



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 31 | Number 4

Article 13

6-1-1953

Restraint of Trade -- Fair Trade Acts -- Constitutionality

John Ralph Cambron

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

John R. Cambron, *Restraint of Trade -- Fair Trade Acts -- Constitutionality*, 31 N.C. L. REV. 509 (1953).
Available at: <http://scholarship.law.unc.edu/nclr/vol31/iss4/13>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Restraint of Trade—Fair Trade Acts—Constitutionality

Fair Trade Acts¹ authorize resale price maintenance—a form of price fixing. These Acts initially were received favorably by most courts² but recently some have encountered judicial snags.

In 1937, Congress, in passing the Miller-Tydings Amendment³ to the Sherman Anti-Trust Act⁴ sanctioned resale price maintenance agreements in the "fair trade" states in transactions involving interstate commerce. In 1951 the United States Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*⁵ dealt "fair trade" a severe blow by holding that the Miller-Tydings Amendment did not authorize the enforcement of fair trade agreements against non-signers in interstate transactions.⁶ In addition the Court held that this Act authorized only minimum prices and did not sanction absolute prices.⁷ This decision, coupled with *Sunbeam v. Wentling*⁸ which concluded that out of state mail order sales when made by a non-signing Pennsylvania retailer were not subject to the Pennsylvania Fair Trade Act, drained the Acts of most of their vitality.⁹

In 1952 Congress passed the McGuire Act¹⁰ which expressly overruled the *Schwegmann* and *Wentling* decisions by validating the non-signers clause, authorizing both minimum and absolute prices, and declaring regulation of out of state retail sales was not an undue burden on commerce.

¹ Between 1931 and 1941 Fair Trade Acts were passed in 45 states. These Acts uniformly purported to validate agreements between manufacturers and wholesalers or retailers whereby the manufacturer protected his trade mark, brand or name by stipulating the price at which the retailer was to sell the article. 2 CCH TRADE REG. REP. ¶7056 (1953). The North Carolina statute is N. C. GEN. STAT. §§ 66-50 through 66-57 (1943, recompiled 1950); 15 N. C. L. REV. 367 (1937).

² *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*, 299 U. S. 183 (1936); *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942); *Ely Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. 2d 428 (1939).

³ 15 U. S. C. § 1 (1946).

⁴ *Ibid.*

⁵ 341 U. S. 384, 388 (1951). The majority opinion in this case states, "The omission of the non-signers provision from the federal law (Miller-Tydings) is fatal to respondent's position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it." Three justices dissented.

⁶ A typical non-signers clause is: "Willfully and knowingly advertising . . . or selling any commodity at less than the price stipulated in any contract entered into pursuant to this article, whether the person so . . . selling is or is not a party to such a contract is unfair competition and is actionable at the suit of any person damaged thereby." N. C. GEN. STAT. § 66-56 (1943, recompiled 1950). (Italics added).

⁷ In the 45 states that passed Fair Trade Acts minimum prices were authorized in thirty states while fifteen authorized absolute prices. 2 CCH TRADE REG. REP. ¶7001 (1953).

⁸ 341 U. S. 944 (1951).

⁹ H. R. REP. No. 1437, 82d Cong., 2d Sess. (1952).

¹⁰ 15 U. S. C. A. § 45 (Supp. 1953).

Although several state courts, including North Carolina,¹¹ had upheld the constitutionality of their Fair Trade Acts, the Florida Supreme Court refused to follow the well established pattern. Instead, in 1949 it declared the Florida Act violative of the state constitution in that it was an excessive exercise of the police power.¹² However a subsequent re-enactment intended to remedy the constitutional objection has yet to be passed on by the Florida Court.¹³ Subsequently, Michigan, in a decision rendered after the *Schwegmann* case and prior to the McGuire Act, announced that the Michigan Fair Trade Act was violative of the due process clause of the state constitution and further that the authorization of resale price maintenance agreements exceeded the police power of the state.¹⁴

More recently, the Supreme Court of Georgia has joined the dissenting group. In *Grayson-Robinson Stores, Inc. v. Oneida, Limited*,¹⁵ a case in which the defendant was a non-signing retailer who sold the plaintiff-manufacturer's silverware at a price less than that expressed in contracts between the plaintiff and other retailers, the Georgia Supreme Court declared that the Georgia Fair Trade Act¹⁶ contravened both the due process clause of the state constitution¹⁷ and the supremacy clause of the Federal Constitution.¹⁸ On the federal issue the Court utilized a novel twist in "fair trade" litigation by reasoning that when the Georgia Act was passed in 1937¹⁹ it violated the Sherman Act as it then stood²⁰ and the subsequent enactment of the Miller-Tydings and McGuire Acts did not operate to validate the Georgia Act inasmuch as it was void *ab initio*.

¹¹ *Pyroil Sales Co. v. The Pep Boys*, 5 Cal. 2d 446, 55 P. 2d 194 (1936); *Burroughs Welcome & Co. v. Johnson Wholesale Perfume Co.*, 128 Conn. 596, 24 A. 2d 841 (1942); *Seagrams-Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. 2d 940 (1936); *International Cellucotton Products v. Kraus Co.*, 200 La. 959, 9 So. 2d 303 (1942); *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 7 A. 2d 176 (1939); *Johnson & Johnson v. Weissbard Brothers*, 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 & Co. v. Saunders*, 216 N. C. 163, 4 S. E. 2d 228 (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); *Weeco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937) (except a provision exempting non-profit cooperatives).

¹² *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949); 28 N. C. L. REV. 336 (1950).

¹³ *Seagram Distillers Corp. v. Ben Greene, Inc.*, 54 So. 2d 235 (Fla. 1951).

¹⁴ *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N. W. 2d 268 (1952).

¹⁵ 75 S. E. 2d 161 (Ga. 1953).

¹⁶ GA. CODE ANN. §§ 106-401 through 106-408 (1937).

¹⁷ GA. CONST., Art. I, Sect. 1, ¶ II. ¹⁸ U. S. CONST. Art. VI, cl. 2.

¹⁹ Georgia participated in the legislative "avalanche" that saw 28 states pass Fair Trade Acts in 1937. 2 CCH TRADE REG. REP. ¶7056 (1953).

²⁰ 15 U. S. C. § 1 (1946). ". . . every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations" was illegal.

In reaching this conclusion the Supreme Court of Georgia ignored the decision of the United States Supreme Court in *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*²¹ which specifically upheld the right of Illinois to authorize resale price maintenance agreements in *intrastate* commerce. At the time of the *Old Dearborn* decision the law was well established that such practices in *interstate* commerce were illegal²² and the twenty-eight states, including Georgia, which passed Fair Trade Acts in the year *after* the *Old Dearborn* case could have intended to validate *only* such agreements as involved *intrastate* transactions. For this reason the application of the void ab initio doctrine in this situation seems questionable.

The courts of twenty-nine states have yet to pass on the constitutionality of their Fair Trade Acts.²³ Of the twenty-nine all but four were passed prior to the Miller-Tydings Amendment, and all twenty-nine were enacted prior to the McGuire Act. If the reasoning of the Georgia Court on the federal issue should be followed by these states the Acts passed prior to Miller-Tydings are totally void. The other four would become practically impotent for without the benefit of the McGuire Act the non-signers clauses—the heart of the Acts—would be inapplicable in interstate commerce. However, it is unlikely that these twenty-nine states will follow the reasoning of the Georgia Supreme Court and thereby declare their Acts void ab initio in whole or in part.

The alternate ground on which the Georgia opinion is based is less controversial. In holding that the Georgia Fair Trade Act violated the Georgia Constitution the Supreme Court of Georgia employed the same technique as had previously been applied by the highest courts of Florida and Michigan. Opponents of "fair trade," encouraged by these decisions may seek expeditious consideration of the Fair Trade Acts in those states yet to pass on the question. There is little, if any, indication that states which previously have upheld the constitutionality of their Acts are ready to take a contrary view. Recently, the Supreme Court of New York²⁴ and a Federal District Court in Louisiana²⁵ reiterated that the Acts of those states were constitutional. In addition the highest courts of New Jersey²⁶ and California²⁷ have restated the validity of the non-signers clauses in the Acts of those states.

The McGuire Act also has been under attack in both state and

²¹ 299 U. S. 183 (1936).

²² *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911).

²³ 2 CCH TRADE REG. REP. ¶ 8004 through ¶ 8964 (1953).

²⁴ *General Electric Co. v. Klein on the Square, Inc.*, TRADE REG. REP. CURRENT DECISIONS, ¶ 67,443 (1953).

²⁵ *Ely Lilly & Co. v. Schwegmann Bros.*, 109 F. Supp. 269 (1953).

²⁶ *Johnson & Johnson v. Charmley Drug Co.*, 95 Atl. 2d 391 (N. J. 1953).

²⁷ *The Cal-Dak Co. v. Sav-On Drugs, Inc.*, 254 Pac. 2d 497 (Calif. 1953).

federal courts. Schwegmann Brothers, Louisiana retailers and long time foe of "fair trade," challenged this Act on grounds that it violates the due process clause of the Federal Constitution and constitutes an unlawful delegation of legislative power to private individuals. The Louisiana Federal District Court in *Ely Lilly Co. v. Schwegmann Bros.*²⁸ upheld the constitutionality of the Act. In *General Electric v. Klein on the Square*²⁹ the New York Supreme Court declared the McGuire Act constitutional as not being in contravention of the due process or equal protection clauses and not an unlawful delegation of legislative power. Ultimately the United States Supreme Court may rule on the constitutionality of the McGuire Act and its sanction of the controversial non-signers clause.³⁰ Since the Supreme Court of the United States has already held that the Fair Trade Acts do not contravene the Fourteenth Amendment in intrastate commerce³¹ it is quite unlikely that it will now hold the McGuire Act as applied to interstate transactions is violative of the Fifth Amendment.

Although most states will leave the economic wisdom of Fair Trade Acts to the Legislature and hence those declaring such Acts to be unconstitutional will remain in the minority, it is evident that the courts will give more careful scrutiny to this legislation in the future than has been true in the past.

JOHN RALPH CAMBRON

Unfair Competition—Export Trade Act—Unfair Methods of Competition under Section Four

The Sherman Act of 1890 prohibited concerted action by independent exporters including the formation of trade associations for the purpose of eliminating competition among themselves in foreign trade.¹ The importance of allowing American exporters to combine into such an association was stressed in a report submitted to Congress by the Federal Trade Commission in 1916.² Spurred by this report,

²⁸ TRADE REG. REP., CURRENT COURT DECISIONS, ¶ 67,443 (1953).

²⁹ 109 F. Supp. 269 (1953).

³⁰ The Supreme Court of the United States has never passed directly on the constitutionality of the Miller-Tydings Act.

³¹ *Old Dearborn Distributing Co. v. Seagrams-Distillers, Corp.*, 299 U. S. 183 (1936).

¹ The Sherman Act prohibits: "Every contract, combination . . . or conspiracy, in restraint of trade. . ." 26 STAT. 209 (1890), as amended by 50 STAT. 693 (1937), 15 U. S. C. §§ 1-7 (1946).

² Public hearings were conducted in 16 cities; several thousand questionnaires were sent out to interested individuals and firms; American consuls and commercial attachés sent in reports; a study of the ramifications of foreign cartel arrangements was made. On June 30, 1916, this report on *Cooperation in American Export Trade* was submitted to Congress. This report may be found in EXPORT PRICES AND EXPORT CARTELS (WEBB-POMERENE ASSOCIATIONS) 113-118 (TNEC Monograph 6, 1941). See also Love, *The Export Trade Act*, 8 GEO. WASH. L. REV. 608 (1940).