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FAIR TRADE—"NON SIGNER" CLAUSE IN STATE FAIR TRADE ACT HELD UNCONSTITUTIONAL

The plaintiff brought this action to enforce the Florida Fair Trade Act¹ against the defendants who were "non signers." The Florida Supreme Court dismissed the amended complaint, holding that the "non signer" clause of the Act is unconstitutional and void as an invalid use of the police power for a private, not public, purpose in that it sanctions anti-competitive price fixing contrary to traditional concepts of free competition. *Miles Laboratories, Inc. v. Eckerd, et al.*, 73 So. 2d 680 (Fla., 1954).

With the growth of the large chain, department, and cut-rate stores at the turn of the century in the United States, there came a system of vigorous price competition, underselling, and price cutting, causing wholesalers and retailers to organize and seek legislative aid.² This aid was in the form of resale price maintenance,³ a system which is brought about by a "vertical trade agreement" by which the manufacturer of a branded or trademarked commodity attempts to impose a stipulated resale price upon a distributor and all subsequent retailers.⁴ In 1911, such agreements were held invalid as to *interstate* commerce by the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁵ because they violated the Sherman Anti-Trust Act of 1890.⁶

As a result of this decision, modern fair trade acts relating to *intrastate* commerce started slowly, beginning with the California Fair Trade Act of 1931.⁷ Most states, doubtful of the constitutionality of this type of statute, made their move after the United States Supreme Court held, in *Old Dearborn Distributing Co. v. Seagrams-Distiller Corp.*,⁸ that the Illinois Fair Trade Act⁹ was constitutional and that the "non signer" clause¹⁰ did not violate due process or deny equal protection of the laws in violation of the Fourteenth Amendment.

¹ Fla., Rev. Stat. (1953) c. 541.

² Zorn & Feldman, *Business Under the New Price Laws* 7-22 (1937).

³ Resale price maintenance is that "system of distributing trade-marked articles by which the trade-mark owner fixes the price at which his trade-marked goods are to be sold by wholesalers and retailers irrespective of their individual contractual relations with the trade-mark owner." Callman, *The Law of Unfair Competition and Trademarks* at p. 358 (1945). For an excellent condensation of the purpose of resale price maintenance legislation, see 2 CCH Trade Reg. Rep. (9th ed.) ¶ 7052.

⁴ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), for a discussion of vertical and horizontal trade agreements.

⁵ *Ibid.*

⁶ 26 Stat. 209 (1890), as amended, 15 U.S.C.A. § 1 (1949).

⁷ Cal. Gen. Laws, Act 8782 § 1 (1931).

⁸ 299 U.S. 183 (1936).

⁹ Ill. Rev. Stat. (1953) c. 121- $\frac{1}{2}$, § 188.

¹⁰ The "non signer" clause in Illinois is as follows: "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract

Shortly thereafter, the Miller-Tydings Act¹¹ was passed by Congress. This legislation excepted price maintenance contracts on commodities in *interstate* commerce from the provisions of the Sherman Act. However, the "non signer" clause, which is found in most statutes to insure workable fair trade, was left unmentioned in the Miller-Tydings Act, and hence was not excepted from the Sherman Act. The result of this omission was the famous case of *Schwegmann Bros. v. Calvert Distillers Corp.*¹² in which the Supreme Court held that the Miller-Tydings Act did not except the "non signer" clauses from the Sherman Act. Fair trade was on shaky ground and Congress, realizing this, passed the McGuire Act¹³ in 1952, which exempted the "non signer" clauses from the Sherman Act. The constitutionality of this act has been upheld in various decisions.¹⁴

Florida, in the face of all this federal legislation, has consistently and distinctly found her fair trade acts unconstitutional, both as to state and federal constitutions.¹⁵

The principal case in Florida's short but fiery fair trade history is *Liquor Stores, Inc. v. Continental Distilling Corp.*,¹⁶ in which the plaintiff corporation, a liquor manufacturer, sold certain trademarked whiskies to a distributor under a trade agreement not to resell below a minimum price fixed by the plaintiff. The defendants, who did not sign the agreement, purchased some of these whiskies from the distributor with notice of the resale price agreement and sold the plaintiff's trademarked whiskey below the set price. The plaintiff brought suit to enjoin the defendant retailers from doing so under the Florida fair trade

entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." Ill. Rev. Stat. (1953) c. 121- $\frac{1}{2}$, § 189.

¹¹ 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (1937).

¹² 341 U.S. 384 (1951).

¹³ 66 Stat. 632 (1952), 15 U.S.C.A. § 45 (Supp. 1953).

¹⁴ *Schwegmann Bros. v. Eli Lilly Co.*, 205 F. 2d 788 (C.A. 5th, 1953) cert. denied, 346 U.S. 856 (1953). For an excellent analysis of the general situation see, *Lionel Corp. v. Grayson-Robinson Stores*, 15 N.J. 360, 104 A. 2d 304 (1954). See also *Scovill Mfg. Co. v. Skaggs Payless Drug Stores*, 275 P. 2d 619 (Cal., 1954); *Cal-Dak Co. v. Sav-on Drugs*, 40 Cal. 2d 492, 254 P. 2d 497 (1953); *General Electric v. Packard Bamberger & Co.*, 14 N.J. 209, 102 A. 2d 18 (1953); *General Electric v. Klein on the Square*, 121 N.Y.S. 2d 37 (1953).

¹⁵ The first fair trade law was enacted in 1937. Fla. L. (1937) c. 18395. This was found unconstitutional in 1939. *Bristol-Myers Co. v. Webb's Cut-Rate Drug Co.*, 137 Fla. 508, 188 So. 91 (1939). The Act was then amended. Fla. L. (1939) c. 19201.

¹⁶ 40 So. 2d 371 (Fla., 1949). The other leading cases expressing Florida's views and rejecting fair trade and similar acts, are as follows: *City of Miami v. Shell's Super Store Inc.*, 50 So. 2d 883 (Fla., 1851); *Seagram-Distillers Corp. v. Ben Greene, Inc.*, 54 So. 2d 235 (Fla., 1951); *Robbins v. Webb's Cut-Rate Drug Co.*, 153 Fla. 822, 16 So. 2d 121 (1943); *Scarborough v. Webb's Cut-Rate Drug Co.*, 150 Fla. 845, 8 So. 2d 913 (1942); *Miami Laundry Co. v. Florida Dry Cleaning and Laundry Board*, 134 Fla. 1, 183 So. 759 (1938); *State ex rel. Fulton v. Ives*, 123 Fla. 401, 167 So. 394 (1936).

law.¹⁷ In reversing the trial court, the Supreme Court of Florida held that it was an invalid use of police power for a private and not a public purpose to allow a price fixing statute designed to permit a small group to eliminate free competition effectively. This invalidity was said to be especially true in regard to those retailers who had not signed the price fixing agreement.¹⁸ In contrast to the opinion in *Old Dearborn Distributing Co.* the court held that the fair trade law did deny equal protection of laws in that it allowed manufacturers of trademarked commodities to fix prices and not manufacturers of nonidentifiable commodities.¹⁹

As to "non signers," the Court said, "Why should the trade-name owner have protection, which he does not need, at the expense of the consumer?"²⁰ Such protection is not necessary for the public welfare. It is not necessary to transgress the rights of others. The manufacturer can protect himself by not selling to a retailer who refuses to agree to his minimum sales price.

After the *Schwegmann* case, and before the McGuire Act, the Supreme Court of Florida again held that state's fair trade law unconstitutional, under the federal constitution and state constitution, because of the *Schwegmann* reasoning as to "non signers."²¹

This leads us to the McGuire and the instant case in which the purpose of the McGuire Act, to permit "non signer" clauses in fair trade acts, is ignored.²² The Court says in regard to this:

It is hardly necessary to point out that the decisions of this court interpreting the Constitution of Florida are supreme, and will not be overthrown by act of Congress or the Federal Courts unless some Federal constitutional question is involved.²³

Thus, Florida in affirming her previous decisions, has remained uninfluenced by the fact that the McGuire Act has been found constitutional,²⁴ that the fair

¹⁷ Fla. L. (1939) c. 19201.

¹⁸ "The police power has been wisely restricted to those things which of necessity affect the public morals, public health or public safety." 40 So. 2d 371, 374 (Fla., 1949).

¹⁹ "It seems obvious that such arbitrary selections for legislative favor as are contained in the Fair Trade Act were precisely what the constitutional provisions were designed to prevent." 40 So. 2d 371, 385 (Fla., 1949).

²⁰ *Ibid.*, at 388.

²¹ *Seagram-Distillers Corp. v. Ben Greene, Inc.*, 54 So. 2d 235 (Fla., 1951). Shortly thereafter, Florida again re-enacted her Fair Trade Act. Fla. Stat. (1953) c. 541.

²² McGuire Act only *permitted* "non signer" clauses so that Federal law would not be violated. The Act does not command or even suggest to Florida that she adopt such a provision.

²³ *Miles Laboratories, Inc. v. Eckert*, 73 So. 2d 680, 681 (Fla., 1954).

²⁴ *Schwegmann Bros. v. Eli Lilly Co.*, 205 F. 2d 788 (C.A. 5th, 1953) cert. denied, 346 U.S. 856 (1953); *Lionel Corp. v. Grayson-Robinson Stores*, 15 N.J. 360, 104 A. 2d 304 (1954). See also *Scovill Mfg. Co. v. Skaggs Payless Drug Stores*, 275 P. 2d 619 (Cal., 1954); *Cal-Dak Co. v. Sav-on Drugs*, 254 P. 2d 497 (Cal., 1953); *General Electric v. Packard Bamberger & Co.*, 14 N.J. 209, 102 A. 2d 18 (1953); *General Electric v. Klein on the Square*, 121 N.Y.S. 2d 37 (S. Ct., 1953).

trade acts have been found constitutional,²⁵ and that the majority opinion throughout the country is strong against her. She has rejected their argument that price cutting injures the goodwill of the producer. She has rejected their argument that price cutting injures the general public. She has rejected their argument that the statute is needed to protect the producer's property interest in his trademark.²⁶

Illinois stands as the bulwark of this majority opinion. It was her fair trade act,²⁷ including the "non signer" clause,²⁸ that was declared constitutional by the United States Supreme Court in the decision that opened wide the doors to modern fair trade, the *Old Dearborn* case. The reasoning of the Court in that case has been the basis of almost all courts who have found their fair trade acts constitutional. This constitutionality was upheld in *Triner v. McNeil*²⁹ where the Illinois Supreme Court said that the police power of the state was sufficiently broad to authorize the enactment of such a statute and that no special privileges and immunities were granted in violation of equal protection of the laws. The court said that the judiciary has no power to interfere with the determination of economic policy made by the legislature unless the legislation is found arbitrary and unreasonable.³⁰

But the Florida view, instead of losing ground, seems to be gaining support. In Georgia,³¹ the Georgia fair trade act of 1937 was held unconstitutional and void under the Sherman Act when passed, and if void when enacted, the statute is forever void.³² In addition, it was stated that the act was unconstitu-

²⁵ Among them are: *Seagram Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N.E. 2d 940 (1936); *aff'd sub nom Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936); *Sunbeam Corp. v. Wentling*, 185 F. 2d 903 (C.A. 3d, 1950); *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 55 P. 2d 177 (1936); *Pepsodent Co. v. Krauss Co. Ltd.*, 200 La. 959, 9 So. 2d 303 (1942); *Schill v. Remington Putnam's Book Co.*, 179 Md. 83, 17 A. 2d 175 (1941); *W. A. Sheaffer Pen Co. v. Barrett*, 209 Miss. 1, 45 So. 2d 838 (1950); *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 7 N.E. 2d 30 (1937); *Borden Co. v. Schreder*, 182 Ore. 34, 185 P. 2d 581 (1947); *Miles Laboratories v. Owl Drug Co.*, 67 S.D. 523, 295 N.W. 292 (1940); *Frankfort Distillers Corp. v. Liberto*, 190 Tenn. 478, 230 S.W. 2d 971 (1950); *Sears v. Western Thrift Stores of Olympia*, 10 Wash. 2d 372, 116 P. 2d 756 (1941); *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N.W. 426 (1937). For a complete list showing the states that have declared their fair trade acts constitutional, consult 2 CCH Trade Reg. Rep. (9th ed.) ¶ 7128.

²⁶ The majority of the courts cited in note 25 *supra* were content to follow these basic arguments as laid down in *Old Dearborn Distributing Co. v. Seagrams Distillers Corp.*, 299 U.S. 183 (1936).

²⁷ Ill. Rev. Stat. (1953) c. 121-½ § 188 *et seq.*

²⁸ Ill. Rev. Stat. (1953) c. 121-½ § 189.

²⁹ 363 Ill. 559, 2 N.E. 2d 929 (1936).

³⁰ These two cases aptly summarize the Illinois view.

³¹ *Grayson-Robinson Stores Inc. v. Oneida, Ltd.*, 209 Ga. 613, 75 S.E. 2d 161 (1953), cert. denied, 346 U.S. 823 (1953).

³² There is much authority to the contrary concerning this doctrine of void "*ab initio*." In *re Rahrer*, 140 U.S. 545 (1891) is the principal case. See also, *General Electric Co. v. Packard Bamberger & Co. Inc.*, 14 N.J. 209, 102 A. 2d 18 (1953), which held that re-enact-

tional under the due process clause of the Georgia Constitution,⁸³ in that the business regulated was not affected with a public interest.⁸⁴

In Michigan, prior to the McGuire Act and subsequent to the *Schwegmann* case, in an action to enjoin the defendant "non signer" from selling the plaintiff's fair trade articles below the minimum price, the Supreme Court of Michigan held that the Michigan Fair Trade Act was violative of the due process clause of the state constitution, and that the authorization of resale price maintenance agreements exceeded the police power of the state.⁸⁵

Most recently, the Arkansas Supreme Court in *Union Carbide & Carbon Corp. v. White River Distributors Inc.*,⁸⁶ after analyzing Florida, Georgia, and Michigan decisions as well as the decisions of seventeen states who have found their fair trade acts constitutional, fell in line with this minority. They held that the non signer clause of their fair trade act violated the due process clause of their constitution in that it restrained free competition, benefited a certain few and therefore was in derogation of the general welfare.

So today, when nearly all the states have fair trade acts⁸⁷ and more than half have as yet to pass on the constitutionality of their acts,⁸⁸ the following problems present themselves: What will those states whose fair trade laws were enacted before the Miller-Tydings Act and before the McGuire Act⁸⁹ hold as to their acts in relation to the Georgia decision which declared its act void "*ab initio*"? What will all of the courts say in regard to Florida's stand in the instant case, which refuses the sanctions of the McGuire Act? What will these courts say in regard to the pointed argument of this strong minority that the fair trade laws are an invalid use of police power for a private and not a public purpose?

Thus, today it seems that the fair trade acts are again on shaky ground.

ment of their fair trade law was not necessary after the passage of the McGuire Act to make the "non signer" clause enforceable.

⁸³ Ga. Const., Art. I, § 1, para. 3.

⁸⁴ Georgia, as Florida, relies on the well-settled rule that a court may interpret its own constitution as it pleases. *Harris v. Duncan*, 208 Ga. 561, 67 S.E. 2d 692 (1951).

⁸⁵ *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W. 2d 268 (1952). The court felt that the better reasoned view is the Florida one, stated in *Liquor Store Inc. v. Continental Distilling Corp.*, 40 So. 2d 371, (Fla., 1949).

⁸⁶ 23 LawWeek 2416 (Feb. 22, 1955).

⁸⁷ Texas, Vermont, Missouri and the District of Columbia are the only states who have not passed fair trade laws.

⁸⁸ See CCH Trade Reg. Rep. ¶ 8004 through ¶ 8964 (1953).

⁸⁹ A majority of fair trade acts were enacted before these two acts. CCH Trade Reg. Rep. ¶ 8004 through ¶ 8964.