, 433 U.S. at 49.

15. To reach the rule of reason analysis, the rebuttable presumption would require a defendant to show that its activity is benign or procompetitive at the initial pleading stage, *see* FED. R. CIV. P. 12(b), (c), on motion for summary judgment, *see* FED. R. CIV. P. 56, or on other appropriate motion. One advantage of the rebuttable presumption is that it would allow the plaintiff to move for summary judgment on the presumed illegality of the defendant's actions. The court then could decide whether to dispose of the action, restrain the defendant's conduct, or order a trial under the rule of reason.

16. This Note contends that if the Supreme Court wants to preserve the *Colgate* exception, it could retain the exception as a safe harbor for defendants and thereby eliminate even the abbreviated litigation that the rebuttable presumption requires.

17. 709 F.2d 1257 (9th Cir. 1983).

II. The Current Controversy

A. *Minimum Price Restrictions in the Supreme Court*

Vertical price restrictions are written or oral directives setting a price above or below which a manufacturer wishes its distributors to sell. If the manufacturer establishes a price below which a distributor should not resell a product, the manufacturer is imposing minimum price RPM. Maximum price RPM—the setting of price ceilings— and minimum RPM are per se violations of section 1 of the Sherman Act.[18] Nonprice vertical restrictions, however, which include primarily territorial distributorship limitations, generally are reviewed under the rule of reason.[19]

1. *Dr. Miles*: The Per Se Rule

Dr. Miles Medical Co. v. John D. Park & Sons Co.[20] is the basis of much of the current academic criticism of the Supreme Court's RPM approach.[21] The plaintiff Dr. Miles, a medicine manufacturer, required its wholesalers and retailers to adhere to a minimum resale price schedule. The plaintiff also required its wholesalers to maintain control over the retailers' subsequent resale prices. The defendant Park & Sons, a wholesaler that refused to purchase from Dr. Miles under the minimum price contract, bought Dr. Miles' medicines from third parties and resold them below the plaintiff's price schedule. The plaintiff charged the defendant with inducing the plaintiff's distributors to breach their contracts by reselling to a price cutter.[22] The Court denied the plaintiff's request for relief and held that the plaintiff's contract provision was void under common law and the Sherman Act.[23]

After determining that the agreement between Dr. Miles and its vendees fulfilled the duality requirement of the Sherman Act,[24]

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18. *See, e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (minimum price RPM); Albrecht v. Herald Co., 390 U.S. 145 (1968) (maximum price RPM).

19. *See* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 14 (1977).

20. 220 U.S. 373 (1911).

21. *See, e.g.*, R. Bork, The Antitrust Paradox 289 (1978); Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 Va. L. Rev. 1457, 1463-67 (1981).

22. *Dr. Miles*, 220 U.S. at 394.

23. *Id.* at 409.

24. *Id.* at 395-99. Under the duality requirement a litigant must demonstrate concerted action designed to fix prices that involves at least two parties. *See* Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2744-45 (1984).

the Court found that the plaintiff's resale price schedule eliminated competition by controlling the price at which all purchasers received the product.[25] The Court refused to accept the defendant's argument that producers of patented products have a right ordinary sellers do not have—the right to dictate the destiny of their products.[26] The Court inquired whether the plaintiff had a right to restrain trade. The Court held that generally a right to control alienation does not exist without an agreement.[27] Applying the common-law rule that contractual restraints on alienation must be reasonable and limited to the necessity of the circumstances,[28] the Court found that Dr. Miles' agreement did not fit any of the common forms of acceptable restraints.[29]

The Court's final inquiry was whether the benefits that the plaintiff gained from its pricing restrictions were entitled to more protection than the property rights that the defendants had in the medicine.[30] The Court's response to this issue forms the heart of the per se rule.[31] Although the Court never explicitly condemned all vertical price fixing agreements, it found that the effects of the *Dr. Miles* scheme were the same as the effects that could result from horizontal price fixing at the dealer level. The Court, therefore, held that both kinds of price fixing were illegal.[32] The Su-

25. *Dr. Miles*, 220 U.S. at 399. The Court perceived the relevant product as Dr. Miles' medicines, not medicine in the generic sense. According to the Court, the only relevant competition was *intrabrand* competition, not *interbrand* competition. The Court's analysis illustrates the tenuous grounds upon which it later applied the per se rule. In addition, the Court reasoned that vertical restrictions operate like horizontal restraints and, therefore, are equally hostile to the Sherman Act. The Court's reasoning, however, is flawed when the plaintiff proves only intrabrand vertical restraint. The acceptability of decreased intrabrand competition, when offset by increased interbrand competition, was the basis of the Court's landmark decision in the area of vertical nonprice restrictions. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50-56 (1977); *see infra* notes 119-28 and accompanying text (discussing *Sylvania* and its impact on RPM analysis).

26. *Dr. Miles*, 220 U.S. at 400-04. The Court refused to give patented products special treatment. According to the Court "[t]he secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices . . . . Here, however, the question concerns not the process of manufacture, but the manufactured product, an article of commerce." *Id.* at 402.

27. *Id.* at 405.

28. *Id.* at 406.

29. Examples of acceptable restraints include singular business transactions of good will and grants of manufacturing processes, such as patent licenses. *Id.* at 407.

30. *Id.* at 407-08.

31. Per se rules prohibit certain conduct without inquiry into possible justifications for the conduct. Courts impose per se rules when the interests of judicial economy outweigh other interests. *See* Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach*, 92 YALE L.J. 706, 708 (1983).

32. *Dr. Miles*, 220 U.S. at 408-09.

preme Court's focus on the effects of the alleged violative activity, without regard to its purposes or benefits, is characteristic of other Supreme Court per se decisions.[33]

The breadth of the *Dr. Miles* decision is still unclear.[34] A narrow interpretation of the holding is that express contractual provisions restraining resale prices violate the Sherman Act. The decision left open many further questions, the first of which the Court answered by creating the *Colgate* exception.

2. The *Colgate* Exception

The Court's 1919 decision in *United States v. Colgate & Co.*[35] is still difficult for courts and commentators to harmonize with the *Dr. Miles* rule of per se illegality.[36] In *Colgate* the prosecution charged the defendant under the Sherman Act[37] with forming an illegal combination to fix resale prices among the wholesalers and retailers of the defendant's soap and toilet products.[38] Colgate circulated price lists, along with provisions for penalties to distributors that did not adhere to the defendant's price lists. Colgate also engaged in policing activities, such as obtaining information from other distributors concerning noncomplying dealers, and requesting assurances from nonuniform pricers that they would comply with the defendant's guidelines.[39]

The trial court sustained the defendant's demurrer[40] and the Supreme Court affirmed on direct appeal. The Court permitted the defendant's pricing structure based on the trial court's finding that Colgate reserved no contractual rights in the goods after their sale to dealers. Colgate could enforce the price restrictions only by later refusing to deal with wholesalers and retailers that breached their

33. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-23 (1940) ("The elimination of so-called competitive evils is no legal justification for [violative] programs."); United States v. Trenton Potteries Co., 273 U.S. 392, 392-97 (1927) ("Agreements which create such potential power may well he . . . unreasonable . . . without the necessity of minute inquiry whether a particular [fixed] price is reasonable or unreasonable.").

34. For a defense of the majority position in *Dr. Miles*, see Andersen, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality*, 54 WASH. L. REV. 763, 769 n.27 (1979).

35. 250 U.S. 300 (1919).

36. *See, e.g.*, R. BORK, *supra* note 21, at 289; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 287 (1975).

37. 15 U.S.C. § 1 (1982); *see supra* note 3 (quoting provision).

38. *Colgate*, 250 U.S. at 302.

39. *Id.* at 303.

40. United States v. Colgate & Co., 253 F. 522, 528 (E.D. Va. 1918).

contracts.[41] According to the Court, because the contracts in *Dr. Miles* "undertook to prevent dealers from freely exercising the right to sell," *Dr. Miles* was distinguishable from *Colgate*.[42] The Court then laid out the *Colgate* doctrine: "In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[43] If the Court had employed the "effects only" logic that it used in *Dr. Miles*, *Colgate* would have been an inconsequential extension of the *Dr. Miles* progeny. By blending the section 1 duality requirement with common-law business principles, however, the Court created an exception to the per se rule.[44]

3. Narrowing *Colgate*

The Court quickly issued three decisions reaffirming the viability of *Colgate*, but in increasingly narrow circumstances.[45] Less than one year after *Colgate*, the Court decided *United States v. A. Schrader's Son, Inc.*[46] *Schrader's Son* was factually similar to *Dr. Miles*,[47] but the district court initially held for the defendant, rea-

41. *Colgate*, 250 U.S. at 304-06. The Government maintained that the facts evidenced a per se violation. *Id.* at 306. The Court, however, placed greater emphasis on the notion that Colgate's agreements did not *obligate* its dealers to resell at specific prices. *Id.* at 306-07.

42. *Id.* at 308.

43. *Id.* at 307.

44. Unlike *Dr. Miles*, *Colgate* is understandable from two perspectives. First, the decision is explicable on the ground that the Court adopted a strict reading of the duality requirement of section 1. *See supra* note 24 (defining the duality requirement). Thus, a manufacturer who does not enter a legal relationship with its vendee cannot by itself combine, contract, or conspire. Second, *Colgate*, which arguably preserves the longstanding common-law right of a manufacturer to choose the parties with whom it deals, may represent a repudiation of *Dr. Miles*. *See* Baker, *supra* note 21, at 1473-77 (citing Pitofsky & Dam, *Is the Colgate Doctrine Dead?*, 37 ANTITRUST L.J. 772, 787 (1968)).

For a list of federal appellate court cases applying *Colgate*, see Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1114 n.8 (5th Cir. 1979).

45. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).

46. 252 U.S. 85 (1920).

47. In both *Schrader's Son* and *Dr. Miles* manufacturers imposed vertical price fixing plans through express contracts with distributors. The *Schrader's Son* Court quoted the district court judge's frank admission: "Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between [*Dr. Miles*] and [*Colgate*]." *Id.* at 97 (quoting United States v. A. Schrader's Son, Inc., 264 F. 175, 183 (N.D. Ohio 1919)).

soning that *Colgate* implicitly had overruled *Dr. Miles*.[48] The Supreme Court reversed, stressing that its intent in *Colgate* was only to preserve the manufacturer's right to announce its pricing policy and cease to do business with dealers that failed to comply.[49]

Based on this narrow interpretation of *Colgate*, the Court extended the scope of *Dr. Miles* to implicit agreements that attempt to make resale rates binding, including agreements "implied from a course of dealing or other circumstances."[50] The Court contrasted *Colgate*'s holding with situations in which "the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition."[51] This language created a major expansion of the per se rule by shifting the Court's inquiry from "contract" to the less restrictive term "agreement." The Court's characterization of implicit agreements as section 1 violations is the basis of most criticism of the per se rule.[52] *Schrader's Son* did not resolve the open distinction between implicit agreements that derive from dealer acceptance of fixed prices and unilateral declarations of terms that originate from a manufacturer's normal course of dealing.

The Supreme Court was quick to quell rumors of *Colgate*'s early demise. In *Frey & Son, Inc. v. Cudahy Packing Co.*[53] the trial court instructed the jury that the plaintiff could prevail despite the lack of an express or implied agreement or objections to the seller's pricing demands.[54] The Supreme Court held that the jury instruction was insufficient to establish the defendant's liability under section 1.[55] Despite the Court's inability to draw a clear distinction between *Dr. Miles* and *Colgate*, the Court refused to extend the per se rule to prohibit inferential agreements.

The Court continued to narrow *Colgate* in *FTC v. Beech-Nut*

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48. United States v. A. Schrader's Son, Inc., 264 F. 175, 182-86 (N.D. Ohio 1919).

49. 252 U.S. at 99.

50. *Id.* Although this statement is arguably dictum, later cases enforce the precedential value of *Schrader's Son. See* United States v. Parke, Davis & Co., 362 U.S. 29 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

51. *Schrader's Son*, 252 U.S. at 99-100.

52. The problem with using the term "agreement," and allowing inferential evidence to prove the existence of these agreements, is that drawing a distinction hetween violative conduct and the unilateral declarations of sales conditions that *Colgate* permits becomes impossible. *See, e.g.*, Baker, *supra* note 21, at 1477-83 & n.76; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 684-85 (1962).

53. 256 U.S. 208 (1921).

54. *Id.* at 210-11.

55. *Id.*

Packing Co.[56] The defendant's activities in *Beech-Nut* were substantially similar to the defendant's activities in *Colgate*, yet the Court invoked the per se rule to hold Beech-Nut liable. In both *Beech-Nut* and *Colgate* the parties never entered a formal pricing contract, but both defendants solicited reports on noncomplying distributors, required assurances of future acquiescence from these distributors, and suspended dealings with price cutters.[57] The Court noted that the Government had sued Beech-Nut under section 5 of the Federal Trade Commission Act[58] rather than the Sherman Act. The Court held that although the Sherman Act's prohibition against price fixing is only a declaration of public policy that a court considers in determining unfair methods of competition,[59] the evidence, nevertheless, supported liability under either act, because "the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices."[60] The Court found the defendant's comprehensive RPM system as effective at maintaining prices as similar express or implied contractual provisions that courts have held violative of antitrust law.[61]

In *United States v. Bausch & Lomb Optical Co.*[62] the defendant, Soft-Lite Lens Company, used a standard two-tier distribution system, which included distribution of published price lists. Soft-Lite did not set ultimate consumer prices but expected retailers to sell at prevailing local price schedules.[63] The defendant enforced its policies through surveillance of retailers and use of product tracing devices.[64] The Supreme Court denied the defendant's *Colgate* argument in a decision that tortured readings of precedent and the facts at bar. The Court adopted a new threshold of liability and stated that whether the defendant achieved its conspiracy and combination by agreement or by wholesaler *acquiescence* was

56. 257 U.S. 441 (1922).

57. *Id.* at 445-51; *Colgate*, 250 U.S. at 303.

58. 15 U.S.C. § 45 (1982). The Act provides in relevant part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 45(a)(1).

59. *Beech-Nut*, 257 U.S. at 453.

60. *Id.* at 454.

61. *Id.* at 455. Justice McReynolds, the author of *Colgate*, *Schrader's Son*, and *Frey & Son*, dissented in *Beech-Nut* because he felt that *Beech-Nut* was indistinguishable from *Colgate*. *Id.* at 458-59 (McReynolds, J., dissenting).

62. 321 U.S. 707 (1944).

63. *Id.* at 715.

64. *Id.* at 715-17. One method that the defendant used to trace its product was numbering the certificates for each pair of lenses that it sold. *Id.* at 714-15.

immaterial.[65]

By narrowing the *Colgate* doctrine, the Court expanded the scope of the per se rule beyond the express contracts in *Dr. Miles*. The Court extended *Colgate* to implied agreements in *Schrader's Son* and to mere acquiescence in *Bausch & Lomb*. Following *Bausch & Lomb*, therefore, line drawing between unilateral and conspiratorial activities became extremely difficult.[66]

4. *Parke, Davis*

In 1960 the Court decided its third landmark RPM case,[67] *United States v. Parke, Davis & Co.*,[68] the most comprehensive review of *Colgate* to date. Although the Court refused to uphold the *Colgate* defense, the Court again recognized a manufacturer's right to define the terms upon which it would deal with sellers. The dissent, however, concluded that the majority's holding implicitly buried *Colgate*.[69]

Defendant Parke, Davis, a pharmaceutical producer, printed minimum resale prices in its catalogues for wholesalers. To maintain uniform consumer prices, the defendant also ordered direct purchase retailers to adhere to pricing schedules.[70] After some retailers breached the plan by selling at a discount, the defendant demanded that wholesalers join the defendant in refusing to sell to the discounters. Parke, Davis told each wholesaler that all competitors were subject to the same requirement. The wholesalers supplied the defendant with the names of continual price cutters, and the defendant then refused to sell to them.[71] The defendant agreed to resume sales only upon the assurance that the offending buyer would adhere to the defendant's pricing policy.

The Court recognized the narrow vitality left in *Colgate* by stating that the defendant loses the safe harbor by using methods of enforcement "beyond his mere declination to sell to a customer who will not observe his announced policy."[72] The Court deemed

65. *Id.* at 723.

66. One commentator felt that after *Bausch & Lomb* the line between unilateral and conspiratorial activities ceased to exist. *See* Baker, *supra* note 21, at 1481 n.79.

67. The other two major RPM cases were *Colgate* and *Dr. Miles.*

68. 362 U.S. 29 (1960).

69. *Id.* at 49 (Harlan, J., dissenting). *Parke, Davis* was a five member majority decision, with one concurrence and three dissenters.

70. *Id.* at 32-33.

71. *Id.* at 33-34. The defendant's refusal included sales of prescription medicines, even if the dealers discounted only nonprescription items.

72. *Id.* at 43.

the defendant's program of refusing to deal with wholesalers to achieve retailer compliance a violation of section 1.[73] The Court focused on the section 1 requirement of a "combination" between the defendant and third parties and attempted to avoid using loaded terms like "agreement" and "acquiescence" that the Court used in earlier cases.[74] The Court, however, did not clarify *Colgate* by relying on its combination phraseology. The majority's use of this term has prompted a reading of *Parke, Davis* to mean that *Colgate* only protects direct sales to retailers because the wholesaler's conduct fulfills the requirement of a combination.[75]

Decisions since *Parke, Davis* continue to suggest that *Colgate* is no longer good law.[76] With *Simpson v. Union Oil Co.*[77] the Court began looking deeper into the reasons for buyer compliance with RPM systems to discover whether the parties had combined to fix prices. Defendant Union Oil Co. sold gasoline to retail dealers under a system of one year lease and consignment agreements. The relatively short duration of the agreements allowed the defendant to police its RPM scheme and to terminate the plaintiff's dealership when the plaintiff failed to maintain the required prices.[78]

The majority, emphasizing the coercive nature of the leasing system, relied on *Parke, Davis* for the proposition that *Colgate* does not protect coerced RPM.[79] The Court held that even coerced compliance is sufficient to infer agreement.[80] The Court stressed the plight of the small struggling seller that could not fight the defendant's power to impose noncompetitive prices.[81] Thus, what

73. *Id.* at 45-46. Even though the group boycott undertones of the opinion are inconspicuous, they provide strong insight into the decision. Had the Court granted the defendant in *Parke, Davis* a safe harbor, group boycott defendants could argue more forcefully that *Parke, Davis* is precedent for extending *Colgate* to refusal to deal cases.

74. *See supra* text accompanying notes 50-52 (agreement) & 62-66 (acquiescence).

75. *See* Levi, *The* Parke, Davis-Colgate *Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258, 325. For additional discussions of *Parke, Davis* and its effect on *Dr. Miles* and *Colgate*, see Fulda, *Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 LAW & CONTEMP. PROBS. 590 (1965); Comment, *Unilateral Refusal to Deal: King Colgate is Dead!*, 30 OHIO ST. L.J. 537 (1969).

76. The notable exception is Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464 (1984). *See infra* notes 86-93 and accompanying text (discussing *Monsanto*).

77. 377 U.S. 13 (1964).

78. The plaintiff claimed that he sold gasoline at 27.9 cents per gallon, two cents cheaper than the defendant desired, to meet competition. *Id.* at 15.

79. *Id.* at 17. The Court also summarily dismissed an argument that the defendant's system of consignments shielded it from liability. *Id.* at 18.

80. *Id.* at 17. According to one commentator, "the 'agreement' need not be an agreement at all, rather it may be coerced 'compliance.'" Comment, *supra* note 75, at 545.

81. 377 U.S. at 21.

the Supreme Court originally perceived as a need to protect manufacturers from having to trade with dealers that refused to sell on the manufacturers' terms evolved, under *Simpson*, into a deterrent to manufacturer overreaching and a scheme to foster fair competition among dealers.[82]

Recently, the Court summarily reaffirmed the per se rule, relying primarily on the *Dr. Miles* rationale. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[83] the Court struck down a state system for wine pricing among competing wholesalers. The Court noted as support for the per se rule the 1975 repeal of the fair trade laws, which protected small businesses from excessive price competition by allowing states to pass laws legalizing RPM.[84] The Court felt that this legislation lent strength to the Court's stand against vertical restrictions. Although the vitality of Colgate was not at issue in *Midcal*,[85] the holding is consistent with earlier cases that denied *Colgate* protection because *Midcal* reaffirmed the per se rule against RPM.

5. *Monsanto Co. v. Spray-Rite Service Corp.*

The recent Supreme Court decision in *Monsanto Co. v. Spray-Rite Service Corp.*[86] is a significant development in both the per se rule and the *Colgate* doctrine. Petitioner Monsanto was a maker of herbicides. Over a four year period the petitioner's share of the corn herbicide market rose from fifteen to twenty-eight percent, while its share of the soybean herbicide market rose from three to nineteen percent. Respondent Spray-Rite lost its renewal of Monsanto's distribution rights and alleged that the petitioner conspired to fix higher prices than the respondent's discount prices.[87]

The Supreme Court held that while the jury may have based its decision on sufficient evidence, the Seventh Circuit's standard of proof was erroneous.[88] The Court did not review the merits of

82. According to Judge Posner, "[t]his rationale for the rule against resale price maintenance stands *Dr. Miles* on its head . . . . The two grounds . . . cannot be reconciled." Posner, *supra* note 36, at 290.

83. 445 U.S. 97 (1980).

84. *Id.* at 102-03; *see* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a) (1976)).

85. The central issue in *Midcal* was whether the state immunity doctrine of Parker v. Brown, 317 U.S. 341 (1943), protected the price fixing plan. 445 U.S. at 103.

86. 104 S. Ct. 1464 (1984).

87. *Id.* at 1467.

88. *Id.* at 1470-71. The Supreme Court defined the correct threshold of proof that the plaintiff must meet:

the per se rule[89] or even address *Colgate*, except to establish the proper standard of proof.[90] The Court, however, did try to protect the *Colgate* doctrine[91] by discussing section 1 combination in terms of the contract concept of a "meeting of the minds," rather than more liberal terms like "acquiescence" and "coerced adherence" that the Court used in *Parke, Davis*.[92] In addition, the Court conceded that the economic impact of conduct that is per se illegal and conduct that *Colgate* allows is almost always identical.[93] *Monsanto* illustrates the Court's current willingness to reconsider *Dr. Miles*. The case is the Court's strongest statement of support for the per se rule in decades, even though the facts of *Monsanto* did not present a direct confrontation between *Colgate* and *Dr. Miles*.

6. *Filco v. Amana Refrigeration, Inc.*

Although the Supreme Court has narrowed significantly the *Colgate* doctrine, *Colgate* remains popular with the lower federal courts. A discussion of the way lower courts have interpreted the Supreme Court's per se analysis is helpful in understanding the Court's approach.[94] In *Filco v. Amana Refrigeration, Inc.*[95] the Ninth Circuit upheld an alleged RPM defendant's motion for sum-

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> [S]omething more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently . . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

Id. at 1471 (quoting Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

89. In a celebrated amicus curiae brief, former Assistant Attorney General William F. Baxter urged the Court to reconsider the tenets of the per se rule. The Court, explicitly declining the invitation, noted that neither party to the case had argued the point at trial or on appeal. 104 S. Ct. at 1469 n.7.

90. Although the *Monsanto* Court discussed *Colgate*, the Court did not apply *Colgate* to the facts of *Monsanto*. *Id.* at 1470.

91. *See, e.g., id.* at 1470 ("[I]t is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment . . . .").

92. *Id.* In an important footnote, the Court reasoned:

> 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. at 1470 n.9.

93. *Id.* at 1470.

94. For a list of federal appellate court cases applying *Colgate*, see Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1114 n.8 (5th Cir. 1979).

95. 709 F.2d 1257 (9th Cir.), *cert. dismissed*, 104 S. Ct. 385 (1983).

mary judgment. The defendant, an appliance manufacturer, sent its agent to sell appliances to the plaintiff. The representative attempted to stop the plaintiff's price cutting[96] and complained about the plaintiff's allegedly insufficient displays, product line, and presale services.[97] Amana subsequently refused further direct sales to the plaintiff.

Relying on *Albrecht v. Herald Co.*,[98] the *Filco* court inquired whether the defendant had pressured the plaintiff into setting prices and whether the defendant "actually impinged upon [the] plaintiff's freedom to set prices."[99] The court rejected the plaintiff's argument that it had acquiesced in the scheme because the plaintiff initially had claimed that its noncompliance had resulted in its termination. The court's finding that these two theories were mutually exclusive[100] reflects the problem that courts face in trying to interpret Supreme Court precedent. A dealer may acquiesce temporarily to a distributor's pricing demands, but then cease to comply and lose the distributor's account. The *Filco* court's desire to characterize the defendant's actions as "mere exposition, persuasion, argument, or pressure,"[101] rather than coercion, was another indication that the court was sympathetic to the defendant.

7. Summary

With the exception of *Monsanto*, the Supreme Court continually has reasserted the viability of *Colgate*, yet has refused to protect it.[102] The rule against RPM originally required the existence of an express contractual price demand.[103] In *Schrader's Son* the

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96. The representative allegedly told the plaintiff: "I don't want Amana to be discounted. I don't want to make a K-Mart out of Amana, you know, with the low prices . . . . If you want to have Amana, you have to do so and so. You have to maintain the price. You cannot discount it." *Id.* at 1263.

97. *Id.* The plaintiff also accused the defendant of terminating the plaintiff's account because of complaints about the plaintiff's low prices. Based on *Colgate*, the court found no nexus between the complaints and the termination. *Id.* at 1261-66.

98. 390 U.S. 145 (1968); *see infra* notes 109-13 and accompanying text.

99. 709 F.2d at 1266.

100. *Id.*

101. *Id.* at 1263 (citations omitted).

102. *See* R & G Affiliates, Inc. v. Knoll Int'l, Inc., 587 F. Supp. 1395, 1399 (S.D.N.Y. 1984). *Colgate*, nonetheless, remains vital among the federal appellate courts. *See* Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1114 n.8 (5th Cir. 1979) (listing federal courts of appeal that have applied *Colgate*).

103. A narrow reading of *Dr. Miles* and *Colgate*'s subsequent interpretation of *Dr. Miles* implies that the per se rule extends only to express contracts.

Court expanded the boundaries of the per se rule to include agreements implied from a course of dealing.[104] The rule gradually increased in scope at the expense of the *Colgate* defense. *Parke, Davis* imposed liability for combinations that set prices;[105] *Simpson* culminated the expansion by focusing on the prohibition of coercive tactics.[106] The recent *Monsanto* decision may reflect a reversal of Supreme Court thinking about *Colgate*. The status of vertical price restraints in the Court, nonetheless, remains problematic. The Court currently imposes liability for policed acquiescence and coercion in cases that are factually similar to *Colgate*.[107]

B. Maximum Price Restrictions: Albrecht *and* Maricopa

In 1968 the Court extended the *Parke, Davis* prohibition of RPM to maximum price fixing systems.[108] In *Albrecht v. Herald Co.*[109] the Court applied the combination requirement of *Parke, Davis* to the joint activities of a newspaper company, a telephone solicitation service, and a newspaper carrier that together acted to replace the plaintiff as the paper's carrier.[110] The Court, relying on *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*[111] to justify use of the per se rule in maximum price fixing cases, reasoned that "schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and

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104. United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99 (1920).

105. United States v. Parke, Davis & Co., 362 U.S. 29, 43-45 (1960).

106. Simpson v. Union Oil Co., 377 U.S. 13, 17 (1964).

107. *See, e.g.,* Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980). In *Colgate* the defendant certainly was economically superior to its many dealers, and the Court's recited facts included policing activities, promises from recalcitrant buyers as a condition of further sales, and dealer adherence to suggested prices. 250 U.S. at 303-04; *see also* Comment, *supra* note 75, at 538 (concluding that the facts of *Colgate* clearly support a finding of combination).

108. For a definition of maximum price RPM, see *supra* text accompanying note 18.

109. 390 U.S. 145, *reh'g denied*, 390 U.S. 1018 (1968).

110. *Id.* at 149. In a footnote, Justice White, writing for the majority, stated:

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

Id. at 150 n.6. This comment virtually swallows *Colgate* but is dictum, and the Court never has applied this reasoning.

111. 340 U.S. 211 (1951). In *Kiefer-Stewart* the respondent established agreements to sell liquor only to wholesalers who would resell the liquor below the respondent's price ceilings. The Court held that maximum price RPM inhibited the dealers' rights to select a fair price for their products just as effectively as minimum price RPM. *Id.* at 213.

survive in that market."[112] The Court also cited as pernicious the tendency of a maximum price fixing system to eliminate nonprice competition, to favor volume dealers, and to operate as both a price floor and a price ceiling.[113]

Recently, in *Arizona v. Maricopa County Medical Society*,[114] the Court relied on *Albrecht* as controlling precedent. In *Maricopa* a group of doctors established maximum fee schedules for policyholders of certain insurance plans. The agreement provided that insurers would pay doctors' fees up to the maxima and that the doctors would consider these fees payment in full.[115] Although the facts disclosed a horizontal price fix, the Court relied on the vertical per se rule to condemn the activity.[116] The Court considered briefly the detriments unique to the payment plan,[117] but consistent with per se analysis, refused to consider the alleged benefits of the plan.[118]

C. *Nonprice Restrictions:* Sylvania

The Court cast serious doubt on the validity of the *Dr. Miles* per se rule in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[119] a landmark nonprice restriction case. Sylvania, a manufacturer of color television sets with a dwindling one or two percent national sales share, limited distribution of its sets in an attempt to reduce intrabrand competition,[120] increase profits, and encourage dealers to promote Sylvania products more aggressively. In three years the defendant's share of the market jumped to five percent.[121] When a franchisee challenged Sylvania's new policy, the Court rescinded

112. 390 U.S. at 152-53.

113. *Id.* at 153. *See generally* Popofsky, *Resale Price Restraints Revisited*, 49 ANTITRUST L.J. 109, 116-17 (1980) (discussing *Albrecht*).

114. 457 U.S. 332 (1982).

115. *Id.* at 339-40.

116. *Id.* at 348 & n.18.

117. *Id.*

118. The respondents alleged that the plan enabled patients to choose their own doctors, to rely upon complete insurance coverage, and to pay lower premiums. *Id.* at 351 & n.23 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)). The dissent disagreed with the majority's reasoning and relied on Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), *reh'g denied*, 450 U.S. 1050 (1981), and National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), to criticize the per se analysis. 457 U.S. at 362-64 (Powell, J., dissenting).

119. 433 U.S. 36 (1977).

120. Intrabrand competition is competition among retailers of a single manufacturer's product. In contrast, "[i]nterbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law." *Id.* at 52 n.19.

121. *Id.* at 38.

its per se rule against territorial restraints[122] and established the rule of reason.[123] The Court, finding for Sylvania, relied more heavily than ever before, or since, on scholarly opinion[124] to support the conclusion that territorial restrictions have no "pernicious effect on competition."[125] The Court acknowledged the benefits to interbrand competition when retailers receive protection from full intrabrand competition and are able to increase dealer services and advertising.

The Court held that it could apply the per se rule only when it had evidence of a demonstrable economic effect, a test that Justice White argued in his concurrence would militate forcefully against applying the per se rule in RPM cases as well.[126] The majority, weakly rebutting Justice White's argument, found significant differences between nonprice restrictions and RPM that easily could justify different treatment.[127] The Court pointed to the invariable tendency for RPM to decrease interbrand competition and increase the likelihood of cartels. The Court also emphasized Congress' implicit condemnation of price restrictions when it repealed the fair trade laws.[128] *Sylvania* evinces the Court's modern view that economic and pragmatic factors militate in favor of allowing manufacturers to retain some control over their downstream distribution.

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122. The Supreme Court first announced the per se rule for nonprice vertical restraints in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

123. For a definition of the rule of reason, see *supra* note 14.

124. The Court cited more than 15 scholarly articles in its majority opinion.

125. *Sylvania*, 433 U.S. at 50 (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

126. *Sylvania*, 433 U.S. at 67-70 (White, J., concurring).

127. *Id.* at 51 n.18.

128. *Id.* Although a full discussion of the implications of *Sylvania* is beyond the scope of this Note, the prevailing view among a majority of the members of the Supreme Court is that RPM is unique and, therefore, outside the purview of rule of reason analysis. *See id.* In *Sylvania* the Court held that it would permit reduced intrabrand competition if sufficiently offset by increases elsewhere. *Sylvania*, 433 U.S. at 50-54. This line of thinking questions *Dr. Miles*' reliance on perceived injury to intrabrand competition as the basis of a per se rule against RPM. *See* Baker, *supra* note 21, at 1465; *cf.* Andersen, *supra* note 34, at 769 n.27 (noting the perceived economic injury in *Dr. Miles*).

Drawing a line between RPM and territorial restrictions is difficult. *See* Baker, *supra* note 21, at 1467 (discussing the overlap between territorial restrictions and RPM). One commentator concluded that no policy justification exists for subjecting vertical restraints to two rules. *See* Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171, 173, 190. *Sylvania* also implicitly supports the *Colgate* doctrine because of the Court's willingness to recognize the value of the manufacturer's interest in maintaining control over its goods. For further discussion of *Sylvania*, see Baker, *supra* note 21.

D. *Lower Court Interpretations of* Colgate

1. *Russell Stover Candies, Inc.*

The Federal Trade Commission (FTC) recently challenged the validity of the *Colgate* doctrine in *In re Russell Stover Candies, Inc.*[129] The Commission brought the case as a test[130] stipulating the facts for purposes of its prosecution. Respondent Russell Stover, a major seller and maker of various candies, had designated resale prices for its products through price lists, invoices, order forms, and prepriced packages.[131] Russell Stover also had informed retailers that discounting its products would result in cancellation of further dealings, but it neither requested nor accepted express assurances of pricing.[132] The respondent not only ceased dealing with price cutters, hut also refused initial contact with retailers that it helieved intended low price resales.[133] Russell Stover's plan was so effective that a Louis Harris survey estimated a 97.4 percent retailer compliance rate.[134] Potential witnesses before the FTC intended to testify that they wanted to sell at lower prices hut maintained the designated rates for fear of termination.[135]

When the parties stipulated the facts, the focus of the case became the viability of the *Colgate* doctrine. The FTC did *not* attempt to demonstrate the existence of policing activities, threats of termination, economic coercion, or the reinstatement of price cutters.[136] The case plainly presented the issue whether the expanding per se rule still would permit unilateral acts by a manufacturer. The administrative law judge relied on *Colgate* to sanction the manufacturer's plan and dismiss the FTC complaint.

(a) The FTC Opinion: Colgate *Overruled*

The FTC overruled and reversed the administrative law judge. It held that a combination existed between Russell Stover and its acquiescent retailers by reasoning that some of the dealers would have discounted their prices if Russell Stover had not threatened

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129. 100 F.T.C. 1 (1982), *rev'd*, 718 F.2d 256 (8th Cir. 1983).
130. *Id.* at 7.
131. *Id.* at 4-5.
132. *Id.* at 5.
133. *Id.* at 6.
134. *Id.*
135. *Id.*
136. *See* Kilburn, *Other Vertical Problems: Pricing, Refusals to Deal, Distribution*, 51 ANTITRUST L.J. 173, 174-75 (1982).

termination.[137] In evaluating the per se rule, the FTC stated that decisions after *Colgate* would have ruled that the defendant in *Colgate* itself violated the Sherman Act.[138] The FTC relied on *Parke, Davis* and *Albrecht* for the proposition that a conspiracy may occur even when retailers comply out of fear of termination.[139] The Commission concluded that the *Colgate* exception only applied to initial customer selection; any later use would constitute a combination.[140]

(b) The Eighth Circuit Reversal

The Eighth Circuit, reversing the FTC and dismissing the complaint, found the stipulated facts insufficient to establish liability under the *Colgate* doctrine.[141] Petitioner Russell Stover argued that the FTC's unwilling acquiescence test missed the point of *Colgate*—that the unilateral actions of a manufacturer become no less unilateral simply because a dealer responds.[142] Russell Stover also argued that the FTC's rule could lead to abuse by dealers that, fearing termination because of poor productivity, could claim that they adhered to a manufacturer's price because of coercion, threat, or pressure.[143] Finally, Russell Stover averred that subjective dealer inquiries defeated the per se rule's implicit requirement of significant market power in the manufacturer.[144] Absent market power, Russell Stover argued, a manufacturer has no way to make

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137. 100 F.T.C. at 18.

138. *Id.* at 21 n.16. The FTC summarized its view of *Colgate*'s remains as follows:

> An announced policy of terminating non-complying dealers, *standing alone*, does not *automatically* create a combination because such a policy *standing alone* does not necessarily imply any dealers act to avoid the carrying out of the threat. However, if, as is likely, some dealers do act to avoid termination, their unwilling compliance does give rise to combinations.

Id. at 40-41 (emphasis in original).

139. *Id.* at 34-35.

140. *Id.* at 46. FTC Chairman Miller dissented, reasoning that the majority's test made *Colgate* "applicable only in situations where it is irrational and futile for a manufacturer to make the 'protected threat' in the first place." *Id.* at 50 (Miller, Chairman, dissenting).

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

142. Petitioner's Brief at 36-37, *Russell Stover*, 718 F.2d 256. Russell Stover contended: "The Court has never inquired into the reaction of the retailers to an announcement because the reaction was irrelevant to the unilateral nature of the announcement itself . . . . The dealer's reasons for observing the suggested retail price do not affect the unilateral nature of the manufacturer's policy." *Id.* Russell Stover also relied on *Parke, Davis*. *Id.* at 37 (quoting *Parke, Davis*, 362 U.S. at 44).

143. Petitioner's Brief at 37-38, *Russell Stover*, 718 F.2d 256.

144. *Id.* at 40-41.

its dealers comply.[145]

The Eighth Circuit agreed with Russell Stover's argument that the stipulated facts failed to constitute a sufficient "plus factor" to imply a combination agreement.[146] The court refuted the view that plus factors are unnecessary under the *Albrecht* dicta.[147] The Eighth Circuit felt that the Supreme Court did not indicate whether unwilling compliance alone was enough to support a combination claim or whether coercive tactics must induce the unwilling compliance, as in *Parke, Davis.*[148] The court, therefore, refused to overrule *Colgate* on such inferential grounds.[149]

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145. *Id.* Significantly, Russell Stover did not make a product that was its retailers' primary source of income—such as gasoline, electronic equipment, or drugs—but instead provided candy as one of a wide variety of items that the retailer sold. *See Russell Stover,* 100 F.T.C. at 4. This distinction reduces the dealer's economic interest in the manufacturer's unilateral activity to the level of the reseller in *Colgate.* Although the distinction is not relevant under the per se rule, the distinction is implicit in the fact finding process. *See Parke, Davis,* 362 U.S. at 31-36; *Bausch & Lomb,* 321 U.S. at 709-16; *see supra* text accompanying notes 62-65 & 68-71.

146. *Russell Stover,* 718 F.2d at 260. "Plus factors" are manufacturer actions that exceed the parameters of *Colgate.*

147. *See Albrecht,* 390 U.S. at 150 n.6.

148. 718 F.2d at 259.

149. Several other federal courts also have considered the issues in *Russell Stover.* For example, in Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982), Judge Posner considered a suit by a wholesaler who charged its supplier with wrongful termination. The wholesaler accused the supplier of engaging in both RPM and restricted distribution. The court, however, found no violation of the Sherman Act under either the per se rule or the rule of reason. Judge Posner applied the rule of reason to the combined price and nonprice restraint system, which the court apparently accepted as beyond the ambit of the per se rule. *See id.* at 744. The court held that absent evidence of "signficant market power," the plaintiff did not meet its burden, because smaller firms cannot afford to injure customers, and market forces can correct any errors. *Id.* at 745. The court required the defendant to possess market power, which the court could infer from the "power to raise prices significantly above the competitive level without losing all of one's business." *Id.* Although a restrictive definition, the concept of market power as a liability yardstick comes from *Sylvania. Sylvania,* 433 U.S. at 38-39, 53 & n.22; *see also* Goldberg, *Resale Price Maintenance and the FTC: The Magnavox Investigation,* 23 WM. & MARY L. REV. 439 (1982) (discussing the restricted distribution system of the third largest color television maker).

In Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980), the Second Circuit attempted to avoid the per se rule. Defendant Texaco continually threatened to terminate the plaintiff's lease and dealership unless the plaintiff observed maximum price ceilings. The *Yentsch* court adopted an expansive reading of the per se rule and concluded that the defendant "creat[ed] a coercive business climate." *Id.* at 53. The Second Circuit imposed liability despite the plaintiff's three brief acquiescences to Texaco's demands. The *Yentsch* court's reading of tbe law clearly reflects a narrow interpretation of *Colgate.*

2. *Arnott v. American Oil Co.*

The Eighth Circuit also considered a combination situation in *Arnott v. American Oil Co.*[150] The majority found an illegal combination between defendant Amoco and plaintiff Arnott, lessee of an Amoco gas station. The majority based its finding on evidence of Amoco's pricing demands, intermittent one year lease renewal refusals, and eventual termination of Arnott's lease in part for raising prices against the defendant's directives.

Judge Bright, who concurred in part and dissented in part, considered Arnott's antitrust claim dubious and based on an incorrect interpretation of *Colgate.*[151] He contended that Arnott enjoyed inflexible demand due to his location on an interstate highway, away from competitors.[152] In addition, Amoco calculated its lease receipts from the number of gallons of fuel that its lessees purchased.[153] No combination between the litigants existed, according to Judge Bright, because Arnott failed to prove that he ever had changed his price in response to Amoco's directives. In addition, Judge Bright found no combination between the defendant and its other dealers and emphasized that even if he had found a combination, it would have been irrelevant to the plaintiff's claim because the plaintiff operated without any real competition.[154]

Arnott is one of the best illustrations of the argument that RPM often operates procompetitively. The unilateral or conspiratorial nature of the activity is irrelevant in *Arnott.* The defendant merely sought to control the plaintiff's exorbitant profits and thereby protect the plaintiff's customers and the defendant from the plaintiff's monopolistic pricing policy. The court's disallowance of RPM plainly injured the defendant by defeating its right to lease payments and by injuring its reputation for competitive pricing.

III. Disadvantages of the Per Se Rule

Proponents of the per se rule argue that it precludes difficult and costly litigation of antitrust issues, efficiently contributes to enforcement, provides predictable results for planning purposes,

150. 609 F.2d 873 (8th Cir. 1979), *cert. denied,* 446 U.S. 918 (1980).
151. *Id.* at 893 (Bright, J., concurring and dissenting).
152. *Id.* at 891 n.6.
153. *Id.*
154. *Id.* at 892.

and saves courts from engaging in unwieldy economic analysis.[155] In evaluating the effects of the rule, however, its inequities in the RPM setting outweigh its justifications. The problems courts have faced in attempting to apply the per se rule to RPM cases include: (1) the producer's loss of marketing control; (2) distortion of the role of the combination requirement; (3) disallowance of procompetitive activities; (4) encouragement of free riders; and (5) unpredictability. This part of the Note considers each of these disadvantages in turn.

A. *Loss of Marketing Control*

Manufacturers may desire vertical price restraints for several reasons.[156] First, manufacturers may want to discourage "free riding"—one seller usurping its competitors' services and advertising.[157] Second, RPM permits producers and dealers to form cartels.[158] Third, the manufacturer may want to increase nonprice competition and output if its output is not responsive to changes in price.[159] Fourth, the manufacturer may produce a "status symbol" product that sells better at a higher price than at a lower price.[160] Last, manufacturers believe that they should be able to maintain a diverse retailer group because one retailer that consistently sells a product for less than its competitors may reduce retailer competition and gain bargaining strength against the manufacturer.[161]

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155. *See* Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489 (1983); Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1, 4 (1979); Note, *supra* note 31, at 708.

156. *See* P. AREEDA, ANTITRUST ANALYSIS 645-49 (1981).

157. For a discussion of the free rider debate, see *infra* text accompanying notes 185-95.

158. Proponents of the per se rule argue that the desire to form cartels is the only possible motive for RPM. *See* Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 96-99, 104 (1960).

159. *See* Albrecht v. Herald Co., 390 U.S. 145, 157-58 (1968) (Harlan, J., dissenting); *see also* Posner, *supra* note 36, at 291 (analyzing *Albrecht*). This purpose infers some degree of market power. Increasing nonprice competition gives rise to an independent cause of action under the Sherman Act. 15 U.S.C. §§ 1, 2 (1982).

160. *See* Scherer, *supra* note 10, at 695-96; *see also* Fitzgerald, *Antitrust, Discounting, and RPM in the Sporting-Goods Industry: A "Chicago" Reply to Professor Baxter*, 14 ANTITRUST L. & ECON. REV., No. 3, at 43, 56 (1982) (discussing pricing tendencies in the ski equipment industry).

161. *See* Mattioli, *Resale Price Fixing and the "Hi-Tech" Discounter: Consumer Electronics in Madison*, 14 ANTITRUST L. & ECON. REV., No. 3, at 11, 20-22, 28-29 (1982). The advantage of RPM in this situation is that manufacturers do not have an obligation to cater to large distributors that control certain markets. The product becomes accessible to a

Although not all manufacturer ends are procompetitive, some commentators argue that the overwhelming effect of RPM is beneficial to the market. Professor Bork, for example, feels that RPM is always beneficial to consumers because a manufacturer would invoke RPM only to increase its output. More consumers, therefore, must be willing to buy the new product-services package than were willing to buy the product alone at a lower price.[162] Professor Bork would argue that the manufacturer is responding to a greater demand than it could before it instituted RPM.[163] To the extent that RPM may have procompetitive effects, the per se rule is too blunt a weapon against anticompetitive RPM.

The basis of most judicial and scholarly criticism of RPM is that it promotes supplier or dealer cartels. According to this view, dealers can influence their suppliers to implement price restrictions because the suppliers can eliminate competition by establishing a price, policing noncomplying sellers, and punishing discounters by terminating their accounts.[164] At the manufacturer level, stabilized prices that are easily monitored by competitors could promote a manufacturer cartel.[165]

Although cartelization is a possible motive for RPM campaigns,[166] forming cartels is also independently actionable under the Sherman Act.[167] In maximum price fixing cases, cartelization is rarely the manufacturer's intention.[168] In minimum RPM cases, a manufacturer level cartel is easily noticeable by the lack of interbrand competition among different products.[169] An RPM cartel imposed at the dealer level would be unusual because retailers rarely

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greater number of retailers that can expand tbe ultimate consumer base. Strong arguments to the contrary exist, however. For example, one commentator criticizes this system because it requires discount or other low cost sellers to raise prices, thereby preventing manufacturers from maximizing their profits. This system encourages new entrants to squeeze the volume of the original retailers and creates a free rider problem. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 593 (2d ed. 1980); Halverson, *An Overview of Legal and Economic Issues and the Relevance of the Vertical Merger Guidelines*, 52 ANTITRUST L.J. 49, 71 (1983).

162. R. BORK, *supra* note 21, at 288-89; Bork, *supra* note 128, at 180-81.

163. Bork, *supra* note 128, at 181.

164. *See* Lifland, Pitofsky & Popofsky, *Panel Discussion*, 51 ANTITRUST L.J. 50, 51, 53 (1982); Pitofsky, *supra* note 155, at 1490-91.

165. *See* Pitofsky, *supra* note 155, at 1490-91.

166. One commentator, however, has claimed that this idea is "an bypothesis without empirical data to support it." Popofsky, *supra* note 113, at 115.

167. 15 U.S.C. § 1 (1982); *see* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

168. *See* Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 900-04 (1981).

169. *See* Bork, *supra* note 128, at 190-91; Posner, *supra* note 19, at 8.

are able to force a large seller into a conspiracy to restrain trade. Furthermore, dealers could form a cartel more efficiently without manufacturer involvement.[170] A rebuttable presumption that the RPM scheme is illegal would allow courts to detect and restrain cartels in the preliminary stages of litigation. The possibility that abuse could occur in limited instances does not justify the all encompassing per se rule.[171]

B. The Definition of Combination

The Supreme Court has expanded its original application of the per se rule against RPM from express contracts[172] to an amorphous prohibition of all manufacturer actions designed to set resale prices, except announcements of pricing policy and manufacturer termination of or refusal to deal with discounters.[173] The confusion in interpreting the terms "combination," "coercion," "agreement," and "acquiescence" arises, therefore, because the Supreme Court has failed to indicate when *Colgate* applies and because lower courts are dissatisfied with the infiexible per se rule.[174] For example, in *Filco v. Amana Refrigeration, Inc.*[175] the Ninth Circuit's requirement that the plaintiff comply, at least momentarily, with its manufacturer's demands to prove acquiescence is a frivolous, possibly damaging prerequisite to suit. The result in *Filco* is disturbing in view of the court's ultimate decision that the defendant was not liable.

Russell Stover aptly illustrates the various ways in which courts have manipulated *Colgate* to achieve an equitable result.[176]

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170. Bork, *supra* note 128, at 190-91.

171. *See* Posner, *supra* note 19, at 8. Under Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958), a court may impose the per se rule only if the activity has a "pernicious effect on competition." *Id.* at 5.

172. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

173. *See* United States v. Parke, Davis & Co., 362 U.S. 29 (1960). *But cf.* Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) (implying future restriction of *Dr. Miles*). *See generally supra* notes 18-93 and accompanying text (tracing the evolution in the Supreme Court's reasoning).

174. According to one commentator, " '[a]greement' has become a code word meaning only that the manufacturer has pursued its price preferences with an unacceptable vigor." Andersen, *supra* note 34, at 772; *see* Kilburn, *supra* note 136, at 178-79; *cf.* Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (no coercion because the defendant relied on its dealer's individual self-interest to ensure pricing uniformity); Westinghouse Elec. Corp. v. CX Processing Laboratories, Inc., 523 F.2d 668 (9th Cir. 1975) (no conspiracy because no direct evidence of pricing demands).

175. 709 F.2d 1257 (9th Cir.), *cert. dismissed*, 104 S. Ct. 385 (1983).

176. Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983), *rev'g* 100 F.T.C. 1 (1982); *see supra* notes 129-49 and accompanying text (discussing *Russell Stover*).

Limiting judicial review of the record to facts that support the *Colgate* defense before deciding whether to apply the per se rule is an intellectually dishonest, potentially anticompetitive approach to RPM cases.[177] *Colgate* and its progeny have created in the combination requirement a blunt, irresponsible weapon against the per se rule.

The time honored principle underlying *Colgate*—that manufacturers have the right to select with whom and under what circumstances they will do business—is still the basic concern of the combination requirement.[178] Courts more likely would stick to *Colgate*'s basic premise in RPM cases if they were not searching for a vehicle by which to insert rule of reason analysis. Because the rebuttable presumption of illegality that this Note proposes[179] allows full rule of reason inquiry into cases that overcome the initial presumption, the rebuttable presumption would restore clarity and integrity to the *Colgate* doctrine.

C. Disallowance of Procompetitive or Benign Activities

Proponents of the rule of reason argue that manufacturer-initiated RPM is always procompetitive or benign. They assert that increases in interbrand competition compensate for reductions in intrabrand competition.[180] Commentators also postulate numerous manufacturer benefits that have procompetitive, or at least benign, effects.[181] Maximum price restraints have great potential for lowering consumer prices, although the *Albrecht* decision failed to recognize this potential as sufficient to overcome per se treatment. Several results that are helpful to the consumer may flow from minimum RPM as well. For example, minimum pricing may encourage national advertising of prices and dealer services; new or small manufacturers may set minimum prices to allow dealers a

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177. Other means that courts have used to avoid the per se rule include refusing to find sufficient evidence of conspiracy or pricing demands, *e.g.*, Westinghouse Elec. Corp. v. CX Processing Laboratories, Inc., 523 F.2d 668, 673-74 (9th Cir. 1975), and refusing to find sufficient levels of coercion, *e.g.*, Knutson v. Daily Review, Inc., 548 F.2d 795, 806 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

178. Many scholars, however, disagree with this principle and would discard *Colgate*, even under rule of reason analysis. *See, e.g.*, Andersen, *supra* note 34, at 792-93; Baker, *supra* note 21, at 1520; Turner, *supra* note 52, at 695, 705-06.

179. *See infra* notes 238-52 and accompanying text.

180. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). *But see* Andersen, *supra* note 34, at 784 ("If enhancing interbrand competition were an adequate justification for eliminating intrabrand competition, horizontal arrangements for this purpose should be allowed.").

181. *See* R. Posner, Antitrust Law: An Economic Perspective 147-51 (1976).

temporary increase in profits and thereby encourage marketing; and "status" products may receive protection against price cutters.[182] These apparent efficiencies, however, may not be as comprehensive as commentators suggest. A leading economist contends that RPM is inefficient when increased services are unnecessary to market a product or when price margins are unnecessarily high.[183] In addition, in certain highly concentrated industries RPM may inhibit low price substitution.[184] The wide divergence of opinion about the effects of RPM on competition indicates the need for a flexible judicial response to RPM cases.

D. *Free Riders*

The free rider effect has provided strong ammunition for scholars who advocate abolishing the per se rule.[185] Recent evaluation of the problem, however, suggests that it may not be as severe as critics once thought.[186] Briefly stated, disallowing minimum RPM encourages low price sellers to take a free ride on the services and advertising of retail competitors that charge higher prices to finance those services. RPM, on the other hand, forces dealers to maintain prices that (1) discourage consumers from using one seller's services to learn about a product and then buying the product from a discount seller and (2) encourage full service marketing by all retailers.[187]

In the marketplace the free rider argument has lost much of its credibility. Dean Pitofsky, who has made the most damaging attack on the theory, feels that it is invalid for three reasons.[188] First, he argues that the free rider concept targets discounters, which as a group represent the free market system at its best because discount prices generally reflect efficient distribution *and* ef-

182. *See* R. BORK, *supra* note 21, at 288-90, 295-96; Andersen, *supra* note 34, at 779-80.

183. *See* Scherer, *supra* note 10, at 691-705. Professor Scherer cites the case of regulated airline rates, which artificially upheld prices, to illustrate the theory that excessive service competition—more than consumers possibly wanted or needed—may produce inefficiencies. *Id.* at 703-04. Likewise, inefficiency results when high volume retailers feel that they must raise prices above profit maximizing levels. *Id.* at 701.

184. *Id.* Under a minimum RPM plan, consumers have few, if any, choices of low priced goods with less service to substitute for the full service product. *Id.* at 704.

185. For one of the most cited expositions on the free rider theory, see Telser, *supra* note 158, at 89-96.

186. *See, e.g.*, Pitofsky, *supra* note 155, at 1493; Scherer, *supra* note 10, at 694-95.

187. *See* Andersen, *supra* note 34, at 779-80.

188. Pitofsky, *supra* note 155, at 1492-93.

ficient services.[189] Second, Pitofsky contends that the establishment of minimum vertical price restrictions does not induce automatically the desired services;[190] contract provisions are a more direct, less intrusive means of achieving the appropriate marketing services.[191] Third, Pitofsky believes that the marketplace, not the manufacturer, is best suited to decide the amount and type of services that consumers want.[192] In other words, consumers ought to have the freedom to choose between discounters, department stores, and specialty shops to determine the amount and type of services that they desire.[193] Discounters and theorists perceive almost no evidence to support the claim that consumers take advantage of a retailer's services before buying instead from a discount retailer.[194] In addition, many commentators question how much service is necessary to sell items such as light bulbs, clothing, liquor, and candy.[195] Thus, the free rider problem, standing alone, is not as strong an argument against the per se rule as it once was.

E. *Unpredictable Advice and Planning*

Although one of the great advantages of a strict per se rule in RPM cases is that it yields predictable results, two factors create uncertainty in the application of the rule. First, the *Colgate* doctrine is a shapeless specter in virtually every RPM adjudication.[196] Second, *Sylvania*'s rule of reason approach to nonprice restrictions

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189. *Id.* Discounters claim that they provide equivalent but more efficient services. *See, e.g.*, Fitzgerald, *supra* note 160, at 68-70; Mattioli, *supra* note 161, at 1718; Milley, *The High Cost of RPM: Discounting, Manufacturing, and the Scale-Economy Problem*, 14 ANTITRUST L. & ECON. REV., No. 3, at 101, 106 (1982) (Mr. Milley is a senior vice president of K-Mart Corp., one of the nation's largest discount retailers.).

190. Pitofsky, *supra* note 155, at 1493. In less than ideal situations, such as inflexible demand at the retail level or heavily concentrated markets, the dealers still may not perform the desired services. *See* Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 20 (1978).

191. Pitofsky, *supra* note 155, at 1493; *see* Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small Town America*, 14 ANTITRUST L. & ECON. REV., No. 3, at 81, 90 (1982) (Mr. Walton is a senior vice president of Wal-Mart, Inc.). Examples of contract provisions include manufacturer-retailer agreements over the desired amounts to spend on advertising, warranty services, samples, or floor display space.

192. Pitofsky, *supra* note 155, at 1493; *see* Mattioli, *supra* note 161, at 30.

193. *See* Walton, *supra* note 191, at 90.

194. *See* Fitzgerald, *supra* note 160, at 68-70; Scherer, *supra* note 10, at 694; Wysocki, *Resale Price Maintenance and the Mass Market: A 'Repeat Business' Rebuttal to Professor Baxter*, 14 ANTITRUST L. & ECON. REV., No. 3, at 91, 99 (1982).

195. *See* Scherer, *supra* note 10, at 694; Walton, *supra* note 191, at 90.

196. Because *Colgate* is the only viable defense in most per se cases, the vast majority of cases discuss the issue.

leads to inconsistent judicial treatment in both combined RPM and territorial restriction cases[197] and single system cases that do not fit into a particular category.[198] The illogical line drawing in the Supreme Court's vertical restraint decisions thwarts rational business planning.[199]

Courts have limited *Colgate* so that it not only confuses business planning, but also discourages producers from terminating dealers for any kind of unsatisfactory conduct for fear of potential liability to dealers that can convince courts of even tenuous RPM strategies.[200] This fear is not irrational considering that some courts have allowed liability for conduct that has little or nothing to do with dual consent.[201]

F. Other Effects

The existence of the per se rule makes a game of achieving a potentially procompetitive RPM equivalent through alternate avenues. A manufacturer may communicate its resale goals through catalogues, price lists, advertising with price included, or prepricing packages.[202] The per se rule, therefore, impedes efficient communication of both procompetitive and anticompetitive marketing strategies.

The final major effect of the per se rule is that it protects dis-

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197. *See, e.g.,* Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982); *see supra* note 149 (discussing *Valley Liquors*).

198. *See, e.g.,* Baker, *supra* note 21, at 1467.

199. *See* R. BORK, *supra* note 21, at 297 (contending that current law denies the manufacturer the opportunity to increase efficiency).

200. *See, e.g.,* Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981); Westinghouse Elec. Corp. v. CX Processing Laboratories, Inc., 523 F.2d 668 (9th Cir. 1975). Professor Andersen rebuts this contention by arguing in favor of imposing a duty to do business with dealers. Andersen, *supra* note 34, at 790.

201. *See* Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), *aff'd,* 104 S. Ct. 1464 (1984); Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980); *see also* Andersen, *supra* note 34, at 777.

Although a rebuttable presumption of illegality alone would not correct all predictability problems, *see* Popofsky, *Lawyer's Response,* 52 ANTITRUST L.J. 719, 729 (1983), it probably would return *Colgate* to its original purpose and end silent judicial manipulations of the per se rule. Dean Levi summed up the current state of legal planning of RPM in 1960:

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

Levi, *supra* note 75, at 326.

202. *See Russell Stover,* 100 F.T.C. at 4-5 (1982); Andersen, *supra* note 34, at 765-66.

counters against manufacturers' forced price increases. Discount retail businesses now do an estimated one hundred to three hundred billion dollars worth of retail sales business a year.[203] Before repeal of the fair trade laws, one discounter estimated that forty to fifty percent of the retail market of television sets was minimum price restricted.[204] Under the rule of reason,[205] RPM would increase prices and restrict discounter markets geographically because discounters depend on low prices to draw customers from a wider area than if the discounters did not offer reduced prices.[206] If discounters cannot reduce their prices, volume also will decrease, causing lower manufacturer volume discounts and lower profit margins for the discounters.[207] This chain of events restricts discounter bargaining power, giving the manufacturer an extra dimension of control over its prices.[208] The inescapable conclusion is that the rule of reason provides too liberal a standard. The rebuttable presumption compromise offers the right balance of interests to ensure the continued existence of the discount retail industry because the rebuttable presumption prohibits systems that severely affect competition and protects retailer interests.

IV. The Rule of Reason

Although the Supreme Court has not applied rule of reason analysis to RPM cases, no discussion of the shortcomings of the per se rule would be complete without an analysis of all the alternatives to the per se standard, including the rule of reason. The rule of reason is a totality of the circumstances approach to resolving antitrust cases. The exact standard for reviewing each case is not readily definable. Accordingly, inquiries and lawsuits under the rule of reason may be protracted, difficult, unpredictable, and expensive. The advantage of the rule is that it can react to new fact situations and balance the procompetitive and anticompetitive effects of a challenged activity. Unlike the per se rule the rule of reason does not assume that the anticompetitive effects always outweigh the procompetitive results. The disadvantage of the rule

203. *See Foreword: Antitrust and the Discounters' Case Against Resale Price Maintenance*, 14 Antitrust L. & Econ. Rev. No. 3, at 1, 4 (1982).

204. Mattioli, *supra* note 161, at 15.

205. The rule of reason, in practice, "is little more than a euphemism for nonliability." Posner, *supra* note 19, at 14.

206. Mattioli, *supra* note 161, at 17.

207. Fitzgerald, *supra* note 160, at 67.

208. Walton, *supra* note 191, at 85.

lies in the practical difficulties of applying a full rule of reason approach in every case. The costs to the judicial system, the litigants, and society outweigh the benefits of the rule in RPM cases. Under the rule of reason, antitrust counsel has free reign to manufacture countless reasons why virtually any RPM scenario may benefit competition. The rule of reason is the polar opposite of the per se rule and each test has significant disadvantages. A rebuttable presumption that the RPM scheme is illegal, on the other hand, would limit rule of reason marathons to cases in which the defendant's justifications for the RPM scheme are strong enough to overcome the presumption.[209]

A. *Judicial Interpretations of the Rule of Reason*

The rule of reason approach that antitrust tribunals currently use adds little to planning predictability and even less to the development of one standard that all the federal appellate courts can employ. For example, in *Sylvania*[210] the Supreme Court listed several inquiries in its rule of reason test, including the nature of the restraint on competition, the factual business context, the condition of the business before and after the restraint, the purpose and history of the restraint, and the knowledge or intent of the defendant.[211] This list is not of practical assistance to the lower federal courts because it does not establish priorities nor does it provide a fulcrum on which to evaluate the facts of each case.[212]

Judge Posner articulated a new approach to rule of reason analysis in *Valley Liquors, Inc. v. Renfield Importers, Ltd.*[213]—the significant market power test. This test holds that a firm without market power is not in a position to disserve customers and, therefore, is presumably not guilty of anticompetitive activity.[214] The *Valley Liquors* test is consistent with *Sylvania*[215] in that *Valley*

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209. A presumption against legality follows from the view that over 50% of all cases that go to trial involve conduct antithetical to the interests of competition. Studies conducted under the Fair Trade Laws indicate that most RPM systems result in increased prices and reduced sales volume. Halverson, *supra* note 161, at 69-70; Pitofsky, *supra* note 155, at 1488.

210. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

211. *Id.* at 49 n.15 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

212. *Accord* Pitofsky, *supra* note 190, at 34 (indicating that the technique of listing unweighted factors is "standard operating procedure").

213. 678 F.2d 742 (7th Cir. 1982); *see supra* note 149 (discussing *Valley Liquors*).

214. 678 F.2d at 745.

215. *See Sylvania*, 433 U.S. at 58 & n.29.

Liquors allows new or weak competitors to be anticompetitive. This exception to liability may be justifiable if it increases interbrand competition.[216] The major obstacle to implementing the *Valley Liquors* test is its restrictive definition of market power. According to *Valley Liquors*, the defendant has market power when it can "raise prices significantly above the competitive level without losing all of [its] business."[217] This definition of market power is the greatest weakness in the test because the definition almost presupposes a section 2 monopoly violation.[218] This threshold fails to protect retailer and consumer interests adequately.

In *Muenster Butane, Inc. v. Stewart Co.*[219] the Fifth Circuit phrased its inquiry as a straight balancing of intrabrand versus interbrand effects on competition.[220] The court held that a bitter rivalry between the plaintiff dealer and its across the street competitor had cut competitive efficiencies, and that the defendant's refusal to do business with the plaintiff encouraged presale services and thus restored full interbrand competition.[221] The court did not explicitly adopt a market share analysis, but considered the defendant's lack of market power as a "plus factor" in the decision.[222] The court's loose treatment of market share, in comparison with the *Valley Liquors* analysis, illustrates the conflicts inherent in rule of reason cases.[223]

B. The Academic Response

Several commentators have addressed the question of the proper standard in RPM cases. Dean Pitofsky defends the per se rule, although he concedes the need for carefully drawn exceptions,

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216. *But see* Scherer, *supra* note 10, at 697-704 (If new entrants feel that they must set their prices beyond profit maximizing levels, increases in output will decrease overall efficiency.).

217. 678 F.2d at 745.

218. In other words, before the defendant could violate the *Valley Liquors* standard, the defendant would be guilty of monopolizing under the Sberman Act. Section 2 of the Act probibits monopolizing any relevant market. 15 U.S.C. § 2 (1982). Although the court must find market power in combination with intent to monopolize to find a violation of the Act, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966), the *Valley Liquors* threshold places a severe limit on the types of defendants that would ever be liable for vertical restraint violations. The practical effect of the test is to open the door for manufacturers to design combined systems of restricted distribution and RPM without fear of judicial prohibition.

219. 651 F.2d 292 (5th Cir. 1981).

220. *Id.* at 296.

221. *Id.* at 297.

222. *Id.* at 298.

223. *See* Posner, *supra* note 19, at 14.

such as the exception for new entrants and weak competitors.[224] Judge Posner believes that the new entrant or small firm exception is part of an inquiry into attempts at forming cartels.[225] Under Posner's approach, if the defendant does not have a high market share, presumably the defendant is not attempting to form a cartel.[226] This approach assumes that RPM is always procompetitive or benign, because any activity short of a violation of the Sherman Act is allowable.[227] Other scholars have adopted a similar high market share threshold requirement.[228] Discount retailers, of course, would disagree with this line of reasoning.[229]

The notion that RPM is always beneficial fails to consider cases in which the parties set prices above the profit maximization level of high efficiency dealers.[230] In these cases RPM necessarily creates inefficiency. Likewise, when competing manufacturers engage in RPM on their own, the effect may be tantamount to forming a cartel.[231]

C. A Suggested Approach to Rule of Reason Analysis

The obvious problem with the broad rule of reason approach is that full inquiry in every case is time consuming and expensive to both the litigants and the judicial system. Under the rebuttable presumption of illegality, however, courts would apply rule of reason analysis only if the defendant fulfills its burden of establishing with reasonable probability a competitive justification for its RPM program. How should a court focus its inquiry under the rule of reason in this second part of the rebuttable presumption standard? Most academic suggestions in this field present two problems.

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224. Pitofsky, *supra* note 155, at 1495.

225. Posner, *supra* note 19, at 17.

226. *Id.*

227. *See* R. BORK, *supra* note 21, at 288.

228. *See, e.g.*, Popofsky, *supra* note 201, at 725.

229. *See* Mattioli, *supra* note 161, at 38-42 (denying that RPM promotes consumer welfare).

230. *See* Scherer, *supra* note 10, at 701.

231. *Id.* at 703. Professor Scherer contends:

> When one looks at a single manufacturer imposing vertical restraints upon its distributors in a way that maximizes the distributors' profits, then one can infer from the fact that output has increased, that efficiency is likely to have increased. If, on the other hand, you get a race among numerous rivalrous manufacturers to raise margins and increase the level of non-price competition, then the results are ambiguous. It may well be that efficiency has increased: that the gain to consumers outweighs the additional cost. But it can go the other way too: the cost of the restraints can exceed the gain to consumers.

Id.

First, scholars emphasize consumer welfare to the virtual exclusion of all other factors.[232] Courts also must consider the interests of the dealer and manufacturer to achieve the equitable results that the rule of reason envisions. Dealer and manufacturer interests do not add any additional uncertainty or undue complexity to the analysis.[233] Second, the economic assumption that RPM necessarily increases efficiency is not persuasive, considering the cases of high volume discounters, products in concentrated industries, and other special fact situations.[234]

The primary goal of the rule of reason approach should be to maintain and promote consumer interests. Consumer welfare is the first, but not singular, goal of antitrust law. Courts should use the *Sylvania* test, which balances decreases in intrabrand competition against increases in interbrand competition, as the primary inquiry under the rule of reason approach.[235] Judge Posner's significant market power test is a helpful guide to determine the effects of the rule of reason approach.[236] Posner's test, however, must allow injured plaintiffs an opportunity to restrain the RPM scheme or gain restitution. The test of significant market power, therefore, should be whether the defendant possesses sufficient power materially to affect a material change in price and consumer interests in the geographic product market. Courts should read the main purpose of this flexible standard to give plaintiffs full opportunity to prove anticompetitive activity. Courts also should inquire into the concentration of the product market to determine the defendant's power.

There are three secondary, or "tipping" factors, in the proposed rule of reason: (1) the independent, proprietary interests of the dealers subject to the RPM; (2) the interests of the manufac-

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232. *See, e.g.*, R. BORK, *supra* note 21, at 66; Baker, *supra* note 21, at 1458; Easterbrook, *supra* note 168, at 888.

233. According to one commentator:

> Those opposed to the inclusion of political factors [such as excessive economic concentration and retailer interests] exaggerate the precision of an enforcement approach that incorporates solely economic concerns, and overstate the administrative difficulties and enforcement costs of taking noneconomic concerns into account.
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> . . . .
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> . . . [A]ntitrust enforcement along economic lines already incorporates large doses of hunch, faith, and intuition.

Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1065 (1979).

234. *See* Scherer, *supra* note 10, at 697-705.

235. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-57 (1977); *see supra* notes 119-28 and accompanying text.

236. *See supra* note 149 (*Valley Liquors*).

turer in marketing its product; and (3) whether the dealer, the manufacturer, or third parties would be in danger of substantial economic injury or hardship if the court ruled against them.[237] These elements embrace more than consumer welfare interests—they consider the interests of small and large retailers and manufacturers, who also merit protection under the Sherman Act.

V. The Solution: A Rebuttable Presumption of Illegality

A. *Why a Rebuttable Presumption?*

The rule of reason, while the most economically precise approach, is too unwieldy a tool to use in every RPM inquiry. The per se rule, however, imposes a far heavier burden on manufacturers and, less directly, consumers. The rebuttable presumption[238] of illegality is a middle ground that balances the interests of the parties, the consumer, and the system of judicial administration. The use of a rebuttable presumption against legality is justifiable on several grounds. First, the Supreme Court in *Sylvania* refused to apply the rule of reason approach to RPM because the Court felt that when Congress repealed the fair trade laws, it expressed a general policy against RPM. The Court also found that RPM tends to encourage the formation of cartels and decrease interbrand competition.[239] The major premise of a rebuttable presumption is that more often than not, the defendant either is guilty of anticompetitive conduct or has greater access to the facts necessary to show that its RPM system was reasonable.[240] Even Assistant Attorney General Baxter, champion of the movement to permit RPM, concedes that RPM may have harmful effects, especially the forming of cartels in concentrated industries.[241]

A Senate subcommittee study of the fair trade laws showed that "minimum vertical price agreements lead to higher, and usu-

237. Recently, the Seventh Circuit considered these three elements in its rule of reason analysis of an exclusive dealing complaint. *See* Roland Mach. Co. v. Dresser Indus., Inc., No. 84-1509 (7th Cir. Aug. 31, 1984). Judge Posner wrote the opinion.

238. For a definition of rebuttable presumption, see *supra* note 13.

239. *Sylvania*, 433 U.S. at 51 n.18.

240. One leading commentator has suggested the opposite standard—a rebuttable presumption of legality. *See* Turner, *supra* note 52, at 690. In addition to the argument that a defendant is likely to be guilty of at least some anticompetitive conduct and is in a better position to show that its RPM system is reasonable, the presumption of illegality is more judicially efficient than Professor Turner's suggestion, given the courts' tendency to sympathize with plaintiffs in RPM cases.

241. Letter from William F. Baxter to Edward A. Borda (May 24, 1982), *reprinted in* Scherer, *supra* note 10, at 715 app. [hereinafter cited as Letter from William F. Baxter].

ally uniform, resale prices."[242] In addition, national studies of the effects of RPM under the lenient fair trade laws reflect a demand curve that shifted *left*, signaling decreased output at higher prices.[243] These tendencies demonstrate the second reason for employing the rebuttable presumption standard: the per se approach to RPM may stifle procompetitive or benign activities, whereas the rule of reason approach does not address vigorously the economic dangers of RPM. For example, when a large RPM firm sells a product that requires little or no presale services and has a system of territorial restraints, courts should require the firm to justify its conduct before granting the expensive privilege of a full rule of reason inquiry.[244]

B. The Framework

This Note proposes that courts make a preliminary finding that the RPM scheme in question has a reasonable chance of passing the rule of reason. This threshold inquiry discourages plaintiffs from bringing frivolous lawsuits, but does not allow the cost of litigation to inhibit challenges to alleged anticompetitive acts. At the same time this requirement permits defendants to defend their marketing techniques under a clearer standard than the current per se rule. Courts may act more rapidly than under simple rule of reason analysis to prevent prolonged consumer injury from anticompetitive RPM. Once the defendant passes the threshold, the court should use the equitable method of full inquiry according to the rule of reason approach outlined above.[245]

. The rebuttable presumption of illegality is a viable compromise between the theoretically optimal rule of reason, which sacrifices judicial efficiency, and the per se rule, which sacrifices flexibility for judicial efficiency.[246] The Supreme Court may find the

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242. Pitofsky, *supra* note 155, at 1488 (citing *Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 174 (1975)).

243. *See* Fox, Scherer & Popofsky, *Panel Discussion*, 52 ANTITRUST L. J. 731, 738 (1983).

244. This hypothetical appears in Tollison, *Economic Analysis at the FTC: An Interview (I)*, 14 ANTITRUST L. & ECON. REV., No. 4, at 45, 57 (1982).

245. *See supra* text accompanying notes 232-37.

246. Professor Scherer has suggested the idea of a rebuttable presumption, *see* Scherer, *supra* note 10, at 707, with exceptions for weak firms or new entrants. These exceptions, however, are not necessary under a standard that includes the significant market strength test. Another commentator has concluded that a rebuttable presumption might be a tentative first step away from the per se rule. *See* Halverson, *supra* note 161, at 81.

Professor Bork also proposed an analysis similar to the rebuttable presumption. *See* rebuttable presumption more palatable than the rule of reason because the presumption is easier to harmonize with precedent.[247] This new approach, however, does not solve all the problems inherent in RPM cases. The Court must redefine *Colgate* to brighten the line between per se legal conduct and conduct subject to the rebuttable presumption. *Colgate* should remain valid only as a recognition of a manufacturer's right to choose its own terms and dealers.[248] The presumption would add needed logic and consistency to future opinions and enable courts to avoid further manipulation of irrelevant facts to support perceived equitable results.

C. *Advantages of the Rebuttable Presumption*

The purpose of antitrust law is to preserve the free market.[249] Although several prominent commentators would exclude political factors[250] from economic policy,[251] past decisions, particularly the *Russell Stover* court's retention of *Colgate*, mandate that courts recognize protectable interests beside consumer welfare.[252] The rebuttable presumption, if it were to validate a manufacturer's RPM system only once, would increase marketplace efficiency more than the per se rule because the rebuttable presumption offers manufacturers an additional means to improve competition. In addition, the rebuttable presumption contains the cost of litigation better than the rule of reason and respects Congress' distaste for RPM.

Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 387-90 (1966). Although Bork discounted nonconsumer oriented inquiries, *id.* at 378, he proposed a per se rule, supplemented by an exception for defendants that are able to prove that their conduct was ancillary to a valid contract, *id.* at 389.

247. The Court, for example, could indicate that the defendant in *Dr. Miles* would have been liable under the rebuttable presumption, while retaining the flexibility to limit past decisions like *Parke, Davis* to their facts to recognize procompetitive and benign RPM systems as legal under the proposed standard. Similarly, the Court should retain the *Colgate* doctrine as an exception to the rebuttable presumption test. The Court, however, must define the content of the doctrine so that manufacturers can implement it in market planning. *Russell Stover* provides a good factual definition. In *Russell Stover* the court held that it could invoke the *Colgate* exception because the court found no evidence of a price agreement that represented an implied or express meeting of the minds, systemic policing or dealer harassment, or economic coercion. *See Russell Stover*, 718 F.2d at 258-60; *see also Monsanto*, 104 S. Ct. at 1470-71 (discussing *Colgate*).

248. See *Monsanto*, 104 S. Ct. at 1470-71; *see also supra* note 44.

249. Letter from William F. Baxter, *supra* note 241.

250. For an explanation of relevant political factors and the Sherman Act, see Pitofsky, *supra* note 233, at 1051-52, 1065-67.

251. *See, e.g.*, Posner, *supra* note 19, at 13. *But see* Pitofsky, *supra* note 233, at 1051-52, 1065 (defending the use of noneconomic factors in antitrust cases).

252. *See* Goldberg, *supra* note 149, at 444 (discussing the FTC's investigation of Magnavox and focusing on the competitors' interests).

Costs to litigants and the judicial system are lower under the rebuttable presumption than under the per se rule as well. Consumers would benefit also because only truly procompetitive arrangements would overcome the presumption. Finally, unlike the per se rule and rule of reason, the presumption considers the independent interests of dealers and manufacturers.

VI. Conclusion

The courts must correct the numerous problems that *Dr. Miles'* inconsistent progeny have created. The courts, however, must retain the basic premise of *Colgate* to ensure the independent right of manufacturers to control unilaterally the marketing of their products. A rebuttable presumption of illegality and a properly defined rule of reason approach will increase economic efficiency and protect the interests of litigants, consumers, and the judicial system more equitably than the present per se rule. Only through this middle ground approach can antitrust law develop a logical and practical set of rules in the field of resale price maintenance.

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