

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

RUSSELL STOVER CANDIES, INC.

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

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

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

Appearances

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

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

COMPLAINT

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

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

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

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

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

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

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

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

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

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

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

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

MARCH 16, 1981

I.

STATEMENT OF THE CASE

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

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

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

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

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

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

¹ Complaint, Paragraph Five.

² Complaint, Paragraph Six.

³ Complaint, Paragraph Seven.

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

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

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

II.

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

⁵ See also Complaint and Answer, Paragraph One.

⁶ See also Complaint and Answer, Paragraph Three.

⁷ See also Complaint and Answer, Paragraph Four.

⁸ See also Complaint and Answer, Paragraph Two.

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

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

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

11. Russell Stover employs approximately eighty field sales personnel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respondent would not offer evidence to rebut that testimony.

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

Initial Decision

III.

DISCUSSION

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

In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

Klein is consistent with the Supreme Court's ruling in *Parke, Davis* that a seller's pricing announcement which engenders "confidence in each customer that if he complies his competitors will also" is not a basis for inferring agreement if the manufacturer takes no affirmative coercive action to achieve [14]compliance. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46 (1960). As for *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944), which relies on both *Interstate Circuit and Colgate*, more was involved there than just acquiescence of wholesalers in Soft-Lite's published resale price list. At issue was a multi-level system and a combination which arose when "[t]he wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." 321 U.S. at 723.¹³

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

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

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

distribution, *Parke, Davis*, 362 U.S. 29 at 45-46, or if the manufacturer uses the threat of its own direct competition or retaliation from others [16] to obtain compliance, *Colgate* does not apply. *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968). The results in the "coercion" cases are also supportable on the alternative theory that in a multi-level distribution system the wholesaler or jobber who either cooperates by informing on price-cutting retailers, or refuses to resell to such retailers, should be considered as forming the requisite combination with the manufacturer. *Beech-Nut*, 257 U.S. at 454-455; *Bausch & Lomb*, 321 U.S. at 723; *Parke, Davis*, 362 U.S. at 45-46.¹⁵

Going beyond coerced acquiescence or inferences of combinations following multi-level coercion or cooperation, several cases have suggested that the business setting alone may create a coercive environment which induces an agreement or combination and thereby shuts off recourse to *Colgate*. To illustrate, if a car muffler or newspaper franchisee who for all practical purposes is dependent for his livelihood on one source which cannot be easily substituted, and after investing money and effort in developing a market is given to understand that his supplier is firm and resolute in its insistence on observance of stated prices (say, by evidence of a strict policy [17] of cancellations), it is doubtful that the dealer's "independence" is very real, and under these circumstances, too, the *Colgate* doctrine may not apply. See, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968); *Albrecht*, 390 U.S. at 150 n.6.¹⁶

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

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

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

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

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

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

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

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

¹⁸ *Albrecht*, 390 U.S. at 150 n.6.

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

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

Having failed to present an adequate factual background respecting the product or the market from which an element of coercion may have been inferred, complaint counsel then attempt to resurrect the coercion point by asking that an inference of coercion be drawn from the announcement itself plus the evidence of compliance, which in the case of some dealers would not have occurred except for the existence of the announcement. But the very point of the cases which have followed *Colgate* is that a mere announcement of pricing policy followed by compliance does not constitute a coerced agreement. And although *Schwinn*, *Albrecht*, and *Perma Life* may signal a further erosion of the *Colgate* doctrine in the peculiarly coercive atmosphere of a franchise relationship revolving around a retailer's essential product, the burden is still on complaint counsel to supply, at the very least, the elements of such an environment. If, on the other hand, all that is provided is a [21]stipulation saying that retailers were induced to comply "because of the price-related refusal to sell announcement"²⁰ there is simply no Sherman Act agreement under *Colgate*, irrespective of how whimsical it may be to have the presence or absence of an agreement turn on whether there was an announcement (or, if you will, an exhortation) followed by compliance, or coercion (or a coercive atmosphere) followed by compliance, or an explicit or tacit contract (either coerced or induced) which requires no showing of compliance at all. See *Parke, Davis*, 362 U.S. at 44.²¹

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

²⁰ Finding 24 (emphasis added).

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

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

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

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

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

²³ Tr. 36.

jurisdiction of the Commission. Conceivably, Section 5 of the Federal Trade Commission Act²⁴ might have been invoked to charge that even apart from any Sherman 1 agreement, Russell Stover's practices have the effect of putting together an anti-competitive arrangement among retailers which may be in violation of the spirit of the Sherman Act, *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965), or may be an incipient violation of the letter of the Sherman Act, *FTC v. Motion Picture Advtg. Serv. Co.*, 344 U.S. 392 (1953), *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941), or may be an unfair method of competition, irrespective of any violation of the letter or spirit of the Sherman Act, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). But all that the complaint alleges is that respondent's announced pricing policy and compliance with that policy is a *per se* Sherman 1 contract, combination, or conspiracy "and therefore" violates Section 5 of the Federal Trade Commission Act. That complaint counsel want no part of Section 5 is made plain in the following disclaimer: [25]

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

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

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

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

²⁵ Comp. Counsel Brief at 30 n.95.

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

IV.

CONCLUSIONS OF LAW

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

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

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

Accordingly, the following order should be issued:

ORDER

The complaint is dismissed.

OPINION OF THE COMMISSION

By PERTSCHUK, *Commissioner*:

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

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

I. THE FACTUAL RECORD

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

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

¹ 250 U.S. 300 (1919).

² See JX-126.

The following abbreviations are used in this opinion:

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

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

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

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

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

II. ELEMENTS OF A VIOLATION

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

In determining whether Stover has violated the Sherman Act and

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

⁵ See *Atlantic Ref. Co.*, 381 U.S. 357 (1965).

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

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

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

A. Commerce

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

B. Contract, Combination, or Conspiracy

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

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

⁸ 15 U.S.C. 45(a)(2).

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

¹⁰ 250 U.S. 300 (1919).

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

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

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

1. *The Colgate Doctrine*

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

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

¹² 220 U.S. 373 (1911).

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

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

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

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

¹³ 220 U.S. at 303.

¹⁴ 253 F. 522, 527 (E.D. Va. 1918).

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

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

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

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

In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. *And, of course, he may announce in advance the circumstances under which he will sell.* (emphasis added)¹⁷

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

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

¹⁷ 250 U.S. at 307.

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

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

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

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

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

¹⁹ 256 U.S. 208 (1921).

²⁰ *Id.* at 210.

²¹ 257 U.S. 441 (1922).

²² 257 U.S. at 454.

by dealers, the logic of finding "agreements," in light of the original *Colgate* pronouncement concerning the right to threaten termination, is not apparent. In later comments about *Beech-Nut*, the Court indicated that the case went beyond [15]earlier cases by making clear that an agreement did not have to rise to the level of an express or implied contract²³ but that a combination would be found if the seller secured adherence to his pricing policy by any means which go beyond a "mere declination to sell."²⁴

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

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

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

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

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

²⁵ 321 U.S. 707 (1943).

²⁶ *Id.* at 719.

²⁷ *Id.* at 723.

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

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

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

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

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

²⁹ 362 U.S. 29 (1960).

³⁰ 362 U.S. at 43.

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

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

³³ *Id.* at 44.

