

A NEW APPROACH TO RESALE PRICE MAINTENANCE

HISTORY OF FAIR TRADE LEGISLATION

The depression following 1929 gave impetus to the movement for legislation which would allow the establishment of minimum resale prices. Forty-five states enacted so-called fair trade laws by 1941.¹ The statutes apply to products sold under the manufacturer's trademark or brand name which are in free and open competition with products of the same general class. Contracts are authorized between the distributor and the manufacturer whereby the distributor agrees, (1) to sell the product at a stipulated or minimum price and (2) to require any other distributor who may buy from him to agree to sell at the stipulated or minimum price. This created a system of vertical price controls enabling the manufacturer to control the selling price of both the wholesaler and retailer. Fair trade statutes have never applied to horizontal agreements between distributors or between manufacturers. The heart of the statutory scheme is the "non-signer" clause which binds non-contracting distributors of the product to sell at the price agreed upon by the manufacturer and the distributor who have signed a fair trade agreement. A cause of action for unfair competition is created against anyone who sells below the contract price, provided he has notice of the contract.

In 1936, the United States Supreme Court, in the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*² disposed of the "due process," "equal protection of the laws" and "unlawful delegation of legislative power" objections arising under the Federal Constitution against fair trade laws. The basic theory relied upon by the Court, and later adopted by many state courts, is that this legislation protects the ownership of the trademark or brand name which remains the manufacturer's property, even after the tangible product is sold to the distributor.

The Miller-Tydings Amendment to the Sherman Act was passed in 1937 to give statutory immunity from federal anti-trust laws to all fair trade statutes. Without this enabling legislation, fair trade agreements in interstate commerce would be in violation of the Sherman Act. In 1951, the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*³ held that the Miller-Tydings Amendment did not sanction interstate enforcement of the "non-signer" provisions. Congress re-examined the fair trade problem in 1952 and passed the McGuire Act,⁴ which exempts resale price maintenance agreements and non-signer clauses from the federal anti-trust laws and declares that such agreements do not con-

¹ Only Missouri, Texas, Vermont and the District of Columbia have never enacted fair trade legislation.

² 299 U.S. 183 (1936).

³ 341 U.S. 384 (1951).

⁴ 15 U.S.C. § 45 (1952).

stitute an unlawful burden on interstate commerce when authorized by the law of the state in which the resale is to be made. This act, of course, was a major victory for the proponents of fair trade.

The Supreme Court refused to take a new look at the *Old Dearborn* decision in 1954 by denying certiorari to a Fifth Circuit Court of Appeals decision,⁵ despite cogent arguments for reappraisal by both the dissenting opinion of Judge Holmes and the district judge.⁶

Thus, state fair trade laws continue to be considered valid under the federal constitution and opponents have been forced to shift their attacks to the state courts.

STATUS OF FAIR TRADE LAWS IN THE STATES

Fair trade statutes were not successfully challenged in the state courts until 1949 when the Florida Supreme Court declared the "non-signer" clause of its fair trade act to be in violation of its constitution.⁷ Michigan followed in 1952.⁸ From 1955 to date⁹ fourteen more states¹⁰ have held the "non-signer" clause unconstitutional, including Utah and Nebraska which held their entire fair trade act invalid.¹¹ Although there

⁵ *Schwegmann Bros. v. Eli Lilly Co.*, 205 F.2d 788 (5th Cir. 1953), *cert. denied*, 346 U.S. 856 (1953).

⁶ 109 F. Supp. 269, 271-72 (E.D. La. 1953), "Perhaps after twenty years of experience under fair trade acts, the Supreme Court may conclude that the real purpose of these acts is not to protect the good will of the manufacturer, and that price-fixing under these acts is not an appropriate means to that perfectly legitimate end, but is in fact an end in itself. In other words, it may well be found that the real purpose of fair trade legislation is to protect the retailer from competition with another retailer who, because of his efficient merchandising methods, is able to reduce his distributive costs and consequently his retail prices."

⁷ *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949).

⁸ *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods*, 334 Mich. 109, 54 N.W.2d 268 (1952).

⁹ August 20, 1958.

¹⁰ *Union Carbide & Carbon Corp. v. White River Distributors, Inc.*, 224 Ark. 558, 275 S.W.2d 455 (1955); *Olin Mathieson Chemical Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956); *Cox v. General Electric Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955); *Bissell Carpet Sweeper Co. v. Shane Co.*, 143 N.E.2d 415 (Ind. 1957); *Quality Oil Co., v. E. I. du Pont de Nemours & Co.*, 182 Kan. 488, 322 P.2d 731 (1958); *General Electric Co. v. American Buyers Coop., Inc.*, CCH TRADE REG. REP. (10th ed.) ¶ 69,058 (Ky. 1958); *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*, 231 La. 51, 90 So. 2d 343 (1956); *McGraw Electric Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 68 N.W.2d 608 (1955); *Skaggs Drug Center v. General Electric Co.*, 63 N.M. 215, 315 P.2d 967 (1957); *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958); *General Electric Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956); *Rogers-Kent, Inc., v. General Electric Co.*, 231 S.C. 636, 99 S.E.2d 665 (1957); *General Electric Co. v. Thrifty Sales*, 5 Utah 2d 326, 301 P.2d 741 (1956); *General Electric Co. v. Dandy Appliance Co.*, 103 S.E.2d 310 (W. Va. 1958).

¹¹ Virginia invalidated its Fair Trade Act not on constitutional grounds but upon a holding that it was repealed by implication by the 1950 enactment of the

are some recent decisions upholding fair trade acts in their entirety,¹² the trend is obviously towards invalidating at least the "non-signer" clause. The Ohio Supreme Court, in holding this clause of the Ohio act unconstitutional, offered the following reasons: (1) it constitutes an unauthorized exercise of the police power in that there is no substantial relation to the public safety, morals, or general welfare, (2) it contravenes the "due process" provisions by arbitrarily denying a seller the privilege of disposing of his own property on terms of his own choosing, and (3) it delegates legislative power to private persons.¹³

These adverse rulings in the state courts are an important cause for the breakdown of the fair trade program. Another significant contributing cause is enforcement difficulties, as illustrated by a recent decision¹⁴ holding that the New York fair trade act was unenforceable against a mail order discount house located in the District of Columbia, which has no fair trade law, even though mail order sales below fair trade prices were made to New York residents. The sale took place in the District of Columbia and enforcement of a fair trade agreement can only be taken in a state that has a fair trade law. The effect of the holding is that the manufacturer can no longer control the selling price of his product if the consumer is willing to wait one day for postal delivery from an out of state firm. Recent abandonment of fair trade practices by many companies, including such giants as Westinghouse, General Electric and Eastman Kodak, is easily understandable in the light of these developments.

PROPOSED FEDERAL LEGISLATION

Proponents of resale price maintenance did not give up the fight. On the contrary, they are attempting to revive and even expand their system. Their aim would be accomplished by the enactment of a bill, introduced in February 1958¹⁵ which would amend the Federal Trade Commission Act so as to "equalize rights in the distribution of identified merchandise." Hearings on this bill have been held before the Committees on Interstate and Foreign Commerce of both houses of Congress but the bill was not reported out of either committee. It is certain to be reintroduced in the 86th Congress where a bitter fight is expected. The declared purpose of the bill, which, like fair trade legislation, applies only

Virginia anti-monopoly laws. *Benrus Watch Co. v. Kirsh*, 198 Va. 94, 92 S.E.2d 384 (1956). On March 8, 1958, Virginia passed a new Fair Trade Act effective 91 days after adjournment. 2 CCH TRADE REG. REP. (10th ed.) ¶ 15,120.

¹² *Scovill Mfg. Co. v. Skaggs Pay Less Drugs*, 45 Cal. 2d 881, 291 P.2d 936 (1955); *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 104 A.2d 304 (1954); *Burche Co. v. General Electric Co.*, 382 Pa. 370, 115 A.2d 361 (1955).

¹³ 167 Ohio St. 182, 147 N.E.2d 481 (1958).

¹⁴ *General Electric Co. v. Masters Mail Order Co.*, 244 F.2d 681 (2d Cir. 1957), *cert. denied*, 355 U.S. 824 (1957).

¹⁵ H.R. 10527, 85th Cong., 2d Sess. (1958).

to products sold under a trademark or brand name in competition with products of the same general class, is: (1) to recognize the interest of the manufacturer in stimulating demand for his merchandise by permitting him to maintain selling prices adequate to enlist the active efforts of distributors, and (2) to equalize rights, by affording the small manufacturer an opportunity to compete on more nearly equal terms with large manufacturers who can control selling prices by controlling distribution, and by affording the small retailer an opportunity to compete on more equal terms with the large retailer.

The bill would give the manufacturer of a trademarked or identified product, if any portion of his production crosses a state line while in the chain of distribution, the unilateral, unreviewable federal right to fix the selling price of the product at all levels of distribution. Not only may he set the selling price at the time the distributor acquires the merchandise; he is also authorized to change that selling price at any time he desires.

The McGuire Act of 1952, as noted above, merely permits interstate enforcement of state fair trade laws, which require at least one bona fide contract between the manufacturer and a distributor. The proposed act differs in that it is not dependent on state law but creates a federal cause of action against any distributor who sells at a price other than that set by the manufacturer, provided that he has notice of that price. This represents a drastic change by extending price fixing legislation into those states that have never passed fair trade laws, as well as those states that have held fair trade legislation to be in violation of their constitutions. Another important difference is the lack of any contract requirement in the bill. The Supreme Court in the *Old Dearborn* case had reasoned that when a distributor purchased a fair trade item, he impliedly consented to sell at the price agreed upon by other retailers with the manufacturer. Such consent cannot be implied under the bill unless it were to be assumed that all distributors would consent to have one person, or company, dictate to them the price at which they must dispose of their property. Experience under the fair trade laws indicates that such an assumption would be very unrealistic. Thus, the constitutionality of the bill is in doubt since the *Old Dearborn* case is clearly distinguishable.

OBJECTIONS TO THE BILL

The real effect of the bill would be anti-competitive, vertical price fixing, designed principally to destroy competition at the retail level. Inflexible price schedules, selected by the manufacturer, fail to make any allowance for local conditions, or supply and demand, and are opposed to our traditional concepts of free enterprise. The uniform price will usually be high enough to satisfy the high cost retailer. This will have a detrimental effect on the consumer, the more efficient retailer and

also on the manufacturer. The practice of selling merchandise at below cost to "bait" customers into the store has been alleged to be an ever present threat to fair competition,¹⁶ but it has never been proven that the practice is as frequent as fair trade supporters suggest. In any event, this bill prevents all competitive price cuts,¹⁷ thus going far beyond the "loss-leader" evil. Whether or not that particular evil should be curbed, certainly price reductions that only reflect the increased efficiency of individual retailers should not be prohibited. Overhead savings should be capable of being passed on to the consumer. Some may prefer to shop in air conditioned stores in the down-town shopping district, with easy credit terms and free delivery; but if a consumer is willing to buy in a store without obtaining the extra services, that consumer should be able to purchase at a lower price. Instead, all will have to pay the same uniform price.

Enforcement of the provisions of the proposed act will be up to any person suffering or reasonably anticipating damage by reason of any price cutting. It is to be expected that the courts will insist, as they have in the enforcement of fair trade agreements,¹⁸ that failure to enforce will be regarded as a waiver or abandonment of the right to enforce. This will make it necessary for the manufacturer to spend additional money to police the distributors and to bring lawsuits against even the small retailers. Of course this adds to the cost of the product. In addition, any law which the public will not accept as reasonable or necessary is bound to encounter enforcement difficulties. Most consumers will not believe it to be wrong to buy at lower than established prices. Most retailers will not be convinced that they are in the wrong by evading the provisions of this bill. Some sort of a "grey-market" must be anticipated.

The bill purports to aid small retailers by enabling them to compete with the larger retailers. In the Senate hearings held July 21, 1958, Charles F. Fort, president of Food Town Ethical Pharmacies, Inc., protested that passage of the bill would take away the best weapon that small businesses have. Mr. Fort said the only hope of competing with private brands sold by such large chains as Sears Roebuck was for smaller retailers with low operating expenses to shave prices on national brands.¹⁹ So while some small retailers may benefit, Mr. Fort's statement shows that others will certainly be harmed by this price fixing legislation.

CONCLUSION

It is not open to question that legislation necessary to preserve the existence of small retailers in our economy is desirable, but the declared purpose of this bill is to protect high profit margins, "so as to enlist the

¹⁶ Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175, 199-201 (1954).

¹⁷ Procedure is outlined which would permit price reductions for damaged goods, going out of business sales or discontinued items.

¹⁸ Fulda, *supra* note 16, at 202-03.

¹⁹ N.Y. Times, July 22, 1958, § C, p. 44, col. 1.

active efforts of distributors." It is doubtful if this is an effective or an acceptable means to accomplish an admittedly legitimate objective. The effect of the bill, if enacted, would be to give a private party, the manufacturer, the power to dictate to the owner of property the price at which that owner must dispose of that property. The provisions of this bill should certainly be objected to as a violation of due process of law and an unwarranted delegation of legislative power.

B. D. Oliver
Student Contributor