Vanderbilt Law Review

Volume 11
Issue 1 *Issue 1 - A Symposium on Trade Regulation and Practices*

Article 7

12-1957

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A NEW APPROACH TO RESALE PRICE MAINTENANCE

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Resale price maintenance has had a lively legal history. After court decisions under the Sherman Act and the Federal Trade Commission Act had discouraged it in the first third of the current century,[1] it was encouraged by Fair Trade Acts in so many states[2] as to develop an impractical cleavage between state and federal law. Congress responded by passing the Miller-Tidings Act in 1937.[3] This made the relevant antitrust laws inapplicable to resale price maintenance contracts valid by the law of the state where resale is to be made. The amendment conformed in essential respects to the structure of the Fair Trade Acts, in relating only to merchandise identified by trademark or trade name "in free and open competition with commodities produced or distributed by others," and in denying validity to horizontal agreements between manufacturers or between distributors.

Fair Trade Acts typically provide that where the owner of a trademark or trade name has entered into resale price maintenance contracts with some but not all distributors of his product, all such distributors in the jurisdiction are equally bound and subject to sanctions under the law. The constitutionality of the "non-signer" clause was upheld in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* in 1936.[4] With the enactment of a few more Fair Trade Acts after the Miller-Tidings Amendment, raising the total of states with such laws to forty-five,[5] the difficulties to be encountered by fair trade programs for over a decade were more practical than legal. But in 1951, the Supreme Court rather surprisingly held that the Miller-Tidings Amendment gave no support to the non-signer provisions of the Fair Trade Acts.[6] Congress promptly reversed the result by the Maguire Act in 1952,[7] bringing the state and federal laws back into alignment. But the last chapter had not been written. Of recent years a considerable number of state courts have declared state Fair

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1. Federal Trade Commission v. Beech-Nut Packing Co., 257 441 (1922); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
2. Forty-one states had Fair Trade Acts as of 1937 or earlier date; by Sept. 1, 1939, forty-four states had them. See W. P. A. *State Price Control Legislation*, 2 MARKETING LAW SURVEY. xxxvi (1940). The statutes reprinted in said survey support the count of forty-one. The table in *id.* at xlvi cites codes of 1938 and 1939 compiling earlier session laws.
3. Act of Aug. 17, 1937, 50 STAT. 693, 15 U.S.C. § 1 (1952).
4. 299 U.S. 183 (1936).
5. There are none in Missouri, Texas, Vermont and the District of Columbia.
6. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).
7. 66 STAT. 632, 15 U.S.C. § 45 (1952).

Trade Acts to be unconstitutional[8] and one federal district judge threw the Maguire Act in for good measure,[9] although he was promptly reversed.[10]

As one who has discussed the pros and cons of resale price maintenance some time ago,[11] I was recently consulted by proponents of resale price maintenance who requested advice on various points centering around the question whether their case merited a fresh legal approach. My thought was and is at least three-fold. First, though of secondary importance, is the thought that while the Fair Trade label is a venerable one, it is not venerated in many quarters. It arouses antagonism as unduly self-righteous. There are wide differences of opinion concerning the economic merits and demerits of resale price maintenance. Legislatures and courts have never stood aloof from the controversy, at least in modern times, and the problem is essentially an aspect of modern mass distribution. Legislatures and, to a lesser extent, judges have to decide whether to favor or to oppose resale price maintenance and both sides to the controversy cannot win at the same time and place. The word "fair" should remain one of the best words in the English language like justice or honor. It should stay in the public domain and not be granted as a reward for winning a legislative battle.

Secondly, and more fundamentally, the issues may be clarified by

8. Union Carbide & Carbon Corp. v. White River Distributors, 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chemical Corp. v. Francis, 301 P.2d 139 (Colo. 1956); Miles Laboratories, Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Grayson-Robinson Stores v. Oneida, Ltd., 209 Ga. 613, 75 S.E.2d 161 (1953); Bissell Carpet Sweeper Co. v. Shane Co., 143 N.E.2d 415 (Ind. 1957); Dr. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 90 So. 2d 343 (1956); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 343 Mich. 109, 54 N.W.2d 268 (1952); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); General Elec. Co. v. Thrifty Sales Inc., 5 Utah 2d 326, 301 P.2d 741 (1956). In Virginia the Fair Trade Act has been held repealed by the Anti-Monopoly Act of 1950, VA. CODE ANN. §§ 59-20 to -401 (1949). Benrus Watch Co. v. Smith-Williams, Jewelers, 198 Va. 94, 92 S.E.2d 384 (1956). In addition to the foregoing decisions in state courts of last resort there have been adverse lower court decisions in at least two other states. General Elec. Co. v. American Buyers Coop., CCH TRADE REG. REP. ¶ 68,341 (Cir. Ct. Jefferson Co., Ky., 1956); Rogers Kent, Inc. v. General Elec. Co., CCH TRADE REG. REP. ¶ 68,625 (Richland Co. Ct. S.C., 1956).

The weight of authority by number of jurisdictions still sustains such acts. Measured by volume of business the preponderance sustaining is heavier. As of Sept. 1, 1957, the five most populous states are still fair trade jurisdictions. Texas with no act and Michigan on the above list, with a combined population approaching that of New York, are the only exclusions in the first ten states in population and wealth. In weighing the practical status of fair trade, adverse considerations are the trend as an indicator of opinion and the difficulties of enforcement in areas adjacent to breaks in the once almost solid front.

9. Sunbeam Corp v. Richardson, 144 F. Supp. 583 (W.D. Ky. 1956).

10. Sunbeam Corp. v. Richardson, 243 F.2d 501 (6th Cir. 1957).

11. McLaughlin, *Fair Trade Acts*, 86 U. PA. L. REV. 803 (1938). The spelling of the surname was changed by order of court in 1948, correcting an error made in Scotland in the early nineteenth century.

renouncing the device of the non-signer clause. Where antagonism is not aroused by the use of the Fair Trade label, it can flow from a sense of outrage at holding a man to a contract he never made. The real case for resale price maintenance can be formulated in quite different terms.

Thirdly, in such a matter of national concern Congress should take the lead in determining a national policy, instead of drifting in the wake of state law.[12] The following draft of a proposed federal statute has benefited from the criticism of a considerable number of advocates with experience in related fields.

AN ACT TO EQUALIZE RIGHTS IN THE DISTRIBUTION OF IDENTIFIED MERCHANDISE

Section 1. Findings of Fact and Declaration of Policy.

This Act shall be construed with reference to the findings of fact and declarations of policy in this Section contained. The public interest and economic efficiency are promoted by competition between manufacturers, whether or not the individual manufacturers control the prices to the consuming public of the articles they respectively produce. A manufacturer may legally control the price of his goods to the ultimate consumer by distributing his goods entirely through departments of his own organization. He may also achieve the same result by consigning goods to distributors and retaining legal title to the goods until they are sold to the ultimate consumer. These methods of distribution are available to large manufacturers, but are commonly beyond the means of small manufacturers. Manufacturers large and small, however, normally have an interest in the wide and effective distribution of their goods. Independent distributors seek under the law of supply and demand and the price mechanism to handle those products where the spread between their buying and their resale prices is adequate to recompense their active efforts to distribute the merchandise. Manufacturers who do not limit their distribution to direct retail sales accordingly have a legitimate interest in seeing the prices of their goods to the consuming public kept high enough to interest distributors and low enough to compete effectively with other goods adapted to serve the same needs of ultimate consumers. This is particularly true of trademarked goods and goods sold under trade names which identify the goods as the product of the manufacturer. The same considerations apply with less frequency, but with equal force, to the case of distributors marketing their own brands. Owners of identified merchandise commonly conduct advertising campaigns directed to the ultimate consumer with a view to promoting sales at a price established by them. Such promotion is advantageous to distributors, particularly small distributors who do not have the resources for advertising on a comparable scale.

There is a public interest in according to the small manufacturer or small wholesale distributor an opportunity to compete on more nearly equal terms with the large manufacturer or distributor who can afford to control the distribution of his products through his employees or con-

12. The idea of such a federal statute did not originate with the author.

signees. There is a further public interest in encouraging survival of small distributors who, comprising the bulk of small business, add a time and place utility to goods by making them readily accessible to consumers. The public interest in bringing goods of established quality to the consuming public at the lowest possible price consistent with whatever distribution service the various members of the public expect and demand can be best served by fostering competition in the price of particular products between producers and between trademark and brand owners, who must also compete for the favor of the consuming public upon the basis of the quality of their goods and of the distribution services rendered in connection therewith.

This Act is designed further to implement the basic policy of the Anti-Trust Laws, but, to the extent of any conflict of specific provisions, it is intended to modify all previous enactments of the Congress of the United States.

Section 2. Definitions.

The word "commerce" means all commerce that may be lawfully regulated by Congress.

The term "trade name" includes personal names, and any other words or symbols used by manufacturers or merchants to identify their companies, firms or corporations.

The term "trademark" includes any word, name, symbol or device or any combination thereof used by a manufacturer or merchant to identify his merchandise and distinguish it from that manufactured or distributed by others.

A "distributor" includes a broker, jobber, wholesaler, retailer or other person who buys a proprietor's merchandise for purposes of resale. It excludes ultimate consumers who do not make a business of reselling merchandise.

A "proprietor" is one who identifies merchandise manufactured or distributed by him by the use of his trademark or trade name. He is deemed to retain a proprietary interest in such merchandise after he has sold it to distributors, by reason of his interest in stimulating demand for his product through effective distribution to ultimate consumers. Merchandise bearing his trademark or trade name in the course of distribution is accordingly herein designated as "his merchandise" and distributors handling his merchandise are designated as "his distributors." *Provided, however,* that a distributor of merchandise identified by the trademark or trade name of the manufacturer is not a proprietor within the meaning of this Act unless he is an exclusive distributor specifically authorized by the manufacturer to establish resale prices for such merchandise.

The term "commodity" means merchandise manufactured or distributed by a proprietor.

"Actual notice" of established resale prices includes notice imparted by mail, or through advertising, or through notice attached to merchandise or containers thereof, or imparted orally. Deposit in the United States mail, with postage prepaid of a letter properly addressed to a distributor and specifying resale prices established by a proprietor shall constitute prima facie evidence of actual notice of such prices. The purchase of or dealing in merchandise clearly marked or enclosed in containers clearly marked with resale prices established by a proprietor shall be conclusive evidence

of actual notice of such prices. Actual notice may also be established by legally admissible evidence without limitation of manner or form. A person with actual notice of any applicable resale price is thereby charged with notice that such a price is subject to change.

Section 3. Establishment of Resale Price Schedules.

It shall be lawful for a proprietor to establish and control by actual notice to his distributors stipulated or minimum resale prices of his merchandise in commerce which is in free and open competition with articles of the same general class produced by others. He may so establish schedules of resale prices differentiated with reference to any criteria not otherwise unlawful. Such schedules may be changed from time to time, by actual notice to distributors having acquired his merchandise with actual notice of any established resale price. He may so 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.

Except as provided in Sections 7, 8 and 9, it shall be unlawful for any person with actual notice of an applicable stipulated resale price duly established by a proprietor to sell, offer to sell, or advertise merchandise in commerce at a different price, or for any person with actual notice of any applicable minimum resale price so duly established to sell, offer to sell, or advertise merchandise in commerce at a lower price.

Section 4. Actions at Law.

Any person damaged by anything forbidden in Section 3 may sue in any state or federal court of competent jurisdiction, including the District Court of the United States in any district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall be entitled to recover the amount of damages sustained, plus the costs of suit, including a reasonable attorney's fee.

Section 5. Injunctions.

Any person suffering or reasonably anticipating damage by reason of anything forbidden in Section 3 may sue in any of the courts specified in Section 4 without respect to the amount in controversy and obtain injunctive relief and recover costs of suit and a reasonable attorney's fee without the necessity of proving specific monetary damage.

Section 6. Bona Fide Enforcement Required.

It shall be a defense to a proceeding under Section 4, or Section 5, to prove that the proprietor is not making a reasonable effort in good faith to enforce generally his announced resale prices, either through litigation or other appropriate steps.

Section 7. Joint Action by Competing Proprietors Unauthorized.

Nothing in this Act contained permits two or more proprietors or two or more distributors to take joint action in establishing resale prices for competing commodities sold under different trademarks or trade names, but all distributors of the merchandise of the same proprietor sold under the same mark or name may cooperate with him in maintaining the stipulated or minimum prices established by him, or his exclusive distributor specifically authorized for that purpose, and no such cooperation

shall constitute an unreasonable or unlawful contract or combination in restraint of trade.

Section 8. Proprietors With Only Local Distribution.

The provisions of this Act shall apply in the District of Columbia, but shall not apply elsewhere to the merchandise of proprietors no substantial part of whose merchandise crosses state lines at any stage of distribution. If a substantial portion of the merchandise upon which a proprietor has established a particular stipulated or minimum resale price crosses state lines at any stage of distribution, this Act shall apply to all his identified merchandise to which that price applies, whether or not some or most of such merchandise is entirely distributed within the state of origin.

Section 9. Price Variances in Certain Cases.

It shall be a defense to an alleged violation of this Act for a defendant to sustain the burden of proving that merchandise has been advertised, offered for sale, or sold by him only in the following cases:

(a) In closing out the stock on hand for the bona fide purpose of discontinuing dealing in any such commodity, provided plain notice of the fact is given to the public; and, provided further, that the proprietor shall be given prompt and reasonable notice in writing of the intention so to close out and an opportunity to purchase such stock at the original invoice price;

(b) When the commodity is second-hand, damaged, defaced or deteriorated in quality and plain notice of the fact is given to the public in the advertisements and sale thereof and when such notice is conspicuously displayed in all advertisements and affixed to the commodity or the container in which it is offered for resale; provided that the proprietor shall be given prompt and reasonable notice in writing of the intention so to close out and an opportunity to purchase such stock at the original invoice price;

(c) When the commodity is advertised, offered for sale or sold by any officer acting under the orders of any court;

(d) In the sale of any quantity of the commodity acquired prior to actual notice of any established resale prices;

(e) In resales to charitable institutions or government agencies.

While the statement of policy in section 1 is as long as any that might be appropriately extended in a statute, a further explanation is in order. The following should be read as a direct sequel to section 1 of the above draft.

This Act contemplates that the economic forces operating upon the producer or brand owner are adequate to protect the interest of the consuming public. No manufacturer should be required to establish or even suggest resale prices. Some goods are not practically adapted to a resale price maintenance program, as bulk goods and goods marketed in diverse channels where large differences in the quantity and quality of distribution services obtain. Manufacturers in any line are, and should remain, quite free to sell their goods, without estab-

lishing resale prices, in competition with the goods of others upon which such resale prices are established and maintained. Goods distributed under resale price maintenance programs must meet price competition from the goods of competing manufacturers and brand owners who distribute through trade channels without establishing resale price maintenance programs and also price competition from goods marketed directly to the ultimate consumer by manufacturers and brand owners. A resale price maintenance program in many lines requires resale control upon successive resales of the same items in order to enlist the services of wholesalers and retailers in traditional channels of distribution. The policy hereby promoted, of enabling manufacturers or brand owners to compete with manufacturers or brand owners who sell direct to the ultimate consumer or otherwise avoid traditional channels of distribution, requires a recognition of and legal support for price schedules progressively increasing the price by increments covering the respective services performed in each phase of the distribution process. Manufacturers and other owners of trademarks and trade names who desire to control the price of their products to the ultimate consumer should be permitted to do so by notice to distributors of their products establishing such prices at the various stages of distribution and the law should protect their interests in the distribution of their products by declaring a sale at other than prices so established to be illegal, and by providing adequate legal and equitable remedies for damages incurred or injuries in prospect.

So long as manufacturers or brand owners who can afford to and elect to maintain or finance directly all their outlets to the ultimate consumer can and should under the Robinson-Patman Act maintain a single price for like merchandise and services at all outlets, the manufacturer or brand owner who finds it feasible to maintain or finance only a portion of his outlets should be permitted to elect to establish a price to the ultimate consumer to be observed both at his own outlets and upon resales by independent distributors. The policy of this Act, recognizing the legality of price maintenance by the manufacturer to ultimate consumers and promoting resale price maintenance by manufacturers who control none of their outlets, is consistently applied to the intermediate case of the manufacturer or brand owner who controls some of his outlets only. Reliance upon the maintenance of competition between manufacturers under the antitrust laws, and the maintenance of competition between distributors in all respects except with reference to the price of the branded goods of particular manufacturers or brand owners who have elected to proclaim resale price maintenance programs, is equally sound and equally applicable to the case of the manufacturer or brand owner who engages in direct distribution in part only. Any appearance of

horizontal price combinations in such cases is merely superficial and misleading. The small or medium sized manufacturer or brand owner who can afford to finance a portion only of his distribution through direct sales to the ultimate consumer should, equally with the small manufacturer who can afford to control no outlets directly, be enabled to compete with the financially powerful manufacturer or brand owner who controls all the outlets for the distribution of his branded products, and to that end the law should be so framed as to enable the manufacturer or brand owner who controls some of his outlets only to enlist the assistance of independent distributors through the establishment of prices to the ultimate consumer to be observed alike upon direct and upon resale distribution.

It is the essence of a resale price maintenance program to eliminate competition between distributors with reference to the price of distribution services upon particular articles where the resale price has been duly established. This fact must not be permitted to promote any agreement or combination between manufacturers or brand owners to eliminate or restrain competition between them, or between retailers to eliminate or restrain competition in any other respect. Consequently, any program which is part of a combination or agreement between manufacturers or brand owners to eliminate competition between them, or which is part of a combination or agreement between distributors to eliminate competition between them beyond the scope essential to the protection of the lawful interest of the party establishing a resale price, is excluded from the protection of this Act, and may fall within the prohibition of the antitrust laws of the United States, or of the various states, or of other applicable laws. This Act does not apply to goods not identified in association with a trademark or trade name. Bankruptcy and other sales in liquidation of a business are also excluded upon principles long observed in connection with Fair Trade Acts.

Any effective resale price maintenance program must apply to all the goods of the manufacturer or brand owner distributed under the description to which his resale price notices apply. Court decisions now, upon equitable principles, refuse to enforce resale price maintenance programs in favor of brand owners who promote or complacently tolerate distribution through some price cutting channels while endeavoring to hold other distributors to the maintenance of their listed resale prices. Such decisions are hereby reaffirmed and codified. The manufacturer or brand owner who announces a price to the ultimate consumer which he does not attempt in good faith and with reasonable diligence to enforce is entitled to no remedies under the law against price cutters. Any liability in such cases is that of the manufacturer or brand owner, who may have damaged distributors

by misleading them into compliance with a fraudulent or fictitious resale price maintenance program.

When any appreciable portion of identified goods is shipped outside the state of origin at any stage of the distribution process, there is a direct federal interest in laws applicable to resale prices which is within the scope of this legislation. Where substantially all of the products of a manufacturer or brand owner are manufactured and distributed to the ultimate consumer within the bounds of a single state, the matter of resale price maintenance is left to state law. The great bulk of branded or trademarked merchandise available for resale price maintenance is produced or marketed by firms or companies who engage in interstate commerce. Such firms or companies must not discriminate against interstate commerce by adopting an inconsistent position with reference to their local distribution and this federal resale price maintenance law must not be stultified or thwarted by claims that local distributors competing with distributors without the state of origin are outside the power possessed, asserted and exercised by Congress, so this Act is expressly made applicable to all distribution of the trademarked or branded merchandise of a manufacturer or brand owner any substantial portion of whose merchandise of like kind is distributed across state lines, whether by wholesale, retail, direct mail or otherwise.

Congress need not disclaim all power over local manufacture and distribution which may, by weakening small business or otherwise, impair interstate commerce, precipitate bankruptcies, undermine the bases of federal taxes or weaken the power of the nation to engage in war. But the theory of this Act is to leave the manufacturer or brand owner, small or large, free to embrace resale price maintenance or to leave it alone. The small manufacturer or brand owner who wants the protection of this federal law may presumably arrange to distribute a material portion of his identified merchandise across state lines. The policy of this Act does, however, apply to the District of Columbia and the Act accordingly applies to all distribution into or from said District. The population of the District is not large in relation to the population of the United States, but it is large in relation to the area of the District, so that a very large portion of distribution here is connected with interstate commerce. Furthermore, the same needs of small manufacturers or brand owners which support the Act on a national basis support its application on a local basis to the District of Columbia.

Congress should reaffirm its faith in antitrust laws designed to preserve the benefits of the operation of the price mechanism in free competitive markets, but no preconceptions or precedents concerning the construction and the application of the antitrust laws

may restrain Congress from modifying or supplementing the law in and peripheral to the antitrust field. This Act is deemed to supplement the antitrust laws and promote the same ends more effectively, but to the extent that it is held or deemed to be inconsistent with the pre-existing construction and application of such laws, this Act must prevail as the last pronouncement of Congress.

The Supreme Court, while showing no disposition to declare congressional legislation unconstitutional, has repeatedly shown a disposition to construe Fair Trade legislation strictly. To preclude strict construction of this remedial legislation it seems desirable for Congress to assert an intent to exercise its full powers under the Constitution, but in the exercise of such powers expressly to except from the law certain designated subject matter, just as bankruptcy sales have long been excluded from the operation of state Fair Trade Acts. Accordingly, there is an express exclusion from the operation of the Act of purely local production and distribution outside the District of Columbia. Any attempt to exhaust federal constitutional power here would invite litigation concerning the limits of such power of cost disproportionate to any legitimate interest to be served and would so be detrimental to the public interest.