Price Fixing—Fair Trade Laws

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heritance tax regulations. It is well settled in West Virginia that "statutes providing for taxation are to be construed strictly as against the taxing power in favor of the taxpayer."\(^{39}\) Even though an estate holding "eligible" bonds is permitted a tax advantage, the proper way to remedy this is by legislation, not by administrative regulation.\(^{40}\)

John Michael Anderson

**PRICE FIXING—FAIR TRADE LAWS**

The fair-trade movement began when California enacted the first fair-trade statute in 1931.\(^{1}\) Initially there was some concern about the constitutionality of fair-trade laws, but this doubt was removed by a 1936 Supreme Court ruling which held that the Illinois fair-trade act was valid and not in violation of the due process clause of the Federal Constitution.\(^{2}\)

The following year the Miller-Tydings Amendment to the Sherman Act was passed as a rider to an appropriations bill for the District of Columbia, after attempts at enacting it as a separate statute failed.\(^{3}\) The Miller-Tydings Act provides that contracts or agreements prescribing minimum resale prices of trademarked or brand named products are exempt from the operation of the Sherman Act and the Federal Trade Commission Act.\(^{4}\) Since with-

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\(^{2}\)See California Business and Professions Code §§ 16900-16905 (Deering 1960). The nonsigner provision of the California statute was added by amendment in 1933.


\(^{3}\)For a good account of the legislative history, see Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (E.D. La. 1944).

\(^{4}\)Provided, That nothing contained in sections 1-7 (The Sherman Act) of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 46 (The Federal Trade Commission Act) of this title: Provided further, That the pre-
out such exemption contracts or agreements prescribing minimum resale prices of goods traveling in interstate commerce would violate the Sherman Act and the making of such contracts or agreements would violate the Federal Trade Commission Act, the Miller-Tydings Act opened interstate commerce to fair trade where previously it had been limited to goods moving intrastate.\(^5\)

Following passage of the Miller-Tydings Act, almost every state proceeded to enact fair-trade legislation. However, price control was not to come so easily, and in 1950 the Supreme Court dealt fair-trade a setback when it held that the Miller-Tydings Act only exempted enforcement of minimum resale price agreements against contracting parties and did not permit such enforcement against nonsigners.\(^6\) The Court held that imposition of price fixing on nonsigners was a resort to coercion not intended by the Miller-Tydings Act.\(^7\)

Congress, however, rendered the Court's ruling inoperative by enacting the McGuire Amendment to the Federal Trade Commission Act.\(^8\) The amendment reinstated enforcement of minimum or stipulated prices on trade-marked goods against nonsigners of price maintenance contracts who have notice of the existence of such contracts. This was achieved by exempting from the Federal Trade Commission Act the enforcement of any right or right of action created by state law against nonsigners who advertise, sell, or offer for sale at below the prescribed minimum resale prices.\(^9\)

\(^6\)In the absence of such an exemption, resale price maintenance agreements, or concerted efforts to enforce such agreements violate the antitrust laws. United States v. Parke, Davis & Co., 362 U.S. 29 (1960).
\(^8\)'When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion.' Id. at 388.
The McGuire Amendment was attacked in Louisiana a year after passage, but this time fair trade won, and a federal circuit court in a two to one decision upheld both the McGuire Amendment and the Louisiana fair-trade law as valid under the due process clause of the Federal Constitution. The court also agreed that it was clearly the intent of Congress to allow application of fair trade restrictions to nonsigners. The dissent argued that the fair-trade law of Louisiana was an unlawful delegation of price-fixing, a legislative function, to individual vendors and vendees.

Recently fair-trade laws, particularly their nonsigner clauses, have come under attack from another direction. Although forty-six states at one time or another enacted fair-trade laws, four states have repealed their fair-trade laws, and the courts of four other states have held their fair-trade laws to be in violation of their state constitutions. Furthermore, courts in seventeen states have struck down the nonsigner provisions of their states' fair-trade laws as violating their state constitutions. Generally, states which have overturned the nonsigner clause in their fair-trade laws have done so on the basis that it exceeds the police power of the state, that

person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

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

Id. at 793. "The intention of Congress and the intention of the Louisiana Legislature are clearly that restrictions on the non-signers, when imposed as the result of a contract between a producer and a distributor, are to be given effect."

Id. at 798. [T]o the extent that it is coercive, it is lacking in due process, confiscatory, and void. Being entirely coercive as to the appellants, the judgment appealed from, should be reversed; otherwise the original Sherman Act may be whittled away by legislative exemptions and exceptions, administrative orders and processes, trade-mark devices, patent rights, judicial decisions and consensual price-fixing under brigaded state and federal legislation.

Nebraska, Hawaii, Kansas, and Nevada have repealed their fair-trade acts. Courts in Alabama, Montana, Utah, and Wyoming have found their fair-trade laws to violate their respective state constitutions; and Alaska, Missouri, Texas, and Vermont have never enacted fair-trade laws. For a full breakdown on fair-trade laws in each state, see Trade Reg. Rep., 6000 (1967).

Union Carbide & Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 275 S.W.2d 454 (1955); Olin Mathieson Chemical Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Argus Cameras, Inc. v. Hall of Distributors,
it denies due process,16 that it is unlawful delegation of legislative authority,17 or because of technical defects generally having to do with state constitutional provisions regarding titles of legislative enactments.18

Thus there are twelve states without fair-trade laws and seventeen states in which nonsigners cannot be compelled to follow fair-trade price guides. Since price wars and price cutting in general are usually carried on by the very retailers who refuse to sign the fair-trade contract, the nonsigner clause is the backbone of fair-trade laws and without it fair-trade laws are meaningless. Therefore, in twenty-nine states fair trade either does not exist or is unenforceable.

The justification of fair-trade laws and their enforcement against nonsigners is generally stated to be that of permitting trade-mark owners to protect the good will of their trade-mark or brand name, the feeling being that this good will is the property of the trade-mark owner. The use of the well-known branded or trade-marked product


General Electric Co. v. Dandy Appliance Co., 143 W. Va. 491, 493, 103 S.E.2d 310, 311 (1958) in which the nonsigner clause was held invalid in part because it "embraces a matter not stated in the title of said Act, nor germane to the matter stated in the title, and is therefore, unconstitutional and void, because violative of Section 30, Article VI of the Constitution of West Virginia . . . ." Accord, Bristol, Myers Co. v. Webb's Cut Rate Drug Co., 137 Fla. 508, 188 So.2d 91 (1959).
as a loss leader is often cited as one of the practices sought to be curtailed by fair trade. Also it is asserted that fair trade helps to stabilize the economy, preserves small businesses from destructive price competition, and protects consumers against the deceptive use of loss leaders and the long run monopolization of distributive outlets.

However, the Department of Justice and the Federal Trade Commission opposed the enactment of the Miller-Tydings and McGuire exemptions, and the Attorney General's National Committee to Study the Antitrust Laws recommended the repeal of the Miller-Tydings and McGuire Acts. Their reasons for opposition to fair trade are that: it goes further than is necessary to control loss leader selling and protect good will by eliminating all price reduction on such commodities; it relieves distributors from the rigors of price competition and thereby reduces incentive for efficiency in distribution; it is unnecessary to prevent monopolization of distributive outlets; and it facilitates horizontal price fixing and deprives consumers of the benefits of price competition in the distribution of goods.

It is argued by those in favor of fair trade that since a product cannot be fair traded under the McGuire Act unless it is in free and open competition with commodities of the same general class, fair trade does not in effect act to reduce competition. However, those opposed to fair trade argue that since a single price fixing commodity would be exposed to competition from comparable articles sold at a lesser price, horizontal collusion in violation of the law is an indispensable part of fair-trade price maintenance. Therefore, the "free and open competition" requirement is ineffective

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19 Loss leader is the term applied to the practice of selling nationally known articles at cost or less than cost for the calculated purpose of enticing customers away from competitors and into stores where they may be entrapped into purchasing other goods at marked up prices that will more than make up for the loss on the leader.


21 For samples of the views of the Federal Trade Commission and Department of Justice toward Fair Trade, see F.T.C., REPORT ON RESALE PRICE MAINTENANCE (1945); 1955 ATT'Y GEN. REP. 153-55.

22 1955 ATT'Y GEN. REP. 153-55.

23 Id.

and fair-trade laws act as a cover for horizontal price fixing. Since fair-traded products (being brand named or trade-marked items) are usually sold in markets of few sellers, if fair trade is a factor tending to limit competition it does so in a market in which competition is already reduced.

Even assuming effective competition among manufacturers, there is no rational foundation for the assertion that a sufficient degree of competition among manufacturers eliminates the possibility that significant adverse effects may result from fair trade. In so far as fair trade is effective it tends to raise distribution costs by depriving low cost distributors and their customers of the advantages of their efficiency, and diverting competition into cost increasing non-price channels such as games, trading stamps, and various advertising gimmicks.

Indeed, distributors hostile to fair trade charge that fair-trade prices carry unreasonably high profit margins ranging from 33 to 50% and that satisfactory profits can be obtained by much lower profit margins which would permit increasing the volume of sales. This high profit margin, which allegedly decreases sales volume but not sales profits (which because of higher prices are completely out of proportion to production and sales, hence inflationary), deprives the consumer of any chance at savings through the exercise of thrift. Since these high prices are uniform, the consumer is in fact paying not only for the product, but also the above mentioned in practice it is nearly always impossible for one manufacturer to establish a system of vertical price fixing unless he can be sure that his competitors will do likewise; and a single price-fixing commodity is exposed to the inroads of competing commodities when these articles can be sold for less than the fixed price. Consequently, horizontal collusion in violation of the law has been an indispensable part of the movement for resale price maintenance . . . . If the Antitrust Division had the men and money to examine every resale price contract which has been written under the cloak of State and Federal legislation . . . there would be practically no resale price contracts. In the absence of such wholesale law enforcement, the system of resale price legislation has become a breeding ground for restraints of trade such as Congress never intended to sanction and did not sanction. Hearings on Resale Price Maintenance Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 82d Cong., 2d Sess., ser. 12 at 440 (1952).

When retailers are prevented by law from competing on the basis of price, they are forced to resort to extra services or gimmicks, games, and trading stamps. Since fair trade prohibits the offering or giving of these items in connection with a fair-trade product, their cost must be added to the minimum resale price requirement. See, e.g., W. VA. CODE ch. 47, art. 11, § 3 (Michie 1966).

Hearings on Resale Price Maintenance Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 82d Cong., 2d Sess. at 602 (1952).
games, trading stamps, advertising gimmicks, air conditioned store-
rooms, sales services such as delivery or credit, and various other extras which the consumer may not desire.

It is claimed that fair trade protects the local independent merchant who cannot compete with the large chain stores, who buy in large volume and have a faster rate of turnover. This is not necessarily so, since in recent years it has become commonplace for the chain stores to develop their own "private label" products. These "private label" products sell for less than trademarked or brand named products, and since these "private label" products are often identical to the trademarked products, except for the name on the carton, it is difficult to see how fair trade will enable the local merchant to keep the price-conscious consumer.

In 1937, the West Virginia Legislature enacted a fair-trade law\(^\text{28}\) which included the typical nonsigner clause.\(^\text{29}\) Some twenty years later General Electric Company sought to enjoin Dandy Appliance Company, a nonsigner, from selling trademarked articles below minimum retail prices fixed by the former under agreements with dealers. The circuit court held that the act was void and certified questions to the West Virginia Supreme Court of Appeals.\(^\text{30}\)

The court admitted that under the great weight of authority the act was valid under the Federal Constitution, but noted that such authority is not conclusive in determining whether such an act is within the police power of this state or is violative of the due process provisions of the West Virginia constitution.\(^\text{31}\) The court concluded that the act (as applied to nonsigners)\(^\text{32}\) was not a proper

\(\text{\footnotesize \text{\textsuperscript{28}}}\) 'W. VA. CODE ch. 47, art. 11 (Michie 1966).  
\(\text{\footnotesize \text{\textsuperscript{29}}}\) 'Id. § 6. Wilfully and knowingly advertising, offering for sale or selling any commodity at less that the price stipulated in any contract entered into pursuant to the provisions of this article, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.  
\(\text{\footnotesize \text{\textsuperscript{31}}}\) 'Id. at 495, 103 S.E.2d at 314.  
\(\text{\footnotesize \text{\textsuperscript{32}}}\) Throughout the Dandy opinion, the court used the word "Act", resulting in confusion as to whether the decision was that the entire Fair Trade Act was void, or that only § 6, the non-signer provision, was void. A subsequent decision, Union Underwear Co. v. Aide, 151 W. Va. 918, 159 S.E.2d 217 (1967), interpreted the Dandy decision as holding only § 6 of the Fair Trade Act void, meaning that resale price maintenance contracts voluntarily entered may still be enforced. See W. VA. CODE ch. 47, art. 11, § 2 (Michie 1966). A vigorous dissent in Union criticized the majority and stated that the Dandy decision did declare the entire Fair Trade Act to be void.