

Fair Trade - Manufacturer-Wholesaler May Not Fix Prices with Competing Wholesalers

DePaul College of Law

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

DePaul College of Law, *Fair Trade - Manufacturer-Wholesaler May Not Fix Prices with Competing Wholesalers*, 6 DePaul L. Rev. 166 (1956)

Available at: <https://via.library.depaul.edu/law-review/vol6/iss1/16>

This Case Notes is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

which provide a period during which reconciliation is possible, to statutes which provide for the issuance of absolute decrees without any intervening time lapse, but forbid the remarriage of the parties either for a specified period of time or at the discretion of the court.

Of this group, it may be remarked generally that, while it may indeed prevent hasty remarriages by those who already have been through one divorce, and thus save them from a second trip through the divorce courts, it would seem to accomplish little in the way of reconciliation of parties on the verge of a divorce. Experience would lead us to discount whatever deterrent effect on divorces this group of statutes might seem to create.

The second broad grouping of jurisdictions, into which Illinois now settles by virtue of the decision in the *Doty* case, are those in which opportunity (at least) for reconciliation is offered before the parties have reached the point of no return in a divorce action, by providing for a cooling-off period either before an action may be filed,¹⁹ or after the commencement of an action but before the parties find themselves face to face in the divorce court, calling names and telling tales and airing the pent-up grievances which, once uttered, become so irretrievably final. It will readily be observed that, at least where there is a chance for reconciliation, this latter group of states provides an opportunity for the court to do all it can before the rupture of the marital relationship becomes a *fait accompli*.

In declaring constitutional the Divorce Act of 1955, the Illinois Supreme Court has placed the state in the forefront of those seeking, by appropriate legislation, to cut down somehow the appalling divorce rate and its constellar problems of broken homes, broken lives, juvenile delinquency, and the like. In providing for a 60-day cooling off period before a complaint may be filed, and before a decree can issue in the cause the act provides the opportunity, and by its provisions for administrative assistants to judges in divorce matters the machinery for reclaiming those marriages which can yet be saved.

vention of hasty divorces secured because of a desire to remarry immediately, and beyond the mere will to punish the guilty party. It aims to protect the marital status by ascertaining to some extent the fitness of those seeking to re-enter the marriage state after violating its precepts. . . ."

¹⁹ No. Car. Gen. Stat. (1951) c. 50, §§ 50-58; N.J. Stat. Ann. c. 50 § 2:50-2, as amended, L. 1948, c. 320, p. 1284, § (in cases of extreme cruelty).

FAIR TRADE—MANUFACTURER-WHOLESALE MAY NOT FIX PRICES WITH COMPETING WHOLESALERS

McKesson and Robbins, Inc., sold drugstore merchandise of various brands throughout the country, and also manufactured its own brand of drugstore products. The manufacturing division of the company main-

tained its own headquarters and staff of employees, but it was not separately incorporated and remained responsible to the president and board of directors of McKesson and Robbins. The company distributed a major portion of its own brand products directly to retailers through its wholesale division. The remainder of its manufactured products were distributed by independent wholesalers and then to the retailers. The wholesale division of McKesson and Robbins also sold brand products to independent wholesalers. The company had "fair trade" agreements with the wholesalers that had bought from its wholesale division and its manufacturing division, by which these independent wholesalers had bound themselves to adhere to the wholesale prices fixed by McKesson and Robbins. Upon these facts the Government brought suit on the basis that McKesson and Robbins' "fair trade" agreements with the independent wholesalers constituted illegal price fixing in violation of Section 1 of the *Sherman Act*.¹ McKesson and Robbins admitted the contracts, but interposed as a defense that they were exempt from this section by the *Miller-Tydings Act*² and the *McGuire Act*.³ *United States v. McKesson and Robbins, Inc.*, 351 U.S. 305 (1956).

The Supreme Court strictly construed the Sherman Act, reversed the

¹ 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1937). "Every contract or combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or 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. Every person who shall make any contract or engage in any combination or conspiracy declared by §§ 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding 1 year, or by both said punishments, in the discretion of the court."

² 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (1937). The provisos of 1 *supra* are the Miller-Tydings Act, passed Aug. 17, 1937.

³ 66 Stat. 632 (1952), as amended, 15 U.S.C.A. § 45 (1952): "(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or 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."

lower court,⁴ and held that a manufacturer-wholesaler who has "fair trade" agreements with competing wholesalers is not exempt from the Sherman Act merely because its agreements are as to the products it manufactures.

The basis of this decision, quite naturally, is to be found in a close examination of the *Sherman Act* and its amendments. The *Sherman Act* sought:

The prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.⁵

This policy is a primary feature of private enterprise. . . . Anti-trust is a distinctive American means for assuring the competitive economy on which our political and social freedom under representative Government in part depends.⁶

The philosophy behind Section 1 of the *Sherman Act*, as amended by the *Miller-Tydings Act* and the *McGuire Act*, is to allow as equal opportunities for small businesses as are available to larger businesses. A large concern may be a producer, wholesaler and retailer within itself and, of course, without objection set its own prices. The Sherman Act gives an opportunity for smaller businesses to do the same by having the manufacturer set prices by agreements with the wholesalers and retailers. This vertical price fixing is not considered monopolistic because it is still in open competition with other articles of like grade and quality.⁷

"Fair Trade" itself remains highly controversial. On the one hand, protection of "Fair Trade" pricing through state and Federal enactments stands vigorously backed by powerful organized retailers' and manufacturers' groups.⁸ On the other hand, the Department of Justice and the Federal Trade Commission in numerous past official policy pronouncements have registered adamant opposition to "Fair Trade" as incompatible with the Nation's anti-trust policy of fostering free competition,⁹ . . . as a distributor whose inventory consists largely of "Fair Trade" products can carry on business freed from the pressures and tribulations of price competition.¹⁰

However, after passage of the McGuire Amendment, a Congressional Committee Report stated by an overwhelming majority:

The Committee believes that a system of fair trade price maintenance produces beneficial results for many small businessmen when it operates to elimi-

⁴ 122 F. Supp. 333 (S.D. N.Y., 1954).

⁵ *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

⁶ Report of the Attorney General's National Committee To Study the Anti-Trust Laws (March 31, 1955).

⁷ FTC Report on Resale Price Maintenance, 70th Cong., 2nd Sess., H.R. Doc. No. 546, Part I at page xii.

⁸ Authority cited note 6 *supra*.

⁹ See footnote 6 *supra*; FTC Report on Resale Price Maintenance, pages 39-64 (1945).

¹⁰ *Ibid*.

nate loss, leader selling, irresponsible and deceitful price cutting, and contributes to achieving and maintaining a healthy resale price structure.¹¹

If McKesson & Robbins were only manufacturers agreeing on price maintenance with wholesalers, they would be complying with the provisions of the *Sherman Act*. But, as they are also wholesalers, they are agreeing with competitors on the same level, thus eliminating competition. An analysis of Section 1 of the *Sherman Act* as amended by the *Miller-Tydings Act* and the *McGuire Act* supports this conclusion, according to the Supreme Court. Section 1 provides that:

Every contract or combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Therefore, it does not depend on whether such violation is reasonable or unreasonable, nor what the motives of the participants are,¹² for any violation of this section is illegal per se.¹³ The district judge in the lower court opinion of this case¹⁴ said that the illegality of this section could not be effected simply by pointing to some restraint of competition. The "true test of legality of fair trade agreements between a producer-wholesaler and independent wholesalers is whether some *additional* restraint destructive of competition is occasioned." Here the district court was in error, as *any* restraint of competition was enough. It is to be noted that in *Ethyl Gasoline Corp. v. United States*, the Supreme Court said, "agreements for price maintenance of articles moving in interstate commerce are *without more*, unreasonable restraints within the meaning of the Sherman Act *because they eliminate competition*."¹⁵ No additional restraints are needed for a violation of Section 1, and any violation of this act is illegal per se.

Having entered into a price agreement, McKesson and Robbins stated that they had not violated this section because they were exempt from it under the *Miller-Tydings Act*¹⁶ and the *McGuire Act*.¹⁷ The *Miller-Tydings Act* "permits the seller of an article which bears his trade mark, brand, or name to prescribe a minimum resale price by contract, if such

¹¹ H.R. Rep. 1610, 83rd Cong., 2nd Sess., Progress Report of the Select Committee on Small Business (1954). But cf. H.R. Rep. 2683, Dec. 28, 1954, page 70.

¹² *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

¹³ Accord: *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Bausch and Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, Inc.*, 340 U.S. 211 (1951); *Penn. Water and Power Co. v. Consolidated Gas, Electric Light and Power Co. of Baltimore*, 184 F. 2d 552 (C.A. 4th, 1950).

¹⁴ Case cited note 4 supra.

¹⁵ 309 U.S. 436, 438 (1940).

¹⁶ Authority cited note 2 supra.

¹⁷ Authority cited note 3 supra.

contracts are lawful in the State where the resale is to be made and if the trademarked article is in free and open competition with other articles of the same commodity."¹⁸ Before the *Miller-Tydings Act*, the case of *Dr. Miles Medical Co. v. John D. Park and Sons Co.*,¹⁹ the court held that a system of contracts between manufacturers and wholesalers and retail merchants which sought to control the prices for sales by all such dealers by fixing the amount which the consumer should pay, amounted to an unlawful restraint of trade, invalid at common law, and so far as interstate commerce was affected, invalid under the *Sherman Act* of 1890. However, the *Miller-Tydings Amendment* to the *Sherman Act* in 1937 paved the way for the states to create "Fair Trade" laws as applied to intrastate transactions. It imposed the condition besides those previously heretofore mentioned, that *it shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between wholesalers, or between brokers, or between factors, or between persons, firms or corporations in competition with each other.*²⁰ Fifteen years later the *McGuire Act* was passed containing an almost identical proviso.²¹

The Government did not take issue with McKesson and Robbins' "vertical" Fair Trade agreements, which are exempted from the *Sherman Act* by the *Miller-Tydings Act* and the *McGuire Act* or as stated in *United States v. Bausch and Lomb Optical Co.*,²² "a distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the *Miller-Tydings Act*." The route is expressed in *Seagram Distillers Corp. v. Old Dearborn Distributing Co.*²³

Contracts between plaintiff [a manufacturer] and a wholesale distributor, or between distributor and retailers, are denominated vertical price fixing. . . . Contracts between producers or between wholesalers or between retailers as to sale or resale prices are denominated horizontal price-fixing contracts and are not [exempt by Statutes].

Also it can be stated:

Horizontal price fixing is one engaged in by those in competition with each other at the same functional level. The *Miller-Tydings Act* expressly continues

¹⁸ *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 296, 297 (1945).

¹⁹ 220 U.S. 373 (1911).

²⁰ *Eastman Kodak v. Schwartz*, 133 N.Y.S. 2d 908 (S. Ct., 1954).

²¹ Authority cited in note 3 supra.

²² 321 U.S. 707 (1944).

²³ 363 Ill. 610, 2 N.E. 2d 940 (1936).

the prohibitions of the Sherman Act against "horizontal" price-fixing by those in competition with each other at the same functional level.²⁴

McKesson and Robbins conceded that if a contract is between two competing wholesalers fixing the price of a brand product produced by neither of them, they are not exempt by the *Miller-Tydings Act*. However, McKesson-Robbins contended, "what would be illegal if done between competing independent wholesalers becomes legal if done between an independent wholesaler and a competing wholesaler who is also the manufacturer of the brand product because the wholesaler in contract with the independent wholesaler acts solely as a manufacturer selling to buyers rather than as a competitor of these buyers." Mr. Justice Harlan, in his dissent in the case at hand, agreed with the defendants' contention, observing:

While the Government concedes the right of a non-integrated manufacturer to eliminate price competition in his products between wholesalers, it finds a vice not contemplated by the Acts when one of the "wholesalers" is also the manufacturer, for then the contracts eliminate competition between the very parties to the contracts. But in either case, all price competition is eliminated, and I am unable to see what difference it makes between whom the eliminated competition would have existed had it not been eliminated.

Justice Harlan also called attention to the intent of Congress as a factor in determining the case at hand. In accord with this view is *Eastman Kodak Co. v. Schwartz*, where the court held that the intent of Congress was of the utmost importance in deciding a case based on a statute.²⁵ The court went on to cite cases where the Supreme Court had looked to legislative intent as a determining factor.²⁶ Furthermore, the court stated:

²⁴ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Accord: *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31 (N.D. Calif., 1953); *Sears v. Western Thrift Stores of Olympia, Inc.*, 10 Wash. 2d 372, 116 P. 2d 756 (1941); *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N.J.Eq. 105, 19 A. 2d 454 (1941); *Johnson and Johnson v. Charmley Drug Co.*, 11 N.J. 529, 95 A. 2d 391 (1953); Grether, *Price Control Under Fair Trade Legislation* (1939): "Vertical price control is defined as a price constraint between sellers on different levels, as for instance between manufacturers and wholesalers, manufacturers and retailers, or wholesalers and retailers. The most pronounced form of vertical price control has long been known as resale price maintenance. Horizontal price control is defined as a constraint between sellers on a given level. For instance, when retailers in a local market employ measures of price regulation by agreement among themselves, this activity would be classified as 'horizontal.'"

²⁵ 133 N.Y.S. 2d 908 (S. Ct., 1954).

²⁶ *United States v. Five Gambling Devices*, 346 U.S. 441 (1953); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Congress of Industrial Organization*, 335 U.S. 106 (1948); *Harrison, Collector of Internal Revenue v. Northern Trust Co., Executors*, 317 U.S. 476 (1943); *United States v. City and County of San Francisco*, 310 U.S. 16 (1940).

The express language of the *McGuire Act* and the intent of Congress permits a manufacturer . . . to fair trade its trade-marked products by means of agreements with retailers of said products even though it is directly engaged in some retailing (by a separately incorporated subsidiary) of those products, i.e., that in passing the *McGuire Act*, Congress had not intended to withhold its benefits from a manufacturer who also sold at the retail level; and further that the manufacturer's price-fixing was entirely "vertical" because its retailing was through a separate subsidiary. . . . It is equally true that competition between the manufacturer's products and products of the same general class manufactured by competing firms remains free and open and there is no agreement between the manufacturer and other manufacturers of similar products or between retailers of these products fixing the prices at which all such products shall be sold. It is only the latter type of horizontal agreements which Congress intended to prohibit by the *McGuire Act*.²⁷

However, the majority of the court found the act to be unequivocal, looking to Congress *only* as to the limitations *expressly* set forth in the *Miller-Tydings Act* and in the *McGuire Act*, stating that the fact remained that McKesson and Robbins were wholesalers operating on the same functional level as the independent wholesalers; both selling to retailers. "Horizontal price fixing is one engaged in by those in competition with each other at the same functional level."²⁸ Since price fixing between wholesalers is *expressly* prohibited by the *Miller-Tydings Act*, and McKesson and Robbins was a wholesaler, despite the fact that it was also a manufacturer, it was in competition with and operated on the same functional level as independent wholesalers to whom their manufacturing division sold, and thus they were in violation of the *Sherman Act*, were not exempt by the *Miller-Tydings Act*, and therefore were acting illegally *per se*.

²⁷ United States v. McKesson and Robbins, Inc., 351 U.S. 305 (1956).

²⁸ Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951).

TORTS—IOWA'S QUALIFIED RECOGNITION OF RIGHT OF PRIVACY

Defendant's newspaper published a picture of the mutilated and decomposed body of the plaintiffs' eight year old boy who had been found in a field about one month after he disappeared. Plaintiffs conceded that their son's disappearance and the subsequent discovery of his body were legitimate and privileged news, but they insisted that photographic depiction of the body went beyond those limits and thereby constituted an invasion of their right to privacy. The Iowa Supreme Court, in affirming the lower court's finding for the defendant, recognized for the first time the right of privacy as a sound doctrine. However, because a newsworthy