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THE IMPENDING DEMISE OF RESALE PRICE MAINTENANCE

For whatever reason, many manufacturers have utilized various schemes to set the price at which their vendees resell their products. These efforts, whether done by explicit agreement or otherwise, are limited by the antitrust laws. Recent decisions significantly constrict the range of action lawfully available to such manufacturers. This Note seeks to demonstrate that this continued constriction, accompanied by the gradual decline in number of fair trade states, was evolutionarily inevitable under the antitrust laws.

I. OBITUARY FOR RESALE PRICE MAINTENANCE

Resale price maintenance¹ is usually effected by one of three methods; fair trade, refusals to deal, or consignment contracts. However, little vitality remains in resale price maintenance today since none of the three is realistically available to manufacturers.

A. Fair Trade

State fair trade acts permit the adoption of a resale price maintenance program² for any commodity³ sold under the trademark⁴ of the producer or owner which is in free and open competition⁵ with

1. Resale price maintenance refers to the practice of vertical price fixing whereby the manufacturer sets in advance the price at which persons on a different level of distribution must sell his trademarked product. For example, the manufacturer fixes the price at which the wholesaler must resell the manufacturer's product to the retailer, and the price at which the retailer must resell to the consumer. Resale price maintenance, or vertical price fixing, is distinguished from horizontal price fixing in that the latter concerns fixing of prices by persons on the same level of distribution, *i.e.* competitors. *See generally* 1 R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARK & MONOPOLIES* § 22.1 *et seq.* (3d ed. 1967).

2. Fair trade acts in some states authorize the manufacturer to fix minimum resale prices, while others authorize absolute resale price fixing. *See* 2 CCH TRADE REG. REP. ¶ 6041.

3. The great majority of state fair trade acts define the word commodity as "any subject of commerce." *See* 2 CCH TRADE REG. REP. ¶ 6172.

4. Several fair trade acts permit the sale of a commodity at a price other than the stipulated price when the trademark or brandname is removed or obliterated and not referred to in the advertisement or sale of the commodity. 2 CCH TRADE REG. REP. ¶ 6045. For other exempted sales, *see id.* at ¶ 6218-36.

5. A patent does not *ipso facto* preclude the manufacturer from fixing resale prices pursuant to state fair trade acts. *See* *Glen Raven Knitting Mills v. Sanson Hosiery Mills, Inc.*, 189 F.2d 845 (4th Cir. 1951); *Eastman Kodak Co. v. Siegel*, 150 N.Y.S.2d 99 (1956). Copyrighted articles may also be in free and open competition. *See* *Eastman Kodak Co. v. FTC*, 158 F.2d 592 (2d

commodities of the same general class produced or distributed by others. In a typical fair trade contract the purchaser agrees to resell only at prices set by the manufacturer. The purchaser may also agree, in the event he resells to other distributors, to require them to resell only at a stipulated price.⁶ In this fashion the manufacturer can determine the price to be paid for his products by wholesalers, retailers and consumers.

Fair trade statutes also may permit "non-signer" provisions, which make fair trade contracts enforceable against anyone who willfully sells fair traded products at a price other than that stipulated by the manufacturer, even though the seller is not a party to the contract.⁷ Because the provision binds all distributors within the particular state to the fair trade contract price, a manufacturer need make only a single fair trade contract, provided all distributors are properly notified.⁸ The non-signer provision is obviously the heart of fair trade, since few distributors would be willing to enter into fair trade contracts if non-signers were free to sell at any price.

Fair trade contracts are essentially price-fixing agreements and, as such, contravene the antitrust laws whenever interstate commerce is involved.⁹ Hence, state fair trade acts would be of no utility to manufacturers of products distributed nationally had not Congress carved out an exception to the antitrust laws. The Miller-Tydings Act¹⁰ and McGuire Act¹¹ are merely enabling acts for state legislation; the Acts allow fair trade contracts to be enforced in any "fair trade state."¹² A resale price maintenance program cannot be based on the federal legislation alone.

Cir.), *cert. denied*, 330 U.S. 828 (1947) (sole manufacturer of color film not allowed to fair trade because color film not in free and open competition with other articles of same class); *Hutzler Bros. Co. v. Remington Putnam Book Co.*, 186 Md. 210, 46 A.2d 101 (1946).

6. For an example of a fair trade contract see 2 CCH TRADE REG. REP. ¶ 6051-52.

7. *E.g.*, CAL. BUS. & PROF. CODE ANN. § 16904 (Deering 1960); N.Y. GEN. BUS. LAWS ANN § 369-b (McKinney 1968).

8. *E.g.*, *Revlon Nail Enamel Corp. v. Charmely Drug Shop*, 123 N.J. Eq. 301, 197 A. 661 (1938). Plaintiff manufacturer of nail polish made fair trade contract with only one of its retailers. The retailer sold less than a dozen bottles of nail polish in three months, nevertheless the single fair trade contract was held sufficient to bind all other retailers with notice.

9. 1 R. CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARK & MONOPOLIES § 22.1 at 772 (3d ed. 1967); see *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

10. 15 U.S.C. § 1 (1964).

11. 15 U.S.C. § 45 (1964). For a historical analysis of fair trade and the federal enabling acts see *Bowman, The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955); *Fulda, Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954).

12. For a discussion of the history of the two Acts, see 1 R. CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARK & MONOPOLIES § 22.2 (3d ed. 1967).

Despite the Miller-Tydings and McGuire Acts, fair trade has lost much of its vitality as a means of effecting a uniform and effective resale price maintenance system for a nationwide or multistate distribution of products. Although at one time 46 states had fair trade legislation,¹³ 19 acts have been held unconstitutional as applied to non-signers,¹⁴ four have been struck down in whole¹⁵ and four others have been repealed.¹⁶ Thus, only 18 state fair trade acts remain with effective non-signer provisions.¹⁷ In addition, the Supreme Court held in *United States v. McKesson & Robbins, Inc.*¹⁸ that a vertically integrated manufacturer may not enter into resale contracts with purchasers who compete with him. Restated, if a company is both a manufacturer and wholesaler, it may not enter into fair trade contracts with independent wholesalers. Since approximately 75 percent of all fair trade manufacturers are at least partially integrated,¹⁹ the *McKesson & Robbins* decision is a serious blow to fair trade resale price maintenance systems; it forces the vertically integrated manufacturer to choose some other method of price control such as refusal to deal.

B. Refusal to Deal

In *United States v. Colgate*²⁰ the Supreme Court recognized that a manufacturer engaged in private business has a right to refuse to deal, and to announce in advance the conditions under which he will do so. However, the *Colgate* doctrine permits only simple unilateral action; even in the absence of an express agreement a manufacturer may be found to have entered into an unlawful combination.²¹ If a

13. See 2 CCH TRADE REG. REP. ¶ 6041. Alaska, Missouri, Texas and Vermont have never enacted fair trade laws. *Id.* at ¶ 6017.

14. *Id.* at ¶ 6041. Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Washington, West Virginia.

15. *Id.* Alabama, Montana, Utah, Wyoming.

16. *Id.* Hawaii, Kansas, Nebraska, Nevada.

17. *Id.* Arizona, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Wisconsin, Maine.

18. 351 U.S. 305 (1956).

19. Comment, *Resale Price Maintenance by an Integrated Firm: The MCKESSON & ROBBINS Case*, 24 U. CHI. L. REV. 533, 539 n.42 (1957). See generally Weston, *Resale Price Maintenance & Market Integration: Fair Trade or Foul Play?*, 22 GEO. WASH. L. REV. 658, 673-80 (1954).

20. 250 U.S. 300 (1919).

21. See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1949); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921); *United States v. A. Schrader's Sons, Inc.*, 252 U.S. 85 (1920).

manufacturer refuses to deal in order to coerce wholesalers and retailers to cooperate in a system of resale price maintenance, he has exceeded the limits of *Colgate*.²²

The problem of determining at what point a manufacturer has gone beyond a simple unilateral refusal to deal and created an unlawful combination was dealt with in *United States v. Parke, Davis & Co.*²³ There, the defendant-manufacturer adopted a system of “suggested” resale prices for its wholesale and retail outlets. Defendant’s representatives visited wholesalers and advised them that they would be cut off if they either did not adhere to suggested resale prices or sold defendant’s products to non-complying retailers. Defendant Parke, Davis also advised individual retailers that if they would adhere to the suggested prices, other retailers would do the same. Retailers cut off for non-compliance would be reinstated upon giving adequate assurance that they would follow the suggested prices in the future. The Supreme Court found that Parke, Davis had gone beyond a simple unilateral refusal to deal in two specific ways: by threatening not to deal, it forced wholesaler cooperation in a plan to achieve compliance among retailers and it used the report of each retailer’s willingness to cooperate as a “lever” to obtain acquiescence from all.²⁴ Thus, the *Parke, Davis* Court tested the legality of the refusal to deal by the manner in which it was used. It is not unlawful for each customer to independently adhere to the “suggested” price even though induced to do so *solely* by the manufacturer’s announced policy “[s]o long as Colgate is not overruled.”²⁵ But the manufacturer may not employ his right to refuse to deal as a means of coercing compliance with his policy—after announcing it he must do nothing further to “actively bring about” compliance.²⁶

A still further tightening of the *Colgate* doctrine occurred in *Albrecht v. The Herald Co.*,²⁷ which expanded the definition of “combination.”²⁸ *Albrecht* was an independent contractor who

22. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

23. 362 U.S. 29 (1960).

24. *Id.* at 45.

25. *Id.* at 44.

26. *Id.* at 46.

27. 390 U.S. 145 (1968).

28. The Court also held that fixing a *maximum* price by means of a refusal to deal may violate § 1 of the Sherman Act. It is more common for a manufacturer to attempt to set the *minimum* resale price. For a discussion of this aspect of the case, see Note, *Albrecht v. Herald Co.—Resale Price Fixing*, 63 NW. U.L. REV. 862, 864 (1969).

delivered the defendant-publisher's newspapers in an exclusive delivery territory. The Herald Co. printed a maximum resale price in each paper and announced that it would terminate the contract of any carrier who failed to comply. When Albrecht began selling above the suggested price, The Herald Co. engaged a sales firm to solicit Albrecht's customers and another carrier to deliver to them. The second carrier, who was willing to comply with the maximum price, understood that it would retain the customers only so long as Albrecht refused to cooperate. As Albrecht did not acquiesce, The Herald Co. refused to sell him papers, thereby forcing him to sell his route. The Court held that illegal combinations existed between the publisher and the soliciting firm and between the publisher and the second carrier.²⁹

These combinations differ from those found in previous cases in that neither the soliciting firm nor the second carrier had any interest in the success of the price fixing scheme;³⁰ the more usual case involves a combination between the manufacturer and someone in his distribution chain.³¹ Furthermore, the Court suggested that Albrecht might have alleged a combination between the publisher and himself or even between the publisher and the ultimate consumer.³² In short, the case suggests that once the publisher employed coercive tactics in conjunction with a refusal to deal, an unlawful combination between it and *someone* would be found.

Although the right to refuse to deal may retain some theoretical vitality as a method of resale price maintenance,³³ it surely is dead from a planning standpoint.³⁴ The line between "simple unilateral" action and an unlawful coercive combination has been substantially blurred.

29. 390 U.S. 145, 149 (1968).

30. See Note, *Albrecht v. Herald Co.—Resale Price Fixing*, 63 Nw. U.L. REV. 862, 868 (1969).

31. See, e.g., cases cited in note 21, *supra*.

32. 390 U.S. at 150 n.6.

33. Compare *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825, 830 (E.D. Pa. 1964), with *United States v. Parke, Davis & Co.*, 362 U.S. 29, 57 (1960) (dissenting opinion of Mr. Justice Harlan).

34. See *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960):

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; . . .

Id. at 790; 1 R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARK & MONOPOLIES* § 22.2 at 772 (3d ed. 1967). But see *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173 (D.C. Cir. 1965) (Parke, Davis notified a dealer that it had permanently closed his account—held to be "purely unilateral"); *House of Materials, Inc. v. Simplicity Patterns Co.*, 298 F.2d 867 (D.C. Cir. 1962) (apparently facts of "Doric simplicity").

If a manufacturer desires an effective resale price maintenance system, he must develop an enforcement program which will discover price violations and deal with noncomplying distributors. While *Colgate* recognizes the right of the manufacturer to cut off a noncomplying distributor, the manufacturer may be reluctant to exercise that right. On the contrary, he probably would rather retain outlets for his products.³⁵ This may cause the manufacturer to employ his right to refuse to deal as a coercive economic weapon forcing compliance upon a price-cutting distributor. If he does so, however, he goes beyond "simple refusal to deal,"³⁶ and violates the antitrust laws. When one contrasts, as did Justice Harlan,³⁷ the ". . . aggressive, widespread, highly organized and successful merchandizing programs . . ."³⁸ in previous cases with the ". . . defensive, limited, unorganized and unsuccessful effort . . ."³⁹ in *Parke, Davis*, it is clear that the range of manufacturer conduct which will not amount to a coercive program—as distinct from simple unilateral refusal to deal—is perilously narrow. The utility of the *Colgate* doctrine is further limited by the *Albrecht* extension of "combination." It is unlikely that The Herald Co. considered that it would be in an unlawful "combination" with the soliciting firm or second carrier, and certainly not with its readers.

C. Consignment Contracts

The *Albrecht* and *Parke, Davis* decisions concerned the use of refusal to deal as a coercive weapon forcing independent distributors to comply with a "suggested" resale price maintenance system. Those decisions left open the possibility of establishing a resale price maintenance program by use of consignment contracts. This technique eliminates resale from price control because the manufacturer retains title to the goods—he merely entrusts them to one who is to sell for him. Such an arrangement was upheld in *United States v. General Electric Co.*⁴⁰ In that case GE entered into agreements with more than 21,000 agents all over the United States for the sale of its light bulbs. The agreement provided, *inter alia*, that GE would retain title to the bulbs until sold

35. This is clearly illustrated by the action of both *Parke, Davis* and the Herald Co. Both made earnest efforts to obtain voluntary compliance before using coercive tactics of any kind.

36. See notes 23-26, *supra*, and accompanying text.

37. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 55-56 (1960).

38. *Id.* at 56.

39. *Id.*

40. 272 U.S. 476 (1926).

to the customer and would also specify prices; the agents agreed to stock the bulbs, account to GE for sales, pay most expenses and return unsold bulbs if the agency was terminated. The Court held that “. . . genuine contracts of agency . . .” do not violate the antitrust laws.⁴¹

The owner of an article patented or otherwise is not violating the common law or the Antitrust Law by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.⁴²

In *Simpson v. Union Oil Co.*,⁴³ Union Oil used a consignment arrangement for the sale of its gasoline at filling stations which it leased to the dealers. Although the consignment agreement was very similar to that used by GE,⁴⁴ the Court nevertheless held “that resale price maintenance through the present, coercive type of ‘consignment’ agreement is illegal under the antitrust laws”⁴⁵ The majority of the Court sought to distinguish *General Electric*, but most commentators agree that *Simpson* in effect overrules *General Electric*.⁴⁶ Even if not, the close similarity of the two consignment agreements⁴⁷ gives warning that a resale price maintenance program ought not be planned in reliance on the consignment device. If, as is likely, the agreement in *Simpson* was written with the GE agreement as its model,⁴⁸ it would surely be at least imprudent to initiate a resale price maintenance program using the consignment device. A number of cases have been decided since *Simpson*,⁴⁹ but they offer little aid in determining its meaning.⁵⁰

41. *Id.* at 488.

42. *Id.*

43. 377 U.S. 13 (1964).

44. See Rahl, *Control of an Agent's Prices: The Simpson Case—a Study in Antitrust Analysis*, 61 NW. U.L. REV. 1 (1966).

45. 377 U.S. 13, 24 (1964).

46. See *Simpson v. Union Oil Co.*, 377 U.S. 13, 29 (1964) (dissenting opinion of Mr. Justice Stewart); I R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARK & MONOPOLIES* § 25 at 894 (3d ed. 1967); Rahl, *Control of an Agent's Prices: The Simpson Case—a Study in Antitrust Analysis*, 61 NW. U.L. REV. 1 (1966).

47. See note 43, *supra*.

48. See Comment, *Consignment for Retail Maintenance Invalidated by Supreme Court*, 17 STAN. L. REV. 519, 521-22 (1965).

49. *Sun Oil Co. v. FTC*, 350 F.2d 624 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965); *Guidry v. Continental Oil Co.*, 350 F.2d 342 (5th Cir. 1965); *Atlantic Refining Co. v. FTC*, 344 F.2d 599 (6th Cir.), *cert. denied*, 382 U.S. 939 (1965); *CBS Business Eqmt. Corp. v. Underwood Corp.*, 240 F. Supp. 413 (S.D.N.Y. 1964); *Lyons v. Westinghouse Elec. Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964).

50. See I R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARK & MONOPOLIES* § 25

II. THE INEVITABLE RESULT?

The demise of resale price maintenance, particularly in the format of fair trade laws, may be only the inevitable result of its logically inconsistent position within the framework of antitrust law. Vertical price fixing agreements between the manufacturer and the reseller of his products are prohibited by section 1 of the Sherman Act.⁵¹ Continuing judicial pressure exhibited in the progeny of *Dr. Miles* has foreclosed, as a practical matter, other available methods of resale price maintenance. Contrariwise, the Miller-Tydings and McGuire Acts enable states to legislatively authorize resale price maintenance contracts.⁵² This permits the legitimation on a state-by-state basis of business arrangements proscribed by section 1 of the Sherman Act.

The basic principle of antitrust is that the unrestricted competitive process will produce a viable economy with a minimum of political interference.⁵³ The competitive process derives its strength as an ordering mechanism from the existence of numerous independent offers of interchangeable goods to the market.⁵⁴ Axiomatic to this scheme is the belief that the competitive process suffers when two independent competitors agree to fix prices.⁵⁵ Resale price maintenance eliminates competition between retailers by fixing the price at which all retailers will offer a particular product.⁵⁶ The result is the substitution of

at 894 (3d ed. 1967); Rahl, *Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis*, 61 NW. U.L. REV. 1, 6 (1966).

51. *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *cf.*, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406-09 (1911); Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 432-33 (1965); Levi, *The Park-Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258.

52. Miller-Tydings Act 50 STAT. 693 (1937), 15 U.S.C. § 1 (1964); McGuire Act 66 STAT. 632 (1952), 15 U.S.C. § 45 (1964); Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 627 (1959). *But see* H.R. REP. NO. 1516, 82d Cong., 2d Sess. 7 (1952). Hearing on a proposed amendment to § 1 of the Sherman Act precipitated by the Supreme Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The proposals contained therein were eventually reflected in the McGuire Act. 66 STAT. 632 (1952), 15 U.S.C. § 45 (1964).

53. *See* Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382-83 (1965).

54. Bernhard, *Competition in Law and in Economics*, 12 ANTITRUST BULL. 1099, 1130 (1967).

55. *See, e.g.*, *United States v. Socony-Vacuum Oil Co., Inc.* 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); Blake & Jones, *Toward a Three Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 430 (1965).

56. H.R. 1516, 82d Cong., 2d Sess. 31 (1952); Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 432-33 (1965); Bowman, *The Prerequisites and Effects*

competition at the producers level only for the numerous competitive forces of the retail market that would effect a products retail price.⁵⁷ This clearly restricts the competitive process. To allow its creation by agreement is repugnant to the basic principles of antitrust. Thus, the statutory exemption created by the Miller-Tydings and McGuire Acts creates a conflict within the framework of antitrust.

To justify exempting such agreements from the complete prohibition by section 1 of the Sherman Act, it was necessary for the proponents of the exemption to demonstrate that the forces of unrestrained price competition at the retail level produce greater restrictions on the competitive process than does resale price maintenance. This is the central theme of the proponents' arguments in favor of resale price maintenance. They maintain that unrestricted price competition at the retail level is so injurious to some components of the manufacturing, wholesaling and retailing process that it results in their destruction.⁵⁸ This reduces competition and causes a tendency toward monopoly at the different functional levels, thereby restricting the competitive process to a much greater degree than it is restricted by resale price maintenance.⁵⁹

The enabling act character of the statutory exemption created natural laboratories in which the effects of competition both with and without resale price maintenance could be analyzed. There were at one time 46 such laboratories⁶⁰ but the gradual abandonment of fair trade has reduced this number to 18.⁶¹ These states provided proponents of resale price maintenance with the opportunity to show that its existence produced a less restrictive effect on the competitive process than did the forces of price competition at the retail level.

As the record was made in states authorizing resale price maintenance, one thing became apparent. The retail prices paid by consumers for price maintained goods were slightly higher than prices

of Resale Price Maintenance, 22 U. CHI. L. REV. 825, 848-49 (1955); Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 645-47 (1959).

57. Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 645-47 (1959).

58. See, e.g., H.R. 1516, 82d Cong., 2d Sess. 9-12 (1952); Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 836 (1955); Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 632 (1959). See generally V. MUND, *GOVERNMENT AND BUSINESS*, 474-81, 484 (1955).

59. See note 10, *supra*, and authorities cited therein.

60. See text accompanying notes 13 to 17, *supra*.

61. *Id.*

for the same merchandise in non-fair trade states.⁶² This data does not provide a basis for justifying the exemption of resale price maintenance agreements from the reach of the basic principles of antitrust. The record of other effects on the competitive process precipitated by the presence or absence of resale price maintenance is inconclusive. There is some data, however, indicating that the feared destruction of business concerns and resulting monopolization at the retail level of the market by a few giants has not occurred in non-fair trade jurisdictions.⁶³ The only conclusions offered by neutral parties on the effect of resale price maintenance is that its presence within the competitive process only retards change that might otherwise occur through the mechanism of competition.⁶⁴

It is submitted that the inconclusiveness of the above record does indicate that resale price maintenance in practice has failed to justify its existence in contradiction of the basic principles of antitrust. The destructive results from competition without resale price maintenance feared by its proponents have not occurred. By reason of this failure to prove, the conflict created by fair trade laws within the framework of antitrust is gradually resolving itself in favor of the basic principles of free competition. This may be simply an inevitable result when the theoretically predicted results used to justify the creation of a logically inconsistent antitrust exemption failed to materialize in actual practice. The natural tendency was to return to a pattern of regulation consistent with the basic principles governing the regulatory scheme itself.

CONCLUSION

Whether there exists, outside the context of state fair trade laws, a theoretically legal system of resale price maintenance is questionable.

62. H.R. 1516, 82d Cong., 2d Sess. 41-42 (1952); *Statement of W.H. Orrick, Assistant Attorney General, Antitrust Division, Department of Justice, on S. 774 Before the Special Subcomm of the Senate Committee on Commerce, 88th Cong., 2nd Sess. (1964) cited in 9 ANTITRUST BULL. 785, 795-800 (1964); Bowman, The Prerequisites and Effects of Resale Price Maintenance, 22 U. CHI. L. REV. 825, 849-73 (1955).*

As with any empirical data, the above figures are subject to the criticism that there was insufficient control over all of the possible variables for the results to be truly reflective of the effect of resale price maintenance on retail prices paid by the consumer. See Frankel, *The Effect of Fair Trade: Fact and Fiction in the Statistical Findings*, 28 J. BUS. 182-94 (1955). What is noteworthy, however, is the complete absence of such statistical surveys offered by the proponents of resale price maintenance to refute the clear implications of the above data.

63. See H.R. 1516, 82d Cong., 2d Sess. 43-46 (1952); Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 637-39 (1959).

64. Skeoch, *Canada at 60 and Hollander, United States of America at 100 in REALE PRICE MAINTENANCE* (Yamey ed. 1966).

As a practical matter, the alternatives to fair trade—refusals to deal and consignment arrangements—have been restricted into oblivion by continuing judicial pressure from the Supreme Court. The passage of time also has precipitated substantial inroads into the one remaining sanctuary for resale price maintenance—states with “nonsigner-provision” fair trade laws. The number of such jurisdictions has dwindled from a one-time high of 46 to 18. This record, viewed as a whole, could suggest that the continued existence of resale price maintenance is doubtful. It is not unreasonable to assume that this result was the inevitable end to the law’s resolution of an illogical exception to a basic principle that fails to justify its existence in fact.