The Continuing Fair Trade Battle

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I. INTRODUCTION

The battle over fair trade continues unabated. After the opponents of fair trade lost the legislative battle with the enactment of the McGuire Act in the summer of 1952, it was only natural for them to turn again to the courts in their attempt to render fair trade ineffective.

The Supreme Court last year twice refused to review the Fifth Circuit's decision in the Lilly-Schwegmann case upholding the constitutionality of fair trade, and has recently dismissed, for want of substance, appeals which raised substantially the same questions. Since the Lilly-Schwegmann case, the opponents of fair trade have also embarked on state constitutional attacks and a number of cases have already reached the highest state courts in several jurisdictions. The highest state courts in Delaware, New Jersey and New York (as well as lower courts in Louisiana,}
Minnesota \(^8\) and Washington \(^9\) have sustained their state fair trade acts from comprehensive constitutional attacks since the enactment of the McGuire Act. Meanwhile, the opponents of fair trade have recently succeeded in upsetting the non-signer provision of the latest Florida Act,\(^{10}\) as they previously did in Georgia,\(^{11}\) and have obtained similar favorable decisions in lower courts in Arkansas,\(^{12}\) Nebraska,\(^{13}\) and Utah.\(^{14}\)

Cases are also pending in Idaho, Kentucky, Ohio, Pennsylvania and Virginia which may settle the constitutionality of the fair trade acts in those jurisdictions.

Although a United States District Court recently refused to consider state constitutional objections addressed to the Arkansas Act until passed on by the highest state court,\(^{15}\) another District Court upheld the Indiana Act \(^{16}\) against state as well as federal constitutional objections. The Supreme Court of Tennessee, however, refused to apply the Tennessee Act to interstate transactions in the absence of an authoritative federal decision interpreting the McGuire Act.\(^{17}\)

While the constitutional attacks have received the greatest attention, the opponents of fair trade have also launched several statutory attacks which, if successful, could upset

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\(^{8}\) See Kautzy v. The Great-Minneapolis Surplus Store, Inc., unreported (Minn. Dist. Ct., Hennepin County, Jan. 1954).


\(^{11}\) See Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 209 Ga. 613, 75 S.E.2d 161 (1953).


\(^{17}\) Calvert Distillers Corp. v. Robilio, CCH TRADE REG. REP. \# 67,540 (Sup. Ct. Tenn. 1953). Such an authoritative decision has of course been provided by the Lilly case and the other recent cases.
the effectiveness of particular fair trade acts or fair trade in general as readily as any constitutional defect.

Fair traders, for example, have recently noted expanded competition in the use of trading stamps, give-aways, combination sales and in prescription products, particularly in those jurisdictions where these practices are not specifically prohibited by statute.\(^\text{18}\) So, too, there has been greater resort to interstate mail order sales originating in both fair trade and non-fair trade jurisdictions to test the statutory, as well as constitutional, applicability of fair trade to such sales.\(^\text{19}\)

Perhaps most significant, however, is the renewed legislative attack which fair trade is beginning to feel. Fair trade publications have already noted with concern the report that the Attorney General's Committee will recommend the repeal of the McGuire Act.\(^\text{20}\)

Finally, fair traders have also been confronted by multifarious equitable and anti-trust defenses in enforcement proceedings which pose for many manufacturers the problem of finding means of enforcement at a cost not prohibitive.\(^\text{21}\)

II. THE HISTORY OF FAIR TRADE

The significance of the recent constitutional attacks and attempts to render fair trade ineffective cannot be fully appreciated without a background of the legal history of resale price maintenance of which fair trade is merely a particular form.

\(^{18}\) See F-D-C Reports (March 13, 1954 and May 8, 1954) (a trade publication for the drug and cosmetics industry).


\(^{20}\) See F-D-C Reports (Aug. 21, 1954). The economic arguments for and against fair trade have been set forth previously. See Note, Resale Price Maintenance and the McGuire Act, 27 St. John's L. Rev. 379 (1953).

The essential characteristic of resale price maintenance is the control the manufacturer exercises over the price of his product after title has passed from him to a vendee who resells. At common law the courts were divided as to the legality of resale price maintenance agreements; but where interstate commerce is affected, they have been illegal under the Sherman Act ever since the Supreme Court's decision in the Dr. Miles case in 1911.

Between 1911 and 1931 several attempts were made to legalize resale price maintenance agreements, but to no avail. The depression, however, with its epidemic of cut-rate pricing, gave impetus to the movement for legalizing minimum resale prices and, in 1931, California passed the first fair trade law legalizing such agreements for all trade-marked goods. This law proved ineffective because it did not prohibit price-cutting by dealers who were not parties to contracts and, in 1933, California amended her statute to provide that a fair trade contract established a minimum resale price binding upon all distributors who had notice of the contract. This non-signer control feature is the key to the enforcement of fair trade and the main target for constitutional attacks.

When the United States Supreme Court upheld the non-signer provisions of the California and the Illinois Acts in the Old Dearborn and Pep Boys cases in 1936, a nationwide movement began which led to the enactment of fair trade legislation in every state except Missouri, Texas, Vermont and the District of Columbia.

Without the assistance of federal legislation, however, the Dr. Miles case prevented the full utilization of the state acts. In 1937 Congress sought to lift the ban upon resale

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22 See Handler, Cases and Materials on Trade Regulation 247 (2d ed. 1951).
23 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 409 (1911), wherein the Court stated: "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."
26 Under the restricted interpretation of the interstate commerce clause existing at that time, however, there were many transactions which the state laws governed.
price enforcement of the type specified in the various state laws, when it passed the Miller-Tydings Amendment to Section 1 of the Sherman Act.\footnote{27} Congress neglected, however, to exempt non-signer control and in the first \textit{Schwegmann} case \footnote{28} the Supreme Court held non-signer enforcement invalid under the Sherman Act as to commodities in interstate commerce.

The damage done by the first \textit{Schwegmann} case was, however, repaired with the enactment of the McGuire Act Amendment to the Federal Trade Commission Act in 1952.\footnote{29}

The McGuire Act specifically exempts, under specified conditions,\footnote{30} the non-signer provisions from the operation of the federal anti-trust laws\footnote{31} and declares that the enforcement of fair trade rights are not an unlawful burden on interstate commerce.\footnote{32}

Thus, an effective fair trade program depends upon the existence of a private contract, a state enforcement statute, and federal enabling legislation. In the absence of any one of these elements or without their successful interaction, a fair trade program constitutes unlawful price fixing.\footnote{33}

\section*{III. THE CONSTITUTIONAL ATTACKS}

Prior to the first \textit{Schwegmann} case and the enactment of the McGuire Act, the main constitutional attacks upon the validity of the fair trade laws were: (i) that they deprived the non-assenting distributor of freedom of contract without being sufficiently related to the public welfare and thus constituted a violation of due process under the federal and state laws.

\footnote{29}{66} Stat. 631, 15 U.S.C. § 45 (1952). The fact that the Miller-Tydings Act was not amended is attributable to the limited jurisdictional authority of the Interstate Commerce Committee of the House.}
\footnote{30}{See note 60 infra.}
\footnote{33}{See, e.g., United States v. Univis Lens Co., 316 U.S. 241 (1942).}
constitutions; and (ii) that they constituted an unconstitutional delegation of legislative power to private persons.\textsuperscript{34}

The Supreme Court of the United States in the Old Dearborn case,\textsuperscript{36} and the highest courts in fifteen states, found these contentions without merit.\textsuperscript{36} The Supreme Court of Florida, however, sustained objections to the non-signer provision based on these contentions and the Supreme Court of Michigan sustained objections to the same provision based on the due process argument.\textsuperscript{37}

After the enactment of the McGuire Act these attacks were immediately renewed and the validity of the McGuire Act itself was drawn into question. The recent cases,\textsuperscript{38} how-

\textsuperscript{34} The objection was also frequently raised under the federal and state constitutions that the laws discriminated between the producers of identified and unidentified goods, and thus deprived the producer of the latter of the equal protection of the laws. This objection was uniformly rejected as insubstantial. See, e.g., Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 197 (1936); Ely Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939); Sears v. Western Thrift Stores of Olympia, Inc., 10 Wash.2d 372, 116 P.2d 756 (1941). See also Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Two more limited state constitutional objections which are of contemporary interest were also raised. These were: (a) that the titles assigned to various state laws were misleading in that they did not place the legislatures on notice that non-signers were affected; see 2 CCH TRADE REG. REP. (9th ed.) \textsuperscript{7,134} (1953); and (b) that they conflicted with anti-monopoly constitutional provisions. Id. \textsuperscript{7,142}.


\textsuperscript{38} See notes 2 & 3 supra. Although the Supreme Court recently dismissed several similar cases for want of substance, the Lilly-Schwegmann case (109 F.
ever, have removed any doubt which the first *Schwegmann* case may have created as to the continued vitality of *Old Dearborn* and indicate that objections to the McGuire Act are without foundation.

A. The Recent Federal Attack

In the first of the recent cases, the *Lilly-Schwegmann* case, Schwegmann Brothers challenged the constitutionality of both the Louisiana Fair Trade Law and the McGuire Act under the United States Constitution. Eli Lilly and Company brought suit in the United States District Court in New Orleans shortly after the enactment of the McGuire Act to enjoin Schwegmann from selling Lilly products below fair trade prices established by contracts with other Louisiana retailers. Although Schwegmann was not a party to such a contract, the District Court granted Lilly's motion for summary judgment and issued the permanent injunction requested.

The defendants' basic position was that in the first *Schwegmann* case, the Supreme Court "opened the door" to a complete re-examination of the due process objections to the state fair trade acts.

They argued that the decision in the first *Schwegmann* case knocked "the props of theory" from under *Old Dearborn* rendering that decision "obsolete." In particular, it was claimed that *Old Dearborn* did not regard fair trade laws as "price fixing" statutes or as "coercive" on non-signers but was premised on the erroneous assumptions that they were intended for the protection of the manufacturer's good will in his trade-mark and that a non-signer impliedly assents

Supp. 269 [E.D. La., cert. denied, 346 U.S. 856 [1953]) has been singled out for discussion since (1) the constitutional questions were placed squarely in issue in this case without the statutory complications present in some of the more recent cases (e.g., Raxor Corp. v. Goody, 307 N.Y. 229, 120 N.E.2d 802 [1954], cert. denied, October Term 1954, no. 324, Oct. 25, 1954 [15 CCH Sup. Ct. Bull. 33]), and (2) since it has been criticized for applying the fair trade laws to competitive pricing as distinguished from predatory loss-leader pricing. See note 51 infra.

39 "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
to resale price fixing. They further claimed that experience has shown that the good will theory was at odds with the realities of the market place and pointed to the rejection of that theory in several cases. On the other hand, they pointed out that the Supreme Court characterized fair trade statutes as involving "coercive price fixing" in the first Schwegmann case.

In comparing the two opinions, the Court of Appeals pointed out that it must be borne in mind that Old Dearborn was dealing with the question of constitutionality, whereas the first Schwegmann case dealt only with the applicability of the Miller-Tydings exemption to non-signers. The Court could find no implication in the first Schwegmann case that Congressional approval of enforcement against non-signers would be unconstitutional; on the contrary, it felt that the implications of the opinion were to the contrary and that Old Dearborn still controlled. Nevertheless, the Court discussed the merits of the defendants' constitutional contentions.


Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra note 39 at 193-194. Of course, Old Dearborn was dealing with the constitutionality of fair trade, whereas the first Schwegmann case was dealing with the applicability of Miller-Tydings to non-signers. The Court in Old Dearborn recognized that the statute "imposed" an obligation on the non-signers who wilfully and knowingly disregarded the restrictions on sales of trade-marked articles. Under such circumstances the Supreme Court said that a non-signer "upon every principle of fair dealing" could be treated as though he had assented; that so far as the power of the state was concerned, it was no less constitutional to bind such a person than to bind one who had consented by signing a contract.

See Sunbeam Corp. v. Wentling, 192 F.2d 7 (3d Cir. 1951). This case, however, did not involve the interpretation of a fair trade statute. In an earlier phase of the same case (185 F.2d 903, 905 [3d Cir. 1950]), the court upheld the constitutionality of the fair trade acts against due process objections while holding the statute inapplicable to interstate sales.


Ibid. See note 45 infra.
Schwegmann's due process argument was twofold. They claimed the Louisiana Act violated the due process clause of the Fourteenth Amendment (i) because it bore no substantial relation to the public welfare but in reality only benefited retailers and (ii) because it delegated legislative power to private individuals.

Due Process: Public Welfare

As to Schwegmann's assertion that "fair trade acts are concerned more with the protection of distributors than with the protection of the producer or owner of the trade-mark," the Court of Appeals said that these "are matters, it seems to us, for legislative, not for judicial, consideration." The Court added, "We have no judicial concern with the economic and social wisdom of any feature of the law but solely its constitutionality." 45

The Court of Appeals thus adhered to the doctrine of the Nebbia case, wherein the Supreme Court pointed out that there was nothing "peculiarly sacrosanct" about price control:

44 Ibid. The fact that the fair trade laws also benefit retailers and small businesses generally in addition to protecting the producer's good will would seem, however, to broaden their constitutional justification under the Nebbia doctrine. Thus, the state legislative bodies could also have reasonably found that the public interest generally is served by the fair trade laws on the additional grounds that they help prevent the growth of monopoly in distribution and that they discourage deceptive trade practices frequently injurious to the unwary customer. The many other cases on the point include the following: Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952); Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 619 (1950); Carolene Products Co. v. United States, 323 U.S. 18, 31-32 (1944).

45 In Old Dearborn, the Supreme Court similarly stated: "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. . . . True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature." Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 195-196 (1936).

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. 47

The significance of the unanimous holding in Old Dearborn becomes even greater when it is realized that it was decided at a time when much state legislation regulating prices, which today would clearly be held constitutional, had been stricken down by the Supreme Court under the Fourteenth Amendment. At the time of Old Dearborn there remained some vitality to the doctrine of the Tyson line of cases 48 invalidating legislative price fixing. But as the Supreme Court pointed out in Olsen v. Nebraska, 49 the Tyson doctrine was in reality discarded in the Nebbia case. Thus, "[w]hatsoever weakening effect on Old Dearborn may have been caused by Schwegmann's frank characterization of State fair trade statutes as involving price fixing against nonsigners," said the Court of Appeals, is more than off-set "by the weakening also of the broad concept against the validity of legislative price fixing assumed in Old Dearborn." 50

Constitutionality as Applied to Efficient Retailers

The theory on which Lilly elected to try its case against Schwegmann makes it a particularly strong case for fair trade. Lilly did not assert in its complaint or affidavits that the defendants used the plaintiff's products as "loss leaders." Moreover, Mr. Schwegmann testified, and Lilly did not rebut, that he made no sales below cost, that his mark up was uniform on all products and yielded a fair

47 Id. at 537 (emphasis supplied).
49 313 U.S. 236 (1941).
50 Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205 F.2d 788, 791 (5th Cir.), cert. denied, 346 U.S. 856 (1953). Old Dearborn assumed, as well settled, "... the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself and as such is within the protection of the Fifth and Fourteenth Amendments."
profit. Thus, the *Lilly-Schwegmann* case put fair trade to the acid test and held fair trade constitutional even as applied to an admittedly efficient retailer. This of course was the acid test for fair trade. The fact that fair trade, however, makes "no distinction between competitive and predatory price cutting" does not mean that it is not constitutionally justifiable.

Since the legislative bodies have resolved the economic and social debate in favor of the fair trade laws, it would seem that arguments as to the merits of cut-rate pricing in general, and to Schwegmann's own pricing policies in particular, were irrelevant in considering constitutionality. Where a legislative body finds the existence of a general evil requiring remedial action, it has power to legislate generally. It is immaterial whether or not all or any of the abuses aimed at by the statute have been engaged in by the defendant in a particular case arising under it.

**Due Process: Delegation**

Perhaps the most interesting phase of the *Lilly-Schwegmann* case is the due process delegation issue. In substance the contention is that the state fair trade laws constitute a delegation of legislative price fixing power to private individuals, uncontrollably and without standards, and are so inherently arbitrary that they cannot be constitutional, but amount to the taking of defendant's property without due process of law. This, in the main, is the position of the dissenting judge in the Court of Appeals.

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52 "The contention apparently is that §11(b)(1) [of the Public Utility Holding Company Act], as applied to North American, is unconstitutional since none of the evils that led Congress to enact the statute is present in this instance. But if evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." North American Co. v. SEC, 327 U.S. 686, 710-711 (1946). Accord, *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192 (1912); *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943); *Ely Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939).

53 While the dissenting judge took the position that the case could be disposed of by dealing only with the Louisiana statute, his concluding paragraph,
The traditional view of the courts sustaining non-signer enforcement is that the fair trade laws do not delegate anything. This seems to be an oversimplification of the problem as to non-signers. The fact is that one group of private persons is enabled by the statute to establish a minimum price requirement which is enforceable by injunction against a non-signer. As Mr. Justice Jackson remarked, "That certainly is a delegation of the power to fix prices and to bind others who have not agreed." But it does not follow that the state fair trade laws are unconstitutional because there is a delegation to private persons.

The difficulty lies with the dogma of the non-delegability of legislative power which was applied in the Schechter line of cases. Many statutes, however, involving a substantial degree of delegation both to private parties and administrative agencies have been upheld, and if anything the label "obsolete," which Schwegmann attached to Old Dearborn, is

however, stated as a reason for invalidating the Louisiana statute that "... otherwise the original Sherman Act may be whittled away by legislative exemptions and exceptions..." Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., supra note 50 at 798. It is difficult to see how the Federal Constitution prevents Congress from amending its own statute.


55 See Jackson, The Struggle for Judicial Supremacy 164 (1941).

56 For an illuminating discussion of the problem, see Hale, Freedom Through Law 349-382 (1952); Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1938).

57 See Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 491 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). These cases were all cited in the briefs in the Old Dearborn case and rejected by the Supreme Court as a basis for holding the fair trade laws unconstitutional.

more appropriate to the Schechter, Panama and Carter cases.\(^{59}\)

Be that as it may, the fair trade laws do not give unfettered discretion to private individuals to the extent given in the Schechter line of cases. The Court of Appeals particularly noted that the acts were restricted to trade-marked goods in fair and open competition and thus the economic laws of competition "constitute a sufficient restraint against capricious or arbitrary price-fixing by the producer." \(^{60}\)

**Objections to the McGuire Act**

Schwegmann also argued that Congress could not constitutionally consent, as it did in the McGuire Act, to the effective operation of state fair trade laws in so far as they affect interstate commerce. Such action, they argued, was an unconstitutional delegation of legislative power and was also precluded by the force of the Commerce Clause. The argument is insubstantial under the Benjamin line of cases \(^{61}\)

\(^{59}\) As to the Schechter and Panama cases, see Wickard v. Filburn, 317 U.S. 111, 122 (1942); see Bowles v. Willingham, 321 U.S. 503, 540 (1944) (dissenting opinion) ("Whether explicitly avowed or not, the present decision overrules that in the Schechter case."); Yakus v. United States, 321 U.S. 414, 452 (1944) (dissenting opinion). See Davis, Administrative Law 42, 53 (1951); Jaffe, An Essay on Delegation of Legislative Power: II, 47 Col. L. Rev. 561, 581 (1947) ("Undoubtedly it can be argued that realistically considered Schechter has been put in the museum of constitutional history.").

As to the doubtful status of the Carter case, see United States v. Darby, 312 U.S. 100, 123 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (upholding substantially the same Act as was held unconstitutional in Carter).

\(^{60}\) Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205 F.2d 788, 792 (5th Cir.), cert. denied, 346 U.S. 856 (1953). The claim that the fair trade laws lack "standards" or "safeguards" also ignores the following statutory provisions. These define with particularity: (a) the persons against whom fair trade prices may be enforced (only persons who have contracted to that effect or persons who have acquired the commodity with full knowledge of the minimum price restriction and then wilfully and knowingly disregarded it); (b) carefully specified exceptions with respect to closing-out sales, damaged goods and sales pursuant to court order; and also (c) with respect to prices established by so-called "horizontal" agreements between producers, between wholesalers or between retailers.

\(^{61}\) Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946). Professor Dowling very ably analyzes the cases up to 1947, examining all of the competing theories relating to the Commerce Clause, and concludes: "After all—be its exact theory what it may—congressional consent is an assured doctrine." Dowling, Interstate Commerce and State Power—Revised Version, 47 Col. L. Rev. 547, 560 (1947); see Dowling, Interstate Commerce and State Power,
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and was so treated by the Court of Appeals in the Lilly-Schwegmann case. 62

B. The Recent State Attacks

The emphasis of the opponents of fair trade in the recent cases, as noted above, has shifted somewhat to include a state-by-state attack. In many of the recent cases they have argued that the state acts are only applicable to intrastate commerce in the absence of re-enactment of the state act. This argument has been successfully coupled with the state due process and delegation arguments in the Arkansas and Nebraska decisions 63 and is the outgrowth of Grayson-Robinson Stores, Inc. v. Oneida, Ltd. 64

In the Oneida case the Supreme Court of Georgia held that since the non-signer provision in the Georgia Act was invalid as to interstate transactions when enacted in 1936, 65 it remained ineffective as to these transactions (in spite of the passage of the McGuire Act) until re-enacted.

The recent New York, New Jersey and Louisiana cases 66 have rejected the argument as metaphysical and have taken the view that re-enactment is not necessary. The theory of these cases is that the state law was an unqualified exercise of the state's police power with respect to retail sales within the state, but that the full effectiveness of this exercise of

27 VA. L. Rev. 1 (1940); Koenig, Federal and State Cooperation Under the


63 See notes 12, 13 supra.

64 209 Ga. 613, 75 S.E.2d 161 (1953). A similar argument was made in the petition for certiorari in the Lilly-Schwegmann case, but as pointed out in Elgin Nat. Watch Co. v. Barrett, 213 F.2d 776, 780 (5th Cir. 1954), the issue is a state one. Cf. United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 729 (1944) (as bearing on the necessity of re-executing contracts in existence since before the enactment of the McGuire Act).


police power was impeded by the federal antitrust laws until they were amended by the McGuire Act.

The problem is not new and seems to be one in which prior local precedents will play an important part.67

The opponents of fair trade have also sought to upset fair trade by renewing their attacks on the titles assigned to various state acts as being misleading in that they did not put the legislatures on notice that non-signers were affected. This attack succeeded in Nebraska68 although there is authority to the contrary, particularly where the act in question has been re-enacted.69

The principal basis for attacking fair trade legislation, however, continues to be the state due process argument.70 The Supreme Courts in Florida71 and Michigan,72 as well as in Georgia,73 have in general adhered to the "affected with the public interest" doctrine74 (long since overruled as to the Federal Constitution in the Nebbia case),75 in holding their state non-signer provisions unconstitutional.

On the other hand, the courts upholding the constitutionality of the various state acts stress the principle of the finality of the legislative decision on questions of economic and social wisdom.76

68 See note 13 supra.
69 2 CCH TRADE REG. REP. (9th ed.) ¶7,134 (1952). If the Nebraska case is upheld on appeal it will render fair trade unenforceable against signers as well as non-signers in that jurisdiction. The claim that the fair trade laws are invalid under local constitutional provisions relating to monopolies has not as yet been renewed.
70 While the delegation issue has been interspersed with the due process arguments (see, e.g., Miles Laboratories v. Eckerd, 73 So.2d 680 [Fla. 1954]; General Electric Co. v. Brandeis & Sons, CCH TRADE REG. REP. ¶67,682 [Neb. D. Ct. 1954]), actually it is a separate constitutional issue in the states (General Electric Co. v. Masters, Inc., 307 N.Y. 229, 120 N.E.2d 302 [1954]) and perhaps a more substantial one than under Article I of the Federal Constitution. See DAVIS, ADMINISTRATIVE LAW 61-64 (1951).
71 See notes 10 and 37 supra.
72 See note 37 supra.
73 See note 11 supra.
75 See note 33 supra.
While it is true that state courts are entitled to their own standard of public welfare in applying their own constitutional provisions, the federal experience indicates that decisions as to the economic and social wisdom of a statute are best left to the legislative process.\footnote{I. Olsen v. Nebraska, 313 U.S. 236, 246-247 (1941).}

IV. Statutory Problems

It is not necessary to upset the constitutional basis for fair trade to render it ineffective. As long as interstate commerce is affected, as noted above, fair trade is merely a specific exemption from the anti-trust laws and a manufacturer must be careful to comply with both the terms of the McGuire Act and the state fair trade law at the place of resale. Thus, if a manufacturer of wearing apparel attempts to fair trade in Virginia he is engaged in illegal price fixing since clothing cannot be fair traded in that State.\footnote{II. Va. Code Ann. tit. 59, §§ 59-2, 59-20 (1949). Similarly the producer's or owner's trade-mark must be registered in the United States Patent Office if he wishes to fair trade in Kansas. See CCH Trade Reg. Rep. (10th ed.) ¶ 3,200 (1954).} The problem is further illustrated by the case of the integrated manufacturer-retailer or wholesaler.\footnote{III. The applicability of the horizontal prohibitions of the state and federal acts to such manufacturer is the subject of litigation now pending before the Federal Trade Commission and the federal and state courts. Doubleday & Co., 3 CCH Trade Reg. Rep. Docket No. 5897 (F.T.C. 1954), motion to dismiss the complaint granted, 3 CCH Trade Reg. Rep. (9th ed.) ¶ 11,359, rev'd, ¶ 11,515 (F.T.C. 1953). See Eastman Kodak Co., 3 CCH Trade Reg. Rep. Doc. No. 6040 (F.T.C. 1954), motion to dismiss denied, 3 CCH Trade Reg. Rep. (9th ed.) ¶ 11,527 (initial decision dismissing complaint after trial before hearing examiner, id., ¶ 11,731) (F.T.C. 1954); Eastman Kodak Co. v. Aljan Camera Co., CCH Trade Reg. Rep. ¶ 67,770 (Sup. Ct. N.Y. 1954) (judgment for plaintiff after trial); United States v. McKesson & Robbins, Inc., 122 F. Supp. 333 (S.D.N.Y. 1954) (Plaintiff's motion for summary judgment denied.). See 54 Col. L. Rev. 282 (1954); 67 Harv. L. Rev. 892 (1954).}

On the other hand, there are other statutory problems which arise primarily as defenses in enforcement proceedings and which are not likely to give rise to illegal price fixing charges. These involve, for example, the applicability of the state and federal statutes to interstate mail order sales, to indirect price-cutting devices (such as trading stamps), and to other situations.
Mail Order Sales

Ever since the Wentling case, the problem of interstate mail order sales has been a potential Achilles' heel to the fair trader.

In the Wentling case the court held that the Pennsylvania Fair Trade Act could not be enforced against interstate sales by a non-assenting Pennsylvania mail order house. Judge Goodrich held that the practical effect of fair trade pricing in such a situation constituted a burden on interstate commerce. Thus, he reasoned, if a local mail order house was required to abide by fair trade prices whereas its competitors in non-fair trade jurisdictions were not, or could sell at a lower fair trade price for the same article, interstate sales by the local seller would be restrained.

Section 4 of the McGuire Act was designed to alter the legal effect of the Wentling case. Assuming that under this section the state laws may be constitutionally applied to interstate transactions, what is the precise effect of the state fair trade laws?

No serious problem arises when the mail order house and the buyer are located in different fair trade jurisdictions. The difficult situation is where the seller is located in a non-fair trade state and sells to a buyer in a fair trade state. It has been claimed that such a seller is beyond the

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81 "Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action [against non-signers] as described in paragraph (3) of the subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce." 66 STAT. 632, 15 U.S.C. § 45(4) (1952).


reach of the fair trade laws and is in a position to make very
profitable forays into fair trade areas. If the seller arranges his sales so that title passes in the non-fair trade jur-
isdiction, this would, at first blush, seem to be true. The
difficulty, however, is that the mail order house must inform
its prospective purchasers of its lower prices, that is, it must
advertise in a fair trade jurisdiction. This is the source of
the mail order house's difficulty since the typical fair trade
statute provides that it is unlawful to wilfully or knowingly
advertise, offer for sale or sell at less than the fair trade
prices.

Several jurisdictional problems complicate the picture
at this point. It is doubtful whether advertising of itself is
a sufficient basis for the service of process. Thus, if the
mail order house in a non-fair trade state carefully polices
its extraterritorial activities and merely advertises in a fair
trade jurisdiction, the manufacturer will probably have to
proceed against it at its principal place of business, probably
a non-fair trade state. The problem then is whether the
non-fair trade jurisdiction is required to give full faith and
credit to the fair trade jurisdiction's law. Although the prob-
lem has not as yet been litigated in a fair trade context, it
should not be overlooked that the Constitution and the
Congressional Amendment to the Full Faith and Credit
Implementing Act in 1948 apply to the statutes as well as
judicial proceedings of every other state.

86 See Rahl, Fair Trade Since the McGuire Amendment in Lectures on
87 1 CCH TRADE REG. REP. (10th ed.) ¶ 3252 (1954).
88 Trans World Airlines v. Curtiss-Wright Corp., 119 N.Y.S.2d 729, 733-
734 (Sup. Ct. 1953); McGriff v. Charles Antell, 256 P.2d 703 (Sup. Ct. Utah
1953).
89 See note 84 supra.
90 U.S. CONST. Art. IV, § 1.
Abrasive Co., 345 U.S. 514 (1953); First Nat. Bank v. United Air Lines, 342
U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951); Green v. Van
Buskirk, 7 Wall. 139 (U.S. 1868); Green v. Van Buskirk, 5 Wall. 307 (U.S.
1866).
Indirect Price-Cutting

In their efforts to avoid the impact of the fair trade laws, distributors are increasingly employing the use of trading stamps redeemable in merchandise, combination sales of fair trade and other articles at a price slightly above the fair trade minimum, give-aways, trade-in allowances, and gifts to the customer's favorite charity in connection with the sale of fair traded articles.\textsuperscript{92} They have also resorted to selling new merchandise as second hand floor models\textsuperscript{93} and are reported as having abused the close-out sale exemption.\textsuperscript{94}

The use of these so-called indirect price-cutting devices is particularly important in terms of the manufacturer's obligation to follow a consistent policy of enforcement. If the manufacturer permits distributors to utilize indirect methods of reducing fair trade prices he may subsequently be charged with having abandoned his fair trade structure.\textsuperscript{95} It therefore is incumbent upon the manufacturer affirmatively to curtail particular indirect price-cutting practices when they are within the meaning of the local fair trade act, or make the practice uniformly available to all distributors.

In twenty states where the fair trade acts expressly forbid gifts, coupons and combination sales "except to the extent authorized by contract,"\textsuperscript{96} the problem is not serious. In these jurisdictions the manufacturer can uniformly permit the use of these devices without worrying about abandoning


\textsuperscript{94} See, \textit{e.g.}, Sunbeam Corp. v. Windsor-Fifth Avenue, Inc., 14 N.J. 222, 102 A.2d 25 (1953), 67 \textit{Harv. L. Rev.} 1263 (1954).


\textsuperscript{96} See tabulation in CCH \textit{Trade Reg. Rep.} (10th ed.) \textsuperscript{3008}3008 (1954).
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its fair trade structure or it can institute legal proceedings, if necessary, with a reasonable expectation that it will be able to enjoin their continued use without undue expense.97

The manufacturer's problem is serious, however, in those states in which the fair trade acts do not contain any "anti-concession" provisions.98 Its first problem is whether or not the various indirect price-cutting devices fall within the prohibitions of the local fair trade act. If it is fair trading in California99 and Pennsylvania100 it may safely assume that the granting of trading stamps with the purchase of fair trade merchandise, for example, is not considered a fair trade violation.101 On the other hand, in New York the practice has been held illegal even in the absence of an express statutory prohibition.102 But what of the other jurisdictions? The result of course will depend to a great extent on whether the local courts will follow the reasoning of the New York or the California trading stamp cases. But it may also depend to a large extent on the context in which the issue is litigated. For example, if a defendant raises the defense that the manufacturer has abandoned its fair trade program by indiscriminately allowing indirect price cutting to continue, there may be a temptation to hold that the local fair trade act is not applicable to the practice in question.103

In view of the sparseness of judicial precedent as to the various indirect devices, the manufacturer's problem is further aggravated in the states without the "anti-concession"

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98 See note 96 supra.
99 Food & Grocery Bureau v. Garfield, 20 Cal.2d 228, 125 P.2d 3 (1942).
100 See Bristol-Myers Co. v. Lit Bros., Inc., 336 Pa. 81, 6 A.2d 843 (1939).
103 Recent cases indicate, however, that manufacturers can provide for uniform exemptions without abandoning fair trade in states without the "anti-concession" provisions either tacitly (see Frawley Corp. v. Grosslight, CCH Trade Reg. Rep. ¶67,681 [Super. Ct. Cal. 1954]) or expressly (see General Electric Co. v. S. Klein-on-the-Square, Inc., 121 N.Y.S.2d 37 [Sup. Ct. 1953]). But see Frank Fisher Merchandising Corp. v. Ritz Drug Co., 129 N.J. Eq. 105, 19 A.2d 454 (1941); Bathasweet Corp. v. Weissbard, 129 N.J. Eq. 135, 15 A.2d 337 (1940); Magazine Repeating Razor Co. v. Weissbard, 125 N.J. Eq. 593, 7 A.2d 411 (1939).
provision since he will have a difficult time inducing voluntary compliance. If he chooses to prohibit particular indirect price-cutting practices he will have to sue without assurance of success. Furthermore, in view of the multitude of indirect price-cutting devices an enforcement program would be rather expensive.

**Problems Arising Out of the Klein Case**

We have examined a few of the more important statutory problems of fair trade, and turn now to the examination of a specific case to illustrate other statutory problems and to raise a more pervasive problem which every manufacturer must inevitably face, that is, keeping the cost of enforcement within feasible limits. This problem is raised particularly well by the recent *Klein* case.104

Once a manufacturer decides to fair trade it is his duty to enforce his fair trade structure. Experience demonstrates that this is no easy matter. Within sixteen months after the enactment of the McGuire Act, General Electric, for example, found it necessary to file over 145 complaints in 48 cities in 13 states.105 The first of these cases which went to trial in New York was the *Klein* case where General Electric was confronted with sixteen separate defenses.

In spite of the plaintiff's huge financial outlays expended in attempting to enforce its fair trade prices, foremost among the defendant's defenses was the allegation that the plaintiff forfeited any right to injunctive relief because it had been lax or negligent in its enforcement efforts.106

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106 The defendant in the *Klein* case also raised the following statutory defenses:

1. The plaintiff's contracts did not comply with the New York Fair Trade Act in that they did not: (a) constitute "valid contracts" under New York law or within the meaning of the statute, (b) provide that the distributor was required to sell at a price "stipulated" by the plaintiff, and (c) contemplate the maintenance of uniform prices on retail sales to ultimate consumers in New York;

2. The plaintiff's agreements were not contracts or agreements prescribing minimum or stipulated prices within the meaning of the McGuire Act;
Although the Court found that the plaintiff had followed a consistent and non-discriminatory policy of enforcement, much of the extensive evidence introduced at the trial was directed to this issue undoubtedly to the plaintiff's discomfort.

The manufacturer's burden does not end with injunctive relief in his favor; however, he must still police his injunctions. Thus, General Electric felt compelled to institute eleven contempt actions within the same sixteen months period referred to above.\(^\text{107}\)

Another recent case raises the question of whether or not the injunctions obtained against price cutters are enforceable in contempt actions in the federal courts. In the *Hoffmann-LaRoche* case\(^\text{108}\) the plaintiff brought a contempt proceeding arising out of the defendant's sale of packaged prescription products below prevailing fair trade prices.

Although the Court rejected the defendant's claim that the manufacturer's good will is not involved in retail drug transactions where the doctor specifies a brand name\(^\text{109}\) and where the label is removed at the time of the sale, the Court refused to hold the defendant in contempt because the injunction referred to prevailing prices. The Court found that Federal Rule 65(d) requires every order granting an injunction to be specific in terms and describe in reasonable detail,

\(^{107}\) Walton, *op. cit. supra* note 105. Furthermore, in 1948 G.E. obtained injunctions against ten price cutters and subsequently eight of these were adjudged in contempt which resulted in $650 in fines. See Bercher, *Discount Houses*, 14 *Consumer Rep.* 420 (1949).


\(^{109}\) The case is the first definitive ruling on fair trade and prescription products but it leaves the problem of compounded items still unresolved.
"and not by reference to the complaint or other document, the act or acts sought to be restrained." 110

Prior to this case it was customary to provide in the injunction that the defendant could not sell at prices lower than those fixed by prevailing fair trade contracts,111 it being of course implied that the defendant was to be given notice of changes in price. The Hoffmann-LaRoche decision is apparently the first case to hold this type of injunction unenforceable in the federal courts. The decision apparently requires the defendant to move to amend its injunctions every time it changes its fair trade price for a particular product. Since many manufacturers fair trade thousands of items, this decision if upheld will make the manufacturer’s lot an even more burdensome one.

V. CONCLUSION

Fair trade is a controversial field beset with many legal and non-legal problems. It is also an area in which the losers die hard, whether they are fair traders in Florida or the opponents of fair trade in New York. It therefore is unlikely that the volume of litigation in this field will greatly diminish in the near future. The economic motivations, for example, which have led the opponents of fair trade to attack the constitutionality of the New York legislation in the Court of Appeals on seven separate occasions will undoubtedly lead to a series of new or renewed litigations in other jurisdictions.

110 See Hoffmann-La Roche, Inc. v. Schwegmann Bros. Giant Super Markets, supra note 108 at 788. Rule 65(d), unfortunately, was not argued or briefed and the cases which the court relied upon seem to be inapplicable to the situation and the decision in essence must rest on a literal reading of Rule 65(d). Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945), holds that Rule 65(d) prohibits the enjoining of violations "as charged in the complaint"; Russell C. House Transfer & Storage Co. v. United States, 189 F.2d 349 (5th Cir. 1951), holds that a court has no power to enjoin generally all violations of the Interstate Commerce Act; Mayflower Industries v. Thor Corp., 182 F.2d 800 (3d Cir. 1950), holds that Rule 65(d) requires that the court assign reasons for granting an injunction. But see Iowa Pharmaceutical Ass'n v. May's Drug Stores, Inc., 229 Iowa 554, 294 N.W. 756 (1940), criticized in 54 HARV. L. REV. 1068 (1941). The court's decision also casts doubt as to the validity of injunctions obtained under OPA and similar legislation.

111 See, e.g., Sunbeam Corp. v. Masters, Inc., CCH TRADE REG. REP. ¶ 67,841 (S.D. N.Y. 1954). In an early phase of this proceeding Sunbean obtained a $16,000 contempt award under precisely the form of injunction held unenforceable in the Hoffmann-La Roche case.