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## The Status of "Fair Trade"

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# WESTERN RESERVE LAW REVIEW

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## STARTING OHIO LAW SURVEY

Work on an annual survey of important developments in Ohio law, planned as a new feature of the WESTERN RESERVE LAW REVIEW, will begin early in 1952.

The first of the yearly reports accenting significant changes and growth in case law principles will cover the year 1952 and is to be published in a regular issue of the law review in March, 1953.

The survey will be almost entirely the work of the faculty of the School of Law.

## NOTES

### *The Status of "Fair Trade"*

IN THE recent case of *Schwegmann Bros. v. Calvert Distillers Corp.*,<sup>1</sup> a Delaware whiskey distributor sought to enjoin a Louisiana grocer, under the Louisiana fair trade statute, from selling whiskey distributed by the petitioner at a price lower than the price set by the petitioner in contracts with other Louisiana retailers. The respondent had refused to sign a resale price maintenance contract. The Louisiana fair trade statute, like that of all other "fair trade" states, provides that a nonsigner knowing of a fair trade contract on a certain commodity must sell that commodity at the fair trade price. The United States Supreme Court, three justices dissenting,

<sup>1</sup> *Schwegmann Bros. v. Calvert Distillers Corp. and Schwegmann Bros. v. Seagram Distillers Corp.*, 341 U.S. 384, 71 Sup.Ct. 745 (1951).

held that while Congress had approved fair trade agreements on commodities in interstate commerce in the Miller-Tydings Amendment to the Sherman Act,<sup>2</sup> such agreements are not binding on those not parties to the agreements. It is the purpose of this note to consider the effect of this decision on resale price maintenance in the United States.

#### PRICE MAINTENANCE BEFORE FAIR TRADE STATUTES

The history of resale price maintenance in the United States extends back almost as far as the history of large-scale manufacturing. The majority of state courts which passed on the question of resale price maintenance agreements on commodities in intrastate commerce before the enactment of the state fair trade statutes held such agreements valid.<sup>3</sup> These courts usually added the qualification that if there was a tendency toward monopoly from the agreement, or if the object of the price maintenance was to restrain competition, then the agreement would be invalid.<sup>4</sup>

The United States Supreme Court, in a leading case, *Dr Miles Medical Co. v. John D Park and Sons Co.*,<sup>5</sup> stated that the Court considered resale price maintenance agreements on commodities in interstate commerce to be a violation of the Sherman Act. In this case the plaintiff manufacturer fixed by contract both the wholesale and retail prices on sales of its patent

<sup>2</sup> 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U.S.C. Sec. 1 (1946) The Miller-Tydings Act should be distinguished from the Robinson-Patman Act. The latter is an amendment to the Clayton Act [38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U.S.C. Sec. 13 (1946)] forbidding a seller from discriminating in price between two different purchasers on the same level of commodities of the same grade and quality in interstate commerce when that discrimination tends to lessen competition. Differentials in price can be made when justified by savings in the cost of manufacture, sale or delivery, as in the savings effected by a very large order. The Robinson-Patman Act was intended to protect the small retailer from the secret rebates and preferential prices which large chain stores and mail order houses were in a bargaining position to demand. See Schneiderman, *The Tyranny of Labels—A Study of Functional Discounts under the Robinson-Patman Act*, 60 HARV. L. REV. 571 (1947)

<sup>3</sup> *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912); *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S.W. 427 (1901); *Garst v. Harris*, 177 Mass. 72, 58 N.E. 174 (1900); *Clark v. Frank*, 17 Mo. App. 602 (1885); *Walsh v. Dwight*, 40 App. Div. 513, 58 N.Y.S. 91 (1899); *Murphy v. Christian Press Ass'n. Pub. Co.*, 38 App. Div. 426, 56 N.Y.S. 597 (1899); *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913) *Contra: Mills v. General Ordnance Co.*, 113 Kan. 479, 215 Pac. 314 (1923); *New Century Mfg. Co. v. Scheurer*, 45 S.W.2d 560 (Tex. Civ. App. 1932); *Texas Standard Cotton Oil Co. v. Adoue*, 83 Tex. 650, 19 S.W. 274 (1892).

<sup>4</sup> See, e.g., *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913)

<sup>5</sup> 220 U.S. 373, 31 Sup.Ct. 376 (1911) Justice Holmes, dissenting, commented: "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own." 220 U.S. 373, 412, 31 Sup. Ct. 376, 386 (1911)

medicines. The Court not only denied injunctive relief against the defendant wholesaler, who had refused to sign such a contract and was selling below the specified price, but also declared the Miles Company's price maintenance agreements unlawful. In holding that the plaintiff's monopoly of production of the medicine did not carry with it the right to control the entire trade, the Court commented:

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.<sup>6</sup>

Other decisions soon followed the *Miles* case.<sup>7</sup>

#### THE REFUSAL TO SELL DOCTRINE

With the federal courts firmly established as hostile to resale price maintenance agreements, the question arose in *United States v. Colgate and Co.*<sup>8</sup> whether a manufacturer could achieve maintenance of his desired prices by refusing to sell to dealers not conforming to his suggested resale prices. Colgate had refused to sell to retailers who would not promise to adhere to Colgate's suggested prices. The company kept lists of price cutters and asked its dealers to report such price cutters. The Court said that a manufacturer could choose those to whom he wished to sell, in the absence of any purpose to create or maintain a monopoly. The Court distinguished the facts in the *Colgate* case from the *Miles* case by explaining that there was no agreement, express or implied, obligating those buying from Colgate to maintain certain prices. Colgate's action was individual action. There was no cooperation between Colgate and others to maintain prices; there was simply the threat that Colgate might cut off the supply of a price cutter. The Court quoted from the lower court's opinion:

The retailer could sell it at any price he saw fit, but he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do.<sup>9</sup>

<sup>6</sup> 220 U.S. 373, 409, 31 Sup.Ct. 376, 385 (1911). *Accord*, *United States v. Univis Lens. Co.*, 316 U.S. 241, 62 Sup.Ct. 1088 (1942).

<sup>7</sup> *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 40 Sup.Ct. 251 (1920); *Bauer and Cie v. O'Donnell*, 229 U.S. 1, 33 Sup.Ct. 616 (1913); *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 37 Sup.Ct. 412 (1917) (purported licensing agreement invalidated as disguised attempt to control resale price on patented article)

If there is a bona fide agency relationship, the principal can fix the prices at which the agent shall resell. *United States v. General Electric Co.*, 272 U.S. 476, 47 Sup.Ct. 192 (1926).

<sup>8</sup> 250 U.S. 300, 39 Sup.Ct. 465 (1919), *affirming* 253 Fed. 522 (E.D.Va. 1918). Charles E. Hughes, who wrote the majority opinion in the *Miles* case, was counsel for Colgate. Among the cases following the *Colgate* doctrine are: *Frey and Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 41 Sup.Ct. 451 (1921); *Mennen Co. v. FTC*, 288 Fed. 774 (6th Cir. 1923), *cert. denied*, 262 U.S. 759, 43 Sup.Ct. 705 (1923); *United States v. Hudnut*, 8 F.2d 1010 (S.D.N.Y. 1925); *Burroughs Wellcome and Co. v. Johnson Wholesale Perfume Co., Inc.*, 128 Conn. 596, 24 A.2d 841 (1942).

The Supreme Court soon placed a limitation on the *Colgate* doctrine. In *FTC v. Beech-Nut Packing Co.*,<sup>10</sup> the company solicited the cooperation of its dealers in reporting price cutters and even marked its cartons so that it could identify any distributor who supplied Beech-Nut products to a price-cutting retailer. Unlike the situation in the *Miles* case, there was no written agreement between Beech-Nut and its dealers. But the Court found an implied agreement between the manufacturer and his distributors to prevent others from selling Beech-Nut products at less than the designated prices, and held that Beech-Nut unlawfully obstructed the natural flow of commerce by using its distributors' assistance in the maintenance of prices. The *Beech-Nut* case, however, did not change the *Colgate* doctrine allowing a seller to warn a dealer that further supplies will not be forthcoming if the dealer cuts prices.

An agreement between a buyer and a seller that the buyer is to resell only to dealers approved by the seller is an unreasonable restraint of trade when merged with an overall price maintenance plan, the Supreme Court held in *United States v. Bausch and Lomb Optical Co.*<sup>11</sup> Here the distributor of a trademarked optical lens chose its wholesalers, then granted revocable licenses allowing retailers to buy from the wholesalers. The wholesalers cooperated with the distributors in choosing the retail licensees and in maintaining prices. The Supreme Court, while recognizing the validity of the refusal to sell doctrine itself, held that the seller's refusal to sell to non-licensees here was invalid because merged with an overall price maintenance plan.

Courts following the *Beech-Nut* case further defined the limits of the individual action authorized by the *Colgate* doctrine. A seller cannot instruct his salesmen and wholesalers to report those cutting prices.<sup>12</sup> A seller can not compile a "Do not sell" list made up of names of retailers not maintaining the suggested prices when the names are supplied by other dealers at the company's request.<sup>13</sup> Nor can a seller hire agents to report price cutters.<sup>14</sup> A seller can not inform his "loyal" dealers that price cutters have been refused sales.<sup>15</sup> He can not require the retailer's assurance

<sup>10</sup> 250 U.S. 300, 305-6, 39 Sup.Ct. 465, 467 (1919), quoting from 253 Fed. 522, 527 (E.D.Va., 1918). For a discussion of the *Miles* and *Colgate* cases, see *United States v. A. Schrader & Son, Inc.*, 252 U.S. 85, 40 Sup.Ct. 251 (1920)

<sup>11</sup> 257 U.S. 441, 42 Sup.Ct. 150 (1922) Justice McReynolds, dissenting, pointed out that if Beech-Nut had a right not to sell to price cutters, it should be allowed to use appropriate methods to enforce the right.

<sup>12</sup> 321 U.S. 707, 64 Sup.Ct. 805 (1944).

<sup>13</sup> *Oppenheim, Oberndorf and Co., Inc. v. FTC*, 5 F.2d 574 (4th Cir. 1925)

<sup>14</sup> *Hills Bros. v. FTC*, 9 F.2d 481 (9th Cir. 1926), cert. denied, 270 U.S. 662, 46 Sup.Ct. 471 (1926)

<sup>15</sup> *Q.R.S. Music Co. v. FTC*, 12 F.2d 730 (7th Cir. 1926); *Cream of Wheat Co. v. FTC*, 14 F.2d 40 (8th Cir. 1926).

that suggested retail prices will be maintained.<sup>16</sup> It is lawful, however, for a retailer to give an assurance to maintain suggested resale prices without solicitation.<sup>17</sup> It is lawful for a seller to act on a report of price cutting spontaneously submitted by a dealer in his own interest even though the seller could not solicit such a report.<sup>18</sup> Further, there is nothing to prevent a seller from compiling a list of price cutters when he takes his information from the price cutters' public newspaper advertisements.<sup>19</sup>

The case of *Harriet Hubbard Ayer, Inc. v. FTC*<sup>20</sup> is an example of what a manufacturer can do under the *Colgate* doctrine. The Ayer Co. suggested a resale price on its products and stated its policy of not selling to price cutters, but the company took no active steps to seek out price cutters. No list was kept, but if a dealer reported a price cutter, the company sent a form letter warning that future supplies would be cut off if the price cutting continued. Only occasionally did the Ayer Co. check to see whether the price cutting continued; ordinarily, it stopped filling the price cutter's orders only if a second complaint was made. Since there was no cooperation between the Ayer Co. and its dealers toward price maintenance, the court upheld the Ayer Co.'s occasional refusal to sell.

A recent federal case recognizing the refusal to sell doctrine is *Adams-Mitchell Co. v. Cambridge Distributing Co., Ltd.*<sup>21</sup> The plaintiff contracted to buy whiskey from the defendant but came into court to rescind because the defendant had not kept its collateral agreement to maintain a certain price on the whiskey, to limit the number of wholesalers and to refuse to sell to price cutters. The court rescinded the contract and added that such refusal to sell is a legitimate means of price maintenance.

A clear statement of the present vitality of the *Colgate* doctrine by the Supreme Court is needed.<sup>22</sup> The doctrine was first enunciated by the Court in 1919. With the present trend toward more stringent enforcement of

<sup>16</sup> *Cream of Wheat Co. v. FTC*, 14 F.2d 40 (8th Cir. 1926); *Moir v. FTC*, 12 F.2d 22 (1st Cir. 1926).

<sup>17</sup> *Shakespeare Co. v. FTC*, 50 F.2d 758 (6th Cir. 1931); *Armand Co. v. FTC*, 78 F.2d 707 (2nd Cir. 1935), *cert. denied*, 296 U.S. 650, 56 Sup.Ct. 309 (1935) (manufacturer cannot require dealer to sign "declaration of intention" to maintain prices).

<sup>18</sup> *Shakespeare Co. v. FTC*, 50 F.2d 758 (6th Cir. 1931).

<sup>19</sup> *Toledo Pipe-Threading Co. v. FTC*, 11 F.2d 337 (6th Cir. 1926).

<sup>20</sup> *Cream of Wheat Co. v. FTC*, 14 F.2d 40 (8th Cir. 1926).

<sup>21</sup> 15 F.2d 274 (2nd Cir. 1926), *cert. denied*, 273 U.S. 759, 47 Sup.Ct. 473 (1927).

<sup>22</sup> 189 F.2d 913 (2nd Cir. 1951). Judge Frank, dissenting, criticized the *Colgate* doctrine, on the ground that the threat of withholding further supplies coerces price maintenance as effectively as a forthright agreement to maintain a price.

<sup>23</sup> A recent dictum indicates that a seller "acting individually perhaps might have refused to deal" with a buyer. *Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, Inc.*, 340 U.S. 211, 214, 71 Sup.Ct. 259, 261 (1951). See also *Loram Journal Co. v. United States*, 72 Sup.Ct. 181, 187 (1951).

For a possible "straw in the wind," see *Standard Oil Co. of Cal. and Standard*

anti-trust laws generally,<sup>23</sup> the question whether an attorney can still safely advise his client to refuse to sell to distributors and others not maintaining the client's suggested prices is a baffling one.

#### THE FAIR TRADE MOVEMENT

The first state fair trade statute was passed in California in 1931.<sup>24</sup> This statute had no nonsigner provision. Because nonsigners could—and did—undersell the dealers who had signed fair trade contracts, the statute was of little effect until a provision binding nonsigners was added two years later. This later statute became the model for the fair trade laws of many other states.

Forty-five states now have fair trade statutes;<sup>25</sup> all the statutes have nonsigner provisions. A state fair trade statute generally allows a manufacturer or distributor of trademarked goods to establish resale price maintenance on his product by securing at least one bona fide contract for price maintenance with a retailer in the state, then notifying other retailers of the contract.<sup>26</sup> If a nonsigner sells below the contract price, the trademark owner, a distributor or a signing retailer can enjoin such selling.<sup>27</sup>

In twenty states only the owner of the trademark or his authorized agent

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*Stations, Inc. v. United States*, 337 U.S. 293, 69 Sup.Ct. 1051 (1949), where the Court invalidated exclusive supply contracts between the oil company and its independent dealers. The contracts were held to violate Sec. 3 of the Clayton Act, 38 STAT. 731 (1914), 15 U.S.C. Sec. 14 (1946), which provides that a contract prohibiting a purchaser from dealing in the goods of a competitor of the seller is unlawful where its effect is to substantially lessen competition or tend to create a monopoly.

<sup>23</sup> See the seven articles in 1950 U. ILL. L. FORUM 491-672.

<sup>24</sup> A forerunner of fair trade statutes was a 1913 New Jersey statute (c.107, Laws of 1916) which made it unlawful for a retailer to sell a trademarked item, after notice, below the price set by the manufacturer. *Robert H. Ingersoll and Bro. v. Hahne and Co.*, 88 N.J.Eq. 222, 101 Atl. 1030 (1917), *aff'd*, 89 N.J.Eq. 332, 108 Atl. 128 (1918), upholds the statute as a valid exercise of police power.

<sup>25</sup> 2 CCH TRADE REG. REP. (9th Ed.) Sec. 7011 (1951). The texts of the statutes are found in Sec. 8011 *et. seq.* Missouri, Texas and the District of Columbia prohibit price maintenance agreements. Vermont has no statute one way or the other. Thirty states legalize a minimum price agreement; fifteen legalize a specific set price agreement.

<sup>26</sup> *Revlon Nail Enamel Corp. v. Charmley Drug Shop*, 123 N.J.Eq. 301, 197 Atl. 661 (1938)

All the states allow exceptions to the established price for a sale when the goods are damaged or deteriorated or when the sale is a bona fide closeout. All the states except Wisconsin allow an exception to the established price when the sale is under court order. Some states, in the case of a closeout sale, allow the producer or distributor an opportunity to repurchase. If the trademark is obliterated, sixteen states allow a sale at a price below the fair trade price; twenty-nine states do not. 2 CCH TRADE REG. REP. (9th Ed.) Sec. 7012 (1951).

<sup>27</sup> *Port Chester Wine and Liquor Shop, Inc., v. Miller Bros. Fruiterers, Inc.*, 281 N.Y. 101, 22 N.E.2d 253 (1939); *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N.Y.S.2d 320 (1938)

can establish the fair trade price.<sup>28</sup> The other twenty-five fair trade states allow a person other than the owner of the trademark or his agent to establish prices. Thus, under the laws of over one-half the states, a person other than the holder of the trademark or his agent can effect resale price maintenance without the trademark owner's consent. However, the contracting party must at some time own or distribute the goods.

The United States Supreme Court established the constitutionality of state fair trade statutes in 1936 by upholding the validity of the Illinois statute in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*<sup>29</sup> All state courts except that of Florida which passed on the constitutionality of fair trade states before the *Schwegmann* case found them constitutional.<sup>30</sup>

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It is necessary that the price be a fixed one, not a mere suggested price. *Magazine Repeating Razor Co. v. Weissbard*, 125 N.J.Eq. 593, 7 A.2d 411 (1939).

<sup>28</sup> 2 CCH TRADE REG. REP. (9th Ed.) Sec. 7011 (1951).

<sup>29</sup> 299 U.S. 183, 57 Sup.Ct. 139 (1936), *affirming* 363 Ill. 610, 2 N.E.2d 940. *McNeil v. Joseph Triner Corp.* is a companion case *affirming* 363 Ill., 559, 2 N.E.2d 929. The defendant nonsigner argued that he was deprived of property without due process of law by not being allowed to set his own selling price, but the Court explained that this right is subject to the police power of the state. The Court also explained that equal protection of the laws was not denied to the owners of unbranded goods, since a classification separating branded from unbranded goods is reasonable.

<sup>30</sup> *Miles Laboratories, Inc. v. Seignious*, 30 F.Supp. 549 (E.D.S.C. 1939); *Max Factor and Co. v. Kunsman*, 5 Cal. 2d 446, 55 P.2d 177 and *Pyroil Sales Co., Inc. v. The Pep Boys, Manny, Moe and Jack of California*, 5 Cal. 2d 784, 55 P.2d 194, both *aff'd*. 299 U.S. 198, 57 Sup.Ct. 147 (1936); *Burroughs Wellcome and Co., Inc. v. Johnson Wholesale Perfume Co., Inc.*, 128 Conn. 596, 24 A.2d 841 (1942); *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 363 Ill. 610, 2 N.E.2d 940 and *McNeil v. Joseph Triner Corp.*, 363 Ill. 559, 2 N.E.2d 929, both *aff'd*. 299 U.S. 183, 57 Sup.Ct. 139 (1936); *Pepsodent Co. v. Krauss Co.*, 200 La., 959, 9 So.2d 303 (1942); *Goldsmith v. Mead Johnson and Co.*, 176 Md. 682, 7 A.2d 176 (1939); *Weco Products Co. v. Sam's Cut Rate, Inc.*, 296 Mich. 190, 295 N.W. 611 (1941); *W. A. Sheaffer Pen Co. v. Barrett*, 45 So.2d 838 (Miss. 1950); *Johnson and Johnson v. Weissbard*, 121 N.J.Eq. 585, 191 Atl. 873 (1937); *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 7 N.E.2d 30 (1937); *Ely Lilly and Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939); *Borden Co. v. Schreder*, 182 Ore. 34, 185 P.2d 581 (1947); *Welch Grape Juice Co. v. Frankford Grocery Co.*, 36 Pa. D. & C. 653 (1939); *Miles Laboratories, Inc. v. Owl Drug Co.*, 67 S.D. 523, 295 N.W. 292 (1940); *Sears v. Western Thrift Stores of Olympia, Inc.*, 10 Wash. 2d 372, 116 P.2d 756 (1941); *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N.W. 426 (1937).

The Florida Supreme Court invalidated the Florida nonsigner provision in 1939 on the technical ground that the title of the statute did not show that the law applied to one not a party to a fair trade agreement. *Bristol-Myers Co. v. Webb's Cut Rate Drug Co., Inc.*, 137 Fla. 508, 188 So. 91 (1939). The legislature rewrote the statute, but the second statute was found an unconstitutional exercise of police power because the benefits under the statute accrued to a class of price-fixers, not to the general public. *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So.2d 371 (Fla. 1949). The court also based the decision on its finding that there was no showing of public necessity. The legislature then hurriedly passed a new fair trade statute, prefacing it with a finding of public necessity. See Notes, 28 N.C.L. REV.

In 1937 the Miller-Tydings amendment to the Sherman Act<sup>31</sup> legalized fair trade agreements on commodities in interstate commerce in those states which have adopted "fair trade" in intrastate transactions. The amendment covers only trademarked commodities<sup>32</sup> and requires that the commodities be in free and open competition with other commodities of the same general class.<sup>33</sup>

#### THE SCHWEGMANN DECISION

In interpreting the Miller-Tydings amendment in the *Schwegmann* case, the majority of the Court delved into the legislative history of the statute and found that the failure of Congress to include a nonsigner provision — especially since the Tydings bill was introduced in Congress three

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336 (1950) and 18 *FORD. L. REV.* 274 (1949), criticizing the decision, and *Legis.*, 63 *HARV. L. REV.* 546 (1950), discussing the new statute. It would seem that the legislature met only one of the court's two objections to the statute. See *Seagram-Distillers Corp. v. Ben Greene, Inc.*, *CCH TRADE REG. REP.* Sec. 62, 913 (Fla. 1951).

<sup>31</sup>26 *STAT.* 209 (1890), as amended, 50 *STAT.* 693 (1937), 15 *U.S.C.* Sec. 1 (1946) "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, that nothing contained in sections 1-7 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 trade mark, 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."

The same section specifically continues the Sherman Act ban against horizontal price-fixing agreements; only vertical agreements are placed outside the statutory prohibition. A horizontal agreement is one between two parties on the same level, such as two producers, two wholesalers or two retailers. A vertical agreement is one between two parties on different levels. See *United States v. Frankfort Distilleries, Inc.*, 324 *U.S.* 293, 65 *Sup.Ct.* 661 (1945) and *Rayess v. Lane Drug Co.*, 138 *Ohio St.* 401, 35 *N.E.2d* 447 (1941), holding horizontal combinations void.

<sup>32</sup>In defining the word "commodity" the Supreme Court has held that the maker of blank lenses, the first in a series of processors, cannot fix a fair trade resale price on the finished lenses, even though the article was trademarked before processing. *United States v. Unis Lens Co.*, 316 *U.S.* 241, 62 *Sup.Ct.* 1088 (1942). Comment, 47 *MICH. L. REV.* 821 (1949) suggests that the Court is working toward a "finished product" definition of commodity, in which the party originating the contract must be the owner, producer or distributor of the finished product.

<sup>33</sup>The fact that a commodity is under copyright or patent does not prevent its being in free and open competition. *Schill v. Remington Putnam Book Co.*, 179 *Md.* 83, 17 *A.2d* 175 (1941); *Miles Laboratories, Inc. v. Owl Drug Co.*, 67 *S.D.* 523, 295 *N.W.* 292 (1940); 2 *CCH TRADE REG. REP.* (9th Ed.) Sec. 7162 (1951).

"Fair trading" of Eastman Kodak color films and black and white films was held an unfair method of competition because neither was in free and open competition with any other film; both films fit exclusively certain patent-protected cameras of Eastman and its licensees. *Eastman Kodak Co. v. FTC*, 158 *F.2d* 592 (2nd. Cir. 1946), *cert. denied*, 330 *U.S.* 828, 67 *Sup. Ct.* 869 (1947), noted in 15 *GEO. WASH. L. REV.* 511, 32 *IOWA L. REV.* 602 (1947).

years after the California nonsigner provision was passed—means that nonsigners are not bound by fair trade contracts on commodities in interstate commerce. Justice Frankfurter's dissent criticized this majority argument because Senator Tydings himself said that the intent of the legislation was to back up the state fair trade laws, all of which contained nonsigner provisions.<sup>34</sup> The concurring justices, Jackson and Minton, were unwilling to go into the legislative history of the statute because they found no ambiguity in it. This writer submits that in this they were correct; there is no ambiguity in the statute in regard to nonsigners. Intentionally or not, Congress simply left out a nonsigner provision.

The *Schwegmann* case releases nonsigners from the effect of fair trade contracts in interstate commerce; it does not invalidate the fair trade contracts themselves. But the effect of the *Schwegmann* holding extends beyond the actual channels of interstate transactions because of prior Supreme Court decisions which have established the doctrine that the exact location of the line between interstate and intrastate commerce is immaterial if a state interferes with Congress's policy regarding interstate commerce.<sup>35</sup> After the *Schwegmann* decision several state courts denied injunctions against price-cutting nonsigners in intrastate commerce because the intrastate commerce affected interstate commerce.<sup>36</sup>

#### THE FAIR TRADE ARGUMENT

Congress could conceivably attempt to invalidate the effect of the *Schwegmann* case by adding a nonsigner provision to the Sherman Act. The question of whether Congress should add such a provision (assuming that a federal nonsigner provision is constitutional) raises a need for a brief explanation of the economic theory of "fair trade."

The advocates of "fair trade" argue that the purpose of "fair trade" is to protect the property rights of a manufacturer or distributor in his trade-marked product.<sup>37</sup> He spends time and money cultivating good will for his product. Allowing a retailer to cut prices leads the public to believe

<sup>34</sup> 341 U.S. 384, 400-401, 71 Sup.Ct. 745, 753 (1951).

<sup>35</sup> See, e.g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 68 Sup.Ct. 996 (1948). *Sunbeam Corp. v. Wentling*, 192 F.2d 7 (3rd Cir. 1951) applies this doctrine to "fair trade."

<sup>36</sup> *Lambert Pharmacal Co. v. Roberts Brothers*, 233 P.2d 258 (Ore. 1951) (dictum); *The Cal-Dak Co. v. Sav-On Drugs, Inc.*, CCH TRADE REG. REP. Sec. 62, 904 (Cal. 1951); *Bulova Watch Co., Inc. v. S. Klein On The Square, Inc.*, CCH TRADE REG. REP. Sec. 62, 854 (N.Y. 1951).

A lower court in Minnesota has extended the interstate authority of the *Schwegmann* decision to intrastate commerce. *Calvert Distillers Corp. v. Sach's*, CCH TRADE REG. REP. Sec. 62, 862 (Minn. 1951). A lower court in Michigan has declared that state's nonsigner provision unconstitutional in intrastate commerce under the Michigan constitution. *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, CCH TRADE REG. REP. Sec. 62,905 (Mich. 1951) The court relies strongly

that the commodity is not worth the higher established fair trade price. If one retailer is allowed to cut prices on a trademarked product, competing retailers must choose between not being able to sell the product or reducing their prices too. If they have to reduce their prices below a certain point, they will cease handling the item as unprofitable.<sup>38</sup> Since "fair trade" in interstate commerce applies only to items in free and open competition, nobody can set his prices too high because of the danger that his competitors will drive him out of business. Fair traders point out that a retailer can deal in unbranded goods if he does not like "fair trade."<sup>39</sup>

The opponents of "fair trade" maintain that the people primarily interested in "fair trade" are retailers desiring a steady profit margin, not manufacturers wishing to protect their trademarks.<sup>40</sup> Adding to this argument is the fact already mentioned that twenty-five states allow someone other than the manufacturer or his distributing agent to set the fair trade price, whether the manufacturer consents or not. The second major point against "fair trade" is that a rigid price on commodities denies the consumer the benefits of retailer efficiency, which could be passed on to the consumer in the form of lower prices.<sup>41</sup> The minimizing of retail price competition leads both the Federal Trade Commission and the Department of Justice to oppose "fair trade."<sup>42</sup>

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upon *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949), discussed *supra* note 30.

<sup>37</sup> "The primary aim of the law is 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." *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 193, 57 Sup.Ct. 139, 144 (1936)

<sup>38</sup> William H. Ingersoll claimed that when a Philadelphia dealer sold the Ingersoll dollar watch for 59c, sales fell to one-third of normal for the Ingersoll Company in Philadelphia while remaining normal elsewhere. Other Philadelphia dealers refused to "push" the watch. Johnson, Ingersoll and Montague, *THE CONTROL OF RESALE PRICES* 127-8 (1936). For an explanation of "fair trade" by its proponents, see *THE BASIS AND DEVELOPMENT OF FAIR TRADE* (2nd Ed. 1950), compiled by the National Wholesale Druggists' Association.

<sup>39</sup> Many department stores and groceries sell goods under their own trademarks. The R. H. Macy Co., instigator of price-cutting on fair trade items in New York City in the summer of 1951, after the *Schwegmann* decision, has 1400 different commodities under its own brand name. *Fortune*, Jan. 1949, p. 166.

<sup>40</sup> Griffin, *ENTERPRISE IN A FREE SOCIETY* 313-314 (1949) The important part played by retail druggists in securing fair trade statutes can be traced in Grether, *PRICE CONTROL UNDER FAIR TRADE LEGISLATION* (1939).

In 1935 the Pepsodent Company cancelled its fair trade contracts in certain areas. Druggists relegated Pepsodent toothpaste to their basements. Sales fell so alarmingly that the company reinstated its contracts and gave \$25,000 to the "fair traders" to advance the cause of "fair trade." Grether, *op.cit.*, 99.

<sup>41</sup> A cash-and-carry store rendering a limited service can afford to sell goods cheaper than a credit and delivery store. See *Florida Dry Cleaning and Laundry Board v. Everglades Laundry, Inc.*, 137 Fla. 290, 188 So. 380 (1939).

"Fair trade" opponents argue that the trademark owner's interest in his product is adequately protected by Unfair Trade Practices Acts (sometimes called Unfair Sales Acts).<sup>43</sup> These statutes, adopted in thirty states, outlaw loss leader selling, a retailing practice in which a few well-known products are sold at a loss in order to lure customers into the store. Such statutes prohibit price reductions below cost,<sup>44</sup> whether or not there is a contract concerning resale. Unlike fair trade statutes, these laws are not limited in their scope to branded goods.

#### SUMMARY AND CONCLUSION

The California experience with "fair trade" before the addition of a nonsigner provision to the California statute is a strong indication that fair trade statutes are unworkable without nonsigner provisions. The *Schwegmann* decision does not mean that state nonsigner provisions are invalid when applied to intrastate commerce, but it does mean that such provisions can not be enforced when their use in intrastate commerce affects interstate commerce. Such a restriction, if it stands, is probably the death warrant for fair trade.

Certainly a manufacturer's trade mark is entitled to some protection from unscrupulous retailers. The brand owner can receive at least partial protection from Unfair Trade Practices Acts. The Unfair Trade Practices Acts prohibit sales below cost but still allow an efficient retailer to give the public lower prices than his competitors. It is probable that the decline in importance of fair trade statutes will be accompanied by a rise in importance of Unfair Trade Practices Acts.

The question of the strength of the refusal to sell doctrine gains renewed importance because of the *Schwegmann* decision.<sup>45</sup> Since nonsigners are not now bound in interstate commerce by fair trade contracts, manufacturers may well try to maintain desired prices by refusing to sell to price-

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<sup>42</sup> FTC, REPORT OF THE FTC ON RESALE PRICE MAINTENANCE, LX-LXIV (1945).

<sup>43</sup> The various state statutes are collected in 2 CCH Trade Reg. Rep. (9th Ed.) Sec. 8028 *et seq.* See comments, 35 IOWA L. REV. 440 (1950), 1948 WIS. L. REV. 395.

Twenty-six states have price discrimination statutes, which prohibit chain stores doing business in more than one area from cutting prices in one area to such an extent as to be unfair competition to other retailers in the area. These statutes are collected in 2 CCH Trade Reg. Rep. (9th Ed.) Sec. 8052 *et seq.*

<sup>44</sup> The word "cost" is ambiguous. It may mean net invoice cost, net invoice cost plus the average cost of doing business, net invoice cost plus the average selling cost of the individual retailer, or something else. Each statute ordinarily defines the term, however.

See *Serrer v. Cigarette Service Co.*, 148 Ohio St. 519, 76 N.E. 2d 91, (1947) invalidating the Ohio Unfair Cigarette Sales Act.

<sup>45</sup> Following the *Schwegmann* case. Attorney General J. Howard McGrath announced that the following acts would be subject to criminal prosecution: agreements among retailers to adhere to specified prices or to threaten boycott of whole-