

1958

A Symposium on the Fair Trade Laws: Part I: Constitutionality

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

A Symposium on the Fair Trade Laws: Part I: Constitutionality, 27 Fordham L. Rev. 68 (1958).

Available at: <https://ir.lawnet.fordham.edu/flr/vol27/iss1/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

COMMENTS

A SYMPOSIUM ON THE FAIR TRADE LAWS

FAIR trade laws are designed to enable the owner of a trade-mark appearing on commodities of his manufacture to protect his good will interest in that trade-mark by stipulating the price at which such commodities may be resold. The method employed is the resale price maintenance contract under which the vendee of trade-marked commodities is contractually bound to sell such commodities at the stipulated price. Although in certain circumstances these contracts were enforceable in intrastate commerce at common law, the present basis for their enforcement lies in the fair trade acts of the various states. While these statutes permit the enforcement of resale price maintenance contracts in intrastate commerce, the fact that such contracts violated the federal antitrust laws necessitated the enactment of federal legislation to permit their enforcement in interstate commerce. Such federal legislation came with the passage of the Miller-Tydings Fair Trade Act of 1937 and the McGuire Act of 1952. These statutes exempted resale price maintenance contracts, where they were legal in the state of resale, from the ban of the antitrust acts. Thus resale price maintenance contracts are effective today as a matter of state law operating with congressional blessing. In such a situation the law is bound to vary from one jurisdiction to another.

The following articles represent an attempt to consider the field of fair trade law from four major aspects: the constitutionality of fair trade legislation; definitions and related problems; enforcement and procedure; and indirect methods of evading the fair trade laws.

PART I: CONSTITUTIONALITY STATUTORY HISTORY

In 1911, resale price maintenance contracts in so far as they were operative in interstate commerce, were held to violate the Sherman Antitrust Act, because they eliminated competition at certain levels in the distribution of commodities and were therefore antithetical to the basic policy of that statute.¹ After 1911, the courts continued to recognize the right of a manufacturer to refuse to sell his products to one who would not maintain satisfactory resale prices.² But where a manufacturer employed a system of placing serial numbers on merchandise, hiring salesmen to report price cutters and urging dealers to do the same, keeping lists of "undesirable price cutters," cutting off supplies to the "undesirables"—all designed to make its "suggested" prices effective—the practice was held

1. *Dr. Miles Medical Co. v. Park & Sons*, 220 U.S. 373 (1911).
2. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

to constitute an unfair method of competition.³ Thus while the right to refuse to sell was recognized it was a naked right and in the practical sense it was impossible for the manufacturer to use it as a method of controlling resale prices.

In 1931 the resale price maintenance agreement was legalized in California by the enactment of the first state fair trade law.⁴ Other states followed suit until by 1936 forty-two states had enacted fair trade statutes.⁵ All were substantial equivalents of the California model, as amended in 1933, and all purported to act only on intrastate commerce. The typical fair trade statute permits a manufacturer of trade name or trademarked articles to control resale prices by contract and includes a provision whereby a nonsigner can be compelled to respect the prices established by the fair trade contracts. The willful sale of fair traded articles below the stipulated minimum resale prices is made tortious by the statutes and such a seller is made subject to an action for damages and where necessary injunctive relief will be granted against him.

The constitutionality of such a statute was first considered in *Doubleday, Doran & Co. v. R. H. Macy & Co.*⁶ In that case the New York Court of Appeals held the nonsigner provision of the statute unconstitutional under both the federal and state constitutions. The court viewed the statute as permitting arbitrary legislative price fixing of goods not "affected with a public interest," and as open to the further criticism that it entailed a delegation of legislative power to private persons. Later in 1936, appeals were taken to the United States Supreme Court from decisions of the highest court of Illinois which had upheld its state fair trade act.⁷ In *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*⁸ the Supreme Court affirmed the decisions of the Illinois court and upheld the constitutionality of fair trade.⁹ On the authority of *Old Dearborn* New York almost immediately overruled the *Doubleday* case.¹⁰

Following the *Old Dearborn* decision Congress, in 1937, enacted

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

4. Cal. Gen. Laws act 8782 (Deering 1931), as amended by Cal. Gen. Laws act 8782, § 1½ (Deering 1933).

5. All states except Alabama, Delaware, Mississippi, Missouri, Texas and Vermont had fair trade statutes by 1936.

6. 269 N.Y. 272, 199 N.E. 409 (1936).

7. *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N.E.2d 940 (1936); *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N.E.2d 929 (1936).

8. 299 U.S. 183 (1936). The appeals from the California decisions were similarly decided on the authority of the *Old Dearborn* case in *The Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936).

9. Relying on its decision in the *Old Dearborn* case the Court, on the same day, upheld the California fair trade act in *The Pep Boys, Inc. v. Pyroil Sales Co.*, 299 U.S. 198 (1936).

10. *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 7 N.E.2d 30 (1936).

the Miller-Tydings Act¹¹ which permitted a limited exception to the Sherman Act. The amendment was patterned on the original California fair trade act, which contained no nonsigner clause.¹² It provided that contracts or agreements, made by producers or distributors, prescribing minimum prices for resale of brand name commodities in free and open competition with other commodities of the same general class, produced or distributed by others, shall be excepted from the general prohibition of the Sherman Act. These contracts would thus be enforceable in interstate commerce where such contracts were lawful in the intrastate commerce of the state of resale.

THE MCGUIRE ACT

The McGuire Amendment to the Federal Trade Commission Act¹³ was enacted in 1952 to obviate two difficulties that were brought to light through judicial interpretation of the Miller-Tydings Act. First, the Supreme Court held in *Schwegmann Bros. v. Calvert Distillers Corp.*,¹⁴ that the Miller-Tydings Act did not legalize the enforcement of the nonsigner provisions of state statutes in interstate commerce. Second, it was held in *Sunbeam Corp. v. Wentling*¹⁵ that the enforcement of state nonsigner provisions in interstate transactions would constitute an unlawful burden upon commerce.

The constitutionality of the McGuire Act has twice been upheld by United States Courts of Appeal, but has yet to be considered by the Supreme Court. The Sixth Circuit Court in *Sunbeam Corp. v. Richardson*¹⁶ cited *United States v. McKesson & Robbins*¹⁷ as "persuasive that the Supreme Court views the McGuire Act as not invalid on constitutional grounds," since in the latter case the statute had been before the Court and no question of its constitutionality was raised. However, in that case the Supreme Court merely interpreted the McGuire Act as not exempting fair trade contracts, made by an integrated manufacturer with wholesalers who were in competition with its own wholesale division, from the prohibition of the federal antitrust laws. No constitutional issue was involved.¹⁸ The Fifth Circuit Court in *Schwegmann Bros., Giant Supermarket v. Eli Lilly & Co.*,¹⁹ rejected a contention that the act con-

11. 15 U.S.C.A. § 1 (1953).

12. The nonsigner clause was added to the original California Fair Trade Act by amendment in 1933. See note 4 supra.

13. 15 U.S.C.A. § 45 (Supp. 1957).

14. 341 U.S. 384 (1951).

15. 185 F.2d 903 (3d Cir. 1950).

16. 243 F.2d 501 (6th Cir. 1957).

17. 351 U.S. 305 (1956).

18. Proposed legislation would effect a change in the result of this case. See H.R. 10527, 85th Cong., 2d Sess. § 2 (1958).

19. 205 F.2d 788 (5th Cir. 1953).

stituted an unconstitutional delegation of the commerce powers of Congress to the states. This decision is in accord with the weight of authority²⁰ if the underlying premise that the states have power to enact fair trade laws be admitted as settled. It would therefore seem that a successful attack on the McGuire Act would have to include a successful attack on the rule of the *Old Dearborn* case.

In recent years a number of state courts have held fair trade a violation of the due process clauses of state constitutions²¹ reasoning that the fair trade statutes have no substantial relation to the public health, safety, morals or general welfare and that they fix the price of commodities not "affected with a public interest." These courts held that fair trade acts are not for the benefit of the public, but for the special interests of certain classes of manufacturers and retailers whose economic position is insured by the destruction of competition on the retail level. That there is some validity to these contentions cannot be denied, but it would seem that they are more properly advanced to the legislatures than to the courts.

The "affected with a public interest" doctrine was reconsidered by the Supreme Court even before it decided the *Old Dearborn* case. In *Nebbia v. New York*,²² the Court, in effect disregarding the "affected with a public interest" test, said, "price control like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."²³ It was this reasoning which the Court in *Old Dearborn* appears to have applied when it said, "the primary aim of the law is to protect the prop-

20. See *United States v. Public Util. Comm'r*, 345 U.S. 295, 304 (1953); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Southern Pac. Ry. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

21. The highest courts of the following states have held fair trade to be an unreasonable denial of property in violation of state due process: Arkansas, *Union Carbide & Carbon Corp. v. White River Distributers, Inc.*, 224 Ark. 558, 275 S.W.2d 455 (1955); Colorado, *Olin Mathieson Chemical Corp. v. Francis*, 134 Col. 160, 301 P.2d 139 (1955); Florida, *Miles Laboratories, Inc. v. Eckerd*, — Fla. —, 73 So. 2d 680 (1954); Georgia, *Cox v. General Elec. Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955); Kansas, *Quality Oil Co. v. E. I. Du Pont*, CCH Trade Reg. Rep. (1958 Trade Cases) ¶ 68970 (Kan. Sup. Ct. 1958); Louisiana, *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Supermarket*, 231 La. 51, 90 So. 2d 343 (1956); Michigan, *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952); Nebraska, *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 68 N.W.2d 608 (1955); New Mexico, *Skaggs Drug Center v. General Elec. Co.*, 63 N.M. 215, 315 P.2d 967 (1957); Ohio, *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, — Ohio —, 147 N.E.2d 481 (1958); Oregon, *General Elec. Co. v. Wahle*, 207 Or. 302, 296 P.2d 635 (1956); South Carolina, *Rogers-Kent, Inc. v. General Elec. Co.*, — S.C. —, 99 S.E.2d 665 (1957).

22. 291 U.S. 502 (1933).

23. *Id.* at 539.

erty—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.”²⁴

Some of the state courts, in invalidating local fair trade laws, resurrected the argument that fair trade is essentially a delegation of a legislative function (price fixing) to private individuals (the manufacturers of trade-marked commodities). They would place reliance on the type of reasoning put forth by the United States Supreme Court in *Carter v. Carter Coal Co.*²⁵ This case questioned the constitutionality of the Bituminous Coal Conservation Act of 1935. The act provided that a fifteen per cent excise tax (admittedly a penalty) be imposed on unrefined coal, ninety per cent of which would be returned to the producers if they filed an acceptance of the Code that was set up by one provision of the act. Members of the Code would be bound by the wages and hours agreements made by the producers of two-thirds of the coal mined in the preceding year and the representatives of half the mine workers. In declaring the statute unconstitutional the Supreme Court said, “the power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form . . . to private persons whose interests may be and often are adverse to the interests of the others in the same business [I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.”²⁶

The *Carter* case, however, was severely limited by later cases²⁷ and it was expressly distinguished in *Old Dearborn* where the Court stated, “we find nothing . . . to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond*, . . . *Seattle Trust Co. v. Roberge*, . . . and *Carter v. Carter Coal Co.* . . . In those cases the property had been acquired without any pre-existing restriction in respect of its use or disposition Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.”²⁸

Finally, whatever vitality may remain in the *Carter* case may well be sapped by the fact that the statute gave private parties the power to fix prices in businesses with which they had no contractual relationship and

24. 299 U.S. at 193.

25. 298 U.S. 238 (1936).

26. *Id.* at 311.

27. See e.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

28. 299 U.S. at 194.