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FAIR TRADE DEVELOPMENTS: 1951 - 1961

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FAIR TRADE DEVELOPMENTS: 1951 - 1961

CHAPTER I

INTRODUCTION

> Fair Trade, the persistent child of protective legislation and the subject of only faint judicial remonstrances for two decades, has, in a few short years, discovered itself in troubled adulthood. Its once tranquil existence has been transformed into one of stormy attack.[1]

Fair trade is a system of price control by which the owner of an article identified by brand name or trademark sets a minimum price below which the article may not subsequently be resold.[2] As it is normally the manufacturer who owns the brand name or trademark, this form of price control is mostly exercised by him. It is a device to control the price behavior of the wholesalers and retailers. Occasionally it is the wholesaler who owns the brand name

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[1]Richard K. Bates, "Constitutionality of State Fair Trade Acts," Indiana Law Journal, 32 (1957), p. 127.

[2]U. S. Congress, House, Select Committee on Small Business, Fair Trade: The Problems and Issues, Report No. 1292, 82d Cong., 2d Sess., 1952, p. 3.

and who employs fair trade provisions to control the prices of its customers - retailers.

Fair trade is one form of resale price fixing or resale price maintenance. It is the general reference given to the form of resale price maintenance which is effectuated through contracts. The extent and applicability of such contracts is delineated and sanctioned by state and federal legislation.[3] This legislation is permissive in character and provides for a voluntary price maintenance program.

In practice, fair trade is a method of price control between the different levels of the production column. It does not result supposedly from any agreement among persons who are in competition with one another, but originates in the manufacturer or wholesaler. This price maintenance system is often characterized as a "vertical" as distinct from a "horizontal" restriction of price competition.[4] Under the fair trade laws of forty-five states[5] the manufacturers or wholesalers are permitted to enter into contracts to pre-

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[3] C. C. H. Trade Regulation Reporter, Commerce Clearing House, Inc., Vol. I, Tenth Ed., 1959, p. 4101.

[4] Søren Gammelgaard, Resale Price Maintenance (Paris: The European Productivity Agency of the Organisation for European Economic Co-operation, 1958), p. 11.

[5] Approximately half of those laws are ineffective, while one has been repealed.

scribe a minimum price or fix a stipulated price at which the buyer must sell the commodity to another person at a different level of the distribution system.

> Vertical price fixing contracts are agreements between producers and wholesalers, between producers and retailers, or between wholesalers and retailers. Horizontal price fixing agreements are contracts between producers themselves, between retailers themselves, or between wholesalers themselves.[6]

This distinction forms the tenuous basis on which the fair trade structure rests as an exemption of the federal and state antitrust statutes. The vertical price fixing characteristics of fair trade legislation supposedly prevent rather than cause monopolization of trade by eliminating certain predatory trade practices at the retail level. All federal and state fair trade statutes contain explicitly prohibitions against horizontal price agreements between manufacturers, wholesalers or retailers.

In addition to the provisions to establish resale prices by contract, the manufacturer may establish prices by notification and announcement. This is accomplished in an indirect fashion. All state laws provide that if a manufacturer negotiates a contract with one retailer in the state

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[6] Seagram-Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N. E. 2d 940, 942 (1936).

and announces the terms of this contract including the stipulated or minimum prices to other retailers, he may enforce these prices on them regardless whether they have refused to agree to his contract. This so-called nonsigner provision is the heart of the whole statutory fair trade scheme. Without it fair trade contracts would be practically worthless, since distributors and retailers who want to cut prices would never sign a price maintenance contract,[7] and resale price maintenance would not be possible.

It is the coercive character of the nonsigner provision which gives fair trade its measure of practicability. At the same time, however, this characteristic is the most difficult aspect of fair trade to justify in the existing body of legal authority and in the economic philosophy of the capitalistic competitive free enterprise system.

State fair trade laws apply directly only to intrastate trade. The U. S. Congress, however, has specially lifted the bar of the interstate commerce provision of the federal constitution with respect to state fair trade regulations. The Miller-Tydings Act, which was enacted in 1937,

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[7]Carl H. Fulda, "Resale Price Maintenance in the United States," The Business Law Journal, 3 (1956), p. 66.

exempts from the Sherman Antitrust Act and the Federal Trade Commission Act contracts to maintain prices in interstate trade in states which have laws authorizing such contracts. The McGuire Act, which was enacted in 1952, exempted from those two federal statutes the nonsigner provision of state fair trade laws, and enabled enforcement of established prices by contract on nonsigners in interstate commerce in those states which have nonsigner provisions.

Character of the Fair Trade Issue

Few subjects of direct concern to the different sectors of the business community and the general public have shown such a high and unchangeable degree of persistent controversy as the principle of fair trade pricing. The objective of the fair trade provisions cannot be stated unequivocally. "Many hold the principle of resale price maintenance to be un-American, a denial of due process, and a price fixing device to guarantee retailers a profit by the elimination of price competition. Conversely, a large body of opinion holds that fair trade confers on certain manufacturers a basic form of property protection and in so doing shields thousands upon thousands of small retailers and wholesalers from predatory price cutting, thus contributing significantly

to the preservation of our free enterprise economy."[8]

The usually avowed purpose of state fair trade acts is to provide a means whereby the manufacturer may protect his property right in the good will of his trademark or brand name from the damaging effects of loss leader selling. There is, however, ample evidence (and many courts and commentators have expressed themselves accordingly) that the raison d'etre of the fair trade acts is really the protection of small independent retailers from price competition.[9]

Economic conflicts are intermingled with legal argumentations for and against,[10] while the economic effects

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[8]U. S., Congress, Senate, Select Committee on Small Business, Fair Trade, Report on a Study on Fair Trade, Based on a Survey of Manufacturers and Retailers, Report No. 2819, 84th Cong., 2d Sess., 1956, p. 1.

[9]See e. g. General Electric Co. v. Whale, 207 Ore. 302, 296 P. 2d 635, 645 (1956), as one of the many examples.

[10]The Practising Law Institute sponsored a special "Fair Trade" Lawyers' Field Day in New York in 1954. The different statements made there are illustrative of the perplexity of the issue. Winston Picket, the legal representative of General Electric Company, called fair trade "a philosophy - to be entered into as serious as a marriage vow." Saul Stone, the attorney for the nationally known opponent of fair trade - Mr. Schwegmann -, asserted less lyrically that "fair trade protects the inefficient retailer" and will therefore "die under its own weight." Lewis Bernstein, the legal advisor for the fair trade minded retail jewelers believed that "every manufacturer has the right to set its own prices at the level he chooses," but Abraham Lowenthal, legal representative for the discounter Sam Goody,

and consequences of fair trade are far from being determined definitely. A comprehensive tabulation of the alleged merits and disadvantages of fair trade amplifies the controversial character of the issue.

The proponents of fair trade argue that (1) fair trade protects the public from the evils of unrestrained price cutting, (2) fair trade protects the producer of branded merchandise, (3) price cutting threatens the existence of the independent wholesaler and retailer, (4) fair trade protects the consumer from the deception of unrestrained price cutting, (5) fair trade is consistent with competitive principles, (6) fair trade imposes a strong curb on monopoly, (7) fair trade prices are fair prices, (8) fair trade does not lead to excessive mark-ups, (9) fair trade promotes efficient retailing operations and reduces the cost of distribution, and (10) the nonsigner provisions are necessary to make fair trade effective and applicable to all retailers. Those

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did not agree with the contention that fair trade is an issue of legal determination of rights. "Legal devices won't decide the issue. It must be settled on basic facts." Christianity and atheism clashed on the fair trade issue when George Chapman of the Sunbeam Corporation confessed that "fair trade embodies the Ten Commandments and the Sermon on the Mount," while William Simon of the American Bar Association claimed that "there's nothing fair about fair trade - it's like a Russian peace proposal." (Quotations cited in "Fair or Unfair Trade: It all Depends Where You Sit," Business Week, May 15, 1954, pp. 122-4.)

provisions are fair and democratic.[11]

The opponents of fair trade have their arguments. In many respects they are more directly related to facts and "sound" economic reasoning.[12] The critics of fair trade contend that (1) the suppression of predatory price cutting is not the real objective of fair trade, but the elimination of price competition on the retail level, (2) few manufacturers or retailers are seriously injured by predatory price cutting; the use as leader rather helps the good will of trademarked products, (3) fair trade is essentially monopolistic in character, (4) fair trade laws are not a remedy for discriminatory pricing, (5) fair trade means higher prices for the consumers, (6) fair trade leads to an undesirable price uniformity and rigidity, (7) the real purpose of fair trade is to obtain higher retail margins, (8) fair trade tends to discourage efficiency in retailing and to increase cost of distribution, and (9) the nonsigner provisions are coercive,

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[11]House Report No. 1292, op. cit., pp. 7-11.

[12]Mr. Maurice Mermey, Director of the Bureau on Education on Fair Trade, stated in 1956 that he knew of very few professional economists in the United States who have emerged as champions of fair trade. (Proceedings of the Silver Jubilee Conference on Fair Trade, New York, 1956 , sponsored by the Bureau of Education on Fair Trade, p. 21.)

oppressive, unfair and undemocratic.[13]

This manifold and intricate network of arguments for and against fair trade has caused a voluminous amount of theorizing, argumentation and statistical surveys to prove or to disprove any of the defenses or adverse allegations. The opposing forces thus far never came to a decisive battle deciding the issue definitely in favor of any one group. The fair trade issue seems to follow a cyclical movement. The depression of the 1930's saw the birth of the present day fair trade structure. The depression, followed on the heels by a period of wartime scarcities and shortages, kept the picture of fair trade out of focus. "The retailers' organized pressure combined with the depression and war was enough to keep the balance among the relevant group interests far in favor of fair trade."[14] The balance between the pros and cons of fair trade began to develop in favor of the fair trade opponents shortly before the beginning of the 1950's, when the market for consumer goods had more or less shifted from a "sellers" to a "buyers" market situation in a prosperous and high employment economic atmosphere. The resultant of the opposing forces in the fair trade issue moved

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[13]House Report No. 1292, op. cit., pp. 11-15.

[14]Bates, op. cit., 129.

rapidly in favor of the fair trade adversaries.

Statement of Objectives and Limitations

The major purpose of this study is to trace the legal fair trade developments and their economic causes and effects during the last decade. The developments in other forms and devices of resale price maintenance are beyond the scope of this study although they are occasionally mentioned.

For practical purposes it is impossible to distinguish legal developments from changes in economic factors affecting the fair trade structure. They are mutually dependent. The approach of this study was strongly influenced by this situation. The study follows in chronological order the legal developments of the main aspects of fair trade. The interdependency of economic pressures for and against and the legal developments find expression in almost every part of this treatise.

This study does not include sales-below-costs or unfair trade legislation. These laws are often confused with fair trade or resale price maintenance. The purposes and results of unfair trade practices acts, the field in which they are normally applied, and the problems inherent in their

enforcement are quite different from those intrinsic to fair trade practices.

This study is not intended to be a legal treatise even though there are many references to judicial interpretation of legal provisions. The writer is not tutored in legal theory and speculations concerning the law in its technical aspects would have been far beyond his means. Only the economic consequences of developments in legal fair trade interpretations pertain to the subject of this study.

Sources

The primary legal sources for this study were the individual court cases as reported in the National Reporter System of the West Publishing Company, St. Paul, Minnesota. A selective choice was made from a complete list of fair trade articles which appeared during the last ten years in legal periodicals published in the United States. Other sources were obtained through the bibliographical sections in the American Economic Review and the Journal of Marketing. References to governmental publications were obtained through the Bulletin of the Public Affairs Information Service. General information pertaining to the fair trade developments was selected from a bibliography compiled through the Busi-

ness Periodicals Index and the Reader's Guide to Periodical Literature. A copy of select references, 1957 - 1961 on resale price maintenance from the Library of Congress Legislative Reference Service constituted another source through which several references were obtained.

Order of Chapters

To put the fair trade issue in the right perspective the extent of fair trade pricing and the composition of the practitioners of fair trade expressed in statistical data has been attempted in Chapter II. This chapter also contains a statistical approach to describe the extent of the effects of legal fair trade developments during the last decade. In Chapter III a very concise historical review of the origin and development of resale price maintenance is presented. The legal and economic history and the legal justification of the present fair trade structure form the final part of this chapter. The significant adverse fair trade developments were initiated by two U. S. Supreme Court decisions. The Schwegmann and Wentling decisions and the resulting federal McGuire Amendment constitute the subject material in Chapter IV. The trend of state courts invalidating their fair trade statutes was started in 1949 by the Florida Su-

preme Court. Chapter V traces chronologically the subsequent influence of this action on the reasoning of the courts in other states in respect to fair trade legislation. Chapter VI covers the legal decisions and their economic effects pertaining to fair trade enforcement procedures including the problems (and consequent decisions) created by the mail order vendors selling from non-fair trade jurisdictions. The methods of fair trade proponents to counteract the weakening of the fair trade structure are surveyed in Chapter VII. Chapter VIII analyses the major economic factors that contributed to the decline of fair trade pricing and traces the effects of legal developments on the extent of this practice. The final chapter summarizes the study and attempts to make an evaluation of fair trade in the light of the present economic conditions in relation to the different economic interest groups involved.

CHAPTER II

EXTENT AND COMPOSITION OF FAIR TRADE

> Characteristically, discussions of fair trade give off more heat than light, because the subject of resale price maintenance inherently is not amenable to conclusive theoretical discussions ... While opinions are plentiful, of facts there is paucity.[1]

The extent of fair trade pricing should be described in order to evaluate the significance of the issue in the context of the whole economic framework. No satisfactory comprehensive statistics for any one period, however, do exist or are being compiled concerning the extent of fair trade pricing.

Although extensive factual information with regard to the extent and consequences of fair trade pricing would mean a substantial elimination of the controversial character of the issues and interests involved, the goal of this

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[1]U. S. Congress, Senate, Select Committee on Small Business, Fair Trade, Report on a Study on Fair Trade, Based on a Survey of Manufacturers and Retailers, Report No. 2819, 84th Cong., 2d Sess., 1956, p. 3.

treatise is much less ambitious. The statistics on fair trade pricing as presented below must be considered as intellectual guesses afflicted by a substantial margin of error. The required data to measure reliably the extent of fair trade pricing do not exist. The presented statistics are only employed to designate roughly the magnitude of the fair trade pricing phenomenon in order to qualify and possibly to quantify the significance of developments in fair trade pricing during the last ten years.

It can be generally stated that the practice of resale price maintenance varies considerably in the different trades and industries, while "... its adoption has increased with the growth of industrialization and, particularly, of branding of goods. The practice seems to have spread gradually up to the outbreak of the second world war, its growth being perhaps most rapid between the wars, when the method of branding goods in several trades came into more general use."[2]

The fact that nearly the entire U. S. A. was covered by effective fair trade laws during the first few

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[2]Søren Gammelgaard, Resale Price Maintenance (Paris: The European Productivity Agency of the Organisation for European Economic Co-operation, 1958), p. 18.

years of the 1950's,[3] does not mean that the major part of all trade laws themselves contain important limitations on the practical application of fair trade pricing provisions.[4] First, the fair trade legislation is of a permissive character in the sense that it does not forcedly require a manufacturer or wholesaler to establish minimum resale prices and to enforce them. Furthermore, the privilege of employing the fair trade provisions to engage in resale price maintenance is limited for the most part to goods identified by trade-marks or brand names.[5] A third restriction, however of minor practical importance, is the legal requirement that commodities subject to resale price maintenance must be in free and open competition with similar goods.[6] In most

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[3] Infra, Chart 1, p. 169.

[4] McGuire Amendment, 66 Stat. 632 (1952), 15. U.S.C. 45(a) (1958).

[5] A minor exception to this rule is to be found in the court's rejection of the contention that the sale of prescription drugs after removal of the trade name is exempt for the fair trade statute. [Hoffman-La Roche, Inc. v. Schwegmann Bros. Giant Super Markets, 122 F. Supp. 781. (La. 1954)].

[6] The legislative history of the Miller-Tydings amendment and the McGuire amendment shows clearly that the purpose was to validate only resale price agreements with respect to branded commodities which are in effective competition with similar commodities produced by others so that if the resale price of the branded article was set too high

trades and industries the economic circumstances create the most powerful factors that limit the implementation of effective and/or profitable resale price maintenance programs.[7] "Those limitations in both law and economics mean that only a small fraction of all goods produced for sale is or ever will be subject to maintained prices."[8]

Fair-traded Volume of Retail Sales

The most meaningful measure of the extent of fair trade pricing is the volume of goods sold under effective fair trade contracts as a percentage of total retail sales. Only very widely diverse estimates are available. In a report to the Temporary National Economic Committee in 1941 it was estimated that not more than 15 per cent of retail

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the manufacturer would lose his trade by competition of the other articles. This restriction caused only in one case an invalidation of a fair trade program. The decisive case here is Eastman Kodak Co. v. Federal Trade Commission, [158 F.2d 592 (2 C. A. 1946)]. In this case it was contended that color film is in free and open competition with black and white film, both competing for the "consumer dollar". The court disagreed and considered those products not in the same general class. That the consumer "... can buy a black and white film will not serve to destroy the monopoly of the sole producer of color film...." (Ibid.)

[7] Infra, Chapter VII, pp. 212-3.

[8] U. S., Congress, House, Select Committee on Small Business, Fair Trade: The Problems and Issues, Report No. 1292, 82d Cong., 2d Sess., 1952, p. 20.

sales came within the scope of the various fair trade laws.[9] Grether supplies a more specific estimate for the pre-second world war period. He estimates the fair trade fraction of the total volume of retail sales to be probably no more than 5 per cent and certainly less than 10 per cent.[10] Other estimates place the percentage all the way from 4 to 20 per cent.[11] The estimate is that in 1952 less than 10 per cent of the total turnover of consumer goods was subject to resale price maintenance under fair trade programs.[12]

Herman provides the most sophisticated and more recent estimates.[13] In his article he employs unused material of a survey of manufacturers and retailers conducted by the Senate's Select Committee on a Study of Fair Trade.[14]

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[9]Temporary National Economic Committee, Problems of Small Business, Monograph No. 17 (Washington: U. S. Government Printing Office, 1941), p. 199.

[10]E. T. Grether, Price Control under Fair Trade Legislation (New York: Oxford University Press, 1939), p. 322.

[11]House Report No. 1292, loc. cit.

[12]U. S. Congress, House, Antitrust Subcommittee of the Committee on the Judiciary, Hearings on H. R. 4365, etc.: Resale Price Maintenance, 82d Cong., 2d Sess., 1952, p. 746.

[13]Edward S. Herman, "A Statistical Note on Fair Trade," Antitrust Bulletin, 4 (1959), 583-92.

[14]Senate Report No. 2819, op. cit.

The total retail value of fair traded goods in 1954 is estimated at $11.7 billion, or 6.9 per cent of the total 1954 retail sales.[15] "This suggests that the volume of goods sold under fair trade contracts may have reached 10 per cent of retail sales in the pre-Schwegmann decision era. There is little doubt that the value of the fair traded goods sold today [1959] is substantially below 1954."[16]

Although those estimates function as an illustration of the quantitative significance of resale price maintenance through the provisions of fair trade legislation,

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[15]Herman assumed the population of fair trading firms in 1954 to be equal to the rough estimate for 1956 (Infra, Chapter II, p. 23, note 22.) in order to apply this estimate to the 1954 Census data. His justification is twofold. First, the 1954-1956 period did not contain any major developments in fair trade and secondly the available population estimate for 1956 was the most reliable in order to come to a volume estimate in which an accurate ratio of large firms was represented. Next he adjusted the 1954 fair-traded sales volume sold by 175 manufacturers included in a sample (Infra, Chapter II, p. 23 ; also Table 2, p. 29.) for wholesale and retail markups based on information to be found in H. Barger, Distribution's Place in the American Economy Since 1869 (Princeton: Princeton University Press, 1955), pp. 81-83. The resulting retail value of the 1954 fair traded goods sold by the 175 manufacturers in the sample amounted to $2.300 million. As the 1956 population estimate of 893 firms was assumed also to apply to 1954 and the sample of 175 manufacturers was assumed to be representative of the population, the total estimated 1954 retail value of fair traded goods of $11.7 billion was obtained by multiplying the sample retail value of $2.300 million with the ratio of manufacturers 893/175. (Herman, op. cit., p. 587).

[16]Ibid.

one should be warned not to conclude from those estimates that the total volume of retailed goods and services minus the fair traded fraction constitute the volume of retail sales of which the prices are determined solely by competitive forces at the retail level. Several substitute methods of resale price maintenance do exist with different degrees of success to the practitioners and with different effects on the various levels of the production column and the consumer. Supporters of fair trade use as an argument the statement that the volume of goods subject to fair trade legislation is relatively small, but that the volume sold under all forms of price maintenance is large. In a House Report in 1952 reference is made to an estimate of the Bureau of Education on Fair Trade.[17] It was stated that the fair trade laws account for approximately $5.2 billion of annual retail sales or about 4 per cent of the total. Over $30 billion was estimated as the amount of retail sales that takes place annually under other forms of "standard" pricing.[18] In

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[17]House Report No. 1292, loc. cit.

[18]This $30 billion would represent approximately 23 per cent of annual retail sales. It is interesting to compare this percentage for the United States with some estimates of a few other industrialized countries. Two reasons justify this note on an international comparison of the extent of resale price maintenance. First, it gives a rough

the latter category are included such products which are distributed through agencies, goods sold directly, products which are distributed through licensing arrangements, e.g., newspapers and magazines, and many miscellaneous products in respect to which informal price maintenance has long been practiced.

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indication of the degree of competitive pricing on the retail level in the United States in comparison with other capitalistic free enterprise countries. Secondly, this comparison can function as a verification of the estimates for the United States.

In Sweden, where resale price maintenance is now banned, it was found in an extensive study in 1948 that an average of 25 to 28 per cent of the public's expenditures on consumer goods was subject to resale pricing by private firms. If tobacco and spirits, which in Sweden are produced by publicly owned companies and sold under maintained resale prices are included, the percentages were 31to 34. In the United Kingdom, where since November 1956 collective resale price maintenance is unconditionally prohibited, it was estimated that in 1938 about 30 per cent of the sales volume of consumer goods was price-maintained, and in 1951 the Board of Trade thought it likely that this percentage had gone up rather than down. In Germany, where the American and British Occupation Forces in 1947 legally allowed only certain types of resale maintenance, similar to the legal provisions in the United States, information from trade associations in industry and trade indicated that 12 per cent of the total retail turnover in 1954 was made up of articles with maintained retail prices. In France, it was estimated in 1952 that about 10 per cent of the total turnover of consumer goods was covered by resale price maintenance. The practice, however, has been banned since 1953. In Canada, resale price maintenance has been illegal since 1951. Before this the practice was reported to be of significant and growing proportions, but no figures indicating the share of price-maintained goods in terms of total turnover are available. (Gammelgaard, op. cit., pp. 19-21.)

On this bases, the above estimates should only be considered as rough indicators of the role fair trade legislation plays among the several forms of resale price maintenance. Even then a further qualification is necessary. It is doubtful to assume that the volume of retail sales priced under fair trade programs would not be affected by some other form of resale price maintenance in the absence of enabling fair trade legislation. It should be noted, therefore, that the extent of fair trade pricing as expressed by the percentage of the total volume of retail sales affected, is highly unconclusive in the attempt to quantify the significance of the effects of fair trade legislation.

Industrial Composition of Fair Trade Population

Another approach to the problem of statistical quantification of the extent of the fair trade practice is the enumeration of the population of fair-trading manufacturers and the determination of its composition as to the industries and the volume of fair traded products and the effectiveness of the different fair trade programs.

On the basis of lists supplied by the American Fair Trade Council, the Bureau of Education on Fair Trade, and other organizations, the Senate's Subcommittee on Retailing, Distribution, and Fair Trade Practices attempted to

survey the entire population of fair-trading manufacturers in 1956.[19] Questionnaires were originally sent to approximately 1,700 manufacturers, which number was reduced due to duplications to no more than 1,453 individual manufacturing firms. From this number 836 manufacturers replied, or slightly less than 58 per cent.[20] The received returns indicated that at least 514 manufacturers or approximately 61.5 per cent were fair trading during 1956.[21] In order to arrive at a population value for manufacturers engaged in fair trade in 1956, Herman applied a crude but plausible adjustment for non-returns and estimated the population value for the manufacturers engaged in fair trade in 1956 to have been approximately 893.[22]

In 1952, Mr. John W. Anderson, President of the American Fair Trade Council, informed the Celler Committee

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[19] Senate Report No. 2819, op. cit.

[20] Ibid., p. 3.

[21] Ibid., p. 4.

[22] The same percentage of fair-traders among the total of 836 respondents was assumed also to be among the 617 non-responding manufacturers. The upward bias toward the number of fair-trading manufacturers which was encountered by this assumption, due to the very logical fact that non-fair-traders would much easier not respond, was supposed to be compensated for by the incompleteness of the employed lists of fair trading manufacturers. (Herman, op. cit., p. 584.)

that 1,595 manufacturers were known by the Council to be fair-trading at that time.[23] The 1947 Census of the Manufacturers reports a total of 240,881 manufacturers in the United States. It is, therefore, not likely that in 1952 the percentage of fair-trading manufacturers in the United States did exceed sixty-six one hundredths of one per cent of the total number of manufacturers as reported in the 1947 Census of Manufacturers.[24]

According to those estimates the number of fair-trading manufacturers showed a decline during the period from 1952 to 1956 of approximately 44 per cent. As will be dealt with in subsequent chapters, this decline took place before the major legal and economic attacks on fair trade booked their most significant successes. Especially since mid-1956 fair trade suffered a "... sharp decline under the dual impact of a major series of adverse court decisions and the growth of excess capacity and sharpened competition in many consumer goods industries."[25] Fair trade programs were abandoned in a number of significant consumer goods industries

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[23]House, Hearings on H. R. 4365, etc., op. cit., p. 731.

[24]Ibid.

[25]Herman, op. cit., p. 585.

while they suffered important attenuation in many other former strongholds.[26]

Table 1 gives the percentage of the total number of manufacturers of nationally advertised products as listed in the 1951 Standard Advertising Register which fair traded one or more products in 1951, as well as this percentage for each industrial classification. The sequence of the industrial classification was rearranged according to the percentage fair trading manufacturers constitute of the total number of manufacturers in each classification. Only 1,031 or 8.7 per cent of the 11,842 manufacturers of nationally advertised products, listed in the 1951 Standard Advertising Register, fair-traded one or more products. Only very inaccurate conclusions can be drawn from those percentages concerning the quantitative significance of fair trade pricing of nationally advertised products. Information on the fair-traded sales volume of the individual firms in the different classifications should be available to function as weights in order to calculate more conclusive percentages. However, Table 1 indicated that important differences do exist in the utilization of fair trade programs between industrial classifications.

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[26] Infra, Chapter VIII, pp. 229-38.

TABLE 1

NUMBER AND PERCENTAGE OF THE FAIR TRADING MANUFACTURERS OF NATIONALLY ADVERTISED PRODUCTS BY INDUSTRIAL CLASSIFICATION. 1951[a]

Industrial classification	Number of manufacturers listed by 1951 Standard Advertising Register	Number of fair trading manufacturers	Per cent fair trading manufacturers
Smokers' requisites	110	46	41.82
Proprietary medicines, drugs, chemicals, etc.	620	174	28.06
Cleansers	213	53	24.88
Office equipment	225	51	22.67
Automobile accessories	354	78	22.03
Tires and tubes	25	5	20.00
Sporting goods	345	65	18.84
Toilet requisites	402	61	15.17
Jewelry, silverware, etc.	248	37	14.92
House furnishings	553	82	14.83
Household appliances	142	18	12.68
Gasoline and lubricants	109	13	11.93
Hardware	337	33	9.79
Publishers, engravers, etc.	493	48	9.72
Paints, varnishes and enamels	175	17	9.71
Flour and cereal	76	6	7.89
Wines and liquors	165	13	7.88
Coffee and tea	59	4	6.78
Musical instruments, amusement, etc.	104	6	5.77
Games, toys, etc.	88	5	5.68
Knit goods and underwear	230	13	5.65
Airplanes and accessories	72	4	5.56
Food products	861	44	5.11
Radio and television	158	8	5.06
Livestock, poultry and supplies	204	10	4.90

TABLE 1--Continued

Industrial classification	Number of manufacturers listed by 1951 Standard Advertising Register	Number of fair trading manufacturers	Per cent fair trading manufacturers
Furniture, floor covering, decorations and upholstering	330	16	4.85
Fancy goods, notions, etc.	335	16	4.78
Lighting	150	7	4.67
Heating	244	11	4.51
Automobiles and trucks	59	2	3.39
Seeds, plants and fertilizers	287	9	3.14
Men's clothing and furnishings	295	9	3.05
Beer, ale and soft drinks	251	7	2.79
Machinery and supplies	684	19	2.78
Watercraft, bicycles and motorcycles	86	2	2.33
Sweets	137	3	2.19
Shoes	250	5	2.00
Building construction and material	601	12	2.00
Miscellaneous	621	11	1.77
Farm equipment	338	3	0.89
Women's clothing and furnishings	741	5	0.67
Trailers, pleasure	29	0	0.00
Mail-order houses	36	0	0.00
Total	11,842	1,031	8.71

[a]Source: Compiled from data contained in testimony of John W. Anderson, President of the American Fair Trade Council, before the Antitrust Subcommittee of the House Committee on the Judiciary, Congress of the United States, 82d Cong., 2d Sess., Resale Price Maintenance, Hearings on H. R. 4365, etc., 1952, p. 731, Reference I

Weighted Industrial Composition of Fair Trade Population

Herman took a sample of 175 fair trading manufacturers chosen at random from more than 400 full returns received by the Subcommittee of the Select Committee on Small Business in 1956.[27] With this sample he attempted to determine the volume of fair-traded merchandise in total and by industrial classification. He checked the value of sales of the fair-traded goods for the sample categories against the figures of the 1954 Census. He furthermore classified large firms in the sample by industry and compared them with lists of sizable fair traders which were compiled from industry sources. He states that neither check indicated any obvious bias in the returns employed in the sample as regards industrial distribution.[28]

Table 2 summarizes the results of the sample. It confirms the striking numerical importance of the "Proprietary medicines, drugs, chemicals, etc." manufacturers as shown in Table 1. Table 2 additionally shows that this industrial category also looms largest among the practitioners of fair trade if measured by more significant figures, i.e.,

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[27]Senate Report No. 2819, op. cit.

[28]Herman, op. cit., p. 585.

TABLE 2

INDUSTRIAL DISTRIBUTION OF THE FAIR TRADED MERCHANDISE OF 175 FIRMS, FOR 1954[a]

Industrial classification	Number of firms	Per cent of firms[b]	Volume of sales (mil.)	Per cent of sales[b]
Drugs and medicines	26	14.9	$ 271.2	20.0
Druggists' sundries	23	13.4	200.1	14.6
Electric appliances and housewares	6	3.4	186.0	13.6
Alcoholic beverages	7	4.0	131.4	9.5
Cosmetics and perfumes	31	17.7	100.8	7.4
Tobacco products and accessories	8	4.6	90.0	6.6
Cameras and photo supplies	4	2.3	65.5	4.8
Boats and outboard motors	2	1.1	49.8	3.6
Firearms and ammunition	2	1.1	48.9	3.6
Automotive supplies	7	4.0	38.0	2.8
Clocks and watches	4	2.3	36.2	2.6
Clothing	5	2.9	35.2	2.6
Shoes and other footwear	2	1.1	29.9	2.2
Hardware	11	6.3	19.5	1.4
Books	7	4.0	16.2	1.2
Hosiery	3	1.7	16.0	1.2
Food products	2	1.1	5.2	0.4
Sporting goods	4	2.3	2.7	0.2
Other	21	12.0	25.9	1.9
Totals	175	100.0	$1368.5	100.0

[a] Source: Edward S. Herman, "A Statistical Note on Fair Trade," Antitrust Bulletin, 4 (July-August, 1959), 586.

[b] Percentages may not add to 100.0 because of rounding.

the fair-traded volume of sales. While the "Drugs and medicines" category represents only 14.9 per cent of the total number of manufacturers in the sample, it accounts for 20 per cent of the total fair-traded volume of sales.

The results become more conspicuous if the volume of goods of the different industrial categories are related to the type of retail outlets through which they most commonly reach the consumer. The industrial categories which are most closely related with drugstores, i.e., "Drugs and medicines", "Druggists' sundries", and "Cosmetics and perfumes", constitute together 45.7 per cent of the total number of manufacturers in the sample. More than four-tenths of the fair-traded volume of sales originate in those three categories. If the category "Tobacco products and accessories", which is also closely related to the typical drugstore retail outlets, is included in the previously mentioned three categories, the numerical significance of manufacturers whose products are mostly distributed through drugstores is indicated by 50.3 per cent of the total number of manufacturers included in the sample. The sales volume of those four drugstore-related categories represents slightly less than half of the total.

The category "Electric appliances and housewares"

finds its prominent position among the fair-trading industrial categories as a reflection of the wide-spread dissipation of independent hardware stores. The salient position of large manufacturers in this category is expressed by the fact that only 3.4 per cent of the manufacturers in the sample fall into this category, but this category's share of the total fair-traded volume of sales is exactly four times as large. It may be noted at this instant that this category and the other notable category of "Cameras and photo supplies" have been least successful in withstanding the influences of adverse legal and economic fair trade developments since 1956.[29]

More light is put upon the composition of the fair-trading population by the size distribution of the 175 manufacturers, included in Herman's sample, according to the value of goods sold in 1954 under fair trade contracts.

Table 3 shows that the smaller manufacturers are numerically in the majority. Exactly 36 per cent of the manufacturers had a 1954 fair-traded sales volume of less than $1 million. This category represents, however, only 1.4 per cent of the total fair-traded volume of sales. Seven-tenths

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[29] Infra, Chapter VIII, pp. 229-38.

TABLE 3

DISTRIBUTION OF 175 FAIR TRADING MANUFACTURERS BY VALUE OF GOODS SOLD UNDER FAIR TRADE CONTRACTS, FOR 1954

Sales volume	Number of manufacturers	Per cent manufacturers[b]	Volume of sales (millions)	Per cent of sales[b]
0 - less than $ 1 million	63	36.0	$ 18.7	1.4
$ 1 million - less than $ 5 million	62	35.4	135.9	9.9
$ 5 million - less than $10 million	14	8.0	96.9	7.1
$10 million - less than $25 million	17	9.7	258.2	18.9
$25 million and up	19	10.9	858.7	62.8
Totals	175	100.0	$1,368.4	100.0

[a] Source: Edward S. Herman, "A Statistical Note on Fair Trade," Antitrust Bulletin, 4 (July-August, 1959), 588.

[b] Percentages may not add to 100.0 because of rounding.

of all manufacturers sold slightly more than 11 per cent of the fair-traded products. The manufacturers with sales volume of $10 million and up amounted to only 20.6 per cent of the total population, but they handled 81.7 per cent of the total fair-traded sales. The comparison of those percentages is even more striking for the category with sales over $25 million. Percentage-wise their significance expressed in the volume of sales was slightly less than six times their numerical position among the total number of manufacturers. "Many small manufacturers undoubtedly have a stake in fair trade legislation, but in terms of volume of sales of goods under fair trade would appear to be of primary benefit to large firms."[30]

Extent of Fair Trade Programs

Table 4 constitutes an indication of the extent of individual fair trade programs by classifying them according to the number of states covered in 1956. Only 383 manufacturers out of the 514 fair-trading manufacturers from whom the Senate's Subcommittee[31] received the survey returns gave specific information on the state-coverage of their fair

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[30]Herman, op. cit., p. 589.

[31]Senate Report No. 2819, op. cit.

TABLE 4

DISTRIBUTION OF 383 MANUFACTURERS BY THE NUMBER OF STATES IN WHICH THEY HAVE FAIR TRADE AGREEMENTS, 1956[a]

Number of states	Number of manufacturers	Per cent of manufacturers[b]
Fair trade agreements in:		
41 or more states	251	65.5
31 but less than 41 states	7	1.8
21 but less than 31 states	70	18.3
11 but less than 21 states	18	4.9
6 but less than 11 states	8	2.1
1 but less than 6 states	29	7.6
Totals	383	100.0

[a]Source: Compiled from data contained in U. S., Congress, Senate, Select Committee on Small Business, Fair Trade, Report on a Study on Fair Trade, Based on a Survey of Manufacturers and Retailers, Report No. 2819, 84th Cong., 2d Sess., 1956, p. 6.

[b]Percentages may not add to 100.0 because of rounding.

trade programs. It must be assumed that the data contained in Table 4 are biased potentially toward the manufacturers with extensive operations. These are the larger firms that attach much value to fair-trading and are less likely to be inaccurate or negligent in their reporting.

In correspondence with Table 3, it also appears from Table 4 that fair trade seems to be predominantly significant for the larger manufacturer who has a national market for his products. Almost two-thirds of all reporting manufacturers had a fair trade program that can be characterized as a national program. The fair trade programs of only 7.6 per cent of the reporting manufacturers was effective in 1 to 5 states.

State Fair Trade Laws and Retail Market Area

An attempt is made in Table 5 to find a quantitative expression for the legal developments of fair trade during the last decade. This table combines the legal status of fair trade legislation in the various states on January 1, 1951, and on August 1, 1961, with the total retail sales volume by states for 1958. The purpose of Table 5 is to indicate the portion of retail sales that took place in jurisdictions with effective fair trade acts at the beginning

TABLE 5

LEGAL STATUS OF FAIR TRADE LAWS: JANUARY 1, 1951 AND AUGUST 1, 1961
ABSOLUTE AND RELATIVE SHARE OF 1958 TOTAL RETAIL SALES BY STATES[a]

States	Retail sales in 1958		Legal status of fair trade laws[c]		
			January 1, 1951	August 1, 1961	
	Amount (thousands)	Per cent		Act in general	"Non-signer" clause
United States	$ 200,370,378	100.00			
Alabama	2,111,783	1.28	effective	no decision	no decision
Alaska	174,514	0.10	no law	-	-
Arizona	1,001,004	0.70	effective	const.	const.
Arkansas	1,333,632	0.77	effective	no decision	unconst.
California	15,643,974	9.96	effective	const.	const.
Colorado	1,726,759	1.05	effective	const.[d]	unconst.
Connecticut	2,617,526	1.55	effective	const.	const.
Delaware	492,899	0.29	effective	const.	const.
D. of Columbia	1,212,450	0.65	no law	-	-
Florida	4,014,417	2.91	unconst.[d]	const.[d]	unconst.
Georgia	2,963,217	1.76	effective	no decision	unconst.
Hawaii	426,115	0.26	effective	const.	const.
Idaho	670,057	0.41	effective	no decision	no decision
Illinois	11,018,913	6.38	effective	const.	const.
Indiana	4,512,673	2.58	effective	const.	unconst.
Iowa	3,077,580	1.68	effective	no decision	unconst.
Kansas	2,200,585	1.22	effective	no decision	unconst.
Kentucky	2,201,101	1.29	effective	const.	unconst.
Louisiana	2,339,289	1.47	effective	const.	unconst.

and the end of the period. It furthermore provides a standard to measure the significant difference in importance of the individual fair trade acts.

The underlying assumptions of Table 5 are twofold. First, it can be assumed that the relative share of total retail sales of the various states is rather constant; i.e., the occurring shifts between the relative position as to retail sales volume of the individual states during a decade, due to migration and different rates of positive or negative rates of economic growth, are most likely not significant enough to defeat the purpose of Table 5 in which the 1958 retail sales statistics have been employed as weights for the whole period under consideration. Secondly, it seems to be a reasonable assumption that the composition of the retail sales in the various states is to a high degree similar, so that, knowing that fair trade is only practical for a very limited group of retailed goods and within this group with various degrees of practicability, it may be assumed that the application of the fair trade provisions is more or less the same in the different states.

Table 6 is compiled from Table 5. While 88.2 per cent of the states had effective fair trade laws on January 1, 1951, this percentage was reduced considerably during the

TABLE 6

PERCENTAGE OF STATES WITH EFFECTIVE FAIR TRADE LAWS GROUPED BY 1958 RETAIL SALES VOLUME FOR JANUARY 1, 1951 AND AUGUST 1, 1961[a]

	Per cent of total retail sales[b]	Per cent of states with effective fair trade laws[d]	
		January 1, 1951	August 1, 1961
All states[d]	100.00	88.2	49.0
Largest 10 states	57.78	80.0	60.0
Second 10 states	19.93	90.0	40.0
Third 10 states	12.60	100.0	30.0
Fourth 10 states[d]	6.44	90.0	40.0
Smallest 11 states	3.24	81.8	72.7

[a]Source: Compiled from Table 5.

[b]Percentages may not add to 100.00 because of rounding.

[c]Laws on which no court has passed judgment as yet are assumed to be effective. The states in which the fair trade act in general and/or the nonsigner clause has been held unconstitutional, either by the highest court or by a lower court, are assumed to have ineffective fair trade laws.

[d]District of Columbia included.

TABLE 7

PERCENTAGE OF 1958 RETAIL SALES TRADED UNDER EFFECTIVE FAIR TRADE LAWS: JANUARY 1, 1951 AND AUGUST 1, 1961[a]

	Per cent of total retail sales[b]	Per cent of retail sales trade under effective fair trade laws[c]	
		January 1, 1951	August 1, 1961
All states[d]	100.00	88.15	56.60
Largest 10 States	57.78	85.64	68.51
Second 10 States	19.93	87.10	38.38
Third 10 States	12.60	100.00	35.16
Fourth 10 States[d]	6.44	89.90	37.42
Smallest 11 States	3.23	90.12	76.85

[a]Source: Compiled from Table 5.

[b]Percentages may not add to 100.00 because of rounding.

[c]Laws on which no court has passed judgment as yet are assumed to be effective. The states in which the fair trade act in general and/or the nonsigner clause has been held unconstitutional, either by the highest court or by a lower court, are assumed to have ineffective fair trade acts.

[d]District of Columbia included.

next 10 years to 49.0 per cent on August 1, 1961. The percentage decline was least for the smallest 11 states, while the largest 10 states are second in this respect. The latter group has legally well entrenched fair trade histories, while in the former group of states the issue might not be significant enough to create an effective opposition. Table 7, which is also compiled from Table 5, expresses the same developments in terms of retail sales volume. It shows that the percentage of retail sales traded in states which have effective fair trade acts dropped from 88.15 per cent in 1951 to 56.60 per cent in 1961. The fact that it has been on the average the states with relatively smaller populations which invalidated the effectiveness of their fair trade acts explains why the percentage of retail sales traded in states with effective fair trade acts fell less than the percentage of the total number of fair trade acts that did survive the period 1951 - 1961.

As will be amplified in Chapter VIII, the percentage drop of the total retail sales traded in fair trade areas can hardly be accepted as a true quantitative measure of the decline in fair trade due to legal developments. The more non-fair trade areas drive a wedge between the states which have legally solidly established fair trade

acts on the statute books, the harder becomes the enforcement problem to maintain the successfulness of individual fair trade programs, causing several practitioners to abandon their programs. Regardless of the significance or insignificance expressed in the percentage of total retail sales of the states that have invalidated the fair trade acts, the trend that they seem to have established in their legal reasoning undoubtedly has discouraged present fair traders in possible expansion plans for their existing programs and has kept out of the fold of fair traders potential participants who were weighing the pros and cons of a fair trade program in relation to the long run market developments for their products.[32]

Summary of Statistical Data

The available statistical information on the influence of fair trade legislation is highly inadequate to substantiate theoretical conclusions. However, most estimates in terms of fair traded volume of retail sales lead to the general conclusion that the existing fair trade legislation has effected the pricing of a fraction of the total retailed volume of goods during any year the fair

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[32] Infra, Chapter VIII, pp. 229-38.

trade laws have been on the statute books.

The data on the composition of the fair trade population indicate a strong concentration of fair trade pricing practices in a few industrial classifications, while furthermore a small number of large manufacturers handle a remarkably large percentage of the total fair-traded retail sales.

Effective fair trade acts extended their influence over a smaller geographic area in 1961 than in 1951, and, however to a lesser degree, affected a smaller percentage of total retail sales in 1961 than in 1951. Especially these statistics need extensive descriptive qualification before they can be used to indicate the quantitative decline in actual fair trade pricing due to developments during the last decade.

CHAPTER III

HISTORICAL BACKGROUND AND LEGAL JUSTIFICATION

This chapter reviews the most important developments in the fair trade situation up to the beginning of the last decade. The first section pertains to developments under federal law before 1937. The next section covers the development of the fair trade structure by state legislation. The enactment of the first federal fair trade statute in 1937 is treated in a separate section. This development meant an important deviation from the spirit and interpretation of the federal antitrust laws, and strengthened the effectiveness of state fair trade legislation. The U. S. Supreme Court formulated the prevailing legal justification of fair trade provisions in 1936. The final section of this chapter presents the Court's line of reasoning on this point.

Developments under Federal Law

Prior to the enactment of the federal antitrust laws, the legality of resale price maintenance rested on common law and on state laws regulating monopoly and unfair trade practices. Up to the close of the nineteenth century "... the legality of the manufacturer's right to set and to maintain resale prices was unlimited if not unquestioned."[1] In the few instances in which the courts were faced with price maintenance in sales involving interstate trade, they generally upheld the practice.[2] The development of large scale national advertising of identified goods during the last half of the nineteenth century stimulated the development of various schemes of resale price maintenance which represented the modern form of cooperation between manufacturers and their distributors for the elimination or softening of the rigors of price competition among the latter.[3] Since 1900, one by one the

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[1]E. R. A. Seligman and R. A. Love, Price Cutting and Price Maintenance (New York: Harper & Bros., 1932), p. 84.

[2]U. S. Congress, House, Select Committee on Small Business, Fair Trade: The Problems and Issues, Report No. 1292, 82d Cong., 2d Sess., 1952, p. 27.

[3]Federal Trade Commission, Resale Price Maintenance, Part I, 1929, p. 99.

different schemes have been brought before the courts from time to time to test their legality as restraints of trade under patents, copyrights or trademarks, or as violations of the common law or of specific legislation.[4] Since there were no price maintenance statutes passed by the U. S. Congress prior to 1937, the law in relation to resale price maintenance was a product of judicial interpretation. "Consequently the outcome was a result of a process of evolution, was largely patchwork rather than systematic, and was marked by decisions governing special cases instead of broad, general principles."[5]

The Sherman Antitrust Act, enacted in 1890, for the first time brought price maintenance within the scope of federal law. In 1892 Mr. Louis H. Greene of Ohio was lodged in jail by the U. S. marshal for having promised a purchaser of his alcohol a liberal rebate on condition that the buyer would refrain from reselling the product at less than the seller's list prices. The court ordered the release of Mr. Greene and held that he had only ar-

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[4] Ibid., p. 98.

[5] E. T. Grether, Price Control under Fair Trade Legislation (New York: Oxford University Press, 1939), p. 15.

ranged a reasonable protection for his business not violative of the Sherman Act.[6] The general rule under the Sherman Act that contracts for maintaining prices are illegal restraints of trade subject to criminal and civil penalties was not accepted until 1911. Prior to that date, the great majority of decisions sustained the validity of resale price maintenance contracts covering patented, copyrighted and secret process commodities.[7] The experience of the Edison Company may be cited as an indication of the status of resale price maintenance before 1911. In over fifty cases which the company instituted between 1904 and 1911, the courts without exception upheld and enforced the company's price maintenance program.[8]

In 1911 the celebrated Dr. Miles Medical Co. case[9] reached the U. S. Supreme Court for final determination. The Miles Company had made contracts with over

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[6] In re Greene, 52 Fed. 104 (1892), as cited in S. A. Weigel, The Fair Trade Acts (Chicago: The Foundation Press, 1938), p. 23.

[7] Ibid.

[8] Seligman and Love, op. cit., p. 84.

[9] Dr. Miles Medical Company v. John D. Park & Sons Co., 220 U. S. 373 (1911).

400 consignee-wholesale dealers and with some 25,000 retailers, who were selected by the Miles Company's consignee-wholesalers, to maintain stipulated prices at wholesale and retail. The Court established the principle that resale price maintenance contracts involving interstate sales constitute unlawful restraints of trade at common law and accordingly are invalid and unenforceable by injunctive relief or other civil remedies. By implication the Court held that such contracts also contravened the Sherman Anti-trust Act.[10] The Court argued that:

> ... where commodities have passed into the channels of trade and are owned by the dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.[11]

The effect of this decision on subsequent cases under the Sherman Act and on cases arising since 1914 under the Clayton Act and the Federal Trade Commission Act was that effective resale price maintenance in interstate trade

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[10] House Report 1292, op. cit., p. 28.

[11] Dr. Miles v. Park, op. cit., at 409.

became impossible except by resort to the agency device or by provisions in a bona fide license under a patent as to patented articles.[12] Within a decade the U. S. Supreme Court restricted resale price maintenance by holding illegal: affixing a notice to a patented article warning that cut price sales would constitute infringement of patent rights;[13] the use of a license to allow the usage of a patented article where the license was obviously a guise to protect prices;[14] espionage to ascertain price cutters and thereupon refusing to sell to them and to resume sales to them after their assurances of price maintenance.[15] The U. S. Supreme Court condemned the practices of the producer who attempted to maintain resale prices by various methods, including causing dealers to be enrolled on lists of undesirable purchasers who were not to be supplied with the commodity; employing agents to report dealers who cut prices and utilizing symbols on cases containing the merchandise to

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[12]Weigel, op. cit., p. 27.

[13]Bauer v. O'Donnell, 229 U. S. 1 (1913).

[14]Straus v. Victor Talking Machine Co., 243 U. S. 490 (1917), and Boston Store v. American Graphophone Co., 246 U. S. 8 (1918).

[15]Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441 (1921).

ascertain the names of dealers who cut prices.[16]

This general development[17] reached by 1931 a state in which the producer who sold his goods outright was denied most of the devices which are essential to an effective refusal to sell to maintain resale prices, "... so that in many instances there remained little more than the privilege of suggesting resale prices."[18] Grether summarizes the legal status of resale price maintenance in 1931, insofar as the law had become distilled in specific form, as follows:

> 1. The presumed preferential basis for the treatment of secretly processed, patented, and copyrighted products had been shown to be existent in presumption only, and not in law.
> 2. A number of methods employed in enforcing resale prices, such as group action, license, notice, contract, pseudo-agency, and avowed or implied cooperative action to coerce dealers, had been declared unlawful.
> 3. It was held that a purchaser with full title was not subject to interference for purposes of price control.[19]

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[16] Ibid., at 448-450.

[17] The detailed legal history in this field down to the enactment of the first state fair trade act in 1931 can be found in: Seligman and Love, op. cit., Part I and Appendix 3C.; F.T.C., 1929, op. cit., Part I, Chapter VII; A. Haring, Retail Price Cutting and Its Control by Manufacturers (New York: The Ronald Press, 1935), pp. 81-122.

[18] Seligman and Love, op. cit., p. 84.

[19] Grether, op. cit., pp. 16-17. It is interesting to observe that the legal status of vertical price fixing in

Demands for passage of a Federal Act legalizing resale price maintenance contracts covering articles sold in interstate commerce took form in 1912, as a reaction on the U. S. Supreme Court's decision in the Dr. Miles case. The growth in the importance of branded goods and advertising had significantly increased the manufacturer's incentives to maintain resale prices. The early drive for the legalization of resale price maintenance was spearheaded by the American Fair Trade League, an association of manufacturers of branded goods, organized in 1913. Throughout the approximately 20 years of its leadership in the fair trade movement the league, with the more or less active cooperation of various distributor associations, concentrated unsuccessfully its efforts on securing federal legislation sanctioning resale price maintenance contracts.[20] The passage of the National Industrial Recovery Act in 1933 brought the activities

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the State of Texas, which never passed a fair trade act and where vertical price agreements fall under the scope of the Texas Antitrust Act of 1889, is significantly similar at present to the national situation in this respect in 1932. See: Ford Hall and Alfred L. Seeley, "Vertical Price Fixing in Texas," Texas Law Review, 35 (1957), pp. 772-811.

[20]Statement of E. S. Herman before a Subcommittee on the Committee on Interstate and Foreign Commerce. Hearings on H. R. 10527, etc., House of Representatives. 86th Cong. 2d Sess., 1958, p. 631.

for a federal resale price maintenance statute temporarily to a standstill.[21] Until the National Industrial Recovery Act was declared unconstitutional on May 27, 1935, the fair trade proponents did have what they wanted through the retail codes legalized under this act which established resale prices.[22] The rapid developments in state fair trade legislation and the resulting federal enabling legislation in the form of the Miller-Tydings Amendment to the Sherman Act can be explained from the fact that the NRA codes "... left a deposit not in law but in trade experience, practices, and attitudes" as to resale price maintenance.[23]

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[21]The first national resale price maintenance bill was introduced February 12, 1914, and was known as the Stevens Bill. About 25 witnesses, the majority of them retail organizations, testified in favor of the bill and there were no witnesses in opposition. Still the bill was not eancted. Next the Stephens Bill was introduced in the first session of the 64th Congress. During the following years until the enactment of the National Industrial Recovery Act, the so-called Capper-Kelly Bill was continually introduced every session of Congress. Hearings on this bill in 1926 presented the first active opposition. Among other things a witness challenged the value of the favorable testimony of a National Housewives' League which had allegedly truthfully represented many consumers in these and previous hearings on the issue. (Federal Trade Commission, Report on Resale Price Maintenance, 1945, pp. 39-43.)

[22]C. I. Kanter and S. G. Rosenblum, "The Operation of Fair Trade Programs," Harvard Law Review, 69 (1955), p. 318.

[23]Grether, op. cit., p. 17.

The development was "... the response to a cry of distress from groups of people who have found their voices, and who have learned, particularly during the days of the NRA, how to use them in unison and effectively."[24]

Developments under State Law

New Jersey was the first state to enact an actual resale price maintenance law. The act, passed in 1913, permitted resale price fixing by notice in order to protect the good will of makers of branded goods and made a violation of the terms in the notice actionable.[25]

In the early thirties active leadership of the fair trade movement shifted from the manufacturers-dominated league[26] to various associations of wholesale and retail merchants, of which the National Association of Retail Druggists was by far the most important. The new leadership of the fair trade movement temporarily abandoned the attempt to secure favorable federal legislation on resale price maintenance and sought passage of state laws to the same ef-

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[24]H. Shulman, "The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels," Yale Law Journal, 49 (1940), p. 623.

[25]Note, Harvard Law Review, 69 (1955), p. 318.

[26]Supra, p. 50.

fect.[27] The first resulting state fair trade act which was worded in the modern form was enacted during 1931 in California. This statute merely permitted producers and owners of trademarked goods to establish resale prices by contract if the products were in free and open competition with similar products, but the statute specifically denied such contracts for horizontal price fixing. "At the time, this act aroused no great interest, nor did it lead to new developments in the state or nationally, because it added nothing to the existing law under judicial interpretation in the state."[28] But in 1933 the California legislature added a one sentence amendment to the Fair Trade Act of 1933 - the famous nonsigner provision - which became the heart of the whole statutory fair trade scheme. Without that provision, "... fair trade contracts in any state would be meaningless, because the firms who precipitate price wars are the very ones who would not sign the fair trade contract."[29] This

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[27]Statement of E. S. Herman, Hearings on H. R. 10527, etc., loc. cit.

[28]Grether, op. cit., p. 18.

[29]Opinion of the Department of Commerce in the U. S. Congress, House, Hearings on Resale Price Maintenance before the Antitrust Subcommittee of the Committee on the Judiciary. H. R. 4365, etc., 82d Cong., 2d Sess., 1952, p. 602.

amendment[30] incited renewed activity, interest and enthusiasm. Regardless of the federal inactiveness and view on resale price maintenance, the state legislatures definitely seemed to favor it after California had set the example. "Under the efficient propulsion of retailers' organized efforts, especially those of the retail druggists," other states began to imitate California.[31] By the end of 1936 fourteen states had followed the California lead.[32]

The period 1933-1936 was characterized chiefly by testing in the courts. The constitutionality of a fair trade statute containing a nonsigner provision was first[33] considered in New York in the case Doubleday, Doran & Co. v.

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[30]The author of the famous nonsigner provision is reportedly E. S. Rogers, an attorney, who happened to be in Los Angeles when the inadequacy of the 1931 fair trade statute was painfully apparent. One of his clients arranged for a luncheon meeting with a group of business men and trade association executives. It is reported that the attorney pondered the fair trade problem, reached for a menu lying handy, wrote a sentence, passed it to a member of the group and said, "I think that will do it." The actual California nonsigner provision (and consequently of many other states) is identical to this draft with the exception of only one word. (Weigel, op. cit., p. 36.)

[31]Grether, op. cit., p. 18.

[32]Ibid., p. 19.

[33]"A Symposium on the Fair Trade Laws," Fordham Law Review, 27 (1958), p. 69.

R. H. Macy & Co.[34] The court presented several grounds on which it held the nonsigner provision unconstitutional.[35] Later in 1936, appeals were taken to the U. S. Supreme Court from decisions of the highest court of Illinois which had upheld the whole fair trade act of that state.[36] In Old Dearborn Distributing Co. v. Seagram-Distillers Corp.[37] the U. S. Supreme Court affirmed the decisions of the Illinois court, and promulgated the dubious trademark theory of fair trade.

Following this U. S. Supreme Court decision there was a tremendous boom in the fair trade movement throughout the United States. During 1937, 27 additional states enacted fair trade laws,[38] bringing the total of fair trade states to 41. This total increased later to 45 out of 48 states.[39] The California Fair Trade Act of 1933, together with a proposal drafted in 1937 by the National Association of Retail

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[34]269 N. Y. 272, 199 N. E. 409 (1936).

[35]Chapter V, infra, p. 96.

[36]Seagram-Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N. E. 2d 940 (1936).

[37]299 U. S. 183 (1936).

[38]Grether, op. cit., p. 19.

[39]Missouri, Texas and Vermont never enacted a fair trade act. Hawaii and Puerto Rico did, Alaska did not.

Druggists, has served as a model for the 44 other states which enacted fair trade statutes.[40] In general all statutes are similar in purpose, but there are numerous variations in detail.[41] The all-important California nonsigner provision was copied in all state statutes:

> This amendment ... was responsible for a major amendment to the Federal Antitrust laws; was the basic factor in revolutionizing the marketing policies of scores of nationally known manufacturers and the sales practices of thousands of retailers; and was the center of renewed controversy, throughout the nation, as to the merits of sanctioning private control over resale prices.[42]

The fair trade proponents like to bring out as an indication of the public acclaim and the wide acceptance of the fair trade policy by the people's representatives, the favorable voting records by which most state fair trade laws were enacted.[43] The spontaneous public support becomes doubtful, however, if it is known that the National Association of Retail Druggists made a deliberate and systematic effort to

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[40]The California act was copied verbatim by 20 states. Of those states 10 copied two serious typographical errors in the original California act. (Ibid.)

[41]House Report 1292, op. cit., p. 33.

[42]Weigel, op. cit., p. 37.

[43]Statement of H. S. Waller, National Association of Retail Druggists, in Hearings on 10527, etc., op. cit., p. 465.

prevent public hearings on fair trade bills introduced in state legislatures and that it was eminently successful in this regard as public hearings on the fair trade bill were only held in three of the first thirty-two states in which fair trade legislation was passed.[44]

The Miller-Tydings Act

Following the decision of the U. S. Supreme Court in 1935, declaring the National Recovery Act unconstitutional, federal legislation which would legalize resale price maintenance contracts for commodities moving in interstate commerce was again sought through the Miller-Tydings Bill.[45] This bill was designed to obviate the possibility that fair trade acts would be invalidated for conflicting with the Sherman Act. Or, which is the same, to negate the U. S. Supreme Court decision in the Dr. Miles case of 1911,[46] in which resale price maintenance contracts were held to be in restraint of trade.[47]

The National Association of Retail Druggists de-

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[44]Statement of E. S. Herman, ibid., p. 603.

[45]F.T.C., 1945, op. cit., p. 43.

[46]Supra, pp. 46-7.

[47]E. J. Kohrs, "Fair Trade and the State Constitutions," Vanderbilt Law Review, 10 (1957), p. 416.

veloped an elaborate system of pressure on Congress.[48] In the absence of a federal enabling statute it would namely have been "... necessary for a manufacturer to be incorporated in each state in which he wished to issue fair trade contract"[49] on the basis of state fair trade provisions to prevent violation of the Sherman Act in relation to interstate trade. This enabling statute, known as the Miller-Tydings Amendment to the Sherman Act, was passed by Congress in 1937 as a rider to an appropriation bill for the District of Columbia, after attempts at enacting it as a separate statute had failed. The vigorous opposition of the President apparently had doomed the act; its final acceptance demonstrated the weight of the pressure behind it.[50] The President signed the bill into law under protest, objecting that the measure would increase the consumer prices.[51] This amendment, modifying the Sherman Act and limiting application of the Federal Trade Commission Act accordingly, re-

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[48] F.T.C., 1945, op. cit., pp. 64-66.

[49] C. H. Fulda, "Resale Price Maintenance," University of Chicago Law Review, 21 (1954), p. 176.

[50] Grether, op. cit., p. 22.

[51] For a detailed account of the legislative history, see CCH Trade Regulation Reporter, Vol. I, 1959, p. 4303; also Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (1944).

moved the bar of illegality to the making of resale price maintenance contracts covering commodities sold in interstate trade if they were to be resold in a state where such contracts had been legalized with respect to intrastate trade.[52] This amendment was generally held to have removed all obstacles to the enforcement of state fair trade acts in interstate commerce including the use of the nonsigner provisions.[53]

Legal Justification: Trademark Theory

By far the most important court decision concerning resale price maintenance was contained in the Old Dearborn case[54] decided by the U. S. Supreme Court in December 1936. This decision represented a signal victory for the fair trade movement.[55]

Although the Court by the use of arguments presented in strong language did indicate a conviction that state fair trade legislation was constitutional, this was not the issue before the Court. Neither did the Court re-

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[52]F.T.C., 1945, op. cit., p. XXVII.

[53]See e. g. Pepsodent v. Krauss, op. cit.

[54]Supra, p. 55.

[55]House Report 1292, op. cit., p. 34.

verse the Dr. Miles decision. The Court settled in this case the question of whether or not the constitutionality of such legislation was a matter of determination by the state through its legislature and its courts or by the U. S. Supreme Court.[56] Regardless of this limited scope of the decision, the Court delivered a substantial and influential justification for fair trade legislation.

The main points covered by the Supreme Court's decision can be summarized as follows:

> 1. The provision of the state fair trade act which declares as not in violation of the laws of Illinois certain contracts for maintenance of resale prices on identified articles does not infringe upon the property right of the owner to fix the price himself at which he will sell his property; it does not attempt to fix prices; it does not delegate to private persons the power to fix prices in violation of the due process clause of the Constitution.
> 2. The nonsigner provision of the fair trade act does not result in a denial of due process; does not result in a denial of equal protection of the laws.
> 3. The phrase "fair and open competition" as used in the act is not so vague and indefinite as to deny due process.[57]

Mr. Judge Sutherland, who delivered the decision, began by reviewing the contrary precedent of the Dr. Miles

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[56]McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N. W. 2d 608, at 617 (1955).

[57]F.T.C., 1945, op. cit., p. 92.

case. In that case it was stated: "Nor can the manufacturer by rule or notice, in absence of contract or statutory right even though the restriction be known to purchasers, fix prices for future sales."[58] The fact that those agreements were now permitted under state law was of decisive influence.

The Court based its approval of the nonsigner provision on the trademark theory. This theory is an attempt to answer the fundamental constitutional objections to the fair trade scheme, "... which stems from the fact that an individual may acquire unconditional title to goods and still be restricted in disposing of them, by the terms of a contract to which he was not a party."[59] The Court's justification of the subjection of a party to the terms of an agreement he never made is contained in the following quotation concerning the nonsigner provision.

> (It) does not deal with the restriction upon the sale of the commodity qua commodity but with that restriction because the commodity is identified by the trademark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in the forbidden use of the trademark, brand or name in accomplishing such disposition.[60]

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[58]As cited in Old Dearborn, op. cit., at 191.

[59]Kohrs, op. cit., p. 416.

[60]Old Dearborn, op. cit., at 193.

The Court classified good will as a real property, distinct from the physical product:

> ... injury to which ... is a proper subject for legislation....[61] There is nothing in the act to preclude the purchaser from removing the mark or brand from the property ... and then selling the commodity at its own price....[62]

In this way the nonsigner could separate the physical property, which he owns, from the good will, which is the property of another. This solved the due process objections to the nonsigner provision according to the Court.

The primary purpose of the fair trade scheme was stated as:

> ... to protect the property - namely, the good will of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.[63]

Finally, the Court pointed out that there is a great body of fact and opinion

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[61] Ibid., at 194.

[62] Ibid., at 195. At this point the Court justified the very serious due process objections to the nonsigner provision to a large extent on the impossible. Trademark and brand names, not even mentioning registered forms of products and packaging, are quite frequently inseparable without the actual destruction of the physical product.

[63] Ibid., at 193.

> ... tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods but injurious to the general public as well.[64]

It was admitted that "... there is evidence, opinion, and argument to the contrary...,"[65] but the Court considered that

> ... where the question of what the facts established is a fairly debatable one, we accept and carry into effect the opinion of the legislature.[66]

This decision and the trademark theory of fair trade contained in it, blindly accepts the purpose of fair trade legislation to be the protection of the value of good will as symbolized by trademarks. One writer remarks that if the Court would only recognize the open secret that the primary accomplishment of fair trade laws is to protect the smaller independent retailers from price competition by discount houses and other rivals, it would seem to automatically deflate the trademark theory as a basis for sustaining the fair trade laws.[67] Another authority remarks concerning the function and object of fair trade laws that it

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[64] Ibid., at 195.

[65] Ibid.

[66] Ibid., at 196.

[67] Kohrs, op. cit., p. 425.

> ... is not to protect the good will symbolized by the trademark, but to alleviate the rigors of price competition between distributors.... The concern of the acts with trademarked goods is accidental and incidental....[68]

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[68]Shulman, op. cit., p. 623.

CHAPTER IV

THE SCHWEGMANN AND WENTLING DECISIONS THE MCGUIRE AMENDMENT

The course of fair trade ran smoothly in favor of the fair trade proponents after the passage of the Miller-Tydings Amendment to the Sherman Act.[1] The depressed economic condition of the 1930's and the following Second World War years created the special circumstances in which a scheme like fair trade seemed to find fertile soil to flourish. With the return of more normal economic conditions the restrictive characteristics or fair trade legislation in relation to price competition at the retail level became too face strong opposing economic pressures. As one author generalizes:

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[1]R. Stachler, "The Protective Veil Given Mail Order Houses in Fair Trade Jurisdiction," University of Cincinnati Law Review, 25 (1956), 495.

> An expanding economy in its wealthiest period strains at every restraint upon the free market, whether the particular restraint be considered good or bad.[2]

The transition of industry from war production to the production of consumer goods had more or less erased the depression and war-time created backlog in the demand for consumer goods by the end of the 1940's, and the market for those goods adopted by this time at an accelerated rate the characteristics of a "buyers" market. In this situation new developments in retailing to facilitate the sale of mass produced consumer goods could not be prevented. Volume sales had become imperative for the planning and operation of the modern production process. Fair trade meant basically the elimination of the most potent item in a sales promotion scheme, i.e. its intent was to prevent the development of mass production in industry to be copied in retailing of which the resulting economies could be passed on to the consumer in retail price reductions.[3] Consumer

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[2]R. K. Bates, "Constitutionality of State Fair Trade Acts," Indiana Law Journal, 32 (1957), 130.

[3]Economists in many instances have regarded the percentage of distribution cost to total cost as too high. See G. R. Smith and H. C. Smith, An Economic Appraisal of Resale Price Maintenance (New Orleans: Loyola University, 1957), p. 65.

attraction through price reductions was of paramount importance for the development of large volume, low margin sales at the retail level.[4] The consumer goods industry was caught in the middle of the controversy. By adhering to a rigid fair trade program the important loyalty of numerous, but small high-margin retailers would be assured, giving the manufacturers products an extensive exposure and sales promotion. The frequent large orders from large volume, fast turn-over retailers would however be forsaken by a tightly enforced fair trade program. This situation led to much double dealing in relation to fair trade.[5]

It was under those circumstances that two legal decisions in 1950 and 1951 struck severe blows at the fair trade structure from which it never fully recuperated. In the Schwegmann case[6] the U. S. Supreme Court construed the

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[4]It has been estimated that the average retail margins was approximately 28 per cent in 1948. It is further mentioned that this average remained almost unchanged since the 1920's. "Distribution Costs: Really Going Down?," Business Week, January 12, 1952, p. 124.

[5]See especially John Harms, Our Floundering Fair Trade (New York: Exposition Press, 1956).

[6]Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951).

Miller-Tydings Act as not applying to nonsigners of fair trade contracts since it sanctioned only "contracts and agreements" to maintain resale prices and did not contain any nonsigner provision exemption from the Sherman Act. Shortly after this decision tne U. S. Supreme Court vacated and remanded a decision by the Circuit Court of Appeals of the Third Circuit in which another flaw in the federal law was uncovered.[7] This court has held that a state fair trade act could not control a nonsigner retailer, although living and doing business in the fair trade jurisdiction, whose sales were made in interstate commerce by direct mail and express.

Those two decisions resulted in a frantic activity of the fair trade proponents to repair the damage done. Those efforts resulted in a new federal enabling act - the McGuire Act - passed by Congress slightly over a year after the Schwegmann decision, which allowed the enforcement of the state nonsigner provisions in interstate transactions and also negated the Wentling decision.

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[7]Sunbeam Co. v. Wentling, 185 F. 2d 903 (3d Cir. 1950), vacated and remanded, 341 U. S. 944 (1951), modified, 192 F. 2d 7 (3d Cir. 1951).

The Schwegmann Decision

The U. S. Supreme Court's Schwegmann decision, which was announced on May 21, 1951, struck a most serious blow at the fair trade movement.[8] In that case Maryland and Delaware distributors of gin and whiskey sought to enjoin Schwegmann from New Orleans who had refused to sign a resale price maintenance agreement covering the complainants' product from selling their product below fair trade prices.[9] Schwegmann, whose retail business had originated, and after that had grown rapidly, on a price appeal minimum service basis,[10] fought vigorously to maintain this policy of operation for the widest assortment of goods possible, by opposing the fair trade regulations. According to the Louisiana Fair Trade Act Schwegmann should have abided by the prices stipulated by the manufacturers or distributors in contracts with other retailers in Louisiana. On the strength of the Louisiana nonsigner provision Calvert brought suit

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[8]U. S., Congress, House Select Committee on Small Business, Fair Trade: The Problems and Issues, Report No. 1292, 82d Cong., 2d Sess., 1952, p. 35.

[9]C. H. Fulda, "Resale Price Maintenance," University of Chicago Law Review, 21 (1954), 176.

[10]Testimony of John Schwegmann in U. S., Congress., House, Antitrust Subcommittee of the Committee on the judiciary, Hearings on H. R. 4365, etc., Resale Price Maintenance, 82d Cong., 2d Sess., 1952, pp. 282-335.

to enjoin Schwegmann from selling below the stipulated fair trade price, which had been part of the provisions of over one hundred fair trade contracts with other retailers in Louisiana. Schwegmann's main argument of defense was that, in his opinion, the nonsigner provision of the state fair trade statute could not be applied to products moving in interstate trade as the Miller-Tydings Amendment to the Sherman Act did not exempt this provision as a violation of the latter federal statute.

Both the District Court and the Court of Appeals upheld the nonsigner provision of the state fair trade act in this case.[11] Schwegmann, however, carried the issue to the U. S. Supreme Court. By a five to three vote this Court reversed the decision of the two lower courts. The opinion was written by Justice Douglas. Justices Frankfurter, Black, and Burton constituted the dissenting minority.

The Court argued that it was clear that this price maintenance scheme as authorized by the state was completely valid in intrastate trade. But as far as interstate trade was concerned the provisions and leading cases of the Sherman Act were conclusive in condemning the scheme

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[11]House Report No. 1292, loc. cit.

if it were not for the exceptions allowed by the Miller-Tydings Amendment. According to the Court the real question therefore had to do with the determination of the scope of the exceptions of the Miller-Tydings Act. This Act clearly permitted specific contracts to maintain resale prices, but

> What is granted is a limited immunity - a limitation that is further emphasized by the inclusion in the state law of the nonsigner provision. The omission of the nonsigner provision from the federal law is fatal to the respondants' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it.[12]

In respect to this matter the Court reviewed the legislative history of the Miller-Tydings Amendment and found no evidence in congressional debates or committee reports that Congress intended to grant an exception to non-contractual price maintenance,[13] which form of price

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[12] Schwegmann v. Calvert, op. cit., at 388.

[13] Although the legalizing of the state nonsigner provisions in interstate commerce appeared at different occasions in the congressional debates on the Miller-Tydings Bill and similar legislative proposals, the Court relied heavily on the following statement of the co-author of the bill that ultimately was passed by Congress. Senator Tydings stated on the floor: "What does the amendment do? It permits a man who manufactures an article to state the minimum resale price of the article in a contract with the man who buys it for ultimate resale to the public ... (81 Cong. Rec. 7495, as cited in, ibid., at 394.)

maintenance was termed by the Court as:

> That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that resorts to coercion.[14]

The fair trade proponents' interpretation of the Miller-Tydings Amendment was repudiated by the Court in its concluding remark when it said:

> We could conclude that Congress carved out the vast exception from the Sherman Act now claimed only if we were willing to assume that it took a devious route and yet failed to make its purpose plain.[15]

The Court could find no indication from what the Congressional sponsors wrote

> ... that the distributors were to have the right to use not only a contract to fix retail prices but a club as well.[16]

The whole opinion of the Court reflects the degree to which the Court was disturbed by both the coercive characteristics of the nonsigner provision and its effect on competition. The Court refused to believe that Congress had

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[14] Ibid., at 388.

[15] Ibid., at 395.

[16] Ibid.

> ... desired to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it ... Contracts and agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing.[17]

Justice Frankfurter, who wrote the dissenting opinion, based his contrary conclusion largely on the fact that when the Miller-Tydings Amendment was enacted, every state law then in existence contained a nonsigner provision. In his opinion the purpose of Congress was to support these laws as they were, not as they should have been. To exclude the nonsigner provision was in his opinion contrary to the word of the statute and to the legislative history.[18]

The many expressions of hostility employed by Justice Douglas with reference to the nonsigner provision should not obscure the technical reason of the decision: The plain language used by Congress in the Miller-Tydings Act limited the application of that amendment to parties to a contract.[19] It should however be noted that this important conclusion could have easily been reached without the

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[17] Ibid., at 390.

[18] Ibid., at 401.

[19] Fulda, op. cit., 177.

extensive condemning remarks at the address of the all-important nonsigner provision of the fair trade structure. The fact that this path was not followed by the Court resulted in the probably unique situation that the argumentation of this decision had a profound and long lasting effect in weakening the whole fair trade scheme after the actual decision had been reversed by congressional action in the McGuire Amendment.[20] The loss of prestige which fair trade suffered as a result of the hostile Schwegmann decision could not be erased by this amendment.[21]

The Wentling Decision

Already before the Schwegmann decision, the U. S. Court of Appeals of the Third Circuit had initiated the unfavorable fair trade developments by reversing on November 10, 1950 a district court decision which had granted an injunction against a nonsigner retailer forbidding him to sell below fair trade prices both in intrastate and inter-

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[20]Many examples to this effect are contained in Chapter V, infra.

[21]See for example Bates, op. cit., 130.

state commerce.[22] The case concerned the activities of Wentling, a Pennsylvania mail-order operator, who was selling Sunbeam's electric shavers by mail to other states from his by fair trade legislation covered home state at prices below those stipulated by Sunbeam.

The court argued that at least some of the defendant's business was interstate trade. If it were alone for the fact that

> ... the purchase of advertising space in a publication published in another state and of national circulation is interstate commerce.[23]

The interstate commerce clause of the Federal Constitution, according to the court, has as one aim

> ... the protection of the interstate trade against state interference. As a limit on state powers, it is a free trade charter for national commerce.[24]

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[22]The U. S. Supreme Court later granted centiorari, vacated the judgment of the Circuit Court, and remanded it for consideration in the light of the Schwegmann decision. On remand the Third Circuit held that under the Schwegmann doctrine, Sunbeam was not entitled to any protection against Wentling, even in intrastate transactions: Supra, Note 7.

[23]Sunbeam v. Wentling, op. cit., at 906.

[24]H. Rottschaefer, The Constitution and Socio-Economic Change; (Ann Arbor; University of Michigan Law School, 1948), p. 102, as cited in ibid., at 907.

The court considered it not very difficult to put a case in which non-uniform state laws in the price regulation field will result in a complete block to trade between states in fair traded commodities. The court asked the interesting question:

> ... if a state may regulate the price at which an article must be sold if it is to be shipped out of state, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the state?[25]

The court could see no justification for this restricting aspect of fair trade legislation on interstate commerce and remarked:

> Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods.[26]

These constitutional difficulties formed the basis on which the court refused to give the Pennsylvania Fair Trade Act a more extensive than purely local application. The court ruled that price cutting retailers could not be enjoined under the state fair trade act if their sales crossed the state borders. The enforcement of the

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[25] Ibid., at 908.

[26] Ibid.

state nonsigner provision in such a case would constitute an unlawful burden on interstate commerce.

Although mail-order retail sales do not amount to a very significant portion of the total retail volume, this decision was one of the first serious assaults on fair trade after the Second World War, and was considered important enough by the fair trade proponents to be reversed by the subsequent McGuire Amendment.

Economic Consequences of the Schwegmann Decision

Just one week had passed after the Schwegmann decision, when the R. H. Macy Company of New York announced the cutting of prices on several previously fair traded items of merchandise.[27] Other New York department stores had little choice but to follow Macy's lead. The resulting price war was widely publicized in the press.[28] The price

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[27]For a detailed account of the causation, scope, peculiarities, and actual developments of the New York price war, see R. Cassady, Jr., "The New York Department Store Price War of 1951: A Microeconomic Analysis," Journal of Marketing, No. 1, 12 (1957), 3-11.

[28]U. S., Congress, Senate, Prevalence of Price Cutting of Merchandise Marketed under Price Maintenance Agreements, prepared for the Joint Committee on the Economic Report and the Select Committee on Small Business, 82d Cong., 1st. Sess., 1951, p. 1.

war spread to other cities as well, but it was in New York that the war raged wildest because of a "temporary buying hysteria" of its bargain hungry shoppers.[29]

The interest in those events was nation-wide. Many questions were asked and much concern expressed about the possible unfavorable effects on small independent retailers resulting from the price cutting practices of the large-scale operators in retailing.[30] Congress acted through the Join Committee on the Economic Report and the Select Committee of the U. S. Senate, which ask the firm of Dun & Bradstreet to furnish it with a report on the price wars.[31]

A major contribution of this report consisted of the fact that it deflated the extent and severity of the Schwegmann decision induced price war as it had been portrayed by the national press coverage.

Among many other facts concerning the issue, the report indicates that in the period from May 28 to June 16, 1951, price cutting of fair traded merchandise occurred in

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[29] Ibid.

[30] Fulda, op. cit., p. 177.

[31] Prevalence of Price Cutting, op. cit.

43 of the 143 leading trading centers which were covered in the survey. In New York, Detroit and Denver, 70 per cent of all the price cutting stores were to be found. Of the 77,000 stores which handled one or more of the fair traded lines of merchandise, only 825 stores were found to have cut prices below those set in resale price maintenance agreements. In 20 of the 43 cities in which price cutting took place, less than four stores were involved in price cutting. Only in 6 cities were more than 10 price cutting stores to be found. The merchandise of which the prices were cut was restricted to electric household appliances, cosmetics and drug specialties, men's wear and alcoholic beverages. By June 17, 1951, the activity and interest in the price cutting of fair traded merchandise started to diminish noticeably.[32] The price war was logically restricted to those stores which had refused to sign fair trade contracts for the merchandise involved.[33]

The McGuire Amendment

The more important effect of the Schwegmann

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[32] Ibid., pp. 1, 2 and 7.

[33] Signers of fair trade contracts were still legally bound to maintain stipulated prices.

decision and the one accutely feared by the fair trade proponents was the possible complete breakdown of all fair trade laws.[34] The price war was actually turned into a strong tool by the fair trade proponents to argue for the rehabilitation of fair trade[35] and to save it from more severe consequences by state court interpretations. Thus, in spite of the ephemeral character and relatively small area of the price war,[36] the pressure for federal legislation that would restore the legal status of the fair trade scheme did not diminish. The influence of the brief and rather isolated price war culminated in the issue of a report entitled: "Fair Trade: The Problems and Issues" by the House Committee on Small Business.[37] Although this report represents as objectively as possible an examination in

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[34]Note, Virginia Law Review, 37 (1951), 884.

[35]For this "boomerang effect" of the department store price war on the fair trade opposing activities of those companies that started it and culminating it in the McGuire Amendment, see R. Cassady, op. cit., 10. A contrary opinion based on less extensive and clear evidence is contained in W. Adams, "Fair Trade and the Art of Prestidigitation," Yale Law Journal, 65 (1955), 205, note 41.

[36]Fulda, op. cit., p. 178.

[37]House Report 1292, op. cit.

some detail of the opposing views for and against fair trade, the Committee apparently was guided in its final recommendation by the few extreme price reductions which had occurred during the post-Schwegmann decision price war. Those had resulted in below-cost or so-called loss-leader sales. The Committee concluded namely that it was impressed by the complexity of the problem and the weight of evidence at both sides of the issue, but it was convinced that

> ... deceitful and misleading price cutting is not in the public interest and that small business enterprises in particular need protection against loss-leader and similar unfair business practices.[38]

The Committee recommended therefore that Congress should make it possible to enforce fair trade contracts in interstate commerce.[39] This tempts the assumption that the Committee took the post-Schwegmann decision price war as an indication in reverse of the effectiveness of the fair trade scheme to eliminate the evils of loss-leader selling. It would seem more justifiable to consider the limited price war as a temporary phenomenon: a hasty market

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[38] Ibid., p. 1.

[39] Ibid.

adjustment after the change of an important exogenous institutional factor in the market mechanism, a process which caused, in the few instances of loss-leader selling, the prices to go below the newly to be found equilibrium.[40]

The agitation for Congressional action to restore the strength of fair trade in interstate commerce after the Schwegmann decision was basically a retailers' show. The legislative history of the McGuire Amendment is replete with statements to this effect. Among the organized group of distributors the National Association of Retail Druggists played the leading role in organizing effective pressure on Congress.[41] This organization is quite proud of the

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[40]For argumentation and facts deflating the merits of fair trade in relation to loss-leader sales, see Prepared Statement of Edward S. Herman. U. S. Congress. House. Committee on Interstate and Foreign Commerce. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 10527, and other bills, 85th Congr., 2d Sess., 1958, pp. 632-4.

[41]The House Committee on Small Business lists 17 national non-drug retail and wholesale groups which had appeared in favor of fair trade at public hearings held in recent years prior to 1952. Listed as such are: National Association of Retail Grocers; National Retail Jewelers Association; Radio Wholesalers Association; National Federation of Radio, Associations; International Beauty and Barbers' Supply Dealers Association; National Stationers' Association; Meat Dealers Protective Association; National Institute of Wine and Spirit Distributors, Inc.; National Institute of Manufacturers and Distributors; National

pre-eminent position of the druggists in the fair trade movement. It claims credit for the passage of the state fair trade acts but also for the passage of the Miller-Tydings Act[42] and its efforts to secure the passage of the McGuire Amendment or similar legislation are apparent from any Congressional Hearings on the subject of fair trade. In relation to the McGuire Amendment its efforts can be illustrated by a special bulletin[43] sent to the "Presidents, and Secretaries of State, Local, and Metropolitan City Pharmaceutical Associations" after the McGuire Bill had just been reported favorably by the House Interstate and Foreign Commerce Committee. Those leading retail drugstore officials were urged to:

Automobile Dealers' Association; American Book Sellers Association; Toilet Goods Association; National Association of Independent Tire Dealers; National Retail Hardware Association; Retail Tobacco Dealers of America, Inc.; National Retail Furniture Association; and United States Wholesale Grocers' Association. (House Report 1292, op. cit., pp. 22-23.)

[42]Letter from John Dargavel to John Anderson, dated August 22, 1951, cited in Hearings on H. R. 4365, etc., op. cit., pp. 797 and 799.

[43]As reprinted in Hearings on H. R. 4365, etc., op. cit., p. 605.

> ... get not only other druggists but the members of their families, all other independent merchants and everyone else you possibly can to write their Congressmen to call for support ... get busy ... to start the flow of letters and telegrams to the members of the ... House.[44]

The most effectively organized pressure was probably that of the Oklahoma Pharmaceutical Association. It had adopted a so-called "push-button" plan according to which 150 druggists from every part of the state were appointed as a committee to warn druggists in every town "within a few hours when the time comes to give Congressmen an extra nudge in order to get the fair trade bill through."[45]

The manufacturers, for whose trademark and good will protection the fair trade legislation is allegedly meant, took a much less active role in promulgating the virtues of fair trade.[46] In 1952 it was stated that

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[44]This appears to be a repetition of the pressure technique employed at the time of the Miller-Tydings Amendment. Professor J. M. Klamon of Washington University called this "Government by Western Union and coercion" and further mentioned that Mr. Sam Rayburn got 2000 wires in one day concerning the Miller-Tydings Bill. Statement before U. S., House, Subcommittee of the Committee of Interstate and Foreign Commerce. Hearings on H. R. 10527, etc., 86th Cong., 2d Sess., 1958, p. 223.

[45]Hearings on H. R. 4365, etc., op. cit., p. 599.

[46]House Report No. 1292, op. cit., p. 41.

> ... very few manufacturers other than those in the drug, cosmetics and toilet goods industry either individually or through their associations have publicly urged price maintenance legislation upon Congress in recent years.[47]

An explanation for the manufacturers' mild and restraint interest in the fair trade controversy can be read in the following quotations which very possibly represent truthfully the sentiments of the majority of manufacturers concerning fair trade. A manufacturer of small household appliances stated that his company considered the fair trade program "as the small shop-keeper's minimum wage law,"[48] while the council for the Illinois Pharmaceutical Association was quoted as saying that: "The fair trade movement is a retailers' show with a manufacturers' sign or label over it."[49]

The most vigorous opposition to fair trade, and as such to the McGuire Bill, has been presented by the group of retailers who consider fair trade programs a

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[47] Ibid., p. 23.

[48] U. S., Congress, House, Subcommittee of the Committee on Interstate and Foreign Commerce, Hearings on H. R. 5767, Minimum Resale Prices, 82d Cong., 2d Sess., 1952, p. 143.

[49] Hearings on H. R. 4365, op. cit., p. 438.

threat to their marketing methods.[50] The economic philosophy and retailing technique of those businessmen clashes with the effects of fair trade legislation. Some of the salient factors involved were brought out by the most famous of them, Mr. John Schwegmann, who ironically said that he was not appointed his customers' first fighter to preside over the liquidation of the free enterprise system,[51] and then described the economies of the supermarket operations which permits warehousing and retailing under one roof and buying of many supplies directly from manufacturers. Since the customer serves himself on a cash and carry basis, there is no need for sales clerks. These are not, however, the only savings which are passed on to the consumer.[52] Mr. Schwegmann's two stores are not air-conditioned, and one of them is "a big shed", almost like a Quonset hut.[53]

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[50]Among the organizations which are directly related to retailing and are opposed to fair trade due to harmful effects on their business operations, are: National Retail Dry Goods Association, composed of large department stores; Mail Order Association of America; R. H. Macy & Co.; and several other independent large retail outlets. House Report No. 1292, op. cit., p. 23.

[51]Hearings on H. R. 4365, op. cit., p. 306.

[52]Ibid., pp. 309-310.

[53]Ibid., p. 327.

They are 8 miles from the center of New Orleans.[54] Consequently he fights against fair trade since:

> ... it prevents economical variations in types of retail establishments because the manufacturers are compelled to fix the retail price to fit retail operations with high overheads and costly services. Overhead and services then become automatically a part of the commodities' cost to the consumer, whether she can afford it or wishes to pay for extra services.[55]

The critics of fair trade further consists of groups which represent a much larger diversity of economic interests than the proponents of fair trade do. Labor, farmer, and consumer organizations,[56] and several govern-

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[54] Ibid., p. 282.

[55] Ibid., p. 314.

[56] The following witnesses in this category were reported most active before Congressional hearings in opposing fair trade: American Home Economic Association; American Federation of Labor; American Farm Bureau Federation; Cooperative League of the United States of America; Consumers Research, Inc.; National Housewives League; General Federation of Women's Clubs; National Grange; National Dairy Union; American Association of University Women; and the Federation of Citizens Associations. (House Report No. 1292, op. cit., p. 23.)

mental departments and agencies[57] have consistently opposed the underlying philosophy of fair trade. Many newspapers and magazines are anti-fair trade oriented. Among others, "Business Week" and the "Wall Street Journal" hailed the Schwegmann decision as a major victory for the consumer and the free competitive enterprise system.[58] "Fortune" magazine has repeatedly attacked the fair trade laws as economically unsound and harmful to the best interests of the consumers. It opposed the McGuire Bill on the serious allegation that none of the arguments in favor of the McGuire Bill had ever been substantiated.[59]

The McGuire Amendment to the Federal Trade Commission Act was enacted on July 14, 1952, granting antitrust

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[57]See letters to this effect from the U. S. Department of Agriculture, the Federal Trade Commission, and the U. S. Bureau of the Budget (U.S. Congress, House, Committee on Interstate and Foreign Commerce, Fair Trade, House Report No. 467, 86th Cong., 1st Sess., 1959, pp. 25-30.) Also the U. S. Department of Justice, and even the U. S. Department of State expressed opposition. (U.S. Congress, Senate, Committee on Interstate and Foreign Commerce, Hearings on S. 3850, 86th Cong., 2d Sess., 1958, pp. 131 and 281.)

[58]Hearings on H. R. 4365, etc., op. cit., pp. 312-312.

[59]"A Chance for Really Fair Trade," Fortune, 45 (March 1952), p. 79.

exemption to the state nonsigner provisions and declaring that those statutes would not constitute an unlawful burden on interstate commerce. Thus Congress reversed the Schwegmann and Wentling decisions.[60]

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[60]C.C.H. Trade Regulation Reporter, Vol. I, 1959, p. 4305.

CHAPTER V

LEGAL ATTACKS ON CONSTITUTIONAL GROUNDS

> It is ... within the framework of the individual state court systems that Fair Trade is finally meeting defeat. With its tenuous justification for existence hanging by the threat of denial of Federal certiorari, the current of authority appears to be fast moving in favor of the opponents of Fair Trade.[1]

In the previous chapter a review was given of the all-embracing attack on the main pillar of fair trade - the nonsigner provision - by the U. S. Supreme Court in the Schwegmann decision. Congress counteracted this move rapidly by the enactment of the McGuire Amendment to the Federal Trade Commission Act. This amendment nullified the U. S. Supreme Court's decision and established firmly, although

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[1]Richard K. Bates, "Constitutionality of State Fair Trade Acts," Indiana Law Journal, 32 (1957), 149.

not completely,[2] the individual state nonsigner provisions' applicability and enforcement to interstate commerce. By the McGuire Amendment Congress expressly lifted the bar of the interstate commerce clause of the Federal Constitution with respect to fair trade states; thus obliterating the major Achilles' heel of the legal fair trade structure.

After the enactment of the McGuire Amendment, the only possibility left to the fair trade opponents to cripple this system of price fixing in one vital blow was the constitutionality question of this amendment. The U. S. Supreme Court did not pass judgment on the constitutionality of the Miller-Tydings Amendment in the first Schwegmann decision.[3] This indicated already the reluctance of the Court to get itself involved in the determination of the wisdom employed in the economic policy of the legislature in relation to resale price maintenance

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[2]The McGuire Amendment is an enabling act (Supra, Chapter IV, pp. 88 -9.) and not a Federal Fair Trade Act. It does not provide for the enforcement by the states of fair trade prices of commodities that move in interstate commerce from an non-fair trade state to a fair trade jurisdiction. (Infra, Chapter VI, pp. 180-1.)

[3]Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951). Hereafter cited as 'the first Schwegmann decision.'

regulation. This attitude became more apparent shortly after the enactment of the McGuire Amendment. The U. S. Supreme Court refused an attempt by the archenemy of fair trade - Mr. Schwegmann - to obtain the highest court's opinion on the constitutionality of the McGuire Amendment.[4] Up to the present day the Court has maintained this policy of refusing to consider this question, contending that the cases presented and requiring its judgment on the constitutionality of the McGuire Amendment did not constitute 'a substantial federal question'.[5] The fair trade proponents

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[4] Schwegmann Bros. Giant Super Market v. Eli Lilly & Co., 205 F. 2d 788 (1953); certiorari denied, 346 U. S. 856. Some of the reactions of fair traders after the U. S. Supreme Court refused review of the Schwegmann v. Eli Lilly decision are gross exaggerations of the facts. Mr. John W. Dargavel, executive secretary of the National Association of Retail Druggists, according to Business Week, said that the constitutionality issue of the McGuire Act had been 'definitely settled' by this refusal of the court. Doeskin Products, Inc., an ardent advocate of resale price maintenance, trumpeted in an ad: "Thanks to nine wise men - the law of the jungle can no longer decide the price of what you buy." Business Week, Nov. 7, 1953, p. 43.

[5] See also, Lionel Corporation v. Grayson-Robinson Stores Inc., 15 N. J. 191, 104 A. 2d 304, appeal dismissed for want of a substantial federal question, 348 U. S. 859 (1954); General Electric Co. v. Masters, Inc., 307 N. Y. 229, 120 N. E. 2d 802, appeal dismissed for want of a substantial federal question, 348 U. S. 892 (1954).

had won a significant battle. The legal status of fair trade seemed stronger and more solidly established than ever before. However, the loss of prestige which fair trade suffered as a result of the first Schwegmann decision was never fully regained.[6] This decision and its resulting economic events had put the fair trade issue in the limelight of the public attention. It must also be assumed that it did enhance the interest of the state courts in this timely matter, increasing their willingness to scrutinize the issue more closely as soon as the opportunity arose. Regardless of the opinion of Congress expressed by the McGuire Amendment, the opinion of Mr. Justice Douglas expressed in the first Schwegmann decision concerning the nonsigner clause must have had great influence on the legal fraternity.[7]

The fight around fair trade did not cease. By necessity the fair trade opponents had to switch their approach from an all-out attack to a fragmentary warfare. The remaining weaknesses in the legal fair trade structure

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[6]Bates, op. cit., p. 130.

[7]Supra, Chapter IV, pp. 71-4.

proved to be most instrumental in the subsequent attempts to emasculate fair trade pricing. Vehement attacks were now made upon the validity of the statutes which legalized price maintenance agreements. As the attackers were mainly nonsigners, they concentrated the fight on that provision which made fair trade agreements binding on them.

It is the purpose of this chapter to trace the legal reasoning followed and the special circumstances that existed in the decisive cases through which the highest state courts showed an increased willingness to review either their respective fair trade act in general or the nonsigner provision in the light of the states' constitutional provisions.

Adverse Decisions Concerning the Validity of State Fair Trade Acts or the Nonsigner Provisions

The rapid development of the willingness of the highest state courts to invalidate state fair trade laws is rather surprising in view of the fact that prior to 1949, the constitutionality of such legislation under state constitutions had been upheld by every state court in which

it was attacked.[8] This issue was widely considered as being permanently settled.[9] In 1939 Grether could write that at no time the economic consequences of resale price maintenance were squarely faced or even at issue before the courts. "The judiciary was concerned primarily with the specific methods and arrangements employed to achieve the end, not with the end itself."[10] Satisfactory comparisons of the severity of the economic ills to be cured and the social and economic damage attached to the cure itself were mostly beyond the scope of legal considerations.

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[8]The seven pertaining states and cases are: California, Pep Boys v. Pyroil Sales Co., 5 Cal. 2d 194, aff'd, 299 U. S. 198 (1936); Illinois, Seagram Distillers Corp. v. Old Dearborn Distributing Co., 363 111. 610, 2 N. E. 2d 940, aff'd, 299 U. S. 183 (1936); Maryland, Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A. 2d 176 (1939); North Carolina, Eli Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 528 (1939); South Dakota, Miles Laboratories, Inc. v. Owl Drug Co., 67 S. D. 523, 295 N. W. 292 (1940); Connecticut, Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A. 2d 841 (1942). The Washington Supreme Court also upheld the constitutionality of the state fair trade act prior to 1949, however, it reversed this decision later. (Infra, p. 150.)

[9]Stanley D. Rose, "Resale Price Maintenance," Vanderbilt Law Review, 3 (1949), 27.

[10]E. T. Grether, Price Control under Fair Trade Legislation (New York: Oxford University Press, 1939), p. 374.

Necessarily, the developments of the law in relation to resale price maintenance were, and still are, linked more intimately with legal traditions and precedents and the technical interpretation of the law than to the appraisal of economic consequences.[11] As will appear from the following expose by states, this situation changed considerably during the last decade.

The unanimity of the federal and state courts concerning the constitutionality question during the early period of resale price regulation did not, of course, reflect the general state of opinion. The opponents at all times continued attempts to wedge the solid constitutionality opinion of the judiciary. For instance, in 1936 the Court of Appeals of New York struck down the fair trade law in a case involving a nonsigner.[12] The Court of Appeals had held the nonsigner provision to be a measure for price fixing, a purpose which the legislature could not accomplish directly or indirectly. The damage was rapidly

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[11] Ibid.

[12] Doubleday Doran & Co. v. R. H. Macy & Co., 269 N. Y. 272, 199 N. E. 490 (1936).

repaired when the same New York court overruled this decision,[13] on the authority of the U. S. Supreme Court's decision in Old Dearborn v. Seagram,[14] in which this court disposed of any 'due process' and 'equal protection' objections against fair trade laws arising under the federal constitution.[15] This line of attack bore for a long time such discouraging results that the advice given by an attorney of the Antitrust Division of the Department of Justice in 1949 - "... if no aid can be expected from the courts, any opponent of these acts must devote his attention to the wisdom of the legislatures in passing the acts."[16] - was well justified.

However, even before the fair trade structure was bolstered stronger than ever by the enactment of the McGuire Amendment, signs of eventual decay within the legal framework of the individual state court systems appeared. In 1949 the Florida Supreme Court started a trend

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[13]Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. 2d 30 (1937).

[14]299 U. S. 183 (1936).

[15]Supra, Chapter III, pp. 59-63.

[16]Rose, op. cit., p. 37.

which in an accelerating rate[17] brought the current of legal authority in favor of the fair trade opponents. This change in policy with reference to resale price maintenance was not due to the discovery or better understanding of any legal doctrine or precedent. The increasing economic pressure seemed to play a similar significant role in the determination of those new legal developments as the economic depression had played in the determination of the legal opinion in the early period of fair trade legislation. "The disappearance of the depression-born pressure on the courts to refrain from tampering with regulatory laws ... occasioned a willingness to subject measures such as resale price maintenance to more thorough scrutiny."[18] This constituted a recognition of the existence of valid conflicting economic interests and would presumedly have implied a new evaluation of the fair trade laws, and especially the nonsigner provisions, by carefully weighing the harm to remedied against the harm incidental to the remedy itself. As will be shown, however, the balance of justice in the

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[17]See Table 8, p. 100.

[18]Edward J. Kohrs, "Fair Trade and the State Constitutions," Vanderbilt Law Review, 10 (1957), 424.

fair trade issue was not always treated as a precision instrument by considering along with the important weights of economic interests all the - possibly decisive - smaller economic weights. The approach was mostly rather one of suddenly transferring important legal considerations to the opposite scale of the balance of justice.

The developments in the different states that have invalidated or weakened their fair trade provisions through legal constitutionality decisions will be analyzed in chronological order of the courts' of last resort decisions. This method of presentation was mainly chosen to bring out the influence of decisions on subsequent considerations by the courts in other states. This is also the justification and purpose of Table 8, which indicates whether the fair trade act in general or the nonsigner provision was the target of legal criticism and also presents the dates of the highest state courts' decisions.

Florida

In no state have the fair trade proponents found steadfast adverse state court decisions over a longer period than in Florida. In the first adverse decision the Florida Supreme Court managed to invalidate the act on

TABLE 8

SEQUENCE OF ADVERSE FAIR TRADE DECISIONS
COURTS OF LAST RESORT[a]

States	Part of act held unconstitutional	Date of decision
Florida	nonsigner clause[c]	April 5, 1949[b]
Michigan	nonsigner clause	June 27, 1952
Georgia	nonsigner clause[c]	February 24, 1953[b]
Arkansas	nonsigner clause	February 7, 1955
Nebraska	act in general	February 11, 1955
Oregon	nonsigner clause	April 18, 1956
Louisiana	nonsigner clause	June 29, 1956
Colorado	nonsigner clause	August 27, 1956
Utah	act in general	September 22, 1956
Indiana	nonsigner clause	May 22, 1957
South Carolina	nonsigner clause	August 26, 1957
New Mexico	nonsigner clause	September 27, 1957
Ohio	nonsigner clause	January 22, 1958
Kansas	nonsigner clause	March 8, 1958
West Virginia	nonsigner clause	April 11, 1958
Kentucky	nonsigner clause	June 20, 1958
Washington	nonsigner clause	November 5, 1958
Minnesota	nonsigner clause	April 8, 1960
Montana	act in general	February 10, 1961
Iowa	nonsigner clause	April 4, 1961
Oklahoma	nonsigner clause	April 18, 1961

[a]Source: Compiled from data and references contained in Chapter V.

[b]More than one adverse decision. Date of first decision given.

[c]Result of latest decision.

technical grounds without actually declaring the subject of the act unconstitutional. It was as early as 1939 that the nonsigner provision of the first Florida Fair Trade Act was held unconstitutional.[19] In the title of this act was included the expression "... through the use of voluntary contracts."[20] The Florida Supreme Court concurred in the lower court's holding that this restricted the subject of the act and implied that its provision only applied to retailers who voluntarily enter into fair trade contracts. The fair trade minded Florida legislature quickly cured the technical defects by a 1939 amendment to the act, squarely inviting the court to pass judgment on nothing but the constitutionality issue.

Judiciary and legislature came again to grips when in 1949 the Florida Supreme Court in the leading and influential case of Liquor Stores, Inc. v. Continental Distilling Corp.[21] declared the state fair trade act of 1939 to be unconstitutional and, immediately afterwards, the state legislature - with a few insertions - re-enacted the

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[19]Bristol-Myers Co. v. Webb's Cut Rate Drug Co., Inc., 137 Fla. 508, 188 So. 91 (1939).

[20]Florida Laws 1937, ch. 18395. 6. As cited in, ibid.

[21]40 So. 2d 371 (Fla. 1949).

law.[22] The Florida Supreme Court did not limit its decision in this case to the nonsigner provision, but held the entire fair trade act repugnant to the state constitution.

The court repudiated the economic philosophy upon which the validity of the price fixing feature of the Florida Fair Trade Act as it is applied to nonsigners is said to rest. The Florida Supreme Court justified its disregard of the overwhelming preceding body of legal authority in regard to fair trade by taking, "... on its own initiative judicial notice of what had long been apparent to writers on the subject - that the decisions upholding the fair trade acts were based on erroneous assumptions as to their nature and purpose."[23]

As to the legal justification of the nonsigner provision on the basis of the trademark theory as established by the U. S. Supreme Court in the Old Dearborn case,[24] the Florida Supreme Court held: "The court of last resort of each sovereign state is the final arbiter as to whether the

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[22]Manuel Harnik, "The Florida Fair Trade Act Case," Washington and Lee Law Review. 7 (1959), 28.

[23]Note, Harvard Law Review, 63 (January, 1950), 547.

[24]Supra, Chapter III, pp. 59-63.

act conforms to its own constitution whereas the federal courts are concerned only with whether the act offends the federal constitution."[25] This revolutionary attitude of the Florida Supreme Court deviating from the U. S. Supreme Court's established fair trade opinion discontinued a trend of state courts adopting almost automatically the authority of the highest federal court's legal reasoning.[26]

The Florida Fair Trade Act was held to exceed the bounds of the legislature's police power because it served the private interest of one economic group to the detriment of the general public by allowing an interested person the power to fix a price without any review of his act. This lack of a 'yardstick' standard, the court found, made the price fixing statute arbitrary, unreasonable and violative of the constitutional right to own and enjoy property. The court expressly held that legislation of this type "is constitutional and can be constitutional only in situations wherein our economic structure is seriously

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[25] 40 So. 2d 371, 375.

[26] See e. g. the New York case, cited above. Supra, p. 96.

endangered,"[27] thus branding fair trade legislation as a typical depression measure without justification in a sound and dynamic economic situation.

The contention that fair trade did not serve the interest of the general public was mainly determined by the extensive study on resale price maintenance through which the Federal Trade Commission came to the conclusion "... that in the absence of effective Government supervision in the public interest, resale price maintenance, legalized to correct abuses of extreme price competition, is subject to use as a means of effecting enhancement of prices by secret agreements and restraint of competition by coercive action on the part of interested cooperating trade groups of manufacturers, wholesalers, and retailers in such a way and to such an extent as to make it economically unsound and undesirable in a competitive economy."[29] The court contradicted the contention that fair trade

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[27] 40 So. 2d 371, 388.

[28] Federal Trade Commission, Report on Resale Price Maintenance (Washington D. C.: U. S. Government Printing Office, 1945).

[29] Ibid., p. LXIV.

legislation serves the general welfare by quoting from page LXI of this report: "The essence of resale price maintenance is control of price competition. Lack of adequate enforcement of the antitrust laws leaves a broad field for the activities of organized trade groups to utilize it for their own advantage and to the detriment of consumers ..."[30]

Fair trade proponents and some legal writers failed to be impressed by the Federal Trade Commission's findings, or by the opinions of influential personalities and agencies opposing fair trade as quoted in the study.[31] It was held, for instance, that the logic of the Florida Supreme Court's decision was vulnerable in that this court, upon an argumentative non-judicial report, assumed to find as a fact that fair trade did not advantage the general public interest, although the contrary determination by the legislature was clearly within its power.[32] This criticism

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[30](40 So. 2d 371, 375.)

[31]F.T.C., 1945, op. cit., pp. LXII-LXIII.

[32]A. L. Beaudette and M. H. Berens, "The nonsigner clause of fair trade acts; constitutionality and theory of enforcement," Notre Dame Lawyer, 25 (1950), 529. See also: Harold Harper and Dorothy Atwood, "Fair Trade in the Courts," The Basis and Development of Fair Trade (New York: The National Wholesale Druggists' Association, 1955), p. 21.

implies, that the Florida Supreme Court would have been correct if it had, instead of relying on the Federal Trade Commission's finding of facts, followed either of three alternatives. (a) It could have refrained itself from considering the economic aspects by settling the question on legal precedents and blindly accepting the legislature's economic justification of the act; (b) it could have given the facts concerning the public interest on the basis of which the Florida legislature approved the fair trade act priority over the empirical evidence of the Federal Trade Commission; or (c) the court could have conducted an extensive (judicial) economic fact finding investigation itself to determine the public interest issue of fair trade legislation. By not employing the first alternative the court recognized that the problem was broader in scope than could be covered by pure legal interpretation. The court showed also a high degree of realism by preferring the conclusions based on the most extensive study available and conducted by the best qualified experts and least partial agencies. This attitude eliminated the second as well as the third alternative. It would have been obviously beyond the means and capabilities of the Florida Supreme Court to improve on the Federal Trade Commission's empirical study.

The Florida legislature, in the hope of convincing the judiciary branch that its decision in the Liquor Stores case was erroneous and that a reasonable basis did exist for this type of regulatory law,[33] passed a third fair trade act similar to the act of 1939, to which a lengthy preamble entitled "Findings of Fact" was annexed. This preamble in effect declared that the statute was a lawful exercise of the police power and would serve the public interest. A novelty in the act was the provision that the attorney general was empowered to bring an action to restrain the performance or enforcement of any price maintenance agreement if he finds that the given agreements prevent competition with regard to the same general case or that the commodity in question is not in free and open competition with merchandise of the same general class. This provision was presumably inserted to calm the critics of the monopolistic tendencies of the fair trade act.[34]

In 1951 the Florida Supreme Court also struck

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[33]Kohrs, op. cit., p. 419.

[34]Bates, op. cit., p. 135.

down this attempt to legalize fair trade in Florida.[35] In a brief opinion the court affirmed the action of a trial court which had looked behind the "findings of fact" of the most recent fair trade act and had found them wanting. Something of the act was salvaged this time, however, as the court only held the nonsigner provision invalid on the authority of the first Schwegmann decision. The court found it apparently unnecessary to rule on the effectiveness of the supervisory task of the attorney general as provided for in the new act. This neglect gave the fair traders in Florida new confidence in their ability to bend the court's opinion in their favor when the federal McGuire Amendment became an accomplished fact in 1952. The legislature re-enacted the 1949 fair trade act in 1953. Thus leaving the fair trade issue in Florida once more legally unsettled. Although, by now, the position of the Florida Supreme Court could hardly be more obvious.

The court agreed to settle the doubt in the Miles Laboratories, Inc. v. Eckerd[36] case. The question whether

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[35] Seagram-Distillers Corp. v. Ben Green, Inc., 54 So. 2d 235 (Fla. 1951).

[36] 73 So. 2d 680 (Fla. 1954).

the principle enunciated by the court in the Seagram v. Ben Green case had been superseded by the McGuire Amendment was disposed of by holding that "It is hardly necessary to point out that the decisions of this Court interpreting the Constitution of Florida are supreme and will not be overthrown by act of Congress or the Federal Courts unless some Federal constitutional question is involved."[37]

The court, by now bolstered in its critical attitude toward fair trade by the highest courts' decisions in two other states,[38] condemned the nonsigner provision again. "This Court has expressed its views on fair trade ... and has consistently and unequivocally rejected, on constitutional grounds, both the underlying theory and the economic facts on which they are sought to be predicated ... as we have stated before, the real effect of the nonsigner clause is anti-competitive price-fixing, not the protecting of good will of trade marked products as other courts have held ... the nonsigner clause must fall as an invalid use

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[37] Ibid., at 681.

[38] Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N. W. 2d 268 (1952); Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 209 (Ga. 613, 75 S. E. 2d 161, certiorari denied, 346 U. S. 823 (1953).

of the police power for a private, not a public purpose."[39] Justice Terrell theorized, that good will should be determined by the price which the goods can command in the competitive market, and not by the ability of the manufacturer to sell at a pegged retail price which he himself selects.[40]

The court saw the real vice of the nonsigner provision in the absence of a standard for the protection of the consuming public. The court was not impressed with the legislature's provisions in this respect in the re-enacted 1949 Act.[41] "Legislative 'findings of fact' as to the policy beyind the law, does not remove the lack of the 'yardstick' standard, neither does the delegation of the power to the attorney general provide such administrative supervision in the public interest as will overcome the innate vice in the act."[42]

Justice Terrell considered the provided supervision by the attorney general a poor substitute for the concepts

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[39]Miles v. Eckerd, op. cit., at 681-82.

[40]This statement was probably adopted from E. R. Corey, "Fair Trade Pricing: A Reappraisal", Harvard Business Review, 30 (Sept.-Oct., 1952), 60.

[41]Supra, pp. 107-8.

[42]Miles v. Eckerd, op. cit., at 682.

of free competition, which have traditionally been the yardstick for the protection of the consuming public.[43]

An indication of the finality of the Miles Laboratories decision and a further weakening of the status of fair trade in Florida is contained in the holding of the Florida Supreme Court[44] reviewing a circuit court decision which had dismissed a fair trader's complaint for failure to state a claim upon which relief could be granted. Sunbeam Corporation had brought this complaint on the grounds that the defendant had interfered with Sunbeam's uniform fair trade contract system whereby all of its products were sold through distributors who had entered into price maintenance contracts with the company. The defendant had induced those distributors to sell Sunbeam's products to the defendant in violation of these contracts. In the court's opinion, which affirmed the lower court's dismissal of the complaint, Justice Hobson quoted from the lower court decision; "... preventing nonsigners from buying goods diminishes the scope of competition just as surely as preventing them

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[43] Ibid.

[44] Sunbeam Corporation v. Gilbert Simmons Ass. Inc., 91 So. 2d 335 (Fla. 1956).

from selling them below the fair trade price, though it is true that it is a more indirect means of accomplishing the same objective."[45] The court further stated: "The pattern of operation ... represents a slightly different approach, on the part of tne manufacturer, from those which we have previously considered, but the end result is the same as that which we have repeatedly condemned as violative of the public policy of Florida."[46] This broke the last feasible stronghold of the fair trade structure in Florida.

In summary, the nonsigner provision of the Florida Fair Trade Act was held unconstitutional in that it (1) violates public policy, (2) bears no relation to the public health, morals, peace, safety or general welfare, and, as such, is an abuse of the police power, and (3) it attempts to delegate the sovereign power of the state for a private purpose.

Michigan

Just before the passage of the McGuire Amendment by the U. S. Congress, the Michigan Supreme Court followed the example of the Florida court and invalidated the

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[45] Ibid., at 336.

[46] Ibid.

nonsigner provision of the Michigan Fair Trade Act. The Michigan Supreme Court held that the fair trade act provision prohibiting sales by nonsigners of fair trade contracts of trademarked and fair traded articles at less than fixed price, was violative of the due process clause of the Michigan Constitution and was not sustainable under the police power.[47]

The court recognized that the constitutionality of similar legislation, as applied to nonsigners of fair trade agreements, had been upheld in most states considering this question and by the U. S. Supreme Court in the Old Dearborn case.[48] Nevertheless the court followed the unique example of the Florida Supreme Court, which, according to the Michigan Supreme Court, gave a superior reasoned view in the Liquor Store case.[49]

The court contended that laws prohibiting theft, larceny and conversion do bear a relationslhip to public morals and welfare, but it failed to see that the good will,

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

[48]Supra, Chapter III, pp. 59-63.

[49]Shakespeare v. Lippman, op. cit., at 269.

trademark or brand name is wrongfully appropriated or stolen by means of cutting resale prices.

Justice Dethmers agreed that the manufacturer's good will may be adversely affected, but this was, in his opinion, not different from the result of a competitor's placing a better product on the market for less money.[50] Important is the description of the scope of trademark legislation in relation to resale price maintenance. The function of a trademark, the court argued, is simply to designate the goods as the product of a particular manufacturer or trader and to protect his good will against the sale of another's product as his and to prevent confusion of the public regarding the origin of goods of competing vendors. Trademark rights do not go as far that cut-rate sales constitute a breach of such rights. "They do not enable it to sell its cake and have it, too."[51]

The argument that the fair trade law including the nonsigner provision is a valid exercise of the state's police power because it is aimed at destructive price cutting

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[50] Ibid., at 270.

[51] Ibid.

and the evils of a price war, was considered by the court as the controlling question. The court refused to be impressed by this argument and held this reasoning to be repugnant to the concept upon which America's competitive economy was developed. "Can it be said that by the process of reducing prices, either war, destruction or evil are visited upon the public health, safety, morals or the general welfare?"[52] The fair traded product in question in this case was a trademarked line of fishing tackle. In its well reasoned opinion the court could not possibly comprehend now the sale of fishing tackle was in any wise connected with the public interest.

The court failed to see how the plight of the small retailer against the large could be solved by fair trade legislation, as fair trade provisions are restricted to branded and trademarked goods. "Is not the survival of the small retailer made as difficult by the large retailer's cut-rate sales of bulk, unbranded and non-trademarked staples as by the like sale of branded and trademarked goods? The difference, if any, is scarcely such as to render the restriction on price cutting valid in the one

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[52] Ibid., at 271.

instance and invalid in the other."[53]

In 1955 the Michigan Supreme Court rendered the state fair trade act almost totally ineffective by denying a temporary injunction to restrain a nonsigner from tortiously interfering with the manufacturer's written contracts with wholesalers and retailers.[54] The enforcement request was held to be in violation with another state statute, which provides that a defendant is privileged to induce the nonperformance of a contract of which "the purpose or effect ... is to restrict his business opportunities in violation of a defined public policy."[55] This public policy question as to the nonsigner provision was considered to have been settled in the Shakespeare case.

Justice Butzel came to the defense of the fair trader's position in his dissenting minority opinion. He held that the rights of a party evolving from a legal contract between private parties should be honored by third parties. To induce a party to the contract to break it,

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[53] Ibid.

[54] Argus Cameras, Inc. v. Hall of Distributors, Inc., 343 Mich. 54, 72 N. W. 2d 152 (1955).

[55] Restatement, 1939, Torts 766, 774, as cited in ibid., at 154.

is a wrongful act without legal or social justification.[56] This leads necessarily to the implication that the monopolistic possibilities of private contracts which as such do not violate the scope of an existing anti-monopoly law, are socially justifiable. The opinion and public policy rule expressed in the above mentioned statute[57] is radically opposed to this view. The majority of the court believed that the social justification for its decision lay in the maintenance of horizontal price competition. By restricting the enforcement of fair trade contracts to the actual parties of the contracts, the Michigan Supreme Court virtually nullified fair trade in Michigan.

The significance of the Michigan Supreme Court decisions is the excellent policy argument it employed. This argument is actually a two-point attack on fair trade at its very source. The stated purpose of fair trade is the protection of the good will, trademarks and brand names. Yet the federal trademark legislation as well as the doctrine of unfair competition provides extensive protection for those items of good will. Such protection

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[56] Argus v. Hall, op. cit., at 155.

[57] Supra, p. 116, note 55.

should be sufficient and the real purpose of fair trade is really not to render such protection at all.[58] This eliminated any justification of the main objectionable feature of the statute, i.e., the obstruction of price competition.

Georgia

The Supreme Court of Georgia was the first to invalidate a state fair trade law after the passage of the McGuire Act. In Grayson-Robinson Stores, Inc. v. Oneida, Ltd.[59] this court rejected Oneida's petition for injunctive relief from defendants' use of Oneida's 'Community' merchandise as 'loss leaders' and held the whole Georgia Fair Trade Act null and void, because it had conflicted with the Sherman Act at the time of its passage[60] and had not been validated by repassage after Congress removed the conflict by enacting the Miller-Tydings amendment. The court raised by way of dictum due process objections to the statute under the Georgia Constitution, indicating the attitude of the court to fair trade in general. Justice Head, in

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[58]Rose, op. cit., p. 148.

[59]209 Ga. 613, 75 S. E. 2d 161. (1953)

[60]March 4, 1937.

concurring specially in the judgment of the court remarked, "... the sole unfair competition alleged in this case is a violation of contracts based on the minimum retail resale prices established by Oneida, Ltc. ... the petition did not seek relief for any alleged acts of the defendant in deceiving, misleading, and confusing the public, and capitalizing on the reputation and good will of the petitioners."[61]

It is especially in relation to low-margin retail outlets which try to reduce their mark-ups proportionally on the complete stock they carry, that fair traders will find it difficult to bring any of the allegations mentioned by Justice Head against such retailers, neither do the trademark protection merits of fair trade sound very convincing in such cases.

The odds were against the Georgia legislature when it repassed the Georgia Fair Trade Act in 1953. This accounts probably for the inclusion in the act of certain findings of fact. The caption of the Georgia Fair Trade Act of 1953[62] provides an interesting and typical example of

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[61] Grayson v. Oneida, op. cit., at 165.

[62] Georgia Laws, November - December Session, p. 549, as cited in Cox et al. v. General Electric Company, 211 Ga. 286, 85 S. E. 2d 514 (1955).

the fair traders' notion of competition. It provides that the act has for one of its purposes:

> ... to declare the public policy of Georgia with respect to property rights, trademarks, good will, and the right and freedom to contract, and to exercise the policy power of the State of Georgia so as to forbid the conduct of business in such manner as to infringe the equal rights of others, and to protect the general public against practices which may have the effect, or be intended to have the effect, of defeating or lessening competition or encouraging monopoly, by authorizing contracts stipulating minimum resale prices on commodities bearing trade-marks, brands or names, and defining as unfair competition and making actionable knowingly and wilfully to advertise for sale, offer for sale, or sell such commodities at less than the minimum prices established in or under the contracts authorized by this Act, whether the person so advertising for sale, offering for sale or selling is or is not a party to such contracts.[63]

It is rather difficult to reconcile this statement with the economic notion of price competition in the market to which all productive units (retailers included) are supposed to be subjected in our competitive free enterprise system and under the antitrust laws. The differences in definitions of economic concepts does contribute considerably to the confused controversial situation in which the fair trade issue remains.

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[63] Ibid., at 519 - 520.

The above declaration carries the contradictory implication, that it is good public policy to restrict price competition for a particular category of commodities in order to prevent that this price competition eliminate or lessen price competition in the trade of the remaining commodities. Price competition in trademarked commodities supposedly stimulates oligopolistic or monopolistic developments at the retail level.

The Georgia Supreme Court considered the fair trade issue most thoroughly in 1955[64] and rendered the nonsigner provision of the 1953 Georgia Fair Trade Act unconstitutional. This provision was characterized as a clear violation of the provisions of the due process clause of the Constitution of Georgia.[65]

After a review of some cases in which the U. S. Supreme Court had condemned price fixing practices, the Georgia Supreme Court commented remarkably and critically on the delegation to the states the right to enact fair trade laws, applicable to nonsigners in interstate trade, through the provisions of the federal McGuire Amendment.

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[64] Cox v. G.E., op. cit.

[65] Ibid., at 519.

"This attempt by the Congress to delegate to the States this power seems to be in the reverse of the power of delegation as we have always understood this subject under our system of government and under the provisions of the Constitution of the United States."[66]

It is hardly surprising that the court, which had previously ruled that the regulation of the milk price by a board authorized by the legislature was in violation of the due process clause of the state constitution[67] could find no justification for the fair trade nonsigner provision. "Certainly, if milk is not affected with a public interest, electric appliances are not ... if the General Assembly cannot authorize a board created by the State to fix prices, certainly it cannot give this right to an individual."[68]

The court continued to defy the fair traders' arguments one after another. The contention that the price fixing feature of the act was incidental to the real purpose of protecting the property right of the manufacturer in his trade name and trademark, was rebuted: "If the price fixing

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[66] Ibid., at 517.

[67] Harris v. Duncan, 208 Ga. 561, 67 S. E. 2d 692 (1951).

[68] Cox v. G.E., op. cit., at 517-518.

provisions are stricken from the act, the act is destroyed. Surely a provision so vital is not merely incidental."[69]

The self-confidence of the court in the accuracy of its decision is expressed in a statement made after the court had branded the findings of fact, which the General Assembly had included in the 1953 Act, as simple arguments as to the reasons why they considered the act necessary, and their conclusions as to the effect of the act. "We (the Court) are convinced that any findings of fact in conflict with what has been held in this opinion would be an attempt by the General Assembly to find a fact that does not exist, and of course, no court is bound by that sort of finding of fact by a legislative body."[70]

The court refused to be impressed by what other state supreme courts or the U. S. Supreme Court may or may not have decided. It considered the constitutional question of a statute like the fair trade law under the state constitution one of the few powers left to states to decide for themselves. The court would not strike down the constitution for the "modern trend to allow the government to more and

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[69] Ibid., at 518.

[70] Ibid.

more encroach upon the individual liberties and freedoms," neither would it follow the crowd.[71]

The proponents of fair trade hardly could have asked for a more straight forward and clearer adverse decision.

Arkansas

The Arkansas Supreme Court "... did not hesitate to investigate the political-economic aspects of fair trade legislation in reaching its decision."[72] The court declared the nonsigner provision of the Arkansas Fair Trade Act unconstitutional[73] less than a month after the similar Georgia decision. Although the Arkansas Supreme Court restricted its consideration of tne nonsigner provision to the due process clause of the state constitution, it stated; " ... in doing so we do not intend to intimate that otner sections (of the state constitution) are not relevant to the issue here."[74]

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[71] Ibid., at 519.

[72] Bates, op. cit., p. 141.

[73] Union Carbide & Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 275 S. W. 2d 455 (1955).

[74] Ibid., at 456.

The court refused to consider the fair trade act on the ground that it prevents ruinous competition caused by selling below cost, simply because the nonsigner-price cutter made a profit by selling "Prestone" anti-freeze $ 0.78 below the $ 3.75 per gallon fair trade price.[75]

The fact that under the existing fair trade law a manufacturer must have at least one contract with a retailer to employ the nonsigner provision, was labeled as "... a desparate attempt to hedge against the charge of unconstitutionality ... If securing a contract with one dealer binds all otners, than the corollary would be that, absent such contract, the others are not bound. It is frightful to think a device so easily concocted could destroy the constitutional bulwark protecting our personal liberties and the public welfare."[76]

The court agreed with a statement not originating with the court, to the effect that: "It is a generalization, but not an overstatement, to say that the effort to 'fix prices' is made by groups who desire to sell something

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[75] Ibid.

[76] Ibid., at 457-458.

for more than the sponsoring group believes that the purchasing public would pay for that 'something' without an enforced fixed price."[77]

The court leaned heavily on the economic opinion of the Federal Trade Commission[78] and on House Report No. 1292,[79] to determine its opinion concerning the effects of fair trade in relation to the public welfare.

A negative approach to justify the invalidation of the nonsigner provision of the Arkansas Fair Trade Act on the basis that it is not protective of the public welfare sounds most convincing. The court stated: "Nowhere has our attention been called to any demand by the public for the enactment of such legislation."[80]

It has been argued, that violation of the due process clause of state constitutions as a basis of an attack on the nonsigner provisions does not have the stability and performance that constitutional protection

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[77] Ibid., at 461.

[78] Report, 1945, op. cit.

[79] U. S., Congress, House, Select Committee on Small Business, Fair Trade: The Problems and Issues, Report No. 1292, 82d Cong., 2d Sess., 1952.

[80] Union Carbide v. White, op. cit., at 458.

should afford in a democratic society. "These courts which during a period of general prosperity and few bankruptcies have found nonsigner statutes not reasonably related to the public welfare, may change their minds and reverse themselves if the next constitutional test of such statutes is brought during a recession."[81] The Arkansas Supreme Court, after its approximately 5000 words long decision, crammed with due process objections to the nonsigner provision, can hardly be accused of creating instability in constitutional protection as it will not easily reverse its elaborate opinion as expressed in this case.

Nebraska

The Supreme Court of Nebraska declared the entire Nebraska Fair Trade Act unconstitutional.[82] It challenged the act on not less than eight specifications. Although of little interest in the context of this treatise, the Nebraska decision can function as a beautiful example of the

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[81]Michael Conant, "Resale Price Maintenance: Constitutionality of Nonsigner Clauses," University of Pennsylvania Law Review, 109 (February, 1961), 551.

[82]McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N. W. 2d 608 (1955).

rejection of fair trade purely on legal principles and argumentation.

Among other things, the Nebraska Supreme Court held that the purpose of the act was broader than its title; the act was in violation with the state's anti-trust statute; it provided for unconstitutional delegation of legislative power without the imposition of any standards or review; it makes an irrevocable grant of special privileges and immunities to private persons; and the fair trade act constituted legislation beyond the police power of the state violating the due process clause of the Nebraska constitution.[83]

The court argued that the nonsigner provision enables to establish and maintain on a horizontal level for all retailers a minimum retail price by only one fair trade contract with a single retailer. "An effect of this legislation is to permit one producer and one retailer to do on behalf of a class of retailers that which legally the class is forbidden to do as a class ... (The nonsigner provision) immunizes against competition between and among

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[83] Ibid., at 612-613.

retail competitors handling such commodities in trade."[84]

The grant of power to individuals to fix and enforce the prices of merchandise, without the imposition of any standards was found to be particularly obnoxious to the concept of due process of law.[85]

Oregon

In 1951 the validity of Oregon's fair trade law as applied to nonsigners came before the Supreme Court of Oregon. On the authority of the first Schwegmann decision, the nonsigner clause was declared invalid and void.[86]

Because of the uncertainty engendered by the passage of the federal McGuire Amendment and the doubt as to what the U. S. Supreme Court would ultimately decide as to the effects of this federal amendment upon fair trade acts, the Supreme Court of Oregon was willing to consider the issue under the Oregon constitution.[87] The nonsigner

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[84] Ibid., at 616.

[85] Ibid., at 617.

[86] Lambert Pharmaceutical Co. v. Roberts Bros., 192 Or. 23, 233 P. 2d 258, 260 (1951).

[87] General Electric Co. v. Wahle, 207 Ore. 302, 296 P. 2d 635 (1956).

provision was held to violate the state constitutional rights of contract and property and was termed by the court as "... a flagrant violation of the constitutional provision respecting the delegation of legislative power."[88] A comment typical of those state courts rejecting the arguments that fair trade acts are valid exercises of the state police power[89] was made by the Oregon court. "Viewed from a realistic standpoint, it is difficult to find any justification for the fair trade act based upon considerations of public health, safety, morals, and welfare. We can see no real and substantial connection between the nebulous theory that fixed minimum resale prices are necessary to protect the good will of the trademark owner and the welfare of the public."[90]

Regardless of how the true nature of fair trade may be camouflaged by high sounding terms such as 'free and open competition', 'unfair competition', 'protection of goodwill', etc., the court held a matter of common knowledge

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[88] Ibid., at 648.

[89] Case note, "The Constitutionality of the Virginia Fair Trade Act," Virginia Law Review, 47 (May, 1961), 638.

[90] G. E. v. Wahle, op. cit., at 644.

that the nonsigner provision is designed principally to destroy competition at the retail level.[91]

The court also objected to the fact that the fair trade provisions were justified by the fair trade proponents indirectly in terms of the public welfare through the manufacturers' interests involved, while the group really interested in fair trade remained unmentioned. The court brought this out by stating; "... it is obvious that the whole scheme ... is one of private, rather than public, gain, a scheme fathered by highly organized groups of distributors and retailers, interested not in the public weal, but only in their own selfish ends."[92] The court considered the facts, statistics and observations of Professors Shulman and Fulda[93] as a plain indication that the consumer is not benefited, but on the contrary is harmed by the operation of the fair trade act. The court considered the accuracy of the two scholars' findings seemingly beyond

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[91] Ibid., at 642.

[92] Ibid., at 645.

[93] Harry Shulman, "The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels," The Yale Law Journal, 49 (February, 1940), 607-25; Carl H. Fulda, "Resale Price Maintenance," University of Chicago Law Review, 21 (Winter, 1954), 175-211.

question. The court more or less settled the whole issue in these words" "The consumer is the public."[94] Adam Smith's dictum that the ultimate goal of all production is consumption must have been in the mind of the judge that wrote the decision. Well established economic principles and the classification of retailers as producers must also have played a role when the court held that fair trade sacrifices the consumer by compelling him "... to pay a higher price ... in order that the retailer may be guaranteed a higher fixed, and often unreasonable, profit."[95]

Louisiana

After the fair trade history made in Louisiana by Mr. Schwegmann in 1951 and 1953[96] it is not surprising that his name[97] also appears in the name of the case by which

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[94] G.E. v. Wahle, op. cit., at 645.

[95] Ibid.

[96] 1951, supra, pp. 69-74; 1953, supra, pp. 91-3.

[97] The significant role Mr. Schwegmann has played in the fair trade developments during the last decade justify a reiteration of some of his activities as reported in "Taste of Conquest", Newsweek, July 23, 1956, p. 56. Mr. Schwegmann is head of a New Orleans supermarket which sells everything from drugs to shotgun shells. He is passionately convinced of his right to set prices as low as he chooses, with the result that he grossed $ 22 million

the Louisiana Supreme Court declared the nonsigner provision of the state fair trade act unconstitutional.[98]

The court's decision contained basically the same reasoning as was already employed in previous cases on fair trade decided by the highest courts in other states. The Louisiana Supreme Court considered the nonsigner provision from the standpoint of delegation of legislative power and termed it "... legislative delegation in the most obnoxious form."[99]

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in 1956. He had to survive a hoard of lawsuits by manufacturers who insist that their retailers do not sell below the stipulated price. Schwegmann became a national figure in 1951. The McGuire Act did not dismay him. He stuck to his guns, through volleys of subpoenas and a series of legal defeats, eventually accumulating 33 injunctions from various manufacturers. He sponsored a bus motorcade to Baton Rouge to argue futilely against fair trade before the state legislature. In 1956 he even ran for the legislature himself, solely on the fair trade issue (he finished third). But in the Dr. Tichenor v. Schwegmann case crusader Schwegmann proved that he could lose many battles and still win a war. A federal district court reacted on the Louisiana Supreme Court decision by suspending all 33 injunctions against Schwegmann. Schwegmann's militant reaction: "It is D-Day for all consumers in Louisiana."

[98]Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 90 So. 2d 343 (1956).

[99]Ibid., at 348.

Colorado

Olin Mathieson's firearms and ammunition broke the nonsigner provision stronghold of fair trade in Colorado. The influence of the general criticism in previous cases by courts in other states was strongly reflected in the opinion of the Colorado Supreme Court.[100] The court, in its hostility toward fair trade based on a feeling of the economic unsoundness of this statute, stated: "The contract in the instant case[101] ... if enforced ... inevitably will result in monopoly."[102] The court declared that it failed to perceive how a consumer is in any way protected or benefited if he is required to pay a higher price. The court considered it equally obscure "... how this statute ... can operate to accomplish its expressed purpose to foster and encourage competition."[103]

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[100] Olin Mathieson Chemical Corp. v. Francis, 134 Colo. 160, 301 P. 2d 139 (1956).

[101] It was explicitly stated that Olin Mathieson had only one fair trade contract with a retailer in the entire State of Colorado. (Ibid., at 141.)

[102] Ibid., at 147.

[103] Ibid., at 144.

A stinging criticism on the partiality of the legislature's economic policy and the court's earnest belief in the necessity of judicial review is contained in the following quotation concerning the nonsigner provision:

> Legislation of this kind evidences the ability of minorities to induce legislation for their special benefit at the expense of the unorganized purchasing masses. During a recent decade numerous attempts were made to regiment the general public and in each instance they were struck down as violative of constitutional rights of a free people. We have not yet arrived at a place in America where the many must yield to the few, so that the latter may make ever increasing profits ...[104]

The court refused to place "the power of the legislature above the constitution" in regard to the nonsigner provision. The statute was held unconstitutional because it was lacking in due process; because it was confiscatory; and because it tends to establish a monopoly.[105]

Utah

Utah is one of the three western states in which the respective supreme courts struck down the entire fair trade act.[106] The Constitution of Utah, which forbids

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[104] Ibid., at 152.

[105] Ibid., at 139.

[106] Nebraska, supra, p. 127; Montana, infra, p. 156.

"... any combination ... having for its object or effect the controlling of the price ... of any article of manufacture or commerce" provided the Supreme Court of that state with a firm basis for striking down resale price maintenance.[107]

The Utah Supreme Court reviewed extensively the justification of fair trade provisions as presented by the General Electric Company.[108] The traditional fair trade arguments employed by General Electric sounded so convincing to the court that it asserted: "The arguments that the intent and purpose of the Fair Trade Law are in harmony with the anti price-fixing provisions of our Constitution are indeed plausible, and the authorities holding such acts valid are eminent and impressive."[109] The Court saw no

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[107]Kohrs, op. cit., 432. Michael Conant doubts the firmness of this basis: "But in other states with constitutional proscriptions of monopolies, nonsigner clauses have been held not violative of such provisions. The usual reasoning of the courts in these cases is that their constitutions prohibit only complete monopolies of a trade or product and do not bar vertical price fixing agreements for individual products. This reasoning is applied even though the large majority of the producers of a type of product establish the same relatively high resale price for their comparable products." (Conant, op. cit., 551.)

[108]General Electric Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P. 2d 741 (1956).

[109]Ibid., at 747.

other objections to the fair trade law than that it constituted price-fixing, which is in violation of the specific language of the Utah constitution. The court refused to become a 'super constitutional convention' and disregard the language of the constitution and "... impose an interpretation as to what they may secretly have intended or ought have done as divined by plaintiff."[110]

The court, apparently not willing to offend anybody, also found the defense's arguments against fair trade plausible. The court was impressed with the evidence that the fair trade purpose in reality was not to protect the millions spent by General Electric to create superior quality products and to advertise them, all capitalized in the public's good will by the trademark 'GE', but to protect the retailer. The question was asked: "If the protection of good will is so vital, why does not the manufacturer fair trade all his products?"[111]

The court saw no necessity to agree or to disagree with the many arguments for and against fair trade,

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[110] Ibid., at 748.

[111] Ibid., at 749. Fair trade programs will most likely only be emphasized by manufacturers if they are to the mutual benefit of the manufacturer and retailer. (Supra, p. 120.)

but it leaned toward the opponents' side in its contention that even if this type of price fixing under the nonsigner provision were for the salutary purposes as contended by General Electric, it violates the constitution of Utah. "It is like sin: a little sin, properly so classified, is just as definitely sin as a great quantity of it, and hardly to be approved under the pretext that it is so small in amount that it can really be classified as a virtue."[112] Regardless whatever forms or rituals are gone through, the basic essence of the nonsigner provision is 'price fixing'.[113]

Indiana

The Indiana Supreme Court used strictly legal reasoning to invalidate the nonsigner provision of the state fair trade act.[114] Neither the purpose of the law nor the economic conditions or effects were taken into consideration. According to the court the meaning of the constitution is not affected by economic cyclical fluctuation;

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[112] Ibid., at 751.

[113] Ibid., at 752.

[114] Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N. E. 2d 415 (1957).

"... the Indiana Constitution on separation of powers and the vesting of the right to enact laws in the General Assembly have the same meaning whatever may be the business or economic conditions."[115]

The court held that the nonsigner provision had as a consequence that the ultimate retailer would be bound because of a manufacturer's contract and "... not because a statute said he should be bound when he did not consent."[116] The nonsigner provision was compared with the National Industrial Recovery Act of 1933. The similar lack of standards and review, which had been characterized by Mr. Justice Cardozo in Schechter Poultry Corp. v. United States[117] as "delegation running riot", constituted the Indiana court's main objection to the nonsigner provision of the fair trade act.[118]

Interesting is to notice, that in most important fair trade cases, the fair traders are much better represented than the opponents of fair trade. It is mostly the

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[115] Ibid., at 419.

[116] Ibid., at 417.

[117] 295 U. S. 495 (1935).

[118] Bissell v. Shane, op. cit., at 419.

nonsigning retailer who has to fight a lonely battle. In the reviewed Indiana case e.g. there were among the fair trade proponents legally represented as 'amicus curiae'; General Electric Co., American Fair Trade Council, Indiana Retail Hardware Association and four other manufacturing companies.[119]

South Carolina

It was also a fair traded General Electric product which brought the fair trade issue before the South Carolina Supreme Court.[120] As no distinction is made in fair trade legislation between commodities affected with a public interest and those that are not, the court found it difficult to justify the nonsigner provision upon considerations of the public health, safety, morals and general welfare.[121] The court considered the trademark theory of fair trade in the Old Dearborn case unsound. It held that a trademark or brand is not in the nature of a covenant running with property. If the manufacturer sells his

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[119] Ibid., at 417.

[120] Rogers-Kent, Inc. v. General Electric Co., 231 S. C. 636, 99 S. E. 2d 665 (1957).

[121] Ibid., at 669.

product for full value, he should not be able to retain "... some property interest which enables him to control the selling price in perpetuity."[122] The court declared the nonsigner provision of the state fair trade act unconstitutional upon the grounds that it constitutes a deprivation of property without due process of law.[123]

New Mexico

The growing legal authority opposing fair trade is expressed clearly by the New Mexico Supreme Court in its decision that invalidated the nonsigner statute of that state. Not only does this decision[124] contain many quotations from previous decisions in other states, but also several uncited phrases that can be traced as originating with other courts. The court noted that fair trade acts (at the time of the court's decision) had been before the highest appellate courts of 27 states, of which 16 sustained the constitutionality of fair trade legislation, while in 11 states it was held unconstitutional. "The widely differing

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[122] Ibid., at 670.

[123] Ibid., at 671.

[124] Skaggs Drug Center v. General Electric Co., 63 N. W. 215, 315 P. 2d 967 (1957).

theories" employed by the courts make those "figures by themselves almost meaningless."[125] More significance was attached to the fact that, although the majority of courts upheld fair trade, "... the greater bulk of the decisions declaring the statute unconstitutional have been by rulings of appellate courts in more recent years."[126]

Although the court conceded that a great deal of conflict arises by reason of the fact that court after court, regardless of its final holding, "... mentions the question of the economic philosophy of the fair trade acts,"[127] it did not agree with those courts, including the U. S. Supreme Court, which "... have been adhering to the form of the statute and overlooking the substance."[128]

From the wealth of conflicting legal authorities, the New Mexico court selected the Colorado decision as containing "... language, the reasoning of which ... should be adopted in New Mexico."[129]

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[125] Ibid., at 968-969.

[126] Ibid., at 969.

[127] Ibid., at 971.

[128] Ibid., at 974.

[129] Ibid., at 973. For part of the language referred to, see quotation, supra, p. 135.

In holding the nonsigner provision unconstitutional and void as an arbitrary and unreasonable exercise of police power without any substantial relation to the public health, safety, or general welfare,[130] the court asserted that it "... should not require any argument whatsoever to point out that the sale of electric irons having a General Electric label can in any sense affect the public health."[131]

Ohio

The Ohio Supreme Court considered that it would not serve any useful purpose to discuss the pros and cons of fair trade in detail, since it had already been done in many cases. In a short decision[132] the court ruled that the nonsigner provision "... represents an unauthorized exercise of the police power in a matter unrelated to the public safety, morals or general welfare, delegates legislative power to private persons, unconstitutionally denies the owner of property the right to sell it on terms of his own

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[130] Ibid., at 974.

[131] Ibid., at 972.

[132] Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N. E. 2d 481 (1958).

choosing and is invalid."[133] This decision is significant in relation to the fact that the Ohio legislature passed another fair trade act after this decision, which tries to elude the legal objections to the typical nonsigner provision, but which has the same purpose and consequences.[134]

In the Ohio decision the first indication of the economic consequences of the decline in the legal status of fair trade is to be found. "Many manufacturers have abandoned reliance on the fair trade acts to stipulate tne prices ... realizing the difficulty of enforcement and the further facts that arbitrary price fixing is monopolistic in character, has an anticompetitive effect on the economy and works to the disadvantage of the consuming public."[135] The first part of this explanation sounds quite logical, the latter part, however, more or less asserts that those manufacturers cherish competition and implies a social, rather than a private, acquisitive spirit motivating the manufacturers' actions to abandon their fair trade programs,

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[133] Ibid., at 481.

[134] This new fair trade act was subsequently held unconstitutional by a lower court. For description of the act and reference to this decision, see, infra, pp. 203-8.

[135] Union Carbide v. Bargain, op. cit., at 483.

which is alien to the competitive free enterprise system.

Kansas

By the time of the Kansas decision, the Kansas Supreme Court could refer to 31 state supreme court decisions on fair trade legislation.[136] By now the balance had shifted in favor of the fair trade opponents - sixteen courts held the nonsigner provision unconstitutional and void; fifteen sustained it.[137]

The court refused to accept the declared purpose of the fair trade act and held that "... the essence of resale price maintenance is control of price competition, and the backbone of the act is the nonsigner provision without which the law is ineffective to maintain retail prices."[138]

The nonsigner provision was declared unconstitutional and void as constituting an attempt to delegate legislative power. "The legislature is powerless to clothe a private person with power to fix minimum resale prices, binding upon all ..."[139]

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[136] Quality Oil Co. v. E. I. du Pont de Nemours & Co., 182 Kan. 488, 322 P. 2d 731 (1958).

[137] Ibid., at 735.

[138] Ibid., at 736.

[139] Ibid., at 737.

Cases in which the stipulated facts contain information concerning the fair trade price and the selling price of the nonsigner-retailer, contain always the explicit statement that such sales were made at a profit by the retailer. In the Kansas case the product in question was 'Zerex' antifreeze, sold by Quality Oil Company at a profit for $ 2.25 per gallon, while du Pont's fair trade price was exactly one dollar higher per gallon.[140]

West Virginia

The West Virginia Supreme Court, referring to the confusing situation of the number of states sustaining and states invalidating nonsigner provisions, agreed that "... with such respectable authority in favor of tne position of both plaintiff and defendant, it would not be too difficult to substantiate either position ..."[141] The court interpreted the fair trade issue in relation to the police power of the state. It relied heavily on the previous Georgia and New Mexico decisions.[142] It ruled that the nonsigner

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[140] Ibid., at 733.

[141] General Electric Co. v. Dandy Appliance Co., 143 W. Va. 491, 103 S. E. 2d 310, 313 (1958).

[142] Cox v. G.E., op. cit.; and Skaggs v. G.E., op. cit.

provision is "... unconstitutional and void as an arbitrary and unreasonable exercise of the police power because of having no substantial relation to the public health, safety or general welfare."[143]

Kentucky

The Kentucky Court of Appeals phrased its objections to the nonsigner provision of the state fair trade act as "... a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in free trade." It held the nonsigner provision unconstitutional.[144] After a comprehensive summation of all reasons in support of the constitutionality of the nonsigner provision and also of the reasons holding the nonsigner statute invalid, the court rejected the necessity to accept the rationale of all the adverse opinions "... but upon the whole we regard the reasons as better and more in accord with our own jurisdiction than the reasons assigned for sustaining the law."[145] The

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[143] G.E. v. Dandy, op. cit., at 311.

[144] General Electric Co. v. American Buyers Coop., Inc., 316 S. W. 2d 354, 361 (Ky., 1958).

[145] Ibid., at 360.

court posed the pertinent and hard to answer question: "What is wrong with a man selling his own property for what he pleases?" When General Electric received its own asking price, the retailer acquired the commodity, G.E.'s brand and symbol upon them included. "If it choose to do so, it could, without violating the law ..., nave given any of the articles away or have destroyed them, including the brand and G.E.'s good will as well if that be deemed to have adhered to the product,"[146] but when the retailer wants to sell the article at a price satisfactory to him, he comes under the condemnation of the nonsigner statute! The court thereupon sharply remarked tnat in its opinion this so-called fair trade statute actually "... is the antithesis of fair trade."[147] This meant another defeat for the stalwart defender of the virtues of fair trade - General Electric Company.

Washington

The Washington Supreme Court is the only court of last resort on record which first upheld the

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[146] Ibid., at 361.

[147] Ibid.

constitutionality of the nonsigner provision[148] and later reversed this decision.[149] In the earlier decision the court held that the nonsigner provision provided for 'vertical price fixing' and did not contravene with the state constitution prohibiting monopolies. However, the court rested its later decision on a re-examination of the holding in the Sears case that the nonsigner provision of the state fair trade act was a valid exercise of the police power.[150] The theory in the Sears case had been adopted at the time from the U. S. Supreme Court's Old Dearborn decision[151] and in the reversing decision the court stated twice that it "... did not point out (in the previous decision) how the health, safety, morals, or welfare of the public was affected by the legislation."[152] This neglect in the Sears case of the judicial test of reasonableness that this exercise of the police power must pass, formed

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[148]Sears v. Western Thrift Stores of Olympia, Inc., 10 Wash. 2d 372, 116 P. 2d 756 (1941).

[149]Remington Arms Co. v. Skaggs, 345 P. 2d 1085 (Wash. 1959).

[150]Ibid., at 1086.

[151]Ibid., at 1090.

[152]Ibid., 1086-1087.

the basis of the condemnation of the nonsigner provision in the state of Washington eighteen years later.[153] The court did not reject the trademark theory of the Old Dearborn decision, but came to an interesting and convincing modification of the extent to which it can be employed to justify nonsigner legislation.

> In selling the product to the retailer, the manufacturer exacts a price for the use of his trademark and the benefit of the good will associated with it, as well as for the physical components of the product, and unless he also exacts an agreement that the retailer will not resell the product at less than a stipulated price, we can see no equity which should entitle him to the special protection of the law.[154]

The Washington court reversed its earlier decision and declared the nonsigner provision invalid as an improper exercise of the police power.[155] In the Sears case, in which the nonsigner provision had been upheld, three judges had dissented, in the Remington Arms case, invalidating this statute, the decision was rendered five to four.

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[153] Ibid., 1087.

[154] Ibid., 1090.

[155] Ibid., 1091.

Minnesota

The Minnesota Supreme Court set the stage for its condemnation of the nonsigner provision of the state fair trade act in 1951. The conclusive decision did not come, however, until 1960.

In Calvert Distillers Corp. v. Sachs[156] the court in conformity with the U. S. Supreme Court's decision in the first Schwegmann case, recognized the binding effect of this decision and held the nonsigner provision of the state fair trade act invalid and inoperative insofar as it authorizes the enforcement of minimum resale prices against nonsigners of contracts with respect to commodities in interstate commerce.[157] The court gave no indication as to the validity or invalidity under the Minnesota constitution. It can be inferred, therefore, that the court had neither the intention nor the necessity to invalidate the nonsigner provision with respect to commodities in intrastate commerce, or to change its opinion concerning fair trade in general. The court simply accepted and applied the opinion of the highest federal court on this matter as

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[156] 234 Minn. 303, 48 N. W. 2d 531 (1951).

[157] Ibid., at 533.

related to interstate commerce, at the time that the McGuire Amendment had not yet negated this authority. "The omission of the nonsigner provision from the federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading onto the Act (Miller-Tydings Amendment) a provision that was meticulously omitted from it."[158]

In an opinion of the Attorney General of the State of Minnesota[159] after the enactment of the McGuire Amendment, it was contended that as the purpose of this act was to change the U. S. Supreme Court's ruling in the first Schwegmann case, it automatically changed the Minnesota Supreme Court's rule in Calvert v. Sachs to the end that the nonsigner provision was now effective again.

In 1960 the Minnesota Supreme Court considered the fair trade problem more extensively. This time the court was willing to compare the economic aspects of fair trade with the provisions of the state constitution. Consequently the court invalidated the nonsigner provision of the state fair trade act.[160]

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[158] Ibid.

[159] C. C. H. Trade Cases: 1951-1952; #67, 391.

[160] Remington Arms Co. v. G.E.M. of St. Louis, Inc., 257 Minn. 562, 102 N. W. 2d 528 (1960).

This Minnesota decision contains a brilliant expose of legal and economic argumentation against the nonsigner statute. In relation to the alleged purpose of the fair trade act to protect the manufacturer's trademark good will against destructive loss-leader selling, the court drew a clear distinction between the state unfair trade act (sales below cost) and the fair trade act. The former act, the court held, "... is clearly aimed at suppressing predatory practices," it denounces sales below cost "... for the purpose or with the effect of injuring competitors or destroying competition."[161] The fair trade act, however, the court argued, undertakes to make lawful, contracts which were unlawful prior to its passage. "The nonsigner provision in reality, eliminates competition in price honestly based on differences in selling costs as between merchants whose costs of business may differ as a result of normal and natural competitive practices." This "... type of competition is to be encouraged in the public interest, rather than restrained."[162]

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[161] Ibid., at 531.

[162] Ibid., at 532.

The court found nowhere in the record, or in the great volume of material submitted to it, persuasive considerations of public welfare or economic need. "We are convinced that the reasons advanced for the grant of price-fixing power are not so compelling that we are forced to concede that the interest of the consumer are of so little importance that hearing and other safeguards may be dispensed with."[163] The court viewed with grave concern the exercise of arbitrary power delegated to unofficial persons, "... especially ... when, as here, the grant is given to the very persons who will benefit most by an arbitrary and wrongful use of that power."[164]

Most interesting in the Minnesota decision is the way in which the court fits the specific ramifications of the case in question into the framework of the fair trade opponents' theory contending that this legislation works as a boost to monopolistic and oligopolistic power.

> The record in this case contains the testimony of a respected economist to the effect that resale price maintenance under the so-called Fair Trade Act is detrimental both to the consumer and to the economy. He was of the view that the producer of the commodity who invokes the act is usually a

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[163] Ibid., at 536.

[164] Ibid., at 537.

> member of a monopoly or oligopoly, because if there were numerous producers of a competing commodity few would abide by the pricing practices of one or two. His opinion that the policy of the act makes possible a price monopoly inimical to the public welfare is clearly borne out by the record. There is in force a fair trade contract in respect to Remington Shells produced by plaintiff. The major competing shells are manufactured by Olin Mathieson Corporation under the name of "Winchester". Olin Mathieson's shells are also fair traded. These two manufacturers control 87 to 90 per cent of the production of shells in the United States. It appears from the record that for almost all types of shells produced by each of these manufacturers, in fact for every type which is common to the production of both of them, the price is identical to the penny. This is significant considering that the elaborate price lists of both manufacturers were printed and published 3 days apart. It is apparent that the record here establishes that the act, rather than regulating and controlling monopoly power creates a climate where monopolies may flourish. These views are in accord with the thought of authorities who have written and reported on the subject of retail price maintenance in the past few years.[165]

After such a profound legal and economic review of the real purpose and effects of fair trade, it is not amazing that the Minnesota Supreme Court declared the non-signer provision unconstitutional as an unlawful delegation of legislative power.[166]

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[165] Ibid., at 536. The court did not supply the name of the economist referred to. However, several sources substantiating the court's economic reasoning were mentioned in a footnote.

[166] Ibid., at 537.

Montana

The Montana constitution contains a section which quite explicitly rejects fair trade. "No incorporation, stock company, person or association of persons ... shall, directly or indirectly ... make any contract ... for the purpose of fixing the price ... of any article of commerce ..."[167] On the basis of this constitutional provision the Montana Supreme Court held the entire state fair trade act unconstitutional.[168]

The court found the fair trade decisions of other jurisdictions "in hopeless conflict and cannot be rationalized with each other."[169] The discussion of the economic merits, pros and cons, of fair trade legislation was considered to be within the province of legislative powers; "... this court is only to measure the statute against constitutional standards."[170] The controlling question was whether fair trade provisions constitute price-fixing. The court refused to accept the fair traders' argument that it cannot be regarded as price-fixing since the purpose of the

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[167]As cited in Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 359 P. 2d 644, 650 (Mont. 1961).

[168]Ibid., at 654.

[169]Ibid., at 648.

[170]Ibid., at 650.

act is to protect the good will symbolized in the manufacturer's trademark. The court branded fair trade as price-fixing:

> We do not have to go outside the stipulated facts in the instant case to ascertain the truth of this proposition. In this case the plaintiff set the minimum retail resale price of Prestone at $ 3.25 per gallon. It was also stipulated that various competing brands sold at a range of prices from $ 1.95 to $ 3.25 per gallon. In other words, the minimum price at which Prestone can be sold is as high or higher than the price of any other brand of antifreeze. It also appears that the retailer makes a healthy profit at the price of $ 3.25 per gallon since the defendant found it possible to make a satisfactory profit by selling the commodity at $ 2.49 per gallon. We think it is elementary that the Fair Trade agreements of the plaintiff have the necessary effect of setting the exact price at which Prestone is sold. Since the Act accomplishes this result it must be characterized as price-fixing."[171]

The Montana court drew support from the New Mexico decision to qualify fair trade as price-fixing, while the Utah decision served as a further justification to hold fair trade as violating the constitutional provision relating to the validity of price-fixing.[172]

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[171] Ibid., at 652.

[172] Ibid., at 652-653.

Iowa

The Iowa Supreme Court considered resale price maintenance by contract already a substantial privilege.

> With respect to resale price maintenance by contract, the Fair Trade Act not only affirms the Iowa judicial tolerance of binding immediate vendees but also goes beyond all common law development in this state to extend enforcebility to contracts binding subvendees as well.[173]

The court held the nonsigner provision an unconstitutional delegation of authority[174] and to substantiate this decision the court made the following comparisons:

> When we hold it an unconstitutional delegation of legislative authority to permit the highway commission to establish rules governing the stopping of vehicles upon a highway, to permit the conservation commission to determine how many fish a fisherman may catch and for a court to fix the boundaries of a city, it is an obvious non sequitur to permit a manufacturer to regulate the sales policy of a retailer not privy to any contract or agreement with the manufacturer.[175]

The price cutting wholesaler had chosen not to defend its position before the Iowa Supreme Court. The

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[173] Bulova Watch Co. v. Robinson Wholesale Co., 108 N. W. 2d 365 (Iowa 1961), at 367.

[174] Ibid., at 370.

[175] Ibid., at 366.

court implied that economic pressure might have been the cause of this sudden "lack of interest" when it stated:

> ... it would be improper for us to assume it is solely because of loss of confidence in their position as sustained by the trial court.[176]

The court refused to consider resale price maintenance a right of property inherent to the trademark property right.

Oklahoma

The fair trade island, which Oklahoma formed among its six adjacent non-fair trade states,[177] disappeared definitely in the early part of 1961 when the Oklahoma Supreme Court affirmed a trial court decision which had held the nonsigner provision of the Oklahoma Fair Trade Act unconstitutional and void "... as being an improper delegation of legislative power of price fixing to private persons ... and (2) in violation of due process provisions ..., in that there was no real and substantial relation between the price fixing provisions as applied to nonsigners

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[176] Ibid., at 369-70.

[177] Texas and Missouri never had a fair trade act; New Mexico, Colorado, Kansas and Arkansas invalidated their nonsigner provisions. Supra.

and prevention of injury to the economic, social and moral well-being of the state."[178]

The Oklahoma court cited several decisions to prove the improper delegation of legislative power occasioned by the nonsigner provision. "There is no provision for an official or court review of the fixed price for the protection of the nonsigner or the consumer who represents the public."[179]

Among the due process objections to the nonsigner provision the court remarked that the police power of the state must be exercised for public purposes only and not for the exclusive benefit of particular individuals. The court recognized that it was just as much in the interest of the public to have the forces of competition retained at the retail level of the production column as it was beneficial to have "free and open competition" among manufacturers.

> None, including the consuming public, has any voice in the matter except the parties to the price fixing contract. The retailer who by skill and energy has reduced his operation expense and may be satisfied with a smaller

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[178] American Home Products Corp. v. Benny Homsey and Associates, 361 P. 2d 297, 299 (Okl. 1961).

[179] Ibid., at 300.

> profit[180] is regimented with less efficient and less industrious seller of the same commodity. Most important the consumer public must pay this price and is deprived of the benefit of the free and competitive economy so important to the progress of this nation.[181]

The Oklahoma court's double-barrel execution - unlawful delegation of legislative power and due process violation - of the nonsigner provision will mean a hard time for a statute of this character to revive in Oklahoma, and is a solid example for other courts to follow.

Summary and Conclusion

In a 1955 publication of a group of ardent fair trade proponents it was stated without any further comment or justification that the state fair trade laws would "... only stay on the statute books as long as they are in the best public interest."[182] The wisdom of this statement was farther reaching than the author apparently hoped. The foregoing review of adverse legal fair trade decisions

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[180]Presumably meant as 'a smaller profit per unit' and not as 'a smaller total profit'.

[181]American Home Products v. Benny, op. cit., at 302.

[182]E. A. Newcomb, "The Fair Trade Laws," The Basis and Development of Fair Trade (New York: The National Wholesale Druggists' Association, 1955) p. 6.

indicates that the courts in many of those cases came specifically to their fair trade condemnation from the standpoint of the public interest involved.

The influence of such expert opinions on fair trade as those of the Federal Trade Commission, eminent legal and economic scholars, the Antitrust Division of the U. S. Department of Justice, and others, could not indefinitely fail to be reflected in the attitude of the courts.[183]

The three states in which fair trade met complete defeat,[184] the argumentation of the courts of last resort in invalidating the fair trade act in general was mainly based on special state constitutional provisions prohibiting price fixing combinations and/or monopolies.

The 18 state courts that negated the effectiveness of the fair trade provisions by holding the nonsigner provision unconstitutional, used one or more of the following legal argumentations:[185]

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[183]See especially the Florida and Minnesota decisions, supra.

[184]Montana, Nebraska, and Utah.

[185]Robert G. Clayton, "The Present Constitutional Status of State Fair Trade Laws", University of Cincinnati Law Review, 25 (1956), 473.

1. The nonsigner provision deprives an individual of his property and liberty without due process of law.

2. The nonsigner provision impairs the freedom of the individual to contract for the price at which he wishes to sell his property.

3. The nonsigner provision unlawfully delegates the legislative power of the state to private individuals since it confers upon them the power to fix the prices without standards, hearing and review.

4. The nonsigner provision bears no real and substantial relation to the public interest and therefore is beyond the police power of the state.

5. The nonsigner provision is confiscatory and discriminatory and such factors cannot be hidden under the guise of public interest.

Michael Conant contends that the different constitutional objections to the nonsigner provision based on the due process provision of the state constitutions, have a fundamental weakness,[186] but that unconstitutional delegation of legislative power is a more soundly reasoned attack

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[186] Supra, p. 127.

on nonsigner clauses.[187] The preceding review contains four states[188] in which the nonsigner provision was invalidated solely on the ground of unconstitutional delegation of state legislative power. Six other states regarded this argument as one ground, though not the sole basis, for holding their nonsigner provisions unconstitutional.[189] They generally argued that when governmental power to use compulsion in enforcing rules is delegated to private persons, there is created a new, private government, and private government violates the essential concept of a democratic society in which the legislative power is vested solely in the elected legislature.

Besides all the legal considerations, it appears to be extremely significant that each state court which has addressed itself to the validity of fair trade has increasingly come to face the economic realities. Although several courts refused to take the real purpose and economic consequences of this price maintenance system as the basis to determine the constitutionality of those statutes, the

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[187]Conant, op. cit., p. 552.

[188]Indiana, Kansas, Louisiana and Minnesota.

[189]Colorado, Florida, Nebraska, Ohio, Oklahoma and Oregon.

impact of those economic facts is noticeable in the legal reasoning of almost all of them, while a few courts explicitly condemned the economic philosophy of the scheme. It seems, that once the courts are willing to detach the vague emotional appeal of fair trade from its real purposes and effects,[190] the backbone of fair trade has little chance to remain unbroken by the state courts. Although the U. S. Supreme Court's reluctance to intervene in the fair trade issue, apparently because it has come to realize tnat it does not have the investigative machinery to determine whether particular economic regulations are reasonable,[191] some state courts have expressed themselves in strong terms and arguments that they will not practice the humility to abnegate the power of judicial review of economic legislation,[192] and want to remain the custodians of the public interest. The other courts, while less outspoken, practiced the same rule by invalidating fair trade legislation on due process objections. All those courts, tacitly or explicitly, desired to balance the uneven

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[190]Bates, op. cit., p. 143.

[191]Conant, op. cit., p. 543.

[192]See especially the Colorado decision, supra, p. 134.

distribution of political and economic influence on the legislatures, by taking the side of the consumer, who "... most often neglected, could not conceivably organize and maintain lobby and pressure groups so well as retail merchants and other sellers who are solid entities."[193]

In relation to previous and following discussions it is significant to note, that in all adverse decisions the products in question were nationally advertised and marketed. Ten of the twenty cases in which the back of fair trade was broken, were concerned with the products of two national manufacturers. General Electric's products were involved in seven cases, while Union Carbide & Carbon's 'Prestone' antifreeze appeared in three cases.

In an early practical fair trade guide for business executives and members of the bar, an almost naive belief in the infallibility of consumer choice through the channels of the legislature, is contained in a well founded warning:

> It is the consumer in his capacity as a member of the public, whose representatives in the legislatures and the Congress passed the Fair Trade Acts. The consumer having given, he can take away and

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[193]Bates, op. cit., p. 129.

> the minute he feels that the privileges conferred by him are being used to his disadvantage, he will take them away - which impels the suggestion that the people interested in preserving the idea back of the Fair Trade Acts ought to be careful not to abuse their privileges.[194]

Although four state legislatures[195] have steadfastly resisted the enactment of fair trade statutes and the attempts to pass a federal fair trade act have been thus far unsuccessful, no single example has come to this writer's attention where the general public has been able to retract the special privileges given to the trademark owners and retailers groups through the same governmental branch as through which these rights were conferred upon those groups. The preceding analysis can only lead to the conclusion that it is the judiciary branch of government, rather than the legislative branch, that represents the general public's interest in the fair trade issue. By objecting to legislation which grants special privileges without standard or review, the courts have emphasized that in their opinion, the interests of manufacturers of trademarked

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[194]E. S. Rogers, "Foreword," S. A. Weigel, The Fair Trade Acts (Chicago: The Foundation Press, 1938), pp. v-vi.

[195]Alaska, Missouri, Texas and Vermont. The U. S. Congress has thus far also refused to pass a fair trade act for the District of Columbia.

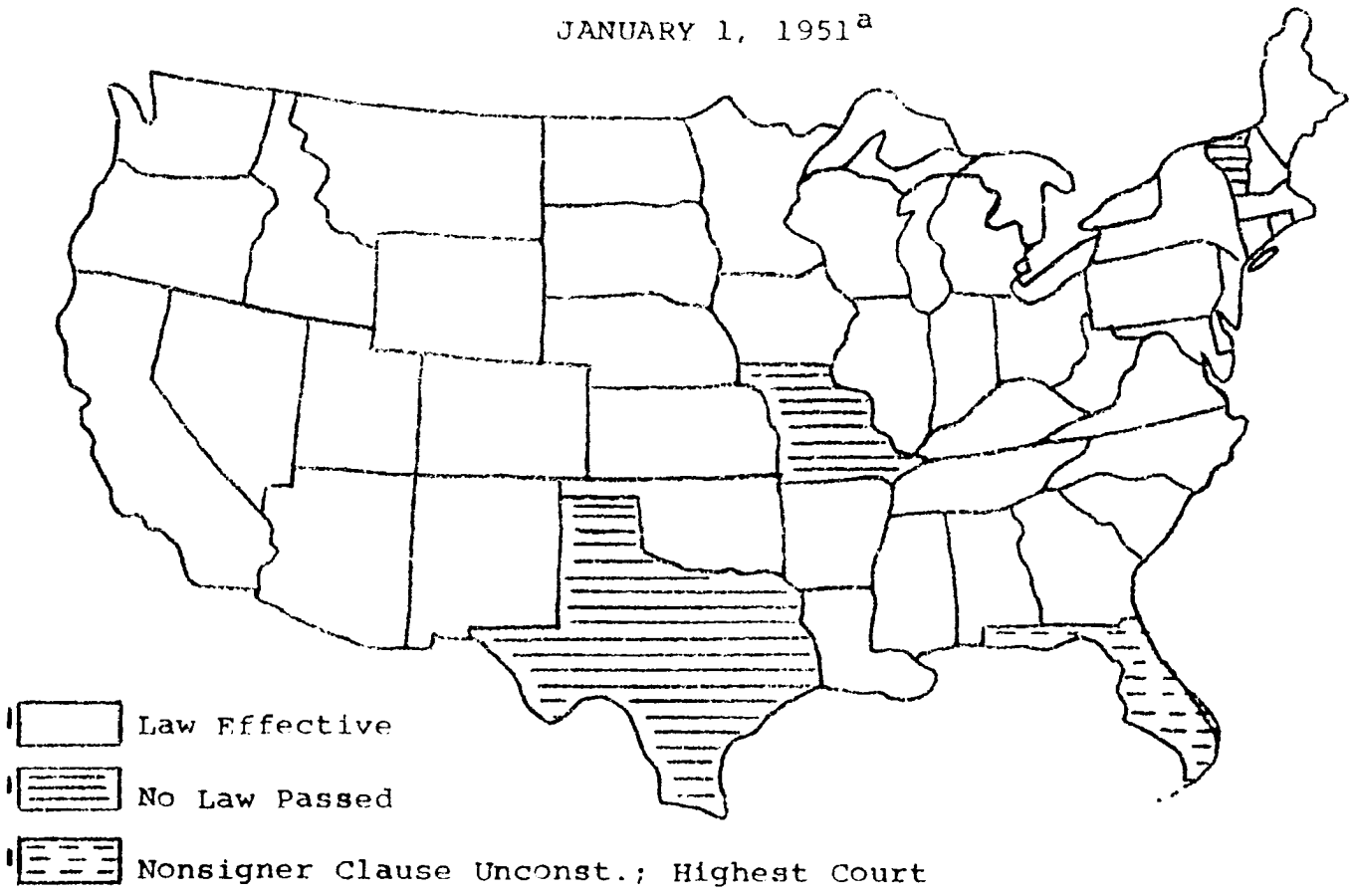
goods and their 'satellite' - 'independent' - small retailers do not necessarily coincide with the public interest. Rather, they contend that those interests are diametrically opposed to each other.

In none of the above mentioned cases the price cutting issue pertained to sales prices below the cost of acquisition. In most cases it was explicitly stated that the so-called Unfair Trade Acts, which concern themselves with sales below costs, were not applicable to the circumstances of the specific disagreements before the courts. The courts apparently could not qualify price reductions as 'predatory' as long as this practice did not reach the lower limits of prices as established by the legislatures as reasonable in the state unfair trade laws. The courts, on the contrary, considered those price reductions beneficial and healthy in our economic competitive free enterprise system.

CHART 1

LEGAL STATUS OF STATE FAIR TRADE LAWS: 48 STATES

JANUARY 1, 1951[a]

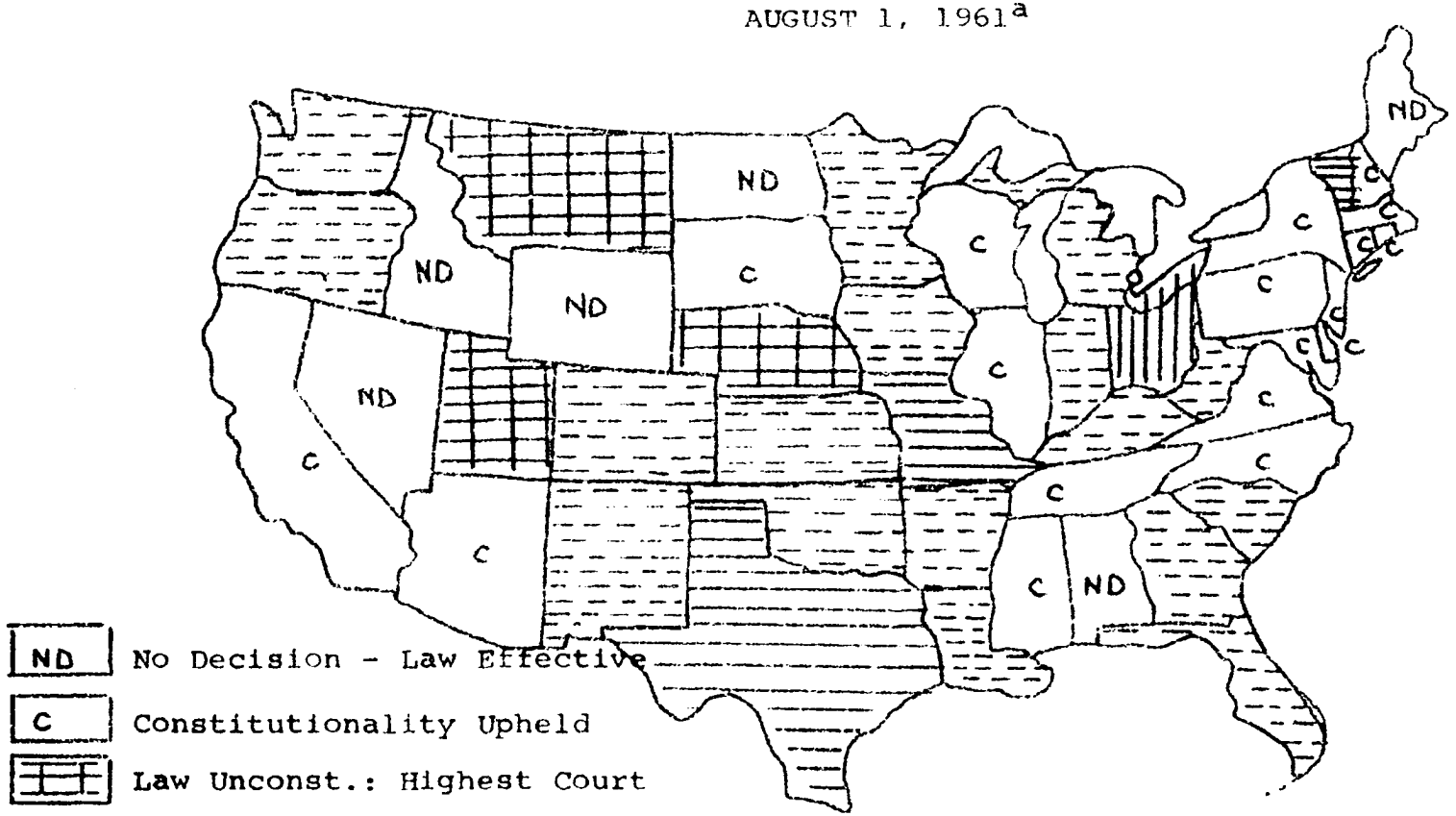


[a]Source: Table 1

CHART 2

LEGAL STATUS OF STATE FAIR TRADE LAWS: 48 STATES

AUGUST 1, 1961[a]



[a]Source: Table 1

CHAPTER VI

OTHER LEGAL DEVELOPMENTS WEAKENING FAIR TRADE

In 1954 a special "Fair Trade" Lawyers' Field Day Conference came to the conclusion that the main threats to the fair trade structure consisted, in order of their respective importance, of: (a) The difficulties in eliminating the widespread price cutting practices of discounters by fair trade enforcement procedures. (b) The unsettled question whether sales originating from nonsigners in non-fair trade states could be covered by the nonsigner provision of the state to which the goods are sold. (c) The uncertainty concerning the constitutionality of fair trade legislation under state constitutions. (d) The doubt concerning the legality of a fair trade program of manufacturers having their own retail outlets.[1]

By the end of the decade all those threats, and others, had materialized in severe attacks which

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[1]"Fair or Unfair Trade: It All Depends Where You Sit," Business Week, May 15, 1954, pp. 123-124.

considerably weakened and restricted the practical application of fair trade provisions to maintain resale prices.

It is the purpose of this chapter to cover the development of statutory issues which arose primarily in legal proceedings concerned with the enforcement of fair trade prices. This includes: (1) The problem of the fair trade program of the vertically integrated manufacturer. (2) The question concerning the extraterritorial application of state nonsigner provisions. (3) The increased reluctance of the courts to grant injunctions against price-cutting retailers if the trademark owner had not vigorously enforced his fair trade prices. (4) The refusal of some courts to enjoin nonsigners who secured supplies from signatories to a fair trade agreement, for inducement of breach of contract. And finally (5) the new activity of the Antitrust Division of the U. S. Department of Justice in matters of resale price maintenance.[2]

Fair Trade and the Vertically Integrated Manufacturer

An important restriction on the applicability of

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[2]Other statutory problems, for example the problem of indirect price-cutting devices such as trading stamps and "free" gifts in relation to the maintenance of fair trade prices, are not reviewed in this study.

fair trade was effectuated by the Antitrust Division of the U. S. Department of Justice, which contended that resale price maintenance agreements between manufacturer-wholesalers and competing independent wholesalers are a violation of the Sherman Act and illegal per se.[3] The problem with which the U. S. Supreme Court had to cope concerned the interpretation of the McGuire Act provision which qualified the fair trade exemptions from the federal antitrust acts.

> Nothing ... shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices ... between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.[4]

It was contended that if a party to a price maintenance agreement have any operations which compete on the same level of distribution, the exemption of the McGuire Act is inapplicable because of the quoted qualification.[5]

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[3] U. S. v. McKesson & Robbins, Inc., 351 U. S. 305 (1956).

[4] 66 Stat. 632, 5. As cited in, ibid., at 311-312.

[5] Note, Harvard Law Review, 67 (1954), 893.

Since many manufacturers engage in some retailing or wholesaling of their products, the question concerning the scope of the restricting qualification of the McGuire Act exemptions was important. The certified results of a survey made by the American Fair Trade Council of known fair trading manufacturers revealed that 86 per cent of all such manufacturers, who returned the survey questionnaires, sold fair traded products to wholesalers. Of this 86 per cent, who sold to wholesalers, 82 per cent also sold to retailers, 34 per cent also sold to consumers, 10 per cent also had wholly-owned or controlled subsidiaries that sold to wholesalers, 9 per cent also had wholly-owned or controlled subsidiaries that sold to retailers and 4 per cent also had wholly-owned or controlled subsidiaries that sold to consumers.[6] Thus, the majority of the surveyed fair trading manufacturers would be vitally effected by the court's decision one way or the other.

The Government had brought action[7] against the largest drug wholesaler in the United States: McKesson &

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[6]Note, Michigan Law Review, 55 (1957), 587.

[7]U. S. v. McKesson op. cit., at 305.

Robbins, Inc.[8]

McKesson had refused to sell its own manufactured and trademarked products to independent wholesalers that had not entered into fair trade agreements obliging them to adhere to the wholesale prices fixed by McKesson.[9] A district court held that the fact that McKesson qua wholesaler competed with independent wholesalers in the distribution of commodities manufactured by McKesson did not automatically prevent McKesson from entering into resale price maintenance contracts with independent wholesalers, and this court denied the Government's motion for an injunction restraining price stipulation affecting competing wholesalers.[10] The court argued that the fair trade agreements of such a trademark owner were capable of having an operative effect

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[8]In 1954 it was reported that McKesson manufactured and packaged over 400 different items in the drug field. In 1928 the corporation began to acquire control of wholesale drug companies and continued to acquire them. Its wholesale drug business operated 74 wholesale drug divisions located in 35 states and those activities amounted to 65 per cent of the total sales of the company. (G. E. Weston, "Resale Price Maintenance and Market Integration: Fair Trade or Foul Play?" George Washington Law Review, 22 (1954), 669.)

[9]U. S. v. McKesson, op. cit., at 305.

[10]U. S. v. McKesson & Robbins, Inc., 122 F. Supp. 333 (S. D. N. Y. 1954).

in both a "horizontal" and "vertical" direction, and the court was unwilling to find either label more appropriate than the other or to pin its decision on factors having little more than semantic significance.[11]

The U. S. Supreme Court in reviewing the lower court decision recognized clearly that the Government

> ... does not question the so-called vertical "fair trade" agreements between McKesson and retailers of McKesson brand products. It challenges only ... price-fixing agreements with independent wholesalers with whom it is in competition.[12]

An agreement between a non-integrated manufacturer and wholesaler or retailer to maintain a resale price on the manufacturer's product is between parties who are not competing on the same functional level of enterprise. The contacts are "vertical" and clearly within the scope of the fair trade legislation,[13] but when a manufacturer owns retail or wholesale outlets and utilizes resale price maintenance legislation to bind competing retailers or wholesalers, the practice takes on

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[11] Ibid., at 337.

[12] U. S. v. McKesson, op. cit., at 309.

[13] Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951), at 389.

strongly "horizontal" price-fixing characteristics.[14]

The Government argued that resale price maintenance contracts of integrated manufacturers with independent competing wholesalers would eliminate price competition on two levels of the distribution system, and as such would leave the manufacturer-wholesaler to undersell freely the independent wholesaler by dealing directly with retailers through its manufacturing division. It was further held that the efficiency or inefficiency of the manufacturer's wholesaling operations would partly determine the magnitude of the fair trade prices without the influence of new entries in the field or the influence of existing competition. None of those dangers are present, it was argued, if the price fixing exists between independent wholesalers and non-integrated manufacturers,[15] because the non-integrated manufacturer's fair trade price is normally geared to the marketing cost of the independent wholesaler and retailer of average efficiency.[16]

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[14]"Use of Resale Price Maintenance by Integrated Manufacturers: A New Loophole for Abuse of Monopoly Power," Yale Law Journal, 64 (1955), 427.

[15]U. S. v. McKesson, op. cit., at 315, note 20.

[16]C. H. Fulda, "Resale Price Maintenance," University of Chicago Law Review, 21 (1954), 191.

The situation gets worse, however, when an integrated producer stipulates fair trade prices, as his selling costs then will be substituted for the average of the independent wholesalers' in the determination of the fair trade prices, because all competitive pressure to greater efficiency will be lost.[17] The only possible but uncertain solace for the consumer's interest in this situation would be that the manufacturer-wholesaler himself sets the example of high efficiency and forces this efficiency on the independent wholesalers by allowing lower margins in reduced fair trade prices.[18]

McKesson argued that the economic effects of fair trading are the same whether or not the manufacturer has its own wholesale outlets, since the protection which fair trade provides for the manufacturer's trademark and goodwill eliminates price competition between different outlets for the manufacturer's own branded merchandise in either case. It was claimed that the manufacturer-wholesaler fair

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[17]Use of Resale Price Maintenance, op. cit., 431.

[18]The former part of this situation would be quite possible, the latter requirement, however, would go against the profit incentive of strongly monopolistic fair trading manufacturers, unless the demand for the products is clearly price elastic.

trades as manufacturer and not as wholesaler.[19]

The U. S. Supreme Court, in reversing the lower court decision, found for the Government. The Court could not find in either the Miller-Tydings Act's or the McGuire Act's legislative history[20] any indication which would justify to interpret McKesson's market arrangement as not to fall under the restrictive qualification[21] of the McGuire Act's exemptions from the federal antitrust laws.

The influence of the first Schwegmann decision was quite apparent in the shaping of the Court's opinion in this case. In this prior case the Court had emphasized that fair trade should be considered as a privilege, restrictive of a free economy, which should be limited to the purposes for which it was clearly intended.[22] In the McKesson case the Court refused to read the McGuire Act provisions in any other way than "in their normal and customary meaning."[23] The Court found McKesson's fair trade agreements

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[19]U. S. v. McKesson, op. cit., at 315-316.

[20]Ibid., at 313-315.

[21]Supra, p. 173.

[22]Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951), at 389-390.

[23]U. S. v. McKesson, op. cit., at 312.

to be agreements between wholesalers, not exempted by the McGuire Act and thus violative of the Sherman Act's per se interpretation regarding horizontal price fixing.[24]

Under the established methods of marketing the effect of this decision was to foreclose considerably the possible use of resale price maintenance.[25] The Court's literal reading of the McGuire Act provisions has been criticized as overreaching congressional intent by limiting this act's applicability too severely.[26] One source argues that it would seem proper to interpret the McGuire Act by requiring only that a fair trade contract be between one selling a product bearing his trademark and the buyer who acquires the product for resale.[27] The courts, however, continued to follow the McKesson decision. A gasoline refiner, for instance, who sold to commercial fleets of vehicles in competition with gasoline retailers, could

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[24] Ibid., at 313.

[25] Note, Michigan Law Review, 55 (1957), 587.

[26] Three justices dissented mainly on the argument that the legislative intent of the fair trade laws was to eliminate price competition for the purpose of protecting the manufacturer's trademark, regardless whether it was a non-integrated or an integrated manufacturer's trademark. (U. S. v. McKesson, op. cit., at 317-319).

[27] Note, Harvard Law Review, 67 (1954), 892.

not employ the McGuire Act provisions to exempt his fair trade program from the Sherman Act provisions.[28] " A ny competition for customers is an absolute bar to price maintenance agreements between the competitors."[29]

Mail Order Sales From Non-Fair Trade Jurisdictions

Another serious shortcoming of the McGuire Act in relation to the strength of the fair trade structure was the hiatus in its coverage created by the failure to "... expressly lift the bar (of the interstate commerce clause concerning the state nonsigner provisions) in respect to free trade states."[30] This gap in the McGuire Act provisions meant that non-signing mail order vendors located in non-fair trade jurisdictions could not be enjoined, and in effect restricted the application of the state fair trade provisions, enabling enforcement of fair trade prices without violating the federal antitrust laws in interstate commerce, to the violators of fair trade laws located in fair trade states.

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[28] Esso Standard Oil Co. v. Secatore's, Inc., 346 F. 2d 17 (1957).

[29] Ibid., at 22.

[30] R. Stachler, "The Protective Veil Given Mail Order Houses in Free Trade Jurisdictions," University of Cincinnati Law Review, 25 (1956), 498.

Mail order sales from non-fair trade jurisdictions constituted during the last decade a very urgent problem in fair trade litigation. One source goes as far as to state:

> It is not an unwarranted generalization to say that the future of fair trade legislation as it exists today is inextricably entwined with the legal implications of mail order sales.[31]

Although total mail order sales take up a small percentage of total retail sales, to fair traders the below-fair trade prices of free state advertisers who used their location as a vintage point to ship fair traded goods across state lines into fair trade states at cut prices constituted a serious threat of undermining their fragile fair trade programs. Especially in areas where a dense population was concentrated at both the free trade border side and the fair trade state border side, the enforcement of fair trade prices became next to impossible. Notorious examples are especially St. Louis, Missouri and Washington, D. C.[32]

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[31]"A Symposium on the Fair Trade Laws," Fordham Law Review, 27 (1958), 107.

[32]Ironically it was in Washington, D. C., the birthplace of the federal fair trade legislation, that the mail order house was located which effectuated one of the most devastating blows at the national fair trade structure. The ambiguous attitude of Congress to pass federal enabling legislation for state fair trade laws, but to refuse to

The difficulties concerning mail order houses arose in cases where there was no resale or contemplated resale within a fair trade jurisdiction, but where systematic advertising and offerings at below-fair trade prices took place in fair trade jurisdictions in relation to sales which were technically being made in free trade jurisdictions.[33] The question whether state nonsigner provisions could be used to enforce prices of out-of-state vendors, became more urgent with the increasing number of states declaring their fair trade provisions unconstitutional.[34]

In all three leading cases through which this issue was settled,[35] it was the same mail order house which

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pass a fair trade act for the District of Columbia, contributed significantly to the practical defeat of the effectiveness of the federal act. The best explanation for this strange situation can be found in a quotation concerning Congress' refusal to enact a fair trade law for the District of Columbia: "The big point against it in the District is that fair trade ... would mean Congressmen would have to pay more for their booze." ("Fair Trade: The War Is Not Over," Business Week, November 7, 1953, p. 44.).

[33]The McGuire Act had extended the effectiveness of state nonsigner provisions in relation to interstate sales of mail order houses located within a fair trade state, and was interpreted as such for instance in Raxor Corporation v. Goody, 307 N.Y. 299, 120 N. E. 2d 802 (1954).

[34]Supra, Chapter V.

[35]Revere Camera Co. v. Masters Mail Order Co., 128 F. Supp. 457 (D. Md. 1955); Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 240 F 2d 684 (1957); General Electric Co. v. Masters Mail Order Co., 244 F. 2d 681 (1957).

fought the fair trade restrictions on his operations. Masters Mail Order Company of Washington, D. C. This is a wholly owned subsidiary of the New York discount store: Masters Inc. In 1952 the parent company had specially organized the Washington, D. C. Masters Mail Order Company which fought the fair trade restrictions by selling fair traded products to consumers in fair trade states below fair trade prices by direct mail order. Customers seeking purchases at discount prices from the New York store were provided with mail order forms and instructed to send them to the Washington, D. C. company. Deliveries were made from Washington, D. C. The New York store further provided extensive services by conducting an advertising campaign in New York for the Washington, D. C. company. Similar advertising campaigns took place in other fair trade states.[36]

In the three actions that were brought against the Washington, D. C. company the fair trading manufacturers contended that Masters had violated state fair trade laws and that the mail order company should be enjoined from

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[36]Note, University of Pennsylvania Law Review, 106 (1957), 139.

"willfully and knowingly advertising, offering for sale or selling"[37] below fair trade prices prohibited by the state fair trade acts concerned.

In Revere v. Masters[38] it was held that the McGuire Act does not empower the states to prohibit delivery within their borders of merchandise purchased in other states, and that the place of sale as determined by the law governs the enforceability of fair trade agreements. If the sale legally was made outside a fair trade state, its fair trade act could not be effective regardless whether the buyer was residing within the fair trade jurisdiction. In Bissell v. Masters[39] it was argued that advertising at cut-rate prices was a disruptive evil to price maintenance, separate from the actual sale at cut prices, and constituted by itself a violation of the state fair trade law. The court rejected this theory by saying:

> We agree ... that advertising the sale of a commodity at less than stipulated fair trade price is of itself unfair competition... whether or not a sale takes place; but we are satisfied that the advertisement must relate to a sale of goods within the

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[37]This phrase appears in all state fair trade acts as part of the nonsigner provision.

[38]Revere v. Masters, op. cit.

[39]Bissell v. Masters, op. cit.

> State in order to fall within the condemnation of the statute.[40]

The advertising operations were particularly prominent in the legal action which General Electric brought against Masters,[41] under the fair trade act of New York, because of the activities of the parent company in the important market of New York and surrounding areas. General Electric argued that for the sales from Washington, D. C. into the state of New York, although technically the sales were consummated in the District of Columbia, the economic impact was found in New York where the bulk of the consumers lived. Therefore, it was contended, those sales constitute for all practical purposes violations of the New York fair trade statute. The court, following the

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[40] Ibid., at 687. Attention was drawn in this case to the active role played by the U. S. Department of Justice to get the courts to interprete the McGuire Act as it actually did in this issue. In a 1954 fair trade case in St. Louis in the non-fair trade state of Missouri, the Justice Department filed an amicus curiae (Sunbeam Corp. v. Missouri Petroleum Prod. Co., Inc., Civil Action No. 9887, E. D. Missouri.) asking the court to dismiss charges brought by Sunbeam Corp. against a price-cutter who had been using a non-fair trade - Missouri - location to ship Sunbeam's fair traded goods at cut prices into fair trade states. ("Justice Dept. Takes Anti-Fair-Trade Stand," Business Week, November 20, 1954, p. 126.)

[41] General Electric v. Masters, op. cit.

McGuire Act interpretation as contained in the Revere and Bissell cases, answered:

> Plaintiff protests that our reading of the statute will allow the District of Columbia to impose its policies on economic activities in New York. But the opposite construction will simply allow New York to dominate the economic activities of the District of Columbia ...[42]

The continuing influence of the first Schwegmann decision was apparent again[43] in the argumentation of the court when, in relation to the McGuire Act exemption of resale price maintenance laws from federal fair trade acts, it considered itself:

> ... bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy.[44]

Those decisions did not leave any doubt that the freedom of pricing of mail order vendors in free trade jurisdictions, could not be burdened by the contrary activities of fair trading manufacturers, because this freedom remained under the protective veil of the Sherman Act."[45]

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[42] Ibid., at 684.

[43] Chapter VIII, infra, pp. 236-9.

[44] General Electric v. Masters, op. cit., at 683. Also, supra, pp. 178-9.

[45] Stachler, op. cit., 499.

Enforcement and Injunctive Relief

Some states have further restricted the practicability of fair trade provisions by denying injunctive relief against price cutting retailers in cases that the trademark owners had not vigorously enforced their rights in the area prior to the action before the court.[46] The courts in those instances reasoned that lax enforcement of a fair trade program could result in discriminatory effects on the different retailers. The manufacturer should provide comprehensive, or at least non-discriminatory, enforcement against all violators.[47] The judiciary, for instance, conditioned the fair trade program of the General Electric Company on the establishment of such an effective enforcement program.[48] An injunction restraining the Macy Company from cutting General Electric's fair trade prices was granted, but the court warned that it was up to the manufacturer to police its fair trade contracts if any one contract was to be valid. To satisfy this condition the

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[46]R. K. Bates, "Constitutionality of State Fair Trade Acts," Indiana Law Journal, 32 (1957), 130.

[47]Note, Yale Law Journal, 65 (1955), 245.

[48]General Electric Company v. R. H. Macy & Co., 199 Misc. 87, 103 N. Y. S. 2d 440 (1951).

General Electric Company set up a special fair trade section in 1952 in its Small Appliance Division which brought 134 legal actions against price cutters within a year.[49]

In 1954 a federal judge in Milwaukee denied the General Electric Company the injunction it was seeking to restrain the price cutting retailer in that city from advertising and selling General Electric appliances below fair trade prices. The judge argued that General Electric had "unclean hands"[50] because it did not "diligently enforce" its fair trade program, not only in the Milwaukee area, but generally. The court came to this conclusion regardless of

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[49]"Fair Trade: The War's Not Over," Business Week, November 7, 1953, p. 44.

[50]A manufacturer's "unclean hands" refers to discrimination in his enforcement of the fair trade prices. The defending retailer may claim that singling him out from a number of equally culpable price cutters for prosecution would unjustly disadvantage him in relation to competitors. (Note, Yale Law Journal, 69 (1959), 187.) Another source reports that interviews indicate that several techniques have been adopted to gather evidence supporting price cutting retailers in their claims that manufacturers have "unclean hands" before the courts. One attorney reports a case in which a shopper purchased the manufacturer-plaintiff's product at a discount at the manufacturer's showroom from the president of the fair trading corporation. The court promptly dismissed the suit. (C. I. Kanter and S. G. Rosenblum, "The Operation of Fair Trade Programs," Harvard Law Review, 69 (1955), 342.)

the fact that General Electric Company had spent $ 500,000 during 1954 to enforce its fair trade program, and had put aside in its budget for 1955 $ 750,000 for this purpose.[51] Although fair trade opponents hoped that this issue would develop into a major weapon in their hands to emasculate fair trade,[52] most courts have denied the defending retailer the argument of manufacturer's "unclean hands" as long as the courts were convinced that the manufacturer made a sincere effort to enforce the fair trade prices, regardless of the success of such an attempt.[53] The restrictive element of those decisions in relation to the practical application of fair trade provisions is the fact that this legal device of resale price maintenance could now only be used by companies with sufficient financial means to have an enforcement program which would satisfy the courts and which thus would make the courts reject "unclean hands" allegations against the manufacturer-plaintiff.

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[51] "Court Enforcement of Fair Trade to All-or-Nothing Basis," Business Week, July 30, 1955, p. 54.

[52] Ibid.

[53] "The Enforcement of Resale Price Maintenance," Yale Law Journal, 69 (1959), 187, note 113.

Inducement of Breach of Fair Trade Contracts[54]

Especially in relation to the increasing number of states invalidating the non-signer provision of the state fair trade statutes, some ardent fair trade manufacturers have tried to take enforcement action against price cutters who had not signed a fair trade contract, by restricting the supply of fair traded goods to retailers who had signed a fair trade contract with the manufacturer or his wholesaler.[55] The price cutters were then accused of inducement of breach of fair trade contracts as they could have secured their supplies only through parties who had signed a fair trade contract with the manufacturer. However, some courts held that to sustain such an action would violate the public policy of the state since the nonsigner provision had been held unconstitutional.[56] Moreover, the enforcement

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[54]For a more detailed and technical coverage of this issue, see: Note, Iowa Law Review, 41 (1956), 715-718.

[55]See for instance: Statement of H. T. Van Mell, Vice-President of Sunbeam Corporation in U. S. Congress, House. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 10527, etc., 85th Cong., 2d Sess., (1958), pp. 275-291.

[56]Two cases to this effect were previously reviewed. Sunbeam Corporation v. Gilbert Simmons Ass. Inc., 91 So. 2d 335 (Fla. 1956), supra, pp. 111-2; and Argus Cameras, Inc., v. Hall of Distributors, Inc., 343 Mich. 54, 72 N. W. 2d 152 (1955), supra, pp. 116-7.

technique whereby only the signers of a fair trade contract could secure supplies, even if it had been fully sustained by all the courts, could not completely prevent the supply of the fair trader's products to price cutting retailers, since mail order houses and other sources in non-fair trade states could ship the goods into fair trade states below fair trade prices or without the restriction that they should be resold at a stipulated price. In those cases no enforcement action was available to the manufacturer.[57]

U. S. v. Parke, Davis & Co.

It has thus far never been too clear what actions beyond those that are specifically authorized by the state fair trade laws a manufacturer may take to enforce resale prices, either by controlling the distribution of supplies or by contracts, without violating the provisions of the Sherman Act.[58] Since 1919 the U. S. Supreme Court's Colgate doctrine[59] has governed the courts' reasoning regarding a manufacturer's right to regulate the distribution of

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[57]See General Electric v. Masters, supra, pp. 186-7.

[58]C. I. Kanter and S. G. Rosenblum, "The Operation of Fair Trade Programs," Harvard Law Review, 69 (1955), 347.

[59]U. S. v. Colgate & Co., 250 U. S. 300 (1919).

his products by refusing to sell to a wholesaler or retailer to whom he sells directly for the simple reason that those parties violated minimum resale prices as stipulated by the manufacturer.[60] This device has been extensively used to enforce fair trade programs and was strengthened considerably in the fair trade states by the fact that the McGuire Act allowed the manufacturer to contract with his wholesalers that the products would be resold only to retailers who had signed fair trade contracts or who honored the manufacturer's prices without any contract. However, in non-fair trade states, where such contracts were illegal, only the "refusal to sell" device was available to maintain resale prices of the parties directly dealing with the manufacturers, while the ultimate retail resale prices remained a completely separate question. Under the rationale of the Colgate doctrine, a trader or manufacturer has a right to exercise his own discretion in his selection of customers, and, if he does not intend to create or maintain a monopoly, to announce in advance the circumstances under which he will refuse to deal.[61] Thus, under the Colgate doctrine, a bare

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[60]Kanter and Rosenblum, op. cit., 348.

[61]"Resale Price Maintenance and the Parke, Davis Case," Virginia Law Review, 46 (1960), 977.

refusal to deal without any monopolistic intent or accompanied by any contract, could be used by the manufacturer in his pricing and distribution policy without violating the Sherman Act.[62]

It was in 1956 that the Parke, Davis & Co. manufacturer was faced with the problem of enforcing its minimum resale prices upon price cutters located in non-fair trade jurisdictions,[63] and used for this purpose an "extended" form of the Colgate doctrine. Especially in relation to the pricing freedom in non-fair trade jurisdictions, which has been of such a great influence in weakening the whole fair trade structure in other states, the success or failure of the Parke, Davis scheme to maintain prices and thus to curtail this freedom of retailers in non-fair trade jurisdictions, was of great significance in the overall fair trade developments.

It was again Congress' inconsistency in passing federal enabling fair trade legislation but not enacting a

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[62]For a more detailed discussion of the limits of a manufacturer's rights to control the price by means beyond those provided by the fair trade laws, see: W. Adams, "Resale Price Maintenance: Fact and Fancy," Yale Law Journal, 64 (1955), 967-978.

[63]Virginia Law Review, op. cit., 977.

fair trade law for the District of Columbia, which made it possible for the U. S. Department of Justice to hit Parke, Davis & Co. with a criminal indictment in 1957. In the indictment, a District of Columbia grand jury accused Parke, Davis of conspiracy with three Washington, D. C. wholesalers to (a) fix prices, forcing consumers to pay nigh, arbitrary, and not competitive prices, and (b) to refuse to supply retailers who would not charge prices set by the manufacturer.[64] Parke, Davis, in its attempt to control the resale prices of its products in non-fair trade jurisdictions, had sent out to all retailers a warning that price cutting would result in them being cut off from future sources of supply. Those sources, however, were mainly independent wholesalers, so that the manufacturer also had to tell the wholesalers that it would refuse to deal with them if they supplied price cutting retailers. A trial court, which first heard the evidence, dismissed the Government complaint,[65] as the court was unable to

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[64]"Justice Department Tries Both Barrels at Parke, Davis Drug Pricing," Business Week, May 11, 1957, p. 144.

[65]U. S. v. Parke, Davis & Co., 164 F. Supp. 827 (1958).

draw any inference of combination, conspiracy, or agreement between Parke, Davis and the wholesalers and retailers involved, from the evidence presented.[66] This court argued that the right of an individual to choose its own customers, as set forth in the Colgate doctrine, was all that Parke, Davis employed to maintain its prices. The Government appealed this decision and the U. S. Supreme Court reviewed the case in 1960.[67] Although this Court argued also that the right of a company or an individual to choose its own customers, as set forth in the Colgate doctrine, outweighs society's interest in unrestrained price competition and that therefore uniform resale prices brought about by an announcement of a price policy and simple refusals to deal, were legal;[68] the Court, however, considered Parke, Davis's conduct to have been beyond this legal device of price maintenance. The Court gave two reasons for this opinion, namely the Parke, Davis scheme had been beyond a simple refusal to deal by (a) securing the acquiescence of the price-cutting retailers in its scheme to

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[66] Ibid., at 835.

[67] U. S. v. Parke, Davis & Co., 362 U. S. 29 (1960).

[68] Ibid., at 44.

suppress the advertising of the prices at which the price-cutters were selling the products and by (b) involving the wholesalers in a plan to cut off price-cutting retailers. Those two factors in combination with a refusal to deal, was in violation of the Sherman Act according to the Court.[69]

Besides the great significance of this decision for the general enforcement of an effective antitrust policy, the importance of the decision in relation to resale price maintenance is well expressed in the following quotation:

> ... the control of retail prices by means of economic pressure on wholesalers was condemned as an unlawful restraint of trade. This would seem to imply that vertical price-fixing by means of a refusal to deal in a non-fair trade jurisdiction can never exceed one link in the chain from manufacturer to retailer. Since most manufacturers in this country do not deal directly with retailers, but rather deal through a series of middlemen, it is most likely that, absent a fair trade statute, the manufacturer will have very little to say concerning the retail prices at which his goods eventually will be sold. Thus, wherever a manufacturer sells to a retailer in a non-fair trade jurisdiction through one or more middlemen, the manufacturer cannot use a refusal to deal as a means of enforcing his suggested retail prices.[70]

The pricing freedom of retailers in non-fair trade jurisdictions seems to be well secured by this decision.

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[69] Ibid., at 45-46.

[70] Virginia Law Review, op. cit., 992-993.

This freedom can thus continue as a bright example, causing for remaining fair traders in the remaining fair trade states a great amount of nuisance through the detrimental effects of those examples on their fair trade programs.

CHAPTER VII

FAVORABLE LEGAL DEVELOPMENTS AND COUNTER-MEASURES

The three previous chapters were basically concerned with adverse fair trade decisions and developments. The significant successes achieved by the fair trade opponents might lead to the implication that the defense of fair trade proponents had been weak and ineffective. However, this is only partly true. The fight for and against fair trade during the reviewed period is characterized by active measures and counter-measures during each stage of the battle. The only generalization which might be justifiable is to state that the opponents' legal attacks and the economic factors working in their favor have been more effective in destroying the fair trade structure than the proponents' counter-measures were effective in sustaining this price maintenance scheme.

It is the purpose of this chapter to review some of the proponents' activities to defend and strengthen fair trade legislation as an effective price maintenance instrument.

Favorable State Court Decisions

The host of decisions invalidating the nonsigner provisions of state fair trade laws during the last decade should not lead to the conclusion that the fair traders were without any support in this particularly controversial part of the complete fair trade issue. The Old Dearborn case,[1] in which the U. S. Supreme Court disposed of all objections to fair trade, as provided for by the states, under the Federal Constitution, served as the example for several state courts to refuse to find merit in the several constitutional objections to fair trade brought before them under the state constitutions. Since the beginning of 1950, 13 highest state courts held the nonsigner provision of their state fair trade laws constitutional. Of those 13 decisions, 3 concerned reaffirmations of similar positions taken in cases prior to 1950,[2] while the other 10 decisions were rendered in states in which the highest court had not settled this constitutional issue previously.[3] Significant is the fact that the majority

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[1]Chapter IV, Supra, pp. 59-64.

[2]For favorable state court decisions prior to 1950, see Chapter V, supra, p. 95, note 8.

[3]The 13 states and cases are: Arizona, General Electric Co. v. Telco Supply, Inc., 84 Ariz. 132, 325 P. 2d 394 (1958); California, Scoville Mfg. Co. v. Skaggs Pay Less

of those states belong to the more densely populated states in the Union.

The persistent refusal of those courts to examine the real economic purpose of the fair trade laws and the refusal to evaluate the legislatures' wisdom to make the enactment of fair trade laws part of their economic policy, constituted the basis for sustaining those statutes.[4] This was illustrated especially clearly when the validity of the fair trade statute was at issue before the Delaware highest court in 1954. The contention was made before this court that economic conditions had changed and that experience had demonstrated that fair trade legislation had not accomplished the intended purposes. The court answered:

Drug Stores, 45 Cal. 2d 881, 291 P. 2d 936 (1955); Delaware, General Electric Co. v. Klein, 34 Del. Ch. 491, 106 A. 2d 206 (1954); Hawaii, Johnson & Johnson, Inc. v. G. E. M. Sundries Co., 43 Haw. 103 (1959); Illinois, Kinsey Distillers Sales Co. v. Foremost Liquor Stores, Inc., 15 Ill. 2d 182, 154 N. E. 2d 290 (1958); Maryland, Home Utilities Co. v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A. 2d 109 (1956); Massachusetts, General Electric Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N. E. 2d 652 (1956); Mississippi, Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950); New Hampshire, Corning Glass Works v. Max Dichter Co., 102 N. H. 505, 161 A. 2d 569 (1960); New Jersey, Lionel Corp. v. Grayson-Robinson Stores, 15 N. J. 191, 104 A. 2d 304 (1954); New York, General Electric Co. v. Masters, Inc., 307 N. Y. 229, 120 N. E. 2d 802 (1954); Pennsylvania, Burche Co. v. General Electric Co., 382 Pa. 370, 115 A. 2d 361 (1955); Wisconsin, Bulova Watch Co. v. Anderson, 270 Wis. 21, 70 N. W. 2d 243 (1955).

> But upon examination it is found that these objections must depend for their validity upon the tacit assumption that the resale price maintenance act is so clearly unsound that the court can say without hesitation that the legislative finding to the contrary have no reasonable basis to support them.[5]

Along with the other 12 courts, the Delaware court because of lack of absolute certainty regarding the economic unsoundness of fair trade, refrained itself from reversing the legislature's action in this area of economic policy. Thus the Old Dearborn decision remains the basis for the legal justification of fair trade in those states.[6] It also continued to be settled fair trade rule as far as the Federal Constitution is concerned. The U. S. Supreme Court's refusal to consider the constitutionality of the McGuire Act[7] has undoubtedly stimulated the influence of the Old Dearborn trademark theory on the favorable state fair trade decisions.

Most fair trade opponents feel that since the

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[4]E. J. Kohrs, "Fair Trade and the State Constitutions," Vanderbilt Law Review, 10 (1957), 417.

[5]General Electric v. Klein, op. cit., at 209.

[6]For an enumeration of the arguments used by those courts to refute the fair trade opponents' allegations, see: R. G. Clayton, "The Present Constitutional Status of State Fair Trade Laws," University of Cincinnati Law Review, 25 (1956), 471-472.

[7]Chapter V, supra, pp. 91-3.

basis of these decisions, which is the assumption that the primary aim of fair trade acts is to protect the property right or goodwill of the manufacturer's trademark, is in question, the U. S. Supreme Court should re-examine its Old Dearborn theory.[8]

Counter-Measures by State Legislatures

The impressive list of highest state courts which could not agree with the fair trade rationale of the Old Dearborn case and which invalidated their nonsigner provisions led to legislative activities to accomplish the same result (as the nonsigner provision had) by different means.[9] The two pioneering states in finding a new approach to circumvent the courts' adverse fair trade decisions are Ohio and Virginia. These states have enacted new fair trade laws which are an attempt to skirt the legal objections to the nonsigner provisions while maintaining the actual effects of those provisions, in the hope that those acts will be upheld as valid before the courts. These attempts are directly in

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[8]Eli Lilly & Co. v. Schwegmann Bros., 109 F. Supp. 269, at 271-272, certiorari denied, 346 U. S. 856 (1953). See also: C. H. Fulda, "Resale Price Maintenance," University of Chicago Law Review, 21 (1954), 208-211.

[9]"The Constitutionality of the Virginia Fair Trade Act," Virginia Law Review, 47 (1961), 634.

line with the great significance which is attached to the characteristics of the nonsigner provisions by fair traders for effective enforcement of fair trade prices. In 1959 Mr. H. S. Waller, General Counsel of the National Association of Retail Druggists, emphasized this again when he stated that experience since 1933 in the operation of resale price maintenance has shown that enforcement solely through contracts is unfeasable.[10]

After the Ohio Supreme Court in 1958 held the nonsigner provision of the state fair trade act unconstitutional[11] the Ohio legislature surfaced resale price maintenance for breath again by enacting a law, over the Governor's veto, to be effective October 22, 1959.[12] This law contained the following language:

> It shall be lawful ... for a proprietor to establish and control by notice to distributors or by contract stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same

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[10]U. S. Congress, House, Committee on Interstate and Foreign Commerce, Fair Trade, Hearings on H. R. 768 and other bills, 86th Cong., 1st Sess. (1959), pp. 92-94.

[11]Chapter V, supra, pp. 143-4.

[12]"Legal Developments," Journal of Marketing, 24 (January 1960), 82.

> general market area. Such minimum resale prices may be differentiated as to the various levels of distribution, provided such differentiations are not unlawfully discriminatory. Such prices may be changed from time to time by written notice...[13]

The most important difference of the provisions of this new fair trade act with those to be found in the traditional fair trade acts, concerns the maintenance of resale prices by notice. Statutes with a nonsigner provision required at least one fair trade contract in a state to maintain prices. This system had run afoul in many courts of the reasoning that a nonsigner would be deprived from his property right if he was forced to abide by provisions of a contract to which he was not a party himself. By eliminating the indirect method of the nonsigner provision to get effective enforcement against all retailers, the Ohio legislature hoped to have also eliminated the legal objections to the coercive power of a private fair trade contract on nonsigners. This legislative maneuver contradicts directly a statement in a fair trade proponents handbook:

> The laws might just as well have allowed the manufacturer to establish minimum prices by announcement or publication; however, they did in all cases say contracts, and contracts it is.[14]

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[13] Ohio Rev. Code Ann. (Supp. 1960), as cited in: M. Conant, "Resale Price Maintenance: Constitutionality of Nonsigner Clauses," University of Pennsylvania Law Review, 109 (1961), 552.

If the author meant "contracts" in combination with the nonsigner provision, it must be agreed that the effect is equal to a law that allows the establishment of prices by announcement. However, the fact that the traditional fair trade laws used contracts was to emphasize the voluntary character of fair trade and this brought the coercive character of the later developed nonsigner provision under extra suspicion in the courts. A suspicion which might not have had such devastating effects if the fair trade proponents had been able to push for fair trade legislation with the "announcement" device in the first place. It should be doubted, however, whether this would have been successful.

The success of the Ohio legislative attempt to satisfy the judiciary branch and at the same time achieve the same effects as the former statute which was declared unconstitutional, is highly in doubt in Ohio. Two lower courts have already held the new act unconstitutional on the ground that it is an unauthorized exercise of the police power of the state and delegates legislative power to private persons without standard or review.[15] The court in the Hudson case

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[14]E. A. Newcomb, "The Fair Trade Laws," in The Basis and Development of Fair Trade, (New York: The National Wholesale Druggists' Association, 1955), p. 2.

[15]Hudson Distributors, Inc. v. Upjohn Co., 1960

refused to be impressed by the "high sounding phrases" of the revised fair trade act.[16] Those decisions in addition to the strong anti-fair trade language employed by the Ohio Supreme Court in its decision which invalidated the old statute[17] leave the new legislative approach in Ohio little chance of success.

The situation in the state of Virginia deserves some special attention as it is unique among the several fair trade states. First, it is the only state in which the highest court invalidated a traditional fair trade act and later rehabilitated fair trade by upholding the constitutionality of an act with the same practical intentions. This new act, which was held constitutional, similar to the new Ohio act, does not contain the traditional nonsigner provision. It was the first time such an act received a favorable review from the highest court in a state. This situation can be partly explained from the fact that the highest court in

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C. C. H. Trade Cases, #69778 (Ohio C. P. July 28, 1960), and Helena Rubinstein, Inc. v. Cincinnati Vitamin & Cosmetics Distributors Co., 1960 C. C. H. Trade Cases, #69720 (Ohio C. P. May 23, 1960).

[16]"Legal Developments," Journal of Marketing, 25 (October 1960), 75.

[17]Chapter V, supra, pp. 143-4.

Virginia never came to a decisive condemning decision on the old fair trade act. It held in 1956[18] that the 1936 state fair trade act had been repealed by implication by the subsequent passage of an anti-monopoly statute.

The great number of states in which the nonsigner provision had been held unconstitutional undoubtedly impressed the Virginia legislature when it re-enacted a fair trade act in 1958 to offset the highest court's decision on the old act.[19] Possibly fore-seeing constitutional pitfalls for the nonsigner provision, the Virginia legislature followed Ohio's lead and did not include the typical nonsigner provision in the new act. Instead the new act defines a fair trade contract as "any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or container thereof."[20] Thus, theoretically this act does not concern nonsigners, but only parties to voluntary contracts which come into existence as soon as a retailer accepts supplies with a notice attached to it. As the existence of this kind of contracts could not be based on common

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[18]Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S. E. 2d 384 (1956).

[19]Virginia Law Review, op. cit., 635.

[20]Va. Code Ann. 59-8.2, as cited in, ibid.

law, the sole basis was formed by the validity of the provisions in the new fair trade act.

In 1960 the highest Virginia court argued that if a retailer accepts trademarked goods for resale with actual notice of an imposed minimum resale price, he thereby automatically contracts to honor that stipulated price under the terms of the new Virginia Fair Trade Act, which is constitutional.[21]

Although the Virginia court held that the new act "... has removed the chief ground and reason relied upon by courts that have held their fair trade acts unconstitutional,"[22] the mere attachment of a new label to the traditional nonsigner provision does not obscure the essential similarity in result. The Virginia court had not previously condemned the nonsigner provision, however, as the lower court decisions in Ohio indicate already, for the state courts which have viewed the nonsigner provision with

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[21] Standard Drug Co. v. General Electric Co., 202 Va. 367, 117 S. E. 2d 289 (1960). This case concerned the price maintenance on one of the few General Electric products still being fair traded; namely, flash bulbs.

[22] Cited in: News Release, Bureau of Education on Fair Trade, dated November 29, 1960, p. 3.

a jaundiced eye, the new Virginia fair trade provisions will not likely be more palatable.[23] A widespread success of this novel approach therefore can hardly be expected.

Activity for Federal Fair Trade Legislation

In view of the impressive series of legal setbacks of the fair trade structure during the last decade, it is hardly surprising that the proponents of resale price maintenance would again seek to revitalize and strengthen fair trade through federal legislation.

For a number of years now, the U. S. Congress has debated several resale price maintenance bills, while on many of them hearings were held.[24] This proposed legislation before the Congress would create a federal cause of action for violations of fair trade agreements,[25] and would

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[23]Virginia Law Review, op. cit., 639.

[24]Hearings on H. R. 10527, 10770, 10847, 11048, 11216, 11264 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Hearings on S. 3850 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Hearings on H. R. 768, 1253, 2463, 2729, 3187, 5252, 5602 before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959).

[25]"A Symposium on the Fair Trade Laws," Fordham Law Review, 27 (1958), 110.

further eliminate the nonsigner provision by employing the same general provisions as found in the new Ohio and Virginia fair trade acts.

It was basically the unsuccessful legal actions of Bissell Carpet Sweeper Company and General Electric Company against the Masters Mail Order Company of Washington, D. C.,[26] which brought the fair traders to prompt Representative Harris to introduce the so-called Harris Bill.[27] Like most other proposals, the Harris Bill would amend the Federal Trade Commission Act, "so as to equalize rights in the distribution of identified merchandise."[28] The special character of this "equalization of rights" aim of the proposal is contained in the title of the bill:

> ... it is the purpose of this act to recognize the legitimate interest of the manufacturer ... who identifies merchandise ... in stimulating demand for his identified merchandise through effective distribution to ultimate consumers; to equalize rights in the distribution of identified merchandise by affording the small manufacturer ... to compete on more nearly equal

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[26]Chapter VI, supra, pp. 183-7.

[27]H. R. 10527, 85th Cong. 2d Sess. Re-introduced as a bill of the Committee on Interstate and Foreign Commerce, Hon. Oren Harris, Chairman, H. R. 1253, 86th Cong., 1st Sess.

[28]Hearings on H. R. 10527, etc., op. cit., p. 1.

> terms with the large manufacturer ... who can control the distribution of his merchandise through his employees and consignees, and by affording the small retailer an opportunity to compete on more equal terms with the large retailer ...[29]

Herman has shown that the benefits of fair trade for the small manufacturers is very much in doubt. The value of a statute to protect the trademark rights is of more benefit to the large manufacturer who has a sizeable advertising budget to make the trademark a national concept which then in turn becomes valuable to price cutters to be employed in their practices. He also argues that the fair trade program of a large firm has the tendency to consolidate its market position against which the small

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[29] Ibid., pp. 2-3. The serious contradictory character of those purposes and the fallacious assumptions underlying them are well covered by Professor E. S. Herman of Penn State University in his testimony and prepared statement before the Subcommittee. (Ibid., pp. 602-642.) He facetiously recommended that the Harris Bill would be made more accurate and straight forward by changing in the above quotation from the bill "by affording the small retailer an opportunity to compete on more equal terms" to read: "by affording the small retailer an opportunity to stay in business by permitting the elimination of retail price competition on branded goods" (Ibid., p. 606.) When this anti-fair trade scholar after a lengthy and profound testimony was asked whether he had any practical business experience himself, the surprising answer was that he worked in his father's drugstore for many years, and that his father had given him his point of view with much vigor continually! (Ibid., p. 630.)

manufacturer has little chance.

> ... fair trade agreements may be appropriately regarded as a form of cooperation between the manufacturer of a well-known and intensively advertised brand and numerous retailers of that product, whereby, in exchange for price protection and satisfactory margins, the dealers tacitly agree to carry and push that particular brand.[30]

The small manufacturer with less-known brand will in such a situation have much difficulty to find interested dealers, who prefer known brands which can be sold in volume with a minimum of buyer's resistance and at prices allowing high retail margins.[31] However, when discount stores get hold of the well-known brands, the small retailer might loose interest in them and might start "switching" to less known brands of smaller manufacturers.[32]

Fair trade proponents have long held that the right to maintain resale prices is identical to or a logical part of the protective provisions of the patent,

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[30] E. S. Herman, "A Statistical Note on Fair Trade," Antitrust Bulletin, 4 (1959), 591.

[31] A Senate survey indicates that the smallest of the ten manufacturers, by retailers most commended for a good enforcement program of their fair trade prices, had sales in 1955 of over $ 40 million. 56 per cent of the retailers surveyed indicated that it is their policy to push products of manufacturers that operate active fair trade programs. (U. S. Congress, Senate, Select Committee on Small Business, Fair Trade, Report No. 2819, based on a Survey of Manufacturers and Retailers. 84th Cong., 2d Sess. 1956, pp. 18-19.)

[32] Ibid., p. 18.

trademark and copyright laws.[33] That the principal benefit of fair trade should accrue to the advantage of the larger manufacturers is implicit in the traditionally stated purpose of fair trade, that is the protection against loss-leader selling by price cutting retailers. Since effective loss-leader selling requires the use of widely know, heavily advertised brands,

> ... it is not the firms of small size and limited reputation that are likely to find price protection very helpful, but rather the well-entrenched giants whose nationally advertised products are most suitable for this purpose.[34]

This was also brought out by a manufacturer of one type of small appliances who stated that fair trade was not possible for his products because all the producers in the field were relatively small operators without widely known brand names; fair trade would only result in a severe loss in his sales, as competitors' prices could be set freely by the retailers.[35] This would verify Bowman's thesis that fair trade will only be beneficial to the businessmen if there are

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[33]Newcomb, op. cit., p. 5.

[34]Herman, Statistical Note, op. cit., 590.

[35]C. I. Kanter and S. G. Rosenblum, "The Operation of Fair Trade Programs," Harvard Law Review, 69 (1955), 325.

(1) monopsonistic elements of dealers organizations present in the market to pressure manufacturers into fair trade programs after which the retailers will obligingly push the fair traded products and/or (2) there are monopolistic powers in the hands of large manufacturers created by heavily advertised trademarked and expensive promotion activities.[36]

If a manufacturer of small size wants to maintain prices, he most likely could use just as well a method of carefully selecting his distributors. Under such a system the distributors knowledge that his franchise can be withdrawn is then a potent weapon against price cutting.[37] Under a market condition where such a resale price maintenance method would not work, a small manufacturer's fair trade program to achieve the same result would require far too expensive enforcement procedures.[38] Others have argued, however, that the small manufacturer needs fair trade provisions as it does not have the same recourse as large

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[36]W. S. Bowman, Jr., "The Prerequisites and Effects of Resale Price Maintenance," University of Chicago Law Review, 22 (1955), 825-827.

[37]Kanter and Rosenblum, op. cit., 324.

[38]Herman, Statistical Note, op. cit., 592.

manufacturers to other methods of resale price maintenance, such as consignment selling, exclusive dealerships or vertical integration.[39] Herman, however, asserts that to assume such a high degree of substitutability of resale price maintenance alternatives for large manufacturers is not warranted in relation to the magnitude of the benefits of maintaining prices as compared with the drastic structural changes in the market relationships and necessary alteration of selling strategy to switch to another method of resale price maintenance.[40] This would again indicate that the large manufacturers have the most to gain by legislative fair trade.

To negate the detrimental effects on fair trade programs of the existence of non-fair trade jurisdictions within the Union, the federal Harris Bill provides for the whole country:

> ... it shall be unlawful for any person with actual notice of an applicable stipulated resale price ...

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[39]W. Adams, "Resale Price Maintenance: Fact and Fancy," Yale Law Journal, 64 (1955), 975.

[40]Herman, Statistical Note, op. cit., 592.

> to sell, offer to sell, or advertise merchandise in commerce at a different price...[41]

Another major restriction of resale price maintenance as created by the U. S. Supreme Court in the McKesson case[42] which dealt with the controversy concerning the distinction of horizontal and vertical price fixing schemes in relation to resale price maintenance programs of vertically integrated manufacturers, was alleviated by providing in the Harris Bill that a manufacturer may

> ... Establish such resale prices for his distributors, even though he sells in competition with them, so long as he sells at the applicable prices he has established for his distributors making comparable sales.[43]

Most likely for practical reasons to make the bill politically more palatable, this attack on a significant anti-trust decision was considerably softened when the bill was re-introduced in the 86th Congress. The provision to this effect then allowed integrated companies to fair trade their product if:

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[41]Hearings on H. R. 10527, etc., op. cit., p. 4. The "different" would indicate that this is both a minimum as well as a maximum resale price maintenance legislative proposal.

[42]Chapter VI, supra, pp. 172-7.

[43]Hearings on H. R. 10527, etc., op. cit., pp. 3-4.

> ... he is not a wholesale distributor of products other than products which he manufactures.[44]

Thus resale price maintenance programs of integrated manufacturers would be protected from the horizontal price-fixing prohibitions of the Sherman Act, as long as the manufacturer's own wholesaling and retailing activities remained limited to its own manufactured products. This would still constitute, however, at least a reversal of part of the McKesson decision.

To soften the blow of a federal fair trade act to those states that never had chosen to enact a fair trade act for themselves, the Harris Bill contained the practically meaningless stipulation for pricing-freedom-loving retailers in those states, that the federal bill's provisions:

> ... shall not apply to the merchandise of proprietors no substantial part of whose merchandise crosses State lines at any stage of distribution.[45]

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[44]U. S. Congress, House, Committee on Interstate and Foreign Commerce. Report No. 467. To accompany H. R. 1253, 86th Cong. 1st Sess., 1959, p. 23. This favorable report stated explicitly that nothing in the proposed bill would upset or conflict with the McKesson decision. (Ibid., p. 19.)

[45]Hearings on H. R. 10527, etc., op. cit., p. 4. This provision was deleted, however, in the next version of the bill, H. R. 1253. (House Rpt. 467, op. cit., pp. 21-24.)

One group of bills among the many federal fair trade proposals has been distinguished purposely from the "fair trade" approach, but has the same purpose. The leading example of these bills is the so-called Madden Bill,[46] which is actively sponsored by the Quality Brands Associates of America, Inc.[47] The Madden Bill takes the brand control approach. The bill is referred to by its proponents as the "Madden Quality Stabilization Bill". They argue that if retail outlets through unrestrained price competition become large enough to put pressure on the manufacturers to lower their prices to those retailers, the manufacturers are forced to lower the quality of their products to break even.[48] This argument for price stabilization through the indirect route of the necessity of quality stabilization[49]

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[46]H. R. 2463, 86th Cong., 1st Sess.; H. R. 116, 87th Cong., 1st Sess.

[47]This is basically an organization of manufacturers interested in resale price maintenance. President is Mr. John W. Anderson, ex-president of the now defunct American Fair Trade Council. (Chapter II, supra, p. 23 . This change was probably occasioned through the belief that "the very name 'Fair Trade' has become anathema to the public." (Newsletter, Quality Brands Associates of America, Inc., September 1960, p. 2.)

[48]Folder of the Quality Brands Associates of America, Inc., "Optional Quality and Price Stabilization," 1960, pp. 4-5.

[49]Sunbeam Corporation for instance is trying

is strongly deflated by the opponents who argue that resale price maintenance is especially urged by manufacturers whose products' manufacturing cost is normally only a small percentage of the ultimate retail price.[50]

> Fair trade goods normally reveal a large margin between the manufacturer's selling price and his direct material and labor costs and also a liberal retail margin.[51]

The remedy proposed in the Madden Bill is simply to allow the owner of the brand or trademark to deny any further use of the brand to those who have utilized the brand in a "destructive" fashion. Three grounds are set out in the bill to allow the owner of the brand to invoke this remedy: (1) bait advertising, (2) selling at other than the established price, and (3) consumer deception.[52]

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since January 1960 to create an image of quality and to down-grade price as a selling tool by only reimbursing dealers for cooperative advertising expenditures for Sunbeam products if the dealers' advertisements stress quality and do not indicate prices. General Electric Company has a similar advertising allowance plan forbidding advertising of prices below certain minimums. "Manufacturers Keep Pressure on Retailers to Stress Quality, Soft-Pedal Price," Business Week, January 9, 1960, p. 61.)

[50]G. R. Smith and H. C. Smith, An Economic Appraisal of Resale Price Maintenance (New Orleans: Loyola University, 1957), pp. 18-19.

[51]U. S. Congress, House, Select Committee on Small Business. Fair Trade: The Problems and Issues. Report No. 1292. 82d Cong., 2d Sess., 1952, p. 20.

This approach which constitutes a substantial extension of the existing legislation to protect trademarks and brand names, is supposed to be "consistent with modern concepts of the role and function of trademarks."[53] This approach follows completely the trademark theory as promulgated in the Old Dearborn decision.[54] It is on this U. S. Supreme Court decision that the hopes of the proponents of this and other federal fair trade legislative proposals rest concerning the constitutionality of those bills.

The pressure for the passage of a federal fair trade statute under which fair traders would have the opportunity to start a federal action against violators is not new. It was also attempted shortly after the first Schwegmann decision. At that time, however, the existence of the three non-fair trade states which would have been forced to accept fair trade by such a federal act, was a major objection for many representatives.[55] The McGuire Act was enacted

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[52]Separate Statement of Mr. Avery, House Rpt. No. 467, op. cit., p. 74.

[53]Ibid., p. 75.

[54]Chapter III, supra, pp. 59-63. A folder of the Quality Brands Associates of America, Inc., explaining the Madden Bill is illustrated by a picture showing a page from the Old Dearborn decision.

[55]For a detailed history of the legislative pro-

to offset the effects on resale price maintenance of two U. S. Supreme Court decisions.[56] The more recent proposals for federal fair trade legislation, however, are aimed at (1) annihilating the effects of more than 20 highest state court decisions rejecting fair trade,[57] and further (2) to force resale price maintenance on those states that never chose to enact a fair trade act. That the persistent attempts in the last few years[58] for federal fair trade legislation have thus far been singularly unsuccessful in spite of the extensive attention paid to them as evidenced by the hearings, is at least partly explained by the two above mentioned purposes of the proposed bills. The uncertainty of the constitutionality of the bills under the Federal Constitution is another drawback. Neither the constitutionality of the Miller-Tydings Act nor the consti-

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posals and debates which ultimately led to the federal enabling statute - The McGuire Act - , see: Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 140 F. Supp. 165 (1956).

[56]Chapter IV, supra.

[57]Chapter V, supra.

[58]For similar attempts prior to the passage of the Miller-Tydings Act in 1937, see: E. T. Grether, Price Control under Fair Trade Legislation (New York: Oxford University Press, 1939), pp. 16-17.

tutionality of the McGuire Act has ever been plainly upheld by the U. S. Supreme Court.[59] The proponents, especially in relation to the Madden Bill, have the strongly reasoned trademark theory of the Old Dearborn Case as a legal precedent. The opponents, however, can rely on the more recent decisions, probably better fitting under the present economic conditions. First, the U. S. Supreme Court's first Schwegmann decision, which condemned vigorously the price fixing characteristics of the fair trade scheme, and, further, many state supreme court decisions which explicitly rejected the Old Dearborn trademark rationale after looking into the real purposes and effects of fair trade, especially in relation to the public's interest. Thus, even if Congress passes a federal fair trade or brand control act establishing resale price maintenance on identified merchandise for the entire United States, the measure still will have to pass the scrutiny of the U. S. Supreme Court.

On the basis of the first Schwegmann decision and the state supreme court decisions invalidating the non-signer provisions, the fair trade opponents generally hold:

> The proposed federal resale price maintenance law ... is a clear delegation of federal legis-

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[59]Chapter V, supra, pp. 91-2.

> lative power to private persons. The language of the statute indicates its purpose of price regulation and of giving power for such regulation to private manufacturers.[60]

Mr. H. A. Bergson, former Assistant Attorney General in charge of tne Antitrust Division of the U. S. Department of Justice, however, is convinced of the complete constitutional soundness as far as it concerns those federal resale price maintenance bills which extend the trademark protection legislation to include the right to maintain prices.[61]

The opposing forces seem to be equally strong politically,[62] while both apparently are also equally well supported by significant legal arguments. Only time will supply the answer what the ultimate role of resale price maintenance by legal sanction will be in the United States.

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[60]Conant, "Resale Price Maintenance: Constitutionality of Nonsigner Clauses," University of Pennsylvania Law Review, 109 (1961), 552.

[61]House Rpt. No. 467, op. cit., p. 75.

[62]The traditional greater lobbying strength of organized businessmen which was so evident in the fair trade history during the 1930's, seems now, in relation to fair trade legislation, for one part to be offset by the opposition of a "matured" group of low-margin-minimum-service retailers and for another part by the more active opposition of economists, governmental departments, consumer groups, etc., as evidenced in the more recent hearings on this subject.

CHAPTER VIII

SOME ECONOMIC FACTORS AND CONSEQUENCES

In the fair trade developments it is hardly possible to distinguish the causes and their effects. The adverse legal fair trade developments were basically initiated by economic forces straining at the restrictive characteristics of fair trade legislation in relation to price competition at the retail level. As became apparent in the preceding chapters, however, the breakdown of the legal fair trade structure occurred in a piece-meal fashion. Each individual adverse development having specific economic consequences through the reduction of the scope and feasibility of effective resale price maintenance. The ultimate effect of this constant trend on several important fair trade programs of large national manufacturers came after an accumulation of adverse state court decisions to which was added the unfavorable influence of federal decisions. Those factors rendered effective enforcement of fair trade prices, where this was still legally allowed,

increasingly expensive and next to impossible.

This chapter will first briefly review the magnitude of the fair traders' enforcement costs. It next enumerates the sequence of abandonments of major fair trade programs and the stated reasons for those policy decisions. The main characteristics of the discount revolution in retailing which brought about a significant pressure on the fair trade structure to which it succumbed, are reviewed in some detail. The final section of the chapter devotes attention to the allegedly ultimate determinant and beneficiary of the free enterprise system's operations - the consumer - and his share and interests in those developments.

Enforcement Costs

That the enforcement of fair trade prices can be very expensive may be inferred from the extensive litigation in this field. It is reported that the largest individual item in a manufacturer's fair trade enforcement budget is the expense of a fully contested law suit when a determined price-cutting retailer, after being detected, challenges the program.[1] According to a survey conducted for the U. S.

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[1]C. I. Kanter and S. G. Rosenblum, "The Operation of Fair Trade Programs," Harvard Law Review, 69 (1955), 329. In case the suit is lost in the lower court, the manufacturer

Senate, a substantial number of small manufacturers considered a fair trade program an expensive luxury, beyond their means, only available to the sizable firms that can afford to employ shoppers and expensive legal counsel.[2]

The manufacturer's decision to fair trade necessarily involves a comparison of the benefits with the costs. Not only the magnitude but also the uncertain character of the costs can be detrimental to effective fair trading. Many manufacturers often lacked the incentive to bear down on price cutters for this reason.[3] Other manufacturers wanted to "have the cake and eat it too," by officially managing a fair trade program to retain the favors of many small dealers, but at the same time filling the appreciated large orders of low-overhead, large-volume retail outlets.[4] The few violators brought to court by those manufacturers

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must appeal the case; otherwise, his fair trade program in the area will disintegrate. (Ibid.)

[2]U. S. Senate. Select Committee on Small Business. Fair Trade. Report on a Study on Fair Trade, Based on a Survey of Manufacturers and Retailers, Report No. 2819, 84th Cong., 2d Sess., 1956, p. 6.

[3]S. M. Lee, "Problems of Resale Price Maintenance," Journal of Marketing, 23 (1959), 274.

[4]See especially the provocative but poorly documented treatise by John Harms, Our Floundering Fair Trade. (New York: Exposition Press, 1956.)

were usually to function as examples in various degrees either to show the dealers the good faith of the manufacturer or to actually discourage price cutting. Those manufacturers attempted to find an optimum between the enforcement costs and the wide-dealer-acceptance-of-his-product advantages of a fair trade program, the difficulty most frequently mentioned as of first importance (99 out of 368 manufacturers who answered this question) was the policing problem of fair trade prices and the costs of enforcement procedures.[5] The Sunbeam Corporation, for instance, figured the costs of its vigorous enforcement program in 1953 at about $1 million.[6] In the Senate Survey 61 manufacturers gave information on their fair trade program. Between $100,000 and $1,000,000 enforcement cost was reported by 5 firms. The fair trade program of 25 firms cost between $11,000 and $100,000 yearly, while 31 firms spent less than $10,000 yearly for this purpose.[7] These figures do little to indicate the effectiveness of those programs but show that the implementation cost of fair trade is a strong deterrent to wide-spread use of the provisions.

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[5]Senate Survey Report No. 2819, op. cit., p. 7.

[6]"Fair Trade: The War's Not Over," Business Week, November 7, 1953, p. 44.

Decline of Fair Trade Programs

The weakening of the legal fair trade structure during the last decade made conditions increasingly more favorable to price cutting retailers. Even for the sizable and prosperous firms this process reached ultimately the limit where the present and future advantages of a fair trade program had been so drastically reduced and the costs of counteracting the diversified assaults had so far risen, that abandonment of fair trade programs became the only choice. The path of many manufacturers with regard to fair trade has been leading in this direction, however, at different speeds.[8]

One of the first fair trade set-backs was encountered by General Electric Company in its attempt to fair trade major appliances in the New York area. Retail competition circumvented this price fixing scheme rapidly by transferring price reductions to the allowance of higher trade-in values.[9] That same year the discount house of Sam Goody's of New York destroyed the fair trade program on Columbia records by touching off a nation-wide price war in

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[7]Senate Survey Report No. 2819, op. cit., p. 7.

[8]S. M. Lee, op. cit., 275.

[9]Business Week, November 7, 1953, op. cit., p. 44.

this product.[10] In April 1955, the Lionel Corporation decided to forsake the mutual advantages of fair trade with small retailers and attempted to increase its sales by selling to large volume dealers without any resale price conditions. That the decision was a correct one was born out by the fact that Lionel sold more merchandise in 1955 than in 1954 under a fair trade program.[11] Another company able to find out whether it was more profitable to fair trade or not was the Westinghouse Corporation. This company had fair traded its small appliances for six years when it abandoned its program in September 1955. This was just two months after Westinghouse's Electric Appliance Division announced that it had set up a special fair trade enforcement committee to put more weight behind its program.[12] Apparently the Westinghouse management foresaw that considerable expense would be needed to effectively control its approximately 500 distributors, who in turn sold merchandise to over 100,000 dealers, when it abruptly changed its policy. The

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[10] Ibid.

[11] S. M. Lee, op. cit., 280. It must be noted that other factors may have played a role improving the sales performance for 1955.

[12] Ibid., p. 277.

company did not disclose its specific reasons for the reversal of its opinion regarding fair trade. The company simply announced: "We believe in fair trade, but under present conditions do not believe it workable."[13] A year later the company blamed the ineffectiveness of fair trade on the fact that "No line is so well protected or policed that any consumer who really shops around enough cannot buy all products of that line at less than fair trade prices."[14] By that time the company's records showed a 34 per cent increase for the first seven months of 1956 appliance sales without fair trade over the sales of the same period in 1955 with a fair trade program, despite a three month strike at the beginning of 1956.[15] The company announced: "We feel that after a fair trial this new policy has proven successful and we do not intend to return to fair trade."[16] It reported that this new policy had created some resistance of dealers which made it difficult for the Westinghouse

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[13]"Westinghouse Off Fair Trade," Business Week, September 3, 1955, p. 31.

[14]"Westinghouse Decides to Continue Policy of Frowning on Fair Trade," Business Week, September 15, 1956, p. 131.

[15]"Another Way to Skin a Cat," Fortune, 54 (October 1956), p. 124.

[16]Business Week, September 15, 1956, op. cit., p.131.

products to get its share of the market in some areas.[17] The favorable result of Westinghouse's new policy should at least partly be explained out of the fact that the other major portable appliance manufacturers stuck to their fair trade prices, which restricted the sale of their products through low-margin, high-volume dealers.

That company statements concerning the effectiveness of a fair trade program cannot always be relied upon is clearly shown by the history of the W. A. Sheaffer Pen Company's fair trade policies. This company had been one of the strongest proponents of fair trade and had a resale price maintenance program before the enactment of fair trade laws.[18] In 1953 this company started a campaign for tracking down price cutters and carrying out legal proceedings against them and repurchasing pens from discount houses, all at a cost in excess of $1 million.[19] On an annual basis the enforcement costs were running as high as 4 per cent of the gross sales value, but with the result that in June 1955 the company could announce that its campaign had reduced price cutting of Sheaffer merchandise over the entire country to

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[17] Ibid., p. 131.

[18] S. M. Lee, op. cit., 278.

[19] Advertising Age, December 12, 1955, pp. 1, 8.

a trickle.[20] This was completely contradicted six months later when a company spokesman released: "We found that Sheaffer merchandise still found its way into discount houses." And this despite the vigorous and expensive enforcement campaign.[21] There was no doubt concerning Sheaffer's decision to abandon its fair trade program. In a news release, dated December 2, 1955, the company announced:

> The W. A. Sheaffer Company ... in order to serve an important segment of the buying public, particularly in metropolitan areas, ... will add to its list of authorized dealers certain large volume retail outlets ... in fairness to all Sheaffer dealers, we are now permitting them to price out merchandise in accordance with their own local economic conditions and competitive practices ...[22]

This statement contains a denial of at least three characteristics of fair trade long preached by fair traders. First, the trademark protection by price fixing was suddenly not of any value to Sheaffer anymore, deflating considerably the alleged merits of fair trade to this effect. Neither gave the sales promotion loyalty of many small retailers to Sheaffer, by fair trading its products, the large market exposure and sales volume normally attributed to accompany a

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[20]S. M. Lee, op. cit., 278.

[21]Advertising Age, December 12, 1955, pp. 1, 8.

[22]S. M. Lee, op. cit., 278.

fair trade pricing policy. And finally the statement acknowledges the existence of differences in local conditions and competitive practices at the retail level, which should have its influence on the ultimate price to the consumer. In relation to the last two points it is interesting to note that although some small dealers initially dropped the Sheaffer line after this company abandoned fair trade, the majority of them began to handle the Sheaffer line again in succeeding months when they found that the effect of the company's decision was not as damaging as they had believed it would be.[23] This cuts deeply into the fourth major argument for fair trade, namely that it is necessary for the very existence of small dealers.

The Eastman Kodak Company reversed a 19 year old fair trade policy on December 31, 1956.[24] It cancelled its fair trade agreements with its retail dealers "reluctantly"[25] but the legal defeats which fair trade by that time had suffered in 16 states made the arrangements impractical

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[23] Ibid., p. 278.

[24] "Business Briefs," Business Week, January 5, 1957, p. 38.

[25] "Eastman Concedes," Fortune, 55 (February 1957), p. 94.

according to the company.[26] To fair trade under those conditions would create, in the company's opinion, unfair competition with those dealers who were in the disadvantageous position to be located in a state with effective fair trade legislation.[27] Thus, without effective and complete monopolistic price control fair trade achieved just the opposite of what it was intended to achieve for the small dealer. The Fortune editor added: "Eastman's sigh of regret merits a cheer from the still beleaguered consumer."[28] Other giants in the photographic field followed. Bell & Howell Company terminated fair trade in February 1957 and Revere Camera Company discontinued fair trade agreements in September 1957.[29]

The use of fair trade provisions in the marketing policies of nationally advertised products experienced a considerable reduction when General Electric Company in March 1958 gave up its fair trade program. As Business Week reported: "... it let loose an avalanche ... In short order,

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[26]Business Week, January 5, 1957, op. cit., p. 38.

[27]Fortune, 55 (February 1957), op. cit., p. 94.

[28]Ibid., p. 94.

[29]S. M. Lee, op. cit., 280.

Sunbeam, Toastmaster, Ronson, Schick, Royal McBee, Smith-Corona, and Waring Products abandoned fair trade on some products at least."[30] Only 8 months earlier W. H. Sahloff, a vice president of the General Electric Company, had strongly defended the company's fair trade program covering small appliances as a reaction on the important legal defeat the company suffered against Masters Mail Order Company.[31] According to this company official the policy would be continued as long as (1) no better system was available, (2) sufficient states had effective fair trade laws and (3) the great bulk of the company's dealers and distributors continued to support the company's price policy.[32] Mr. Sahloff contended that fair trade was necessary in an industry which is based on mass exposure, mass distribution and mass advertising.[33] The General Electric Company also has held continually that price-cutting of its

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[30]"Bargain Hunters Have a Heyday as GE Gives up Fair Trade," Business Week, March 8, 1958. p. 28.

[31]General Electric Co. v. Masters Mail Order Co., supra, pp.

[32]"GE Announces It Will Continue Battling to Enforce Fair Trade," Business Week, June 29, 1957, p. 124.

[33]Ibid., p. 124.

fair trade prices injured the GE trademark and brand name.[34] The economic soundness of those statements becomes highly doubtful when it is known that the General Electric Company in November 1954 decided to abandon factory-set retail prices on almost all of its major appliances. The stated reasons: Mass production requires (this time not fair trade, but) meeting competition! It was the discount house which could give the manufacturer the chance to produce at a large low-cost volume, according to General Electric Company.[35] The elimination of fair trade prices on General Electric small appliances was also primarily caused by the activities of discount houses. The largest discounter Korvette, for instance, stated that "GE was losing sales at Korvette, but Korvette was not losing sales of electric appliances."[36]

In the highly competitive metropolitan retail markets the chain reaction which General Electric Company precipitated by abandoning its small appliances' fair trade

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[34]See for instance Cox et al v. General Electric Co. 211 Ga. 286, 85 S. E. 2d 514 (1955).

[35]"Who's Going to Set the Prices," Business Week, November 27, 1954, pp. 25-6.

[36]S. M. Lee, op. cit., 275.

program caused a short but heavy price war. In New York prices were cut in some cases over 40 per cent of the original fair trade prices. In Philadelphia cuts up to 50 per cent were reported.[37] This price war should be considered as a sudden market adjustment.[38] A gradually settling-down price war seems to have been also the pattern in states that had fair trade laws and then rendered them ineffective by a legal decision. Thus it is reported that in Cincinnati price cutting raged briefly after Ohio's nonsigner clause was declared unconstitutional in 1958. Some time later a retailer indicated that prices stabilized at prices approximately 20 per cent below the previous fair trade price level,[39] which might be a rough indication to what extent the fair trade price level was unrealistic and artificial in a competitive retail market area.

The Discount Revolution

Discount houses and chain groceries have been the individual champions of the fight against the resale price

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[37] Business Week, March 8, 1958, op. cit., p. 27.

[38] See also Chapter IV, supra, pp.

[39] Business Week, March 8, 1958, op. cit., p. 28.

fixing laws.[40] The discount house is by no means a new thing in the business world nor should its development exclusively be explained as a result of the fair trade structure. In 1934, for instance, the New York firm of L. and C. Mayers celebrated already the completion of two decades of successful discount operation,[41] while the New York discounter Stephens Masters in 1958 remarked concerning the relationship between the existence of fair trade and discount operations; "... the fair trade umbrella, which is supposed to have built up discount sales, has been a pretty skimpy object for some time now."[42] The breath taking growth of the discount house and the great impact on certain sectors of the distributive system can be reviewed most usefully after a review of the basic economic functions of retailing in an age of mass distribution of branded goods as seen by the large manufacturers who set their fair trade policies accordingly. This economic philosophy is well expressed by Union Carbide & Carbon Company in

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[40]R. K. Bates, "Constitutionality of State Fair Trade Acts," Indiana Law Journal, 32 (1957), 130.

[41]R. S. Alexander and R. M. Hill, "What to do about the Discount House," Harvard Business Review, No. 1, 33 (1955), 53.

[42]Business Week, March 8, 1958, op. cit., p. 28.

defending its fair trade program on Prestone antifreeze.

> The function of each retailer, under mass-market distribution, is to close the sale with the potential customers and this function is impaired or destroyed unless large numbers of retailers throughout the nation carry adequate stocks of Prestone, give it reasonable display, make it readily available on call and provide reasonable selling support for it. Under national mass-market distribution, the consumer does not rely upon the retailer but does rely upon the manufacturer and his reputation to test, research, package, and select ingredients and materials for his product.[43]

The emphasis of this statement is on the number of retailers and not on the efficiency of the retailer and the resulting higher benefits for the consumer. To provide a strong motivation for selling for all retailers and also to maximize the number of retail outlets that will handle the product, the manufacturer has to assure them a high profit margin so that even high-overhead dealers can sell the products advantageously.[44] This approach might even lead to a strange competition among manufacturers in which each vie for dealers' favor by offering larger and larger mark-ups as is shown in the emphasis which manufacturers place

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[43]Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 359 P. 2d 644, at 655 (Mont. 1961).

[44]Kanter and Rosenblum, op. cit., 327.

on their retail margins in trade journal advertisements.[45] By marketing through a large number of small retailers the manufacturer further minimizes the pressure that could be asserted by a few large retailers to reduce the manufacturer's price or to allow them other concessions.[46] Effectively maintained retail prices substitute advertising and other expensive forms of sales promotion for price competition at the retail level. The emphasis on a large number of retailers tends to decrease also the volume per retailer. Those two factors result in the situation, which a fair trading manufacturer with highly organized retailers especially has to face, in which the retailers are constantly pressing for higher margins.[47]

That this high retail margin structure was basically initiated during the depressed situation of the 1930's and earlier was due to the facts that in this period the per unit selling cost tended to be high because of low

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[45]A survey of the American Druggist, January-June 1951 Volume, produced an impressive amount of evidence to this effect. (G. R. Smith and H. C. Smith, An Economic Appraisal of Resale Price Maintenance. New Orleans: Loyola University, 1957, pp. 69-70.)

[46]Kanter and Rosenblum, op. cit., 351.

[47]W. S. Bowman, Jr., "The Prerequisites and Effects of Resale Price Maintenance," University of Chicago Law Review, 22 (1955), 848.

volume and further because of the introduction of many new consumer goods for which a broad distribution could only be obtained if the retail margins were high enough to attract sufficient retail distributors.[48] The fair trade structure and other administered pricing devices had frequently the effect of freezing those margins at their high initial level. This process was considerably facilitated through the consumer goods shortage which developed since 1940. "Price competition at all levels of the distribution system was thin and watered down, at times almost not existent."[49] During and after the Second World War, however, with the return of sufficient consumer goods on the market, the arbitrary schemes of groups interested in reducing price competition at the retail level crumbled despite repeated legislative attempts to continue them,[50]

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[48]"Distribution: Straining to Move the Goods," Business Week, December 31, 1955, p. 43.

[49]Alexander and Hill, op. cit., 56,

[50]The fair trade structure has been compared with the merchant guild system which controlled the distribution of goods during the Middle Ages and which vanished under the pressure of the increased variety of goods and improved transportation broadening the market. (Smith and Smith, op. cit., pp. 91-2.)

because Grether's generalization: "... any widespread scheme of price control by arbitrary fiat is constantly sabotaged by hidden and indirect methods of violation,"[51] was proven to be true under the buyers' market condition of the last decade.

Many manufacturers and most small retailers have always seen the discount houses as the biggest threat to resale price maintenance schemes to protect their market position. Legislative attempts were mainly aimed at destroying the retailing methods employed by those stores so that price stability would be a fact and the quietude of a less aggressive retailing situation and stable profits could be enjoyed.[52] The cause of the pricing troubles of fair trade minded retailers, however, must be sought deeper than just the existence of discount houses. Mr. Masters enumerates an impressive list of relevant factors in this respect when he attributed the success of his discount house to the recognition of important structural changes such as:

> ... growth of national brand advertising, the ... growth of mass-produced consumer goods, the

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[51] E. T. Grether, Price Control under Fair Trade Legislation (New York: Oxford University Press, 1939), p. 541.

[52] "Tops For Fair Trade," Fortune, 57 (April 1958), p. 106.

> explosion in population, the migration to suburbia, building of a million homes per year, the growth of outdoor cooking, the do-it-yourself movement, the growing demand for labor saving devices in the home, the popularity of outdoor sports and tourism. We (Masters Co.) concluded that enough people were presold on national brands to know what they wanted, that they would come in to get what they wanted, to buy, not to be sold ...[53]

Rather than to consider the discount houses as the main trouble makers for resale price maintenance schemes, it seems more logical to see them as a consequence of a basic change in the manufacturers' market apparatus. Mass-selling in an age when volume production is the prime objective of a manufacturer became imperative. This movement started in groceries with the development of the supermarkets.[54] Most aggressive selling in this situation is conducted by the manufacturer instead of by the retailer. This took place through the manufacturers' advertising budgets which presold the consumers and left the consumer only to shop around for the most favorable price.[55] That the manufacturer, by assuming many traditional retailer

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[53]S. Masters, "Are We 'Illegitimate' or Unorthodox?" Vital Speeches of the Day, 23 (June 15, 1957), 541.

[54]Business Week, December 31, 1955, op. cit., p. 43.

[55]Fortune, 57 (April 1958), op. cit., p. 106.

functions, is hardly without responsibility for the growth of the discount house business and the consequent decline of the fair trade structure has been clearly indicated by Alexander and Hill. (1) Manufacturers' devices designed to stimulate sales by dealers, such as quantity discounts, quota systems to hold franchise, or deliberate overstocking of dealers, made the temptation for many dealers irresistible to dispose surplus stocks to price-cutting, low-margin houses. (2) Heavy advertising by manufacturers creates a degree of faith in his brand which makes it feasible for consumers to by-pass the small reliable retailer and buy the product through any outlet. (3) Manufacturers' guarantee programs took over the repair and guarantee services of small retailers, playing again into the hands of discounters. (4) Enforcement of fair trade prices substantially increased the effectiveness of discount house advertisements. (5) High guaranteed retail margins more liberal than circumstances justified, invited discounting.[56]

The manufacturers' interest in the low-cost, limited-service dealers whose merchandising policies involve high turn-over and low mark-ups is easily explained. It is

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[56]Alexander and Hill, op. cit., 58-9.

consistent with selling the most merchandise at the lowest possible cost, because dealers' competition forces the development of efficient merchandising methods, making for lower retail prices and greater sales without reducing the per-unit returns to the manufacturers.[57] This would also explain the not-more-than lipservice which manufacturers have given in the campaigns for the enacted and proposed resale price maintenance legislation.[58]

Discount house price-cutting is by no means the only price-cutting and probably is not even the most important manifestation of it. It is very possible that the sum total of the casual, individual allowances granted by regular retailers exceeds that of all discounts granted by all the discount houses.[59]

All those official acknowledgments from various economic groups of the price consciousness of the consumer, which the fair trade philosophy tried to deflate, substantiate the remark of one authority concerning the proposed

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[57]Bowman, op. cit., 848-9.

[58]Chapter IV, supra, pp. 84-5; Chapter VII, supra, pp. 210-6.

[59]Alexander and Hill, op. cit., 54.

resale price maintenance legislation of national coverage:

> The federal bill would afford little ... protection ... While vastly extending fair trade coverage, it would not provide the means to overcome present obstacles to effective enforcement.[60]

Resale Price Maintenance and the Consumer

Resale price maintenance schemes try to eliminate competition with that part of the sales dollar which represents distribution costs. With the increased importance of distribution this portion reaches in many instances 50 per cent or more.[61] With the discount house developments offering a wide choice of distribution services and corresponding charges highly appreciated by the consumer,[62] the manufacturers' interests are becoming increasingly out of harmony with the anti-competitive objectives of any resale price maintenance scheme stabilizing the profit margins for all retailers. Just as much as manufacturers are the

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[60] "The Enforcement of Resale Price Maintenance," Yale Law Journal, 69 (1959), 191.

[61] Testimony of Professor C. E. Griffin. U. S. Congress, Senate. Committee on Interstate and Foreign Commerce. Hearing on S. 3850, 85th Cong., 2d Sess., 1958, p. 59.

[62] "Even if most customers prefer to buy their products with a rich admixture of services and a price justified by this service, it should still be the right of others to buy their products with a minimum of service and at a price consistent with the cost of selling that way." (Ibid.)

producers of physical products, retailers are producers of the intangible distribution services. Fair trade advocates competition among the former for the benefit and protection of the consumer, however, it denies the competitive benefits for the consumer on the retail level. This denial appeared to be next to impossible during the last decade to be forced upon the retail distribution system. Fair trade can thus be seen as an attempt by strongly monopolistic manufacturers and organized retail organizations to make the consumer their servant to guarantee the preservation of their vested interests. The developments of the last decade, however, indicate that the businesses which identify themselves with the wishes, ambitions and interests of the consumers and serve the "ultimate determinants and beneficiaries" of the competitive free enterprise system accordingly, will receive the higher economic rewards. In wrongly evaluating the remaining strength of the consumer choice in our economic structure, the fair traders and their proponents fought a losing battle from the beginning, because:

> The retailer is the buying agent of the consumer. By his expert knowledge the retailer can save the consumer money. The consumer is boss. Overcharging the boss for more services

> than he wants, can't go on. By charging the minimum for efficiently provided services, the consumer's buying power is increased which will stimulate the production of a greater diversity of goods. The opposite method would hurt the economy.[63]

Professor Machlup has stated that: "If one wants a strong defense of so-called fair trade protection - resale price maintenance - on economic grounds, one must not turn to an honest economist,"[64] but the honest economist will most likely happily underwrite the economic soundness of Mr. Lynn's business philosophy, as does the price conscious consumer by frequenting honestly and efficiently operated low-margin, limited-service retail institutions.

An estimate of the savings which the limited-service, large-volume operator can pass on to the consumer in comparison with the more conventional department store operations, might function as an indication of the importance of the discount house and adverse fair trade developments to the general public. In 1956 the total yearly volume of discount house sales was estimated at $ 750 million,

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[63]Business philosophy of Mr. Frank N. Lynn, General Manager, G. E. X. department store, Oklahoma City, Okla. Personal Interview, March 8, 1961.

[64]Prepared Statement of Professor Fritz Machlup. Hearings on S. 3850, op. cit., p. 63.

while $ 25 billion was the estimate for merchandise sold at a discount price.[65] The gross margins on sales for discount houses that year ranged from 11.5 per cent to 22.7 per cent. The department stores average was 36 per cent.[66] Making on the basis of these data the safe assumption that the discount houses on the average had a gross margin on sales of 20 per cent, a comparison can be made between their operations and the operations of the traditional department stores. The discount house gross margin of 20 per cent of sales works out to a mark-up on cost of 25 per cent.[67] The department stores' 36 per cent gross margin is identical to 56.25 per cent[68] mark-up on acquisition cost. Taking the discount house prices as the base, the consumer paid an average of 25 cents less for each dollar worth of merchandise[69] she bought in the average

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[65]"Hard Sell Comes to the Discount House," Business Week, October 13, 1956, p. 179.

[66]Smith and Smith, op. cit., p. 79.

[67]Costprice is 80 per cent of salesprice, thus 100/80 x 20 per cent = 25 per cent of cost.

[68]Costprice is 64 per cent of salesprice, thus 100/64 x 36 per cent = 56.25 per cent.

[69]Discount house salesprices were 125 per cent of costprice, while department store prices were 156.25 per cent of the same base. Thus department store prices were 100/125 x (156.25 - 125) = 25 per cent higher than discount house prices.

discount house instead of in the average department store. For an estimated discount house sales volume of $ 750 million, the discount house saved the consumer $ 187.5 million if it is assumed that the consumer would have bought the same quantity volume of merchandise without the existence of discount houses through department stores.[70]

That the discount house policy was economically sound and paid off handsomely for those benefactors of the price-conscious consumer can be shown by conducting some calculations on data reported in Fortune Magazine. It was reported that the largest discount house, E. J. Korvette in New York, with annual sales of around $ 70 million, had overhead costs of 14.5 per cent of sales while this figure was an average 33 per cent of sales for department stores. Korvette's gross margin averaged 20 per cent of sales, the department stores gross margin of sales average was 36 per cent.[71] This means that Korvette made a net profit of 5.5 per cent of sales[72] or $ 3.85 million on a sales volume of

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[70] 25 per cent of $ 750 million. It is assumed in those comparisons that the discount houses and the department stores paid identical prices to the manufacturers or their wholesalers.

[71] "The Spectacular Rise of E. J. Korvette," Fortune, 54 (November 1956), p. 124.

[72] Gross margin 20 per cent minus overhead margin 14.5 per cent.

$ 70 million. The average department store would have sold the same volume of merchandise at 25 per cent higher prices[73] than Korvette for a total of $ 87.5 million, while the net profit would have been only 3 per cent[74] of this sales volume which comes to a total profit of $ 2.625 million. Thus Korvette earned $ 1.225 million more on the same quantity of merchandise than the average department store would have, at the same time charging the consumer 25 per cent or a total of $ 17.5 million less than the average department store would have to make its lower profit.

In the light of this example it seems of great significance to leave the consumer free in choice whether he wants to patronize the conventional retail outlets or to take the less convenient route, thus eliminating some overhead charges and also cashing in on the greater efficiency of large volume discount houses. Any form of resale price maintenance on any portion of the total retail sales would reduce this valuable freedom of choice of varying amounts of retail services to the general public. That

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[73] Supra, p. 250, notes 67-9.

[74] Gross margin 36 per cent minus overhead margin 33 per cent.

this freedom is appreciated has been evidenced by the great quantity of "dollar votes" cast for (into) the discount houses. The ironic situation in the fair trade developments is, that this price maintenance legislation was passed by the representatives democratically elected, while the break-up of the legal fair trade structure was effectuated by millions of individual dollar votes greatly assisted by many judicial authorities.

That for the principle proponents of fair trade - the smaller, higher-overhead retailer - those developments will mean destruction, should be doubted on the basis of the experience in those states that never passed a fair trade law. Although Schumpeter has defined progress as a process of creative destruction,[75] the developments in fair trade and retailing over the last decade still leave to the small and/or conventional retailers the less-price-conscious and more-convenience-and-service-conscious consumer. Although it might be a valid assumption that their share of the total retail volume was not as high during the last decade as it would have under an effective and widely used legal price maintenance umbrella.

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[75]As cited by Professor C. E. Griffin. Hearings on S. 3850, op. cit., p. 62.

CHAPTER IX

SUMMARY AND CONCLUSIONS

The fair trade developments during the last decade seem to warrant two encouraging conclusions. From them it might first be inferred that our mixed economic structure remains free and competitive enough to enable the cherished institution of private initiative to render restrictive legislation ineffective, especially when its aim is to guarantee the status quo of the vested interests of certain business groups without due regard for the interests of the general public. And secondly, that there were many judicial authorities and legislators able to interpret the real purpose of fair trade statutes and their detrimental effects on the freedom of choice and economic interests of the consuming public. And this in spite of the many impressive terms and beneficial purposes attributed to resale price maintenance legislation by its proponents. The judges evidenced this by rejecting in strong or less strong terms the most important provisions of many fair trade laws or by

refusing to give them any more than literal interpretation and application. For the legislators this is shown through the fact that they thus far prevented a reversal of the developments by obstructing the federal resale price maintenance legislative proposals.

The legal fair trade structure is based on a weakening of the Sherman Antitrust Act provisions through the exemption of fair trade practices from them as granted in the Miller-Tydings and McGuire Amendments. The same public sentiments which stimulated the political pressure for the passage of the Sherman Act, destroyed also the effectiveness of the fair trade exemption provisions: namely, the distrust of the general public in the advisability of the delegation of regulatory powers to private profit seeking enterprises. In the case of fair trade this was not expressed by legislative means but through the consumers' support of those businessmen who served their limited budgets most favorably by supplying a mixture of goods and services the consumers wanted and not what they would have been restricted to in this respect by fair trade legislation if this scheme had been able to achieve its goal more completely.

In the legal fair trade developments the most outstanding phenomena is that during the last decade 21 highest

state courts found fair trade provisions violative of the states' constitutional provisions safeguarding the basic American economic, legal and political philosophy. Those states, in combination with the 4 states that never chose to enact a fair trade act, represent exactly half of the states in the Union. The other half of the states either sustained their fair trade laws on the dubious trademark protection theory or have not rendered a decision as yet. The exact balance in the number of states taking opposite fair trade positions is closely related to two decisions of the U. S. Supreme Court. In 1936 this authority in the light of the then prevailing depressed economic conditions strongly defended fair trade provisions on the basis of trademark protection arguments and denied to recognize any objectionable coercive characteristics in the scheme. In the considerably more healthy economic situation of the year 1951 the same court could not have expressed itself more strongly branding the heart of the fair trade structure as coercive and alien to the American legal and economic traditions. It was this last decision that played such a devastating role in the break-up of the fair trade structure during the entire reviewed period. Its influence could not be annihilated by the federal legislative attempt to this effect in the McGuire

Amendment. Thus far the U. S. Supreme Court has not reviewed the constitutionality issue of this statute, but most courts refused to give its provisions any more than a very strict interpretation.

The majority of the most important legal fair trade issues arose in metropolitan areas in which a great variety of consumers is concentrated. It was here that the need and opportunity for varied retailing methods started to strain at the fair trade provisions which tried to deny the existence in differences in local conditions and competitive practices on the retail level. Fair trade provisions presumed all retailing operations homogeneous which proved to be too much of a contradiction of the vitality of the real situation.

Resale price maintenance provisions provided for by state legislation and federal enabling legislation appeared to be vulnerable to diversified attacks. This became especially clear after the important legal decisions concerning the operations of free state mail order vendors, which caused a series of important fair trade programs to be abandoned. Since then the groups interested in resale price maintenance are working for a federal statute.

The developments of the last decade had a signifi-

cant educational effect on the general public and on many groups and authorities concerning the character and purposes of fair trade and similar schemes. The opposition to resale price maintenance thus became more impressive and effective in hearings on proposed federal resale price maintenance legislation in recent years than had existed in the period in which the fair trade structure originated.

Fair trade advocates have respectively justified the necessity of resale price maintenance (1) for the protection of manufacturers' trademarks, (2) to give small manufacturers a better fighting chance against the giants, and (3) for the very existence of the small retailer by eliminating the "law of the jungle" on the retail level. None of those objectives have been factually substantiated in any general sense. Theoretically these objectives are in hopeless conflict with each other.

The activities and opinions of these businessmen who opposed fair trade were mainly inspired by their particular economic interests, but these happened to coincide with the interests of the price conscious consumer and did not conflict with the established and generally accepted philosophy of the competitive free enterprise system.

The developments of the last decade show that even

if the legislatures want to go far in granting resale price maintenance provisions but not all the way, the competitive forces are strong enough to negate the effectiveness of those attempts. The decline of the legal fair trade structure was achieved in a dynamically developing and adjusting economy through methods which simply cannot be characterized as "unfair" or "the law of the jungle" without denying the strength and benefits of our economic system.

Whether the competitive forces would be strong enough to render ineffective a well formulated federal resale price maintenance statute cannot be answered on the basis of the experiences of the recent past. The question concerning the advisability or possibility of the enactment of a federal resale price maintenance statute, therefore, is not anymore an economic one, but exclusively an issue of political character.

The small retailer, notably the druggist, is the main proponent of resale price maintenance legislation. His effective trade organizations pressed successfully for the existing legal fair trade structure. The monopsonistic characteristics of those trade organizations in combination with the strongly monopolistic traits of their suppliers create the special situation which makes a resale price main-

tenance scheme work profitably for both parties involved. That the retail volume sold under fair trade programs has never been estimated higher than 10 per cent of the total retail volume might function as an indication that these special circumstances are not characteristic for the larger part of the American distribution system. Resale price maintenance legislation thus serves specific rather than general business interests. The situation in which the specifically interested business group operates would require actions to increase price competition for the benefit of the general public rather than actions to reduce it.

The developments during the last decade prove that the legal fair trade structure was too weak to offer an effective method of resale price maintenance. The economic reasoning used by the resale price maintenance proponents to justify their schemes should be interpreted as only a disguise for the common trait which John K. Galbraith has phrased so nicely:

> The role of power in American life is a curious one. The privilege of controlling the actions or of affecting the income and property of other persons is something that no one of us can profess to seek or admit to possessing. Yet there is no indication that, as a people, we are adverse to power. On the contrary, few things are more valued, and more jealously guarded by their possessors, in our society.[1]

The general public's interests in a diversified and flexible retailing system has been well guarded against the arbitrary power granted to private business groups in fair trade legislation by the flexibility, inventiveness and strength of the competitive system. Even the legislatures that were too obliging in trying to solve the aroused small retailers' problems created by price competition, were unable to cope with the strength of this cause.

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[1]John K. Galbraith, American Capitalism: The Concept of Countervailing Power (Boston: Houghton Mifflin Co., 1952), p. 28.

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