



7-1-1963

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George J. Alexander

Santa Clara University School of Law, gjalexander@scu.edu

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QUALITY STABILIZATION AND THE CRISIS IN FAIR TRADE

GEORGE J. ALEXANDER*

Historically examining Fair Trade laws and their treatment by the state and federal courts, the author notes that Fair Trade has fallen into increasing constitutional disfavor. Professor Alexander then examines in detail one of the several quality stabilization bills which have been introduced for congressional consideration. Noting that in part quality stabilization with its provisions for price-fixing parallels Fair Trade, he points out that significant differences exist between the two concepts, both in purpose and effect. He concludes that, if adopted, quality stabilization, with its pervasive price protection, will impose even greater restrictions on competition at the retail distributive level than those imposed by state Fair Trade laws.

INTRODUCTION

Rejected, abandoned, and wounded, Fair Trade is but a pitiful skeleton. Clearly incapable of rejuvenation sufficient to bring it to its youthful vigor of the "thirties," its prognosis is grim indeed. Spirit gone, it will likely be left to die. A successor has already been conceived. Quality stabilization is heralded as the new medium of legalized resale price maintenance.

The economic demerits and merits of Fair Trade have been fully and often heatedly discussed in the past.¹ Little mention of them will be made herein. Instead, this article will concern itself with a postmortem examination of Fair Trade and the extent of congenital effect to be expected by quality stabilization.

REJECTED

At the time of this writing, the highest courts of twenty-three states have, in one manner or another, declared their own nonsigner Fair Trade provisions unconstitutional.² One territory (Puerto Rico) in which Fair

* Assistant Professor of Law, Syracuse University College of Law; A.B., LL.B., University of Pennsylvania; Member of the Bars of Illinois and New York.

¹ See, e.g., Adams, Resale Price Maintenance: Fact and Fancy, 64 Yale L.J. 967 (1955); Adams, Fair Trade and the Art of Prestidigitation, 65 Yale L.J. 196 (1955); Herman, A Note on Fair Trade, 65 Yale L.J. 23 (1955).

² Bulova Watch Co. v. Zale Jewelry Co., 147 So. 2d 797 (Ala. 1962); Union Carbide & Carbon Corp. v. White River Distribs., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957);

Trade was constitutional, repealed its Fair Trade law.³ For proponents of Fair Trade, even this rather depressing statistic is an understatement of the degree to which Fair Trade is currently rejected.⁴

It is, for example, significant that the states which have declared Fair Trade unconstitutional have based their decisions primarily on bedrock constitutional principles, a factor which makes it unlikely that minor rewording would suffice to placate the courts. Indeed, in three instances, the courts have vitiated a Fair Trade bill which was passed after an initial bill was declared unconstitutional.⁵ A number of states have denied the right of the legislature to legislate in the area of general pricing either because of specific constitutional provisions relating to economic policy, for example, a provision preventing monopoly or combinations in restraint of trade,⁶ or because, more generally, pricing of consumer goods is held not to be within the affected-with-a-public-interest concept.⁷ Moreover, Fair Trade has been found to be outside the usual

Bulova Watch Co. v. Robinson Wholesale Co., 252 Iowa 740, 108 N.W.2d 365 (1961); Quality Oil Co. v. E. I. du Pont de Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); General Elec. Co. v. American Buyers Co-op., Inc., 316 S.W.2d 354 (Ky. 1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., 231 La. 51, 90 So. 2d 343 (1956); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); Remington Arms Co. v. G.E.M. Inc., 257 Minn. 562, 102 N.E.2d 528 (1952); Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 359 P.2d 644 (Mont. 1961); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Skaggs Drug Center, Inc. v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); The verdict on the latest Ohio act is not yet in. Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distribs., Inc., Trade Reg. Rep. (1962 Trade Cas.) ¶ 70360 (Ohio App. June 19, 1962) (unconstitutional); Hudson Distribs., Inc. v. Upjohn Co., 176 N.E.2d 236 (Ohio App. 1960) (constitutional); American Home Prods. Corp. v. Benny Homsey & Associates, 361 P.2d 297 (Okla. 1961); General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc., v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957); General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956); Remington Arms Co. v. Skaggs, 55 Wash. 2d 1, 345 P.2d 1085 (1959); General Elec. Co. v. A Dandy Appliance Co., 143 W.Va. 491, 103 S.E.2d 310 (1958); Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409 (Wyo. 1962).

³ Laws of P.R., Act No. 3 of July 29, 1958, 2d Spec. Sess.

⁴ For one thing, only decisions of the highest courts of the states have been considered. A lower court in at least one state (Idaho) has also declared its state act unconstitutional.

⁵ Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958).

⁶ General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956); Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 359 P.2d 644 (Mont. 1961).

⁷ Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.

police power concepts of health, morals, and general welfare.⁸ Consequently, in many states this was sufficient to place it without the legislature's prerogative. Still other courts found that Fair Trade was unlawful as a delegation of legislative power in allowing price fixing by private individuals for partisan interests.⁹ One court which might have allowed legislation in this area and perhaps even the delegation of authority to fix prices to persons outside the legislature, has condemned fair trading for failure to provide a standard governing the price to be set, thereby allowing the price to be set "arbitrarily."¹⁰ Still other courts have thrown out state Fair Trade on the ground that it violates due process in depriving the holder of the trade-marked article of a property right by fixing his prices.¹¹ Indeed, a few courts have gone so far as to suggest that, despite the apparent constitutionality of the McGuire Act,¹² state Fair Trade violates federal constitutional guarantees against deprivation of property rights without due process.¹³

A regrettable feature of these rejections, from the standpoint of an advocate of Fair Trade, is not only the already disheartening majority declaration of unconstitutionality but its influence in the remaining states. It would indeed be an extreme overstatement to say that the eighteen states¹⁴ in which Fair Trade has some constitutional sanction are bastions of Fair Trade. In the first place, the recentness of the number of decisions declaring Fair Trade unconstitutional¹⁵ gives some measure of support to the suggestion that a "trend" is forming toward a

W.2d 268 (1952); *Union Carbide & Carbon Corp. v. White River Distrib., Inc.*, 224 Ark. 558, 275 S.W.2d 455 (1955).

⁸ *Ibid.*

⁹ *Bulova Watch Co. v. Robinson Wholesale Co.*, 252 Iowa 740, 108 N.W.2d 365 (1961); *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts.*, 231 La. 51, 90 So. 2d 343 (1956).

¹⁰ *Miles Labs., Inc. v. Eckerd*, 73 So. 2d 680 (Fla. 1954).

¹¹ *E.g.*, *General Elec. Co. v. American Buyer Co-op., Inc.*, 316 S.W.2d 354 (Ky. 1958); *Rogers-Kent, Inc. v. General Elec. Co.*, 231 S.C. 636, 99 S.E.2d 665 (1957).

¹² 66 Stat. 631 (1952), 15 U.S.C. § 45(a) (1958) which survived constitutional attack in: *Sunbeam Corp. v. Richardson*, 243 F.2d 501 (6th Cir. 1957); *Giant Super Mkts. v. Eli Lilly & Co.*, 205 F.2d 788 (5th Cir.), cert. denied, 346 U.S. 856 (1953).

¹³ *E.g.*, *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949); *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956).

¹⁴ In addition to the twenty-three states which have invalidated fair trade in decisions by the highest court, *supra* note 2, one state has challenged fair trade in a lower court decision, *supra* note 3. Alaska, Missouri, Texas and Vermont have no fair trade acts and fair trade has not faced a court test in Maine, Nevada or North Dakota, judging from the reported cases.

¹⁵ See note 2, *supra*.

declaration of unconstitutionality.¹⁶ Secondly, Fair Trade has always depended significantly on the universality of its support. Consequently, each state which rejects Fair Trade, even if it does not thereby persuade other states to take similar action, makes it just that much more expensive and difficult to maintain Fair Trade in the remaining states.

The number, twenty-three, in any event, is a very misleading number. In a number of states that have considered the question recently, the courts have, despite earlier decisions upholding Fair Trade, issued what appear to be judicial warnings that the end of the constitutional road may soon be reached. A case in point is *Glaser Bros. v. Twenty-Fifth Sales Co.*¹⁷ In that case, a superior court in California found that the nonsigner principle was inapplicable to purchasers who were not in a chain of title of, or in some kind of privity with the price-setter. To rule otherwise, said the court, might raise substantial constitutional and other problems. In the face of the transparent fact that nonsigner provisions were designed to affect people who are not in privity of contract and who have in no way shared in the distributive chain which was contractually bound, such a ruling could mean that nonsigner Fair Trade is in trouble in its originating state.¹⁸ In North Carolina, despite a 1939 decision which held nonsigner Fair Trade constitutional,¹⁹ a lower court in a recent case dissolved a restraining order issued under the state Fair Trade law on the ground that the law was unconstitutional. When the Supreme Court of North Carolina reversed, they surprisingly found no occasion to chide that court for its failure to heed precedent. Instead, the lower court decision was reversed solely on the ground that the constitutional question had been prematurely reached in violation of the concept of judicial abstention.²⁰ The Supreme Court of Pennsylvania, which only last year upheld Fair Trade,²¹ found itself hinting this year that the constitutionality of the depression-originated legislation may no longer survive a test.²²

¹⁶ The existence of a trend was suggested in *Bulova Watch Co. v. Zale Jewelry Co.*, 147 So. 2d 797 (Ala. 1962).

¹⁷ Trade Reg. Rep. (1962 Trade Cas.) ¶ 70565 (Cal. Super. Ct. Nov. 20, 1962).

¹⁸ California adopted nonsigner fair trade in 1933. It was the first state to do so and became the model for later acts. The act in its present form may be found in Cal. Bus. & Prof. Code § 16900-05.

¹⁹ *Eli Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 792 (1960).

²⁰ *Union Carbide & Carbon Corp. v. Davis*, 253 N.C. 324, 116 S.E.2d 792 (1960).

²¹ *Mead Johnson & Co. v. Martin Wholesale Distribs., Inc.*, 408 Pa. 12, 182 A.2d 741 (1962).

²² In accordance with the familiar principle that a court will not decide a constitutional question unless it is absolutely required to do so, we refrain from considering the prob-

Decisions in other cases in which Fair Trade has been upheld demonstrate a palpable amount of disaffection for the concept. In upholding the nonsigner clause, the Delaware Supreme Court in *General Elec. Co. v. Klein*²³ sustained the act, primarily on the ground that the underlying economics were fairly debatable and that, within the field of debatable economics, legislative action was not challengeable. In upholding the federal constitutionality of the state's Fair Trade law, a district court in Maryland,²⁴ although it felt itself bound by precedent, indicated its strong disfavor with the law and offered what appears to be considerable encouragement to an appeal and its own reversal.²⁵

ABANDONED

Aside from the outright rejections and hints of rejection mentioned above, Fair Trade has lost substantial support. To some extent, as previously mentioned, this loss of support can be traced to the rejection elsewhere. Not all of the abandonment has a foundation in legal rejection, however. A number of companies have apparently abandoned fair trading because the requirement that a uniform price be maintained has cut sales to high-volume discount houses. Still others have abandoned Fair Trade, finding the enforcement program too difficult or too ineffective. Many more have abandoned Fair Trade for reasons that are unknown.²⁶ The legislature of Puerto Rico has, despite a judicial holding of constitutionality,²⁷ legislatively abandoned Fair Trade.²⁸ Among

lem at this time. . . . However, we cannot fail to observe increasing objections to the legality of nonsigner provisions in particular and to the economic soundness of fair trade bills in general. . . . Changing patterns of merchandising and distribution require a reappraisal of the underlying premises of fair trade legislation.

Shuman v. Bernie's Drug Concessions, Inc., 187 A.2d 660, 664 (Pa. 1963).

²³ 34 Del. Ch. 491, 106 A.2d 206 (Sup. Ct. 1954).

²⁴ *Parke, Davis & Co. v. G.E.M., Inc.*, 201 F. Supp. 207 (D. Md. 1962).

²⁵ In view of the decisions . . . this court, while completely unpersuaded, does not feel that it, as a trial court, should set itself up as above its numerous superiors and equals in authority. . . . As, however, the point has not been decided by the Fourth Circuit, and this court feels so strongly upon it, the court . . . if requested . . . and if an application for appeal be made . . . will stay proceedings in this court.

Id. at 213.

²⁶ Some of the difficulties of enforcement of a fair trade program are chronicled in Brecher, *Buying at Discount*, 14 *Consumers Union Reports* 420 (1949).

²⁷ *Esterbrook Pen Co. v. San Juan F. Vilarino 5 y 10, Inc.*, 144 F. Supp. 309 (D.P.R. 1956).

²⁸ Laws of P.R. Act No. 3 of July 29, 1958, 2d Spec. Sess. The preamble to the repealing law states: "It was in the decade beginning in 1930 that the type of legislation known as 'fair trade laws' came into being. . . . The present price situation calls for a public policy of low prices in order to combat the threat of inflation that would reduce the purchasing power of money."

manufacturers who favor Fair Trade, whether they have maintained a program of fair trading or not, there appears to be despondency at the current course. Certainly the representative proponents of retail price maintenance claimed, in the hearing on a bill which would strengthen Fair Trade, that the present program had been substantially undermined.²⁹

WOUNDED

Perhaps more significant than either the outright rejection or the abandonment of Fair Trade, are a number of decisions which seemed, nominally at least, to have favored Fair Trade, but which have resulted in fashioning or re-emphasizing substantial impediments to its effective enforcement. It is well accepted, for example, that in order to maintain a Fair Trade price in a state, it is necessary that the fair trader enforce his price maintenance against all retailers and that failure to do so affords an adequate defense to a violating retailer. The enforcement of this duty has led a number of courts in Fair Trade states to interdict fair trading because the manufacturer was unable to plug all the leaks in the dike at the same time.³⁰ In this vein, a New York court, while granting a preliminary injunction against Fair Trade violations after initially refusing to do so, pointed out that the plaintiff in such a case has the burden of showing that "it is *presently* vigorously and without discrimination enforcing its fair trade rights."³¹

In another case, a New Jersey court invoked a common provision in corporate statutes, namely, that a corporation may not bring suit in the state unless licensed to do business in it, in order to bar a Fair Trade suit by a manufacturer without such license.³² On the one hand, such a manufacturer, if he is truly not doing business in the state is faced with the onerous burden of obtaining a license which in turn may subject him

²⁹ Take for example this colorful passage: "The afflictions of Job and agonies of Samson were as nothing compared to the travails of this trade [the appliance-radio-TV trade] over the past decade. One of the more lamentable aspects of this saga of sorrows has been a very considerable problem relating to the maintenance of product quality standards in the face of general price demoralization. A degeneration of the marketing atmosphere into something like a state of anarchy has been the inevitable result." Statement by Richard E. Snyder, Consulting Economist. Hearings on S.J. Res. 159 before a Subcommittee of the Senate Committee on Commerce, 87th Cong., 2d Sess. 92 (1962).

³⁰ See, e.g., *General Elec. Co. v. Federated Dep't Stores, Inc.*, Trade Reg. Rep. (1955 Trade Cas.) ¶ 68098 (D. Wis. July 20, 1955).

³¹ *Parke, Davis & Co. v. Jarvis Drug Co.*, 208 F. Supp. 350, 353 (S.D.N.Y. 1962).

³² *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 57 N.J. Super. 291, 154 A.2d 650 (Ch. Div. 1959), *aff'd*, 31 N.J. 591, 158 A.2d 528 (1960), *aff'd*, 366 U.S. 276 (1961).

to the personal jurisdiction of the local courts and may bring about tax consequences not to mention the annoyance of certification itself.³³ On the other hand, if he chooses not to maintain suits in the state by reason of the aforementioned rule, he may be effectively prevented from maintaining his state Fair Trade price by being unable to enforce it. At the time of this writing, however, no other state appears to require this choice on the part of a would-be fair trader.

In part, of course, this problem is a function of the person entitled to bring suit. Some states have allowed persons lower in the distributive chain than the manufacturer to be plaintiffs in Fair Trade actions. The lower one may go in this chain without removing himself from the class of permissible plaintiffs, the less onerous the burden of the certificate. In both New Jersey³⁴ and California³⁵ there is precedent allowing a wholesaler or other temporary owner of the goods to set the resale price although the California holding would seem questionable in light of a recent California case.³⁶ Furthermore, at least in New Jersey, even a retailer may *enforce* a resale price once it has been set.³⁷

A further source of difficulty for the fair trader has been the provision in the McGuire Act³⁸ which specifically excludes horizontal price fixing from the act's protection.³⁹ Under this provision it has been held that a vertically integrated producer may not set the price of a seller with which it competes for sales;⁴⁰ a similar result has followed where there have been isolated retail sales by a manufacturer without integration.⁴¹ The same provision bears the responsibility for a recent case decided by the Supreme Court of Pennsylvania.⁴² In that case, despite

³³ See Henn, *Corporations* § 101 (1961).

³⁴ *Schenley Prods. Co. v. Franklin Stores Co.*, 124 N.J. Eq. 100, 199 Atl. 402 (Ct. Err. & App. 1938).

³⁵ *Parrott & Co. v. Somerset House, Inc.*, digested in 1 Trade Reg. Rep. (10th ed.) ¶ 3170.05 (Cal. Super. 1937) (unreported).

³⁶ *Glaser Bros. v. Twenty-Fifth Sales Co.*, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70565 (Cal. Super. Nov. 20, 1962).

³⁷ *Schenley Prods. Co. v. Franklin Stores Co.*, 124 N.J. Eq. 100, 199 Atl. 402 (Ct. Err. & App. 1938).

³⁸ 66 Stat. 631 (1952), 15 U.S.C. § 45(a) (1958).

³⁹ "Nothing [herein] . . . shall make lawful contracts or agreements . . . between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 66 Stat. 632, 15 U.S.C. § 45(a) (5) (1958).

⁴⁰ *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

⁴¹ *Esso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17 (1st Cir. 1957).

⁴² *Gulf Oil Corp. v. Mays*, 401 Pa. 413, 164 A.2d 656 (1960).

a statutory provision which appears to validate retailer enforcement of Fair Trade, retailers were denied a remedy on the ground that their combination for purposes of enforcing Fair Trade was found to be in violation of the federal antitrust laws. So holding, the court avoided a question of interpretation of the Pennsylvania act as to a retailer's initiation rights and also bypassed the question of the act's constitutionality. In a similar situation, the United States recently filed a complaint charging violations of sections 1 and 3 of the Sherman Act against retail druggists who had been engaged in establishing a Fair Trade system for products which they sold.⁴³

There have been other comparatively minor annoyances to fair traders. One court reasoning from the sometimes requirement that the price-fixer uniformly fix his retail price⁴⁴ held that a price cut in a single area of the state vitiated the Fair Trade agreement; this was true, despite the fact that the price cut was a means of conducting a market test on the acceptability of the product at a lower price.⁴⁵ Another court held that a refusal to deal with a retailer who was a price cutter justified the retailer's sale of goods below the Fair Trade price.⁴⁶ The latter court found an inequity in requiring price maintenance when the retailer could not obtain renewal of the goods he was selling.⁴⁷ Finally, courts have refused to enjoin retailers from distributing the now ubiquitous trading stamps with the sale of fair traded goods, despite the fact that the courts recognize that the practice in question would have the indirect effect of lowering prices below the established level.⁴⁸

Among the major blows to Fair Trade, one of the most significant was the determination that sales could be made from a non-Fair Trade state to consumers in a Fair Trade state without adherence to the Fair Trade

⁴³ Complaint in *United States v. Hawaiian Druggist Ass'n* filed in the District Court of Hawaii, June 29, 1962, reported in 52 A.T.R.R. A-7 (July 7, 1962).

⁴⁴ See *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N.Y.S.2d 320 (Sup. Ct. 1938).

⁴⁵ *Gillette Co. v. White Cross Discount Center, Inc.*, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70481 (Pa. C.P. Sept. 19, 1962).

⁴⁶ *Lentheric, Inc. v. Weissbard*, 122 N.J. Eq. 573, 195 Atl. 818 (Ch. 1937).

⁴⁷ *Id.* at 575, 195 Atl. at 819. Contra, *Parker Pen Co. v. Charles Appliances, Inc.*, 153 F. Supp. 69 (S.D.N.Y. 1957); *Dorothy Gray, Ltd. v. Johnson Wholesale Perfume Co.*, 45 F. Supp. 744 (D. Conn. 1941).

⁴⁸ *Bristol-Myers Co. v. Lit Bros.*, 336 Pa. 81, 6 A.2d 843 (1939). Contra, *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 337 Mass. 221, 148 N.E.2d 861 (1958) (trading stamps); *Bristol-Myers Co. v. Picker*, 302 N.Y. 61, 96 N.E.2d 177 (1950) (redeemable cash register receipts).

prices.⁴⁰ This decision increased in importance as a greater number of states dropped Fair Trade. While its import is not necessarily uniform on the fair trading of all products, there are a substantial number of products brought under new competitive pressure because of the fact that they may be secured within a Fair Trade state at discount prices by the mere expedient of locating a mail order house in a non-Fair Trade state. Of course, even without the decision, the existence of the product at non-Fair Trade prices conceivably puts some competitive pressure on the stores near the boundaries of the state, irrespective of the legality of shipment into the state.

Another blow was dealt to Fair Trade by a California court. In *Glaser Bros. v. Twenty-Fifth Sales Co.*,⁵⁰ the Superior Court for Alameda County refused to allow a wholesaler to enforce Fair Trade prices on cigars against a California retailer who had purchased the cigars from an out-of-state wholesaler. The court felt that substantial problems would be raised by allowing someone other than the manufacturer to set Fair Trade prices for all retailers within the state in that this could lead to the establishment of two different prices where there are more than one wholesaler of the product in the state. The court also found constitutional difficulty with a Fair Trade concept not requiring a privity of contract or, at least, a chain of title between the person being asked to maintain the resale price and a signator to a retail price maintenance contract.

This decision is interesting from a number of standpoints. In the first place, the problem of allowing someone other than the manufacturer to maintain the Fair Trade program has been raised in other states, and the decisions have, in some cases, demonstrated little difficulty in allowing a wholesaler, and sometimes other persons, to establish a program.⁵¹ One of the courts which had previously been faced with the problem was the Superior Court of California for the County of Los Angeles, which in 1937 in the case of *Parrott & Co. v. Somerset House, Inc.*,⁵² had reached an opposite conclusion. The *Parrott* court had been faced not only with the problem of the authority of persons other than the manufacturer to set

⁴⁰ *General Elec. Co. v. Masters Mail Order Co.*, 244 F.2d 681 (2d Cir.), cert. denied, 355 U.S. 824 (1957).

⁵⁰ Trade Reg. Rep. (1962 Trade Cas.) ¶ 70565 (Cal. Super. Ct. Nov. 20, 1962).

⁵¹ *Norman M. Morris Corp. v. Hess Bros.*, 243 F.2d 274 (3d Cir. 1957); *Schenley Prods. Co. v. Franklin Stores Co.*, 124 N.J. Eq. 100, 199 Atl. 402 (Ct. Err. & App. 1938); *Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distrib. Co.*, 287 Ill. App. 187 (1936).

⁵² Digested in 1 Trade Reg. Rep. (10th ed.) ¶ 3170.05 (Cal. Super. Ct. 1937) (unreported).

the price, but had even grappled with the problem of the possibility of multiple pricings, finding such pricing unlikely in light of the original owner's right to exercise his initiative in insuring that a single price be maintained in the state. There is, of course, something to be said for the proposition that if the owner of the trademark is not himself involved in Fair Trade pricing, his apathy at what is designed to be the protection of his trademark might lead courts to conclude that it was not a mark which needed the protection of Fair Trade pricing. It is also a seemingly legitimate assumption that the farther down the distributor's chain that resale price maintenance is actually accomplished, the greater the likelihood that fair trading will be used to effect interests of retailers or wholesalers who are, at least in theory, not the intended beneficiaries of Fair Trade pricing. Nevertheless, the fact remains that by deciding as it did, the *Glaser Bros.* court has lessened the effectiveness of Fair Trade in California.

The suggestion that a type of chain of title or privity of contract be required in fair trading is again an interesting assertion for a court in California since the California nonsigner provision,⁵³ which introduced the concept of binding dealers who had not contractually bound themselves was the national model for such legislation. It is also interesting to note that the case was decided in the same month that another court on the other coast of the country was holding the contract in Fair Trade pricing to be largely an irrelevancy.⁵⁴ While it is by no means clear whether the *Glaser Bros.* decision will remain the law in California and even less clear whether it will have any effect in the other Fair Trade states, its wide adoption might again hasten the already precipitous course of Fair Trade.

Finally, the Pennsylvania courts have, of late, found new significance in the McGuire Act requirement that goods to be fair traded must be in "free and open competition with similar goods,"⁵⁵ and by enforcing this provision have contributed another substantial cloud to the future of Fair Trade as presently constituted.⁵⁶ Indeed, at this point, it does not

⁵³ Cal. Bus. & Prof. Code § 16904.

⁵⁴ In *Mead Johnson & Co. v. Westchester Discount, Health & Vitamin Center, Inc.*, 212 F. Supp. 310 (E.D. Pa. 1962), the court held that the fact that there may be contractual deficiencies in the underlying contract on which the fair trade law is based is not determinative of the validity of the price set in it since it serves a purely documentary function in the program.

⁵⁵ See, e.g., *Gulf Oil Corp. v. Mays*, 401 Pa. 413, 164 A.2d 656 (1960).

⁵⁶ It is surprising that despite the existence of the free and open competition provision in the McGuire Act, little serious effort had been made at its enforcement prior to the recent

seem unlikely that if Fair Trade succumbs completely, the courts of Pennsylvania will have been largely responsible for bringing about its fate. It is hard to imagine that any of the states which have declared Fair Trade unconstitutional, even those which have invoked the most evil-sounding constitutional rationales, will have made the impression of the Pennsylvania courts on the ultimate outcome of Fair Trade. Not even the suggestion of the Supreme Court of Alabama that a "trend" had been established against the constitutionality of Fair Trade⁵⁷ seems likely to match the impression made by a comparatively short series of cases in the state of Pennsylvania.

Pennsylvania has what, by national standards, is a comparatively rigorous Fair Trade law.⁵⁸ It provides expressly for enforcement of a Fair Trade program by retailers as well as persons higher in the chain of distribution.⁵⁹ The act had the affirmative sanction of the highest court of the state.⁶⁰ For these reasons, little concern was probably felt by Fair Trade advocates with respect to the continued effectiveness of the state program. Quite unexpectedly, it would appear, the Supreme Court of Pennsylvania decided, on its own motion, that it ought to consider Fair Trade in a broader context. In *Gulf Oil Corp. v. Mays*,⁶¹ the court, despite the fact that no issue as to free and open competition remained after the pleadings, raised the question whether gasoline could be fair traded in the state because of the apparent lack of competition between the major oil companies. Holding that a plaintiff desiring to enforce Fair Trade had the burden of establishing that his product was in free and open competition, the court reversed the finding that would have allowed the oil company an injunction against a price-cutter.

Pennsylvania action. Its major prior application was a holding that color film, at that time exclusively sold by the fair trading seller, was not in free and open competition with black and white film which the other sellers retailed. *Eastman Kodak Co. v. FTC*, 158 F.2d 592 (2d Cir. 1946), cert. denied, 330 U.S. 828 (1947). This lack of vigorous enforcement is especially puzzling in light of the fact that this provision was perhaps the only provision in the act designed to insure that some economic pressure be brought to bear in setting the price of Fair Trade goods. In fact, one scholar in this field has gone so far as to suggest that with proper enforcement of this provision the Fair Trade concept might be shorn of many of the objections which others have levied against it. See Adams, *Resale Price Maintenance: Fact and Fancy*, 64 *Yale L.J.* 967 (1954).

⁵⁷ *Bulova Watch Co. v. Zale Jewelry Co.*, 147 So. 2d 797 (Ala. 1962).

⁵⁸ Pa. Stat. Ann. tit. 73, §§ 7-11. (1960).

⁵⁹ Pa. Stat. Ann. tit. 73, § 7. (1960).

⁶⁰ *Burche Co. v. General Elec. Co.*, 382 Pa. 370, 115 A.2d 361 (1955).

⁶¹ 401 Pa. 413, 164 A.2d 656 (1960).

As startling as the *Gulf Oil* decision may have been, it was possible after the decision of this case to ascribe it to the peculiarities of the oil industry. The *Gulf Oil* court emphasized that the major oil companies in many instances sold each other's gas as well as charged identical prices. The former argument, while not addressed precisely to the free and open competition concept, was thought relevant since trademark protection could hardly be accomplished in the context of selling another's product. The latter had a direct relevancy to the openness of competition. Perhaps, one could speculate, fair trading was not possible for oil, but as to other products remained unchallenged. Admittedly, a common pleas court in Philadelphia,⁶² shortly after the *Gulf Oil* case, did rule that retailers, despite their apparent statutory favor, could not enforce Fair Trade; but with the exception of these two blows, Fair Trade seemed for the time immune from further attack. As late as the middle of last year, the Supreme Court of Pennsylvania was expressly upholding the constitutionality of the state Fair Trade program.⁶³ In September of 1962, however, a common pleas court in Pittsburgh,⁶⁴ read the *Gulf Oil* decision as a directive to examine the freeness and openness of competition and, finding that Gillette razor blades were subject to comparatively little competition from other blades, refused an injunction against a price-cutter of that product. For good measure, it also ruled that a Fair Trade program could not be maintained when complying retailers were allowed to give bonus stamps which could amount to as much as thirteen per cent rebate on sales of fair-traded items; this was true despite the fact that the court followed an older Pennsylvania ruling⁶⁵ which held it consistent with a Fair Trade program to give trading stamps (these amounting to less than a two per cent rebate). It further ruled that Fair Trade was, of necessity, based on state-wide pricing and that an area price cut, even one designed as a market test for the lower price, vitiated enforcement of Fair Trade pricing.

Those seeking solace were unlikely to find it in the Supreme Court of Pennsylvania which only three months later decided the appeal of *Shuman v. Bernie's Drug Concessions, Inc.*⁶⁶ In that decision, the court

⁶² *Shuman v. Bernie's Drug Concessions, Inc.*, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70270 (Pa. C.P. Feb. 19, 1962).

⁶³ *Mead Johnson & Co. v. Martin Wholesale Distribs., Inc.*, 408 Pa. 12, 182 A.2d 741 (1962).

⁶⁴ *Gillette Co. v. White Cross Discount Center, Inc.*, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70481 (Pa. C.P. Sept. 19, 1962).

⁶⁵ *Bristol-Myers Co. v. Lit Bros.*, 336 Pa. 81, 6 A.2d 843 (1939).

⁶⁶ 187 A.2d 660 (Pa. 1963).

ruled that retailers which had been instrumental in forcing Fair Trade on their suppliers were improper parties to enforce compliance. The court did not go further and rule on either the question of interpretation of the Pennsylvania act, which would appear on its face to provide the right denied in this case, or on the constitutionality of the act. In the latter context, however, the court spoke in menacing terms.⁶⁷ It may well be that the trend suggested by Alabama may yet find another convert in Pennsylvania. Should that happen, Pennsylvania will not only have added to the already staggering list⁶⁸ but also will have contributed gnawing problems for those who remain in the other camp.

Most significant among the problems that have been raised in Pennsylvania, of course, is the problem of free and open competition. So far, its ambit has reached only two classes of goods. In both cases the court seemed convinced that there was little substantial competition. One is left with the question, especially if the original suggestion of the court be taken at face value and each plaintiff be put to the burden of proving that his product is in free and open competition, whether that doctrine will strike down goods sold in markets where there is neither the extreme concentration of the razor blade industry or the suspected cooperation of the oil industry. If free and open competition means, in addition, that the fair traded product must be brought under price competition by another product, one wonders how many items could ultimately remain in the Fair Trade category. It would seem that a manufacturer, forced to maintain uniform prices on his product among all retailers in the face of what could be sporadic price cuts in the "competing" product, would be hard put indeed, if the products were truly interchangeable, to continue his program without some loss. Where such active competition did not result, might not the absence of this conduct itself be persuasive of the fair trader's failure to establish free and open competition?

ALTERNATIVES TO THE PRESENT FAIR TRADE PROGRAM

Two states faced with a declaration of unconstitutionality with respect to their previous nonsigner Fair Trade program have adopted a new order in resale price maintenance. Both Ohio⁶⁹ and Virginia⁷⁰ have attempted to revamp their trade law so as to give a trademark owner a continuing property right in his mark and through that right a right to

⁶⁷ See note 22 supra.

⁶⁸ See note 2 supra.

⁶⁹ Ohio Rev. Code Ann. §§ 1333.27-.34 (Page 1962).

⁷⁰ Va. Code Ann. § 59-8.1-8.9 (Supp. 1962).

prevent price cutting on his product, on the theory that such cuts are trademark defamation. However, it seems unlikely that the new statutes will ultimately solve any major problem under existing law.

The major innovation introduced by the new Ohio and Virginia legislation appears to be primarily a change of focus. Instead of depending on a contract made between the seller and a single retailer to establish the basic pricing structure, the new acts permit the same result to be accomplished either by contract or by notice. The old nonsigner is no longer bound by another's contract but is bound instead by notice, either affixed to the product or communicated to him in some other manner.

In Ohio, which had declared nonsigner Fair Trade unconstitutional,⁷¹ courts are split on the constitutionality of their new act.⁷² Virginia has upheld their new act,⁷³ but it should be noted that in its approval the court also indicated that it would not have stricken the more normal nonsigner provision as unconstitutional,⁷⁴ the issue never having been decided by that court.⁷⁵

While a number of states which have declared nonsigner Fair Trade unconstitutional have preserved resale price maintenance as between contracting parties,⁷⁶ there seems little reason to suppose that the law of contract can be sufficiently rewritten to afford the broad Fair Trade protection found in the Ohio formulation:

'Contract' means any agreement, written or verbal, arising from the acts of the parties. . . . Any distributor [whether he acquires such commodities directly from the proprietor or otherwise] who, with notice that the proprietor has estab-

⁷¹ *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958).

⁷² *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distribs., Inc.*, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70360 (Ohio App. June 19, 1962) (unconstitutional); *Hudson Distribs., Inc. v. Upjohn Co.*, 176 N.E.2d 236 (Ohio App. 1960) (constitutional).

⁷³ *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 117 S.E.2d 289 (1960).

⁷⁴ The *Standard Drug* court rejected contentions which are usually raised with respect to the more usual form of fair trade, namely, that the act violated due process, was an unconstitutional delegation to private parties of legislative power, and was a delegation of price fixing authority to private parties.

⁷⁵ In *Benrus Watch Co. v. Kirsch*, 198 Va. 94, 92 S.E.2d 384 (1956), the Virginia Supreme Court had affirmed so much of a lower court opinion as held that the previous nonsigner Fair Trade provision had been repealed by a later anti-monopoly act, finding it unnecessary to consider the other holding below; *i.e.*, that the nonsigner provision violated the Virginia Constitution.

⁷⁶ See, e.g., *General Elec. Co. v. American Buyers Co-op., Inc.*, 316 S.W.2d 354 (Ky. 1958).

lished a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor. . . .⁷⁷

Virginia attempts its recodification more succinctly. " 'Contract' means any agreement, written or verbal, or *actual notice* imparted by mail or attached to the commodity or containers thereof."⁷⁸ Whatever effect this third-party-notice theory may have on internal law, it would seem to change few issues with respect to Fair Trade. If enforcing a price against unwilling third parties is an unconstitutional delegation of legislative power, it remains so with notice. Indeed, nonsigner provisions are also unenforceable absent notice.⁷⁹ If a manufacturer may not dictate a price to non-agreeing buyers because pricing of general commodities is not affected with a public interest or because this is a taking of property without due process, there would again appear to be little reason for a distinction. Rather clearly, in states in which price fixing without a standard violates the constitution or in which anti-monopoly and restraint-of-trade provisions make price fixing an illegal objective, notice should not affect the result. If, then, notice has any effect, it may be a peculiarly negative one. The McGuire Act exemption, which legalizes Fair Trade, provides for the exemption of "contracts or agreements prescribing minimum or stipulated prices"⁸⁰ and further exempts from antitrust sanction the civil interdiction of price cuts below the contract level.⁸¹ Without questioning the right of the legislatures of Ohio and Virginia to redefine "contract" for internal consumption, it seems questionable that the one-party-plus-notice contract is within the meaning of "contract" in the McGuire Act.

⁷⁷ Ohio Rev. Code Ann. § 1333 28 (Page 1962).

⁷⁸ Va. Code Ann. § 59-8.2 (Supp. 1962). (Emphasis Added.)

⁷⁹ The McGuire Act, 66 Stat. 631 (1952), 15 U.S.C. § 45(a) (1958), only exempts statutes which, in substance, prohibit the willful and knowing cutting of price. The issue usually arises with respect to the duty of the nonsigner to maintain the resale price of which he did not have notice at the time that he purchased the goods, although later notice was given. In this context a number of courts have relieved the retailer of fair trading obligations. E.g., *James Heddon's Sons v. Callender*, 29 F. Supp. 579 (D. Minn. 1939); *Lentheric, Inc. v. Weissbard Bros.*, 122 N.J. Eq. 573, 195 Atl. 818 (Ch. 1937). Some have not. E.g., *Barron Motor, Inc. v. May Drug Stores, Inc.*, 227 Iowa 1344, 291 N.W. 152 (1940). No reported case, however, seems to support an action against a retailer for sales made prior to his receiving notice of the fair trade price.

⁸⁰ 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (2) (1958).

⁸¹ 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (3) (1958).

THE QUALITY STABILIZATION CONCEPT

The Quality Stabilization Bill, which as a joint resolution last year won the approval of the House Committee on Interstate Commerce⁸² and the Senate Commerce Sub-Committee,⁸³ contains a number of provisions which are not directly related to the problem currently under discussion. For example, under the proposed act an owner of a brand name is given the right to prevent retailers, utilizing his branded goods, from adopting certain deceptive practices⁸⁴ as well as to require their adherence to his resale price. It may be, as several witnesses before the Senate sub-committee indicated, that the provisions are designed to divert attention from price-fixing provisions.⁸⁵ It may, on the other hand, be true that a reiteration of presently existing rights against retail abuse coupled with a provision for civil relief is thought to be a genuinely desirable aim of federal legislation. However that may be, Quality Stabilization is significantly to be accomplished under this act by price stabilization.

Procedurally, the Quality Stabilization Bill is designed to function in much of the manner of the Ohio and Virginia acts.⁸⁶ The manufacturer is to provide notice of the established price⁸⁷ and the retailer, whether dealing directly with the manufacturer or not, is to adhere to the price

⁸² H.R. Rep. No. 2352, 87th Cong., 2d Sess. (1962).

⁸³ S.J. Res. 159, 87th Cong., 2d Sess. (Comm. Print July 26, 1962). This bill was chosen as the focus for discussion since it was the subject of extensive public hearings in the 87th Congress. See Hearings on S.J. Res. 159 Before a Sub-Committee of the Senate Committee on Commerce, 87th Cong., 2d Sess. (1962). Furthermore, a number of changes were made from the draft as originally submitted, see S.J. Res. 159, 87th Cong., 2d Sess. (Feb. 21, 1962), indicating close study by the committee.

⁸⁴ S.J. Res. 159, 87th Cong., 2d Sess., § 8(a) (b) (c) (Comm. Print 1962).

⁸⁵ "I know that the crux and heart of this bill . . . refers to price fixing by dealers. If you take that out, I am sure the proponents haven't the least interest in the bill." Testimony by Hon. Lee Loevinger, Assistant Attorney General of the United States. Hearings on S.J. 159, supra note 83, at 143. Congressman Emanuel Celler, after calling the bill a wolf in sheep's clothing continued: "It is as clear as a pikestaff that this is a resale price maintenance bill. There's an old Turkish adage, 'when a cat would eat her kittens she calls them mice.' Call this bill what you may, it is still a resale price maintenance bill." *Id.* at 252.

⁸⁶ See notes 69 and 70 supra, and accompanying text.

⁸⁷ A condition to the invocation of the protection of the act is that: "said goods or the containers thereof or the display devices to which they are attached for sale are plainly marked with the resale price or prices established therefor . . ." S.J. Res. 159, 87th Cong., 2d Sess. § 8. (Comm. Print 1962). In addition, a sale below the established price is only significant "after written notice by [the] . . . owner of the institution of the owner's currently established resale price or prices, . . ." *Ibid.*

of which he is notified.⁸⁸ Failure to adhere by the retailer gives the manufacturer a right to revoke, apparently perpetually, the retailer's right to handle any of the manufacturer's trademarked products.⁸⁹ The bill specifically conditions resale price maintenance on the existence of goods in "free and open competition" with goods identified by a brand name,⁹⁰ although the originally considered draft did not include such a condition.⁹¹ Price maintenance is also expressly conditioned on diligent policing of the provisions against all retailers.⁹² The federal courts are expressly given jurisdiction to enforce the act without respect to the amount in controversy.⁹³

While omitting an express exemption for activities under the act with respect to the general antitrust laws,⁹⁴ the bill does give a greater range of right to the manufacturer than was available under state fair trading. In the first place, he is expressly allowed to maintain a resale price despite the fact that he is himself competing in the resale of his product.⁹⁵ Further, he is given the astonishing right to set a series of resale prices which differ from each other on any basis which is not "made unlawful

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ The condition contained in the original draft was: "When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark, . . ." S.J. Res. 159, 87th Cong., 2d Sess., § 8 (Feb. 21, 1962). That this less restrictive provision may still closely approximate the desires of the quality stabilization advocates seems indicated by the fact that several of the quality stabilization acts introduced in the present Congress revert to this draft. E.g., H.R. 2564, 88th Cong., 1st Sess. § 8 (1963); H.R. 3669, 88th Cong., 1st Sess. § 8 (1963).

⁹² S.J. Res. 159, 87th Cong., 2d Sess. § 12 (Comm. Print 1962).

⁹³ S.J. Res. 159, 87th Cong., 2d Sess. § 11 (Comm. Print 1962).

⁹⁴ The original draft provided: "No exercise of any right or remedy provided in [this act] . . . shall be construed to be a violation of any of the Antitrust Acts . . ." S.J. Res. 159, 87th Cong., 2d Sess. § 14 (Feb. 21, 1962). This provision is again being introduced in new bills. See, e.g., H.R. 457, 88th Cong., 1st Sess. § 14 (1963). In this respect it should be noted that the other provisions of the act may become very significant. For example, the right to revoke a dealer's right to handle trademarked goods because of sales below the established price and the right to do so for vaguely defined acts of deceptive marketing, may well be used by the holder of a trademark to boycott a disfavored retailer which, but for the act, would be a per se violation of the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959). The exemption provided might reverse the anti-boycott ruling. There are many other activities which might be sanctioned by the broad language including some unforeseeable ones.

⁹⁵ S.J. Res. 159, 87th Cong., 2d Sess. § 15 (Comm. Print 1962).

by any other statute."⁹⁶ The combination of these provisions leads, to some rather interesting possibilities should the bill become law.

The provision which expressly gives the right to a trademark owner to set the resale price despite the fact that he also participates in sales at the same distributive level, contains the language: "*Provided*, That such owner shall sell such identified goods at any level of distribution at the price established for that level of distribution."⁹⁷ This is the first direct suggestion in the bill that the manufacturer or other owner is to be given the right not only to set a retail price but to set the price at which his trademark goods may be sold at any level of distribution. While it may well be necessary for a trademark owner to set his retail price at such a level as to allow the retailer to make a profit, there appears to be little suggestion that the power to control wholesale prices is similarly necessary to protect the manufacturer's product. That aside, it is a little difficult to discover in the purported justification of the bill a reason for allowing a control over distributive prices above the retail level. The justification for price stabilization under both Fair Trade and quality stabilization has been hinged to the concept that lowering the product's retail price results in product defamation.⁹⁸ However tenuous this reasoning, the extension of the product defamation concept above the retail level seems almost incredible. If a given trademark product were being distributed at a price which allowed merely the normal wholesaler margin of profit, and if the retail price were controlled, the product would apparently be moving in its manufacturer-determined price level, and consequently would be undefamed. The reduction of the wholesale price, which would result in giving the retailer a greater profit, should hardly result in the retailer's rejection of the line in question. Far from being disparaged, such goods would seem to gain a competitive edge by the greater profit margin at the retail level.

Of course, what this provision more patently does is to provide the manufacturer with an opportunity to stabilize a margin of profit at several levels of distribution and, through use of this horizontal stabilization, to dissipate, conceivably, some price-cutting pressure which might

⁹⁶ S.J. Res. 159, 87th Cong., 2d Sess. § 14 (Comm. Print 1962). This provision was added by the subcommittee; it did not appear in the original draft.

⁹⁷ S.J. Res. 159, 87th Cong., 2d Sess. § 15 (Comm. Print 1962).

⁹⁸ This hypothesis is the recurring theme of the testimony of proponents of quality stabilization. See Hearings on S.J. Res. 159, *supra* note 83. In part, this may be explainable by the encouragement which the United States Supreme Court gave to trademark protection in retail sales in *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936).

otherwise be directed against him. Such a result is not necessarily beyond the purpose of this act since the act seems founded *inter alia* on an economic premise that "it is recognized that unless fair competitive practices [resale price maintenance] can be maintained in all appropriate stages in the distribution of . . . identified products, the marketing of . . . identified products is depressed and the quality thereof tends to deteriorate . . ." ⁹⁹ The proposition that a manufacturer must be guaranteed a substantial profit if he is to produce a quality good may seem an unusual principle in an economy that is, at least nominally, dedicated to a philosophy of competition-enforced quality. Granting that proposition, however, the aforementioned provision seems sensible enough. If it is designed to do anything, it is designed to make it as feasible as possible for the owner of a trademark to build in a profit margin at each level of distribution.

The same provision has another novel application in that, by its express terms, the bill would allow a trademark owner to fix horizontally a price with sellers in competition with him, a result specifically prohibited by the McGuire Act.¹⁰⁰ As a result of this provision, it would seem desirable, indeed, for any retailer who can afford to do so to integrate vertically. With a measure of vertical integration and a product interchangeable at the retail level with that of some of its competitors, each company would become entitled by reason of its ownership of a trademark to make a horizontal price-fixing agreement with a competitor respecting the sale of its product. Moreover, if retailers are judiciously chosen for this purpose, it may be possible to create at the retailing level, through contract, a measure of integration and price stability even where actual integration would quite likely violate either the anti-merger provisions or perhaps even the monopoly provisions of federal law. Of course, the advantages aforementioned are not necessarily limited to the retail level since they can be accomplished at any given level of distribution. Again, this result seems reasonably consistent, granting only the basic premise that an increase in profits is necessary to maintain the quality of goods. The result seems strange, however, in light of the fact that, throughout the hearings on quality stabilization, the Senate sub-committee expressed a strong desire to prevent the act from becoming a vehicle for horizontal price-fixing.¹⁰¹

⁹⁹ Preamble to the original draft. S.J. Res. 159, 87th Cong., 2d Sess. (Feb. 21, 1962). It was removed by the subcommittee, but has returned in several of this year's bills. E.g., H.R. 2564, 88th Cong., 1st Sess. (1963).

¹⁰⁰ See note 39 *supra* and accompanying text.

¹⁰¹ For example, Senator Monroney repeatedly asked for suggestions from witnesses as to

The power granted by this section need not be exercised in the manner above indicated. It can, instead, be used to determine the profit margin of anyone in the distributive chain. Retailers may be rewarded by requiring the wholesaler to resell at a price considerably lower than the required retail price; they may be punished by greatly closing the gap. Similarly, distributors at each level in the chain of distribution may have their profits significantly determined by one who, for all intents and purposes, may be a stranger to them—the owner of the trademark. It is indeed peculiar that, on the whole, retailers and small businessmen testified in support of this bill which would seem a more likely product of the larger corporations which own the majority of significant trademarks.

One further provision should be noted in the same regard. The bill expressly allows the resale price to be "differentiated with reference to any criteria not made unlawful by any other statute."¹⁰² In the event that the trademark owner does not have sufficient power under the aforementioned provisions of the proposed statute, he is hereby given this additional power to force compliance by distributors and retailers. The brand owner by use of this section, has almost perfect control over how his goods shall be distributed. If he wants his goods to move quickly in one area and slowly in another, he has but to set a different price in each. Coupled with the price-fixing provisions allowed among horizontal competitors,¹⁰³ this power can create, without more, a division of markets as well as a price-fixing arrangement. Two competitive distributors need only price-fix each other (assuming that through vertical integration they become sellers of goods under a trademark owned by the other) and then set their respective prices so as to allow one company a low resale price on both its own and its competitor's commodity in one section of the country in return for reciprocity in another. Whether such an arrangement would be "made unlawful by any other statute" merely because market division is a violation of the Sherman Act,¹⁰⁴ is unanswerable. Quite conceivably, since the Sherman Act only prohibits restraints of trade, there is no prohibition sufficiently specific to invoke the "unlawful" clause of the Quality Stabilization Bill.

The price-differentiation section has still other possibilities. A given

how to "straighten out" the provisions of the first draft which would have allowed price maintenance for goods without the requirement of free and open competition with similar goods. Hearings on S.J. Res. 159, supra note 83, at 167.

¹⁰² S.J. Res. 159, 87th Cong., 2d Sess. § 14 (Comm. Print 1962).

¹⁰³ Note 95, supra.

¹⁰⁴ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898).

person in the chain of distribution can be rewarded or put out of business by adjusting his resale price. Since there is no need to make a similar adjustment on all resale prices, assuming that a lawful criterion can be created which would identify the seller in question, much the same range of possibilities as above suggested for classes of distributors and retailers can be applied to individuals. It is not quite clear how the variable price level provision of the bill is to be squared with the provision which requires that if a manufacturer price-maintains on a level in which he sells, he charge the price "established for that level." In any event, at a minimum, the trademark owner, able to conduct horizontal price stabilization even in its uncomplicated form on the level at which he is also a seller, is clearly enabled to build in a substantial profit margin for himself above the level that he might achieve if other purchasers of his product were allowed to compete with him in price for its sale; he may also trim the retail profit margin sufficiently to drive out competitors in any market he wishes to monopolize.¹⁰⁵

To be sure, the trademark holder would under this bill be exercising no greater rights than a totally integrated producer-seller would exercise with respect to goods which were not sold outside the seller's stores. The significant point is that for all intents and purposes this bill gives a person, by virtue of his ownership of a trademark, practically the same control over the sale of his goods as he would have had had he established this integrated plant. This means that trademark owners so large or so powerful that they could not integrate without serious threat of anti-trust sanctions may have the benefits of that integration apparently without antitrust reverberations. This also means that, large or small, the manufacturer of goods is given enormous economic power over those lower in the chain. That also seems a rather interesting anomaly.

When the proponents of the bill spoke of its need, almost all ultimately addressed themselves to the plight of the small businessman.¹⁰⁶ This bill

¹⁰⁵ The Aluminum Company of America used a "price squeeze" of this sort to control sheet aluminum production. Its effectiveness contributed to the finding of monopolization by the company. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

¹⁰⁶ Some, such as Mr. Richard E. Snyder, a consulting economist, took the statistical approach. His statement, replete with charts, undertook the burden of establishing the deplorable condition in retailing which he colorfully described. See Hearings on S.J. Res. 159, *supra* note 83, at 84-106. Others, perhaps best represented by Senator Humphrey, approached the problem by extolling the virtues of the small retailer and the vices of fly-by-night discounters. After praising the former, he testified, as to the latter: "That is generally what a discounter does. He comes in, sets up his establishment, contributes nothing to anybody, including the Community Chest, the church, or the town, and even fights over his taxes." *Id.* at 120.

is touted as a tool to give small retailers a new competitive weapon against the "discount house." In terms of the provisions of the proposed act, however, it seems curious that small business was the intended beneficiary. Vertical integration, so helpful in utilizing the provisions of this bill for the purpose of increasing profit, is presumably not open to most "small businesses." If small businesses need greater countervailing power against manufacturers too prone to sell to discount houses, they are hardly given it by a bill that makes those manufacturers virtual dictators of the retailer's profit margin. Moreover, if the bill was designed to prevent sales to discount houses, it seems strange that it incorporated a provision allowing variable resale pricing. If anything, a volume criterion virtually suggested by the act, and rather clearly not unlawful by any antitrust provision, would make it possible to freeze by quality stabilization a difference in retail price between discount houses and regular retail sales without depriving the manufacturer of sales to either. All that would be increased in such a scheme is the manufacturer's profit from both. Why it has been assumed by proponents of small business legislation that their best alternative is to give increasing power to manufacturers is not known. If Fair Trade has helped retailers at all, it seems in recent years at least to have helped primarily because retailers, who arguably are not entitled to do so,¹⁰⁷ have invoked Fair Trade provisions in self-protection.¹⁰⁸ They are clearly given no such right under quality stabilization. They, then, are to receive their benefits from manufacturers who are to be guaranteed a profit margin sufficiently large to insure that they will continue to make quality goods.

To be sure, price stabilization will only result from dictated pricing in industries in which retailers of the same product are otherwise in a position not to compete with each other, or where this is true on another distributive level. Moreover, price setting will only be effective with respect to goods which are not brought under serious competitive pressure by competing goods. In other words, price maintenance is likely to be effective only where, by using Fair Trade devices, sufficient concentration can be achieved and sufficient competition can be prevented so that there results an oligopolistic situation in which price-cutting no longer seems advantageous. Since, however, many trademark owners in our

¹⁰⁷ See notes 51 and 52 *supra* and accompanying text.

¹⁰⁸ The Federal Trade Commission noted in its 1945 report on resale price maintenance that the leadership in the movement for fair trading has shifted to organized retailers' groups, especially in the retail drug trade. FTC, Report on Resale Price Maintenance 5 (1945).

present economy seem to be among those who are already operating in heavily concentrated fields, the device seems to exist in a dangerous area.

THE PROSPECTS FOR QUALITY STABILIZATION

During the last session of Congress, bills for quality stabilization were extensively discussed and won a considerable amount of support.¹⁰⁹ Pundits suggest that it may be in an even stronger position in this session.¹¹⁰

Should Congress in this session pass the Quality Stabilization Bill, it would, of course, make a major change in the Fair Trade prognosis. To begin with, it would immediately impose on the twenty-four states and territories which have rejected Fair Trade and the four states which have never adopted it a comprehensive system of resale price maintenance. In twenty-three states it would automatically reverse a holding of unconstitutionality under the state constitution.

With respect to the holdings of several states that Fair Trade is unconstitutional within the federal constitution, it seems unlikely that these decisions will prevail. To begin with, the argument, often imposed in state constitutionality cases, that the pricing of general goods is not a matter affected with a public interest, would seem in light of current federal cases to be made too late in the constitutional development of the law.¹¹¹ The later cases appear to support the proposition that, assuming a lack of arbitrariness and no invidious discrimination, economic regulation on any matter thought proper by the state or Congress is constitutionally immune. The closely allied point that price regulation is an unconstitutional taking of property without due process of law would appear to be equally dubious, as is illustrated by many of the same cases.¹¹² The only constitutional argument that appears sufficient to overcome summary disposition is the argument that this type of law constitutes a delegation of price regulation to private persons. While the delegation argument has met with some success, and is advocated as an appropriate reason for rejecting federal Fair Trade by one commenta-

¹⁰⁹ In the 87th Congress, quality stabilization made considerable progress in the House of Representatives—it was approved by the Committee on Interstate Commerce, H.R. Rep. No. 2352, 87th Cong., 2d Sess. (1962), and “cleared” by the Rules Committee, H.R. Rep. No. 2520, 87th Cong., 2d Sess. (1962). It did not get to the floor, however.

¹¹⁰ See report, The 88th Congress, 80 A.T.R.R. B-3 (Jan. 22, 1963).

¹¹¹ See Conant, Resale Price Maintenance: Constitutionality of Nonsigner Clauses, 109 U. Pa. L. Rev. 539 (1961).

¹¹² *Ibid.*

tor,¹¹³ no federal legislation has been invalidated on a delegation argument since the great depression. In sum, it is at this point viewed as unlikely that a federal court will declare quality stabilization, if passed, to be an unconstitutional statute, on these most common bases for state invalidation.

One other state argument appears worthy of note. A number of states have pointed out that fair trade delegates not only the price-fixing authority, but delegates that authority without a standard on which to judge an appropriate price level.¹¹⁴ On this basis, the unconstitutional delegation argument has been sustained. The same argument could be made to support a holding of arbitrariness which might, in state courts, be sufficient to invalidate the legislation. Even conceding this argument, however, the federal courts seem unlikely to find quality stabilization violative of the constitution.

One negative effect which the proposed federal legislation might contribute to the enforcement of Fair Trade is a likely result of freeing federal district courts, which have in the past indicated their reluctance to enforce Fair Trade, from the mandate to follow state law.¹¹⁵ Left to their own devices in interpreting quality stabilization, it may well be that terms such as "free and open competition" may be given the strict interpretation which the Pennsylvania courts have applied, or perhaps one even stricter which would require that there be active price competition between products, as for example, that all products in a given line cannot be fair traded at essentially identical prices. A commentator has suggested that with such an interpretation of Fair Trade, its influence would be minimal.¹¹⁶

Aside from the free and open competition requirement, an apparently reluctant addition to the act in the first place, the phrase "unlawful by any other statute," which qualifies the option of the fair trader to vary his prices, is another vague term which disillusioned courts might well construe strictly.

More obviously, the effect of the Quality Stabilization Act would be to make price maintenance national in scope since there need be no interstate competition in the price of the product. While the manufacturer must, of course, still reckon with the price of competitive goods, except for the influence of those goods, he is free to dictate the price at which

¹¹³ *Ibid.*

¹¹⁴ See, e.g., *Miles Labs., Inc. v. Eckerd*, 73 So. 2d 680 (Fla. 1954).

¹¹⁵ See, e.g., *Parke, Davis & Co. v. G.E.M., Inc.*, 201 F. Supp. 207 (D. Md. 1962).

¹¹⁶ *Adams, Resale Price Maintenance: Fact and Fancy*, 64 *Yale L.J.* 967 (1954).

his product will be sold throughout the nation. Whether the effect of his ability to set a national price will lead to a level of prices that are substantially in excess of prices competitively determined, no one really knows. Many economists guess that it would have that effect,¹¹⁷ but the evidence, other than theory, is rather wanting in respect either to their assertion or its denial.¹¹⁸ Also, by enabling the manufacturer to perform his price planning on a national scale, the act would sweep away whatever economic power was previously held by a localized group of retailers whose influence would then be matched against a national as opposed to a state-wide trading policy. Finally, the form of the act itself may lead to granting so much additional power to manufacturers and making it so desirable to integrate vertically that a considerable amount of concentration may develop. Experience indicates that it is unlikely that concentration once developed can be effectively reversed.

CONCLUSION

It seems reasonably probable that McGuire Act-sanctioned Fair Trade is an ailing concept. Of late, courts have bared their teeth at the concept and a bite at a time, as in Pennsylvania, or with a swift lunge at the jugular, have managed to end their state's experimentation with retail price maintenance. Failing in the states, the proponents now have a substantial representation for their viewpoint in Congress. The proposed federal law, while in the main incorporating national Fair Trade provisions, introduces a small number of innovations some with even more controversial potential than existed under state Fair Trade.

It is unquestionable that quality stabilization—Fair Trade—retail price maintenance, whatever it be called, deviates from the main stream of our statutorily announced economic policy. In a country that has long taught, as a matter of horn-book economics, that price and quality of goods are determined and controlled by competitive forces, the new suggestion that price be controlled by trademark holders and quality protected by ample profit margins strikes a dissenting note. To be sure, state Fair Trade has never approached the predictions of economic doom

¹¹⁷ See, e.g., statement of Stewart M. Lee, Chairman, Department of Economics and Business Administration, Geneva College. Hearings on S.J. Res. 159, supra note 83, at 290-306 (1962).

¹¹⁸ Dr. Lee, despite having more adequate statistical support than most of the other witnesses before the subcommittee, stated, "Let me be the first to admit that these figures are nothing but educated estimates . . ." *Id.* at 294.

that have been uttered of it. Moreover, it may well be that quality stabilization, if passed, will fail because of some of the same vices which are rapidly carrying away its predecessor. However, it may also be that for better or for worse quality stabilization will achieve the result that has long been attempted of Fair Trade.