

MAINTAINING RESALE PRICE THROUGH REFUSALS TO DEAL: A RE-EXAMINATION

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I

Some manufacturers, for a variety of reasons, have from time immemorial desired to control the resale prices of their products. However, an agreement between the manufacturer and a retailer setting forth the price at which the retailer will resell the manufactured product has long been held to be illegal under the antitrust laws.¹

The manufacturer, however, has two possible ways of achieving the objective of controlling resale prices. One method is to comply with the pertinent state fair trade laws, and come within the exemptions from the antitrust laws set forth in the Miller-Tydings Act² and the McGuire Act.³

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¹ This type of price control has usually been referred to as "vertical price fixing" as distinguished from "horizontal price fixing" where two or more competitors agree on the price at which each of them will sell his product. Horizontal price fixing clearly violates § 1 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1952); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), *Trenton Potteries Co. v. United States*, 273 U.S. 392 (1927). Vertical price fixing was held to be illegal under the Sherman Act as early as 1911 in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 370 (1911).

§ 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. § 45(a) (1952), prohibits "unfair methods of competition." The Supreme Court of the United States has held on several occasions that any activity violating § 1 of the Sherman Act also violates § 5 of the Federal Trade Commission Act. *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457 (1941).

Thus, in the absence of one of the exemptions discussed below, a clear-cut understanding between a manufacturer and a retailer as to the price at which the retailer will sell is illegal, both under the Sherman Act and the Federal Trade Commission Act.

² 50 Stat. 693 (1937), 15 U.S.C. § 1 (1952).

³ 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1952). The Miller-Tydings Act, passed in 1937, was an amendment to § 1 of the Sherman Act providing in general that fair trade contracts (or vertical price fixing arrangements), legal under state law, were exempt from the federal antitrust laws. The usual state fair trade acts provided that an agreement between a manufacturer and retailer fixing the prices at which the retailer would sell, was not illegal under state law, and further that it was unfair competition for any other retailer, with notice of the existence of the agreement, to sell below the price specified in the fair trade contract. The retailers bound by notice of the contract have traditionally been referred to as "non-signers." The United States Supreme Court in the case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), held that the exemption created by the Miller-Tydings Act was not as broad as the state fair

The second method of controlling prices is based on the *Colgate*⁴ doctrine established by the Supreme Court in 1919. The substance of the *Colgate* doctrine is that a manufacturer has the right to specify resale prices, announce in advance that he will refuse to sell to customers who fail to maintain the specified prices, and in fact refuse to sell to such customers if the latter fail to comply. In addition, as set forth below, the cases have permitted a manufacturer to engage in other activities in connection with specified prices, as long as no understanding was reached as to price maintenance.

The *Colgate* doctrine has had a stormy history and, as discussed below, has been limited by subsequent cases. The Supreme Court in the last term again refused to apply the *Colgate* doctrine in *United States v. Parke, Davis & Co.*⁵

II

The *Colgate* case involved the sufficiency of an indictment charging defendant manufacturer with a violation of the Sherman Act for an unlawful combination with wholesale and retail dealers for the purpose and with the effect of procuring adherence by the dealers to the resale prices suggested by defendant.

The District Court (E.D. Va.) interpreted the indictment as failing to allege any contract or agreement between the manufacturer and dealers to bind themselves to maintain resale prices. Accepting this interpretation, the Supreme Court affirmed the District Court's ruling sustaining the demurrer to the indictment with these words:

"And we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements, which obligated the latter not to resell except at prices fixed by the company. . . . the act does not restrict the long-recognized right of trader

trade laws. Specifically, it held that the Miller-Tydings Act did not make vertical price fixing arrangements legal insofar as "non-signers" were concerned.

Shortly after the Schwegmann decision Congress enacted the McGuire Act as an amendment to § 5 of the Federal Trade Commission Act. The McGuire Act in substance exempted from the federal antitrust laws fair trade agreements including their applicability to "non-signers."

Although some forty-five states have enacted fair trade statutes, a number of the statutes have been held violative of state constitutions, some being held unconstitutional insofar as the non-signer provision is concerned.

In addition, the fair trade exemption of the McGuire Act is not applicable to any type of horizontal arrangement. For example, if a manufacturer has a fair trade contract with a retailer and the manufacturer also acts as a retailer, the agreement is not within the exemption because this agreement is in effect a "horizontal agreement" between two retailers. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

⁴ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

⁵ 362 U.S. 29 (1960).

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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.*" [Emphasis added.]⁶

It would appear, therefore, that under *Colgate*, in view of the above statement and the other allegation in the indictment, the manufacturer could not only announce in advance the terms upon which it would deal and refuse to deal with non-adhering customers, but it could, in addition to unilaterally refusing to deal, do the following to effectuate its policy of resale price maintenance:

- (1) Urge customers to adhere to such prices,
- (2) Request customers to furnish information about price cutters,
- (3) Investigate activities of price cutters,
- (4) Place the names of price cutters on "suspended lists,"
- (5) Request and receive promises from price cutters of future adherence to resale prices and refuse to deal with any price cutter who did not give assurances.

It can readily be seen from the above that the actions of the Colgate Company amounted to more than a mere refusal to deal. If a refusal to deal is taken as the starting point of permissive behavior under the Acts, the question then becomes: "What other activities by the manufacturer when added to the refusal to deal will bring the entire course of conduct across the line of illegality?"

In the cases which followed *Colgate*, many such activities were permitted.⁷

⁶ Supra note 4, at 306-07.

⁷ Judicially recognized permissible activities have included the receipt of assurances from price cutters that they would adhere to fixed prices in the future, the mailing of form letters to price cutters insisting upon the upholding of retail prices, the requests to customers for information on price cutting activities by other customers, and the investigation of price cutting through company salesmen. Such activities were upheld in *Harriet Hubbard Ayer, Inc. v. F.T.C.*, 15 F.2d 274 (2d Cir. 1926), cert. den., 273 U.S. 759 (1927).

A suggestion by a manufacturer to wholesalers that if the jobbers fixed resale prices the manufacturer would refuse to sell to anyone who did not adhere to such fixed prices, and investigation and refusal to sell to offending wholesale dealers were likewise held permissible activities under the *Colgate* doctrine in *American Tobacco Co. v. F.T.C.*, 9 F.2d 570 (2d Cir. 1925), aff'd, 274 U.S. 543 (1927).

In the case of *Toledo Pipe Threading Mach. Co. v. F.T.C.*, 11 F.2d 337 (6th Cir. 1926), although a violation of the Federal Trade Commission Act was found, the Commission order prohibiting the manufacturer from utilizing the following price control methods was reversed: (1) manifesting to dealers an intent to act on all reports of price cutting by refusal to deal with any price cutter; (2) informing dealers that unless price cutters gave assurances of adherence, they would be refused further sales; (3) em-

While the Federal Courts were thus staking out the path which the *Colgate* case defined, the Supreme Court, just three years after the decision in *Colgate*, decided the *Beech-Nut* case.⁸ Although this case was decided under Section 5 of the Federal Trade Commission Act, a violation of that section is also, as has been noted, a violation of Section 1 of the Sherman Act.⁹ In the *Beech-Nut* case and those following it, the courts attempted to spell out the conduct which, in addition to a refusal to deal, would constitute a violation of either the Sherman or Federal Trade Commission Acts.

As in *Colgate*, there was no agreement, as such, between the manufacturer and the dealers. However, in the *Beech-Nut* case, the defendant attempted to enforce a resale-price policy by a comprehensive plan of supervision at all levels of distribution.¹⁰

In reviewing the activities of Beech-Nut Company the court said: ". . . The facts found show that the Beech-Nut system goes *far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which, in the Colgate case, was held to be within the legal right of the producer.* [Emphasis added.]

"The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the antitrust acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. If he fails so to do, he is subject to be reported to the company, either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it. Furthermore, he is enrolled upon a list known as 'Undesirable—Price Cutters,' to whom goods

ploying its salesmen to investigate charges of price cutting reported by dealers and advising dealers of that fact.

⁸ F.T.C. v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

⁹ Fashion Originators' Guild v. F.T.C., *supra* note 1.

¹⁰ Among the steps taken by Beech-Nut to insure price maintenance were: (1) using its agents, distributors and customers to report price cutting dealers; (2) placing price cutting dealers on lists of undesirable purchasers who were not to be supplied until they gave satisfactory assurances of their intent to maintain resale prices; (3) employing agents to report price cutters and giving orders of purchase only to non-price cutting jobbers; (4) utilizing symbols to ascertain the names of price cutting dealers or those who sold to price cutters in order to prevent price cutters from obtaining the company's products; (5) utilizing other cooperative means of accomplishing price maintenance.

are not to be sold, and who are only to be reinstated as one whose record is 'clear,' and to whom sales may be made, upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices.

"From this course of conduct a court may infer, indeed, cannot escape the conclusion, that competition among retail distributors is practically suppressed, for all who would deal in the company's products are constrained to sell at the suggested prices."¹¹

The *Colgate* decision, it will be remembered, rested upon the absence of an averment of any agreement. In *Beech-Nut*, this hurdle was readily overcome, the court saying:

"... Nor is the inference overcome by the conclusion stated in the commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements, express or implied, intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods." [Emphasis added.]¹²

After the *Beech-Nut* decision, we thus had two separate standards. On the one hand, there was *Colgate* which permitted, absent an agreement, a refusal to sell plus what might be termed other non-coercive price-maintenance activities. On the other hand, *Beech-Nut* said there was no need to find an agreement so long as the methods used were as effectual as agreements.

Beech-Nut has long been looked upon as a decision limiting the *Colgate* holding. In subsequent criminal and civil cases we find the manufacturer invariably attempting to justify his activities in reliance on *Colgate* only to be struck down by the application of *Beech-Nut* standards.¹³

¹¹ F.T.C. v. Beech-Nut Packing Co., supra note 8, at 454-455.

¹² Id. at 455.

¹³ See e.g., United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944);

III

As previously discussed, the fundamental reason for the finding that the activities of the Colgate Company were not in violation of the Sherman Act was that no averment of any contract or agreement whereby the defendant and his customers bound themselves to enhance and maintain prices was included in the indictment. In other words, the absence of any "agreement" was held fatal to an indictment under Section 1 of the Sherman Act. In addition, the court in *Colgate* went on to state that the Sherman Act does not restrict the long recognized right of one engaged in an entirely private business freely to exercise his own independent discretion as to those parties with whom he will deal.

Although the *Colgate* doctrine has been limited through judicial interpretation, from *Beech-Nut* on, it has never been expressly overruled, and, despite the urgings of judges and commentators,¹⁴ has continued to be a basic antitrust principle.

A recent Supreme Court case which has perhaps further confined the permissive area of retail price maintenance is that of *United States v. Parke, Davis & Company*.¹⁵ In this case as in *Colgate*, there was no finding of any express or implied agreement between Parke, Davis and its customers to maintain suggested prices. Nevertheless, the government sought an injunction alleging that Parke, Davis conspired and combined with retail and wholesale druggists to maintain wholesale and retail prices of its pharmaceutical products.

Parke, Davis sold its products through wholesalers as well as directly to large retailers. Separate catalogues were published, each of which listed suggested retail prices. When some retailers began to cut prices, Parke, Davis instituted a program to maintain the suggested prices.

Wholesalers were told not to sell to price-cutting retailers and simultaneously retailers were told they would not be able to buy the company's products, either directly or through wholesalers, if they cut prices. Each wholesaler and retailer was informed that all others were being contacted, and recalcitrant retailers were to be cut off.

Armand Co. v. F.T.C., 78 F.2d 707 (2d Cir. 1935); *Moir v. F.T.C.*, 12 F.2d 22 (1st Cir. 1926); *Hills Bros. v. F.T.C.*, 9 F.2d 481 (9th Cir. 1926); *Cream of Wheat Co. v. F.T.C.*, 14 F.2d 40 (8th Cir. 1926).

¹⁴ See Judge Frank's dissent in *Adams-Mitchell Co. v. Cambridge Distributing Co.*, 189 F.2d 913, 917 and Note, 58 Yale L.J. 1121 (1949).

¹⁵ *Supra* note 5. The case in the Supreme Court was a civil case. The government also brought criminal proceedings which Parke, Davis successfully defended in the District Court, *United States v. Parke, Davis & Co.* 1957 Trade Cas. ¶ 68,856 (D.D.C. (1957)).

There was a good deal of evidence showing that the company's representatives visited some dealers, at the request of others, to obtain adherence to the program. There was also much reporting back to complaining dealers in an attempt to secure unanimity. Efforts were also directed at preventing cut-price advertising of Parke, Davis products by dealers.

The District Court, in the words of Justice Brennan, "apparently assumed that the Government could prevail only by establishing a contractual arrangement, albeit implied, between Parke, Davis and its customers."¹⁶ Citing *Bausch & Lomb* and *Beech-Nut*, the Supreme Court declared this to be an erroneous interpretation of the applicable standard in that "both cases teach that a judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements."¹⁷ The court then set out the standard to be applied: "Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used."¹⁸

The specific statutory violation was described as follows:

"In thus involving the wholesalers to stop the flow of Parke, Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke, Davis created a *combination* with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." [Emphasis added.]¹⁹

An additional violation was found in the manner in which prices were controlled in the direct dealer relationship. By using the acquiescence of others, substantial unanimity was brought about among competitors. Because the resulting concerted action (of the retailers) was induced by the manufacturer, the Sherman Act was violated in that a price-maintenance combination or conspiracy was effected.

Two types of behavior, therefore, must now be found to constitute statutory violations. Where a manufacturer seeking to maintain a resale price policy at the retail level sells his products through wholesalers, he may not "conspire or combine" with them for the purpose of cutting off access to the wholesalers by retailers who fail to observe the retail price policy.

Since many products, which might properly be classified as con-

¹⁶ United States v. Parke, Davis & Co., *supra* note 5, at 43; but see dissenting opinion at 53-54.

¹⁷ *Id.* at 44.

¹⁸ *Ibid.*

¹⁹ *Id.* at 45.

sumer items, are sold through wholesalers and jobbers before reaching the retailer, it is difficult to see in the light of this decision how a manufacturer who chooses this route of distribution can enforce a retail price policy.

A manufacturer can still apparently rely on the *Colgate* doctrine when he is dealing directly with retailers. The caveat here must be that a refusal to sell, which may be announced to all retailers, must only be enforced against the offending retailer. Any attempt at coordinating the resale activities of the retailers in an effort to lessen competition may be a violation.

After the decision of the Supreme Court in *Parke, Davis*, the Second Circuit decided *Warner & Company v. Black & Decker Manufacturing Co.*,²⁰ a case in which treble damages were sought under the Sherman Act.

Warner was a wholesale distributor of Black & Decker tools to the trade and to government agencies. Black & Decker ordered its distributors, when bidding on government orders, to adhere to prices fixed by it. Warner submitted a successful low bid for Black & Decker tools to the New York City Housing Authority. The bid was not in conformity with the company's pricing plan. Warner was warned that unless he withdrew his bid, or revised it to meet the price standards, its distributorship would be terminated. When Warner did not change its bid, Black & Decker carried out its threat.

The action was dismissed in the District Court (Eastern District, N.Y.) for failure to state a claim upon which relief could be granted. The Court of Appeals for the 2d Circuit reversed, finding a meritorious claim had been alleged sufficient to warrant a trial on the merits.

Since the appeal was based on the sustaining of what was essentially a general demurrer, the case may not be a valuable precedent in the price-fixing field. It is important, however, to note that when the cause was pleaded in the District Court, on an amended complaint, the *Parke, Davis* case had not been decided. The District Court used the following language:

"To answer that question, [whether the complaint was adequate to charge a conspiracy] it is necessary to remember that the *essence of a conspiracy is an agreement*, which means that two or more persons—however informal the medium may be—agree to do or refrain from doing one or more things. A conspiracy may embrace an illegal object, or a legal purpose illegally to be effected, *but the fundamen-*

²⁰ 277 F.2d 787 (2d Cir. 1960).

tal requirement is none the less to be averred, in order that issue may be joined for the purpose of trial.

"The amended complaint is replete with alleged evidence, but is deficient in failing to contain the essential allegation of agreement or contract, without which no cause can be deemed to have been stated." [Emphasis and parenthetical material added.]²¹

It will be seen, therefore, that the District Court in *Warner* took the same position as the District Court in *Parke, Davis*.

The Court of Appeals, however, in *Warner* found the allegations [even in the absence of an allegation of conspiracy] were sufficient to bring the amended complaint within the doctrine of the *Beech-Nut* and the recent *Parke, Davis* decisions.

To support its holding, the Court of Appeals, referring to the extremely broad language of *Parke, Davis*, stated:

"The court indicated that when the manufacturer's actions 'go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices,' then he has put together a combination in violation of the Sherman Act."²²

In the case of *Becken Company v. Gemex Corporation*,²³ we find what at first glance would appear to be a simple case of refusal to deal, permissible under the *Colgate* doctrine. In *Becken*, the manufacturer did not attempt to fix the price to the ultimate consumer, but merely tried to control the price at which his wholesalers would sell to the trade.

Gemex is a manufacturer of watchbands and Becken a distributor. There were at least two other distributors working in the same area as Becken. It apparently was the policy of the manufacturer not only to require its distributors to sell Gemex products at suggested prices but also to require the sale of competing lines at prices suggested by the competing manufacturers.

Becken would not agree to this arrangement, although told by Gemex that his competitors had already expressed willingness to go along. Upon Becken's refusal, he was dropped as a distributor of the Gemex line.

The District Court (Northern District, Ill.) dismissed the action

²¹ *Warner & Co. v. Black & Decker Mfg. Co.*, 172 F. Supp. 221, 225 (E.D. N.Y. 1959).

²² *Warner v. Black & Decker*, supra note 20, at 790.

²³ 272 F.2d 1 (7th Cir. 1959).

with prejudice. However, the Court of Appeals for the 7th Circuit found a plan of operation, the essential purpose of which was to limit the sale of the manufacturer's products to wholesalers who would agree not to sell below prices stipulated by defendant. Such an agreement because of its involvement of the two other distributors violated Section 1 of the Sherman Act. The refusal to continue plaintiff as a wholesaler was solely because he would not sell products according to defendant's illegal plan of doing business in violation of Section 1.

CONCLUSION

Any manufacturer who desires to control resale prices must act carefully. The question of the means employed to do this is crucial, for any transgression of the price-fixing laws is sure to bring some form of legal action against him.

If he rests upon the "refusal to deal" techniques sanctioned by the *Colgate* decision he must at all times be aware of the limited amount of affirmative actions legally permitted him to secure adherence to his price policies. The penalties for calculating improperly the means to be used are many. He may become subject to prosecution by the Justice Department for a violation of Section 1 of the Sherman Act and in addition the Federal Trade Commission may bring proceedings under Section 5 of the Federal Trade Commission Act.

Along with this threat of governmental sanctions he must also be aware that a disgruntled retailer, who has been cut off from his source of supply for failure to observe the pricing policies of the manufacturer, may bring a civil suit under the Sherman Act. The assessable damages which may result from a successful prosecution of such a civil case place an extremely heavy burden on the unlucky defendant, carrying as they do treble damages as well as costs and attorneys' fees.

How then may a resale price policy be implemented?

The safest procedure is to follow carefully the route of the Fair Trade laws in states where they are in effect and to the extent provided by those state laws. This means of course that the status of the Fair Trade laws in every state in which business is done must be considered separately. Only thus can the manufacturer be assured of staying within the exemptions to the price-fixing laws.

How long these laws will remain a haven for the sorely pressed manufacturer is an open question.²⁴ The fair-trade exemption has

²⁴ State Fair Trade Acts have been declared unconstitutional in whole or in part in Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Utah,

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always been unpopular with the Justice Department and the Federal Trade Commission, both of whom have always sought to narrow the exemption.

In states in which there are no fair trade laws, no alternative is left except to proceed as carefully as possible under the *Colgate* doctrine. In this connection the contention of the government in the *Parke, Davis* case is revealing:

"The Government contends, however, that subsequent decisions of this Court compel the holding that what Parke, Davis did here *by entwining the wholesalers and retailers in a program to promote general compliance with its price maintenance policy went beyond mere customer selection and created combinations or conspiracies to enforce resale price maintenance in violation of Sections 1 and 3 of the Sherman Act.*"²⁵ [Emphasis added.]

The position of the government is illuminating in that it probably reveals the direction in which it will move in future prosecutions for vertical price fixing.

As a practical matter, it is virtually impossible to secure adherence to a price-maintenance policy without "entwining" the wholesalers or retailers in the implementation of that policy.

There is always continuity on the prosecution side of an anti-trust suit. With every prosecution the government can lay one more brick in its wall of enforcement. The successful prosecution of a case by the government, and adoption by the court of the government's contentions, results in those contentions becoming the standard for future prosecutions. Such a test as "entwining" makes the permissible area of vertical price maintenance ever more narrow.

The Supreme Court in *Parke, Davis* in refusing to overrule the *Colgate* case, stated:

". . . The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, *this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exer-*

Washington and West Virginia. See 1 Trade Reg. Rep. ¶ 3003 (1960). Most of the cases involve only the non-signer provision.

²⁵ United States v. Parke, Davis & Co., supra note 5, at 37-32.

cise his own independent discretion as to the parties with whom he will deal.'"²⁶ [Emphasis added.]

Where a manufacturer distributes exclusively through wholesalers or jobbers, his "discretion as to the parties with whom he will deal" would not extend to the retailers. To effectuate a retail price-maintenance policy at the retail level, the cooperation of the intermediate wholesale level would be essential. It is almost impossible to outline a method of cooperation which would not come within the "entwining" contention of the government in *Parke, Davis*.

On the other hand, the manufacturer who deals directly with his retailers might be able to control resale prices through the use of the *Colgate* doctrine. To him the following suggestions are made:

(1) The manufacturer may suggest resale prices to its customers and state that it will refuse in the future to sell to customers who do not maintain the suggested prices. The manufacturer should also state that the customer is free to sell at whatever prices it desires.

(2) The policy statement in (1) above should be embodied in a written document and mailed to the customer. There should be no other communication, written or oral, with the customer regarding prices. Employees should be advised in writing of these prohibitions and the manufacturer should see that no such discussions take place.

(3) In the event a customer fails to maintain the suggested prices, the manufacturer may refuse to sell to him in the future.

(4) The manufacturer should do no act other than sending out the written policy statement and refusing to sell in the event of non-compliance. Any other activity will raise serious legal problems.

There is, of course, no assurance that even the above described program will not be challenged as illegal. Under such challenge the *Colgate* case may be overruled, in which event the above program could be held illegal if substantial price uniformity resulted.

The practical difficulty with the recommended program is that it is unlikely that it could be limited as set forth. Almost inevitably, it seems, some representative of the manufacturer, either orally or in writing, will take some action to secure adherence to the suggested prices. As Judge Moore of the 2d Circuit stated in the *Warner* case in reference to the *Colgate* doctrine:

"The Supreme Court has left a narrow channel through which a manufacturer may pass, even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."²⁷

²⁶ Id. at 44.

²⁷ *Warner v. Black & Decker*, supra note 20, at 790.