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Trade Regulation—Resale Price Maintenance—Contracts Between Partially Integrated Corporations and Competing Wholesalers, United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956)

the conduct is not indictable,[33] the only sanctions available would be suspension or disbarment.

TRADE REGULATION—RESALE PRICE MAINTENANCE—CONTRACTS BETWEEN PARTIALLY INTEGRATED CORPORATIONS AND COMPETING WHOLESALERS

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

Defendant corporation, in addition to wholesaling the drug products of various manufacturers, manufactures similar commodities which are distributed through its wholesale outlets and through independent wholesale outlets.[1] Defendant executed contracts with independent wholesalers establishing stipulated resale prices for its products. The Justice Department instituted a civil suit based upon the allegation that since these "fair trade" agreements were executed with persons with whom defendant competed, section one of the Sherman Antitrust Act[2] had been violated. Defendant maintained that the contracts were lawful under amendments which created specific statutory exceptions[3] to the Sherman Act. The Supreme Court, reversing the lower court,[4] held that the contracts were "illegal per se" under section one of the act.[5]

Section one of the Sherman Act proscribes "every contract, combination . . . or conspiracy, in restraint of trade . . . ."[6] In two early cases construing this section the Supreme Court evolved two important doctrines. In *Standard Oil Co. v. United States*[7] the Court stated that only *unreasonable* restraints of trade were proscribed; but in *Dr. Miles Medical Co. v. John D. Park & Sons*,[8] it was held that price fixing agreements affecting interstate commerce were per se restraints of trade under section one.[9] Shortly after the *Miles* case fair trade

33. 18 U.S.C. § 1503 (1952) provides that any person is liable to prosecution by indictment if he corruptly or by threats or force endeavors to influence, intimidate, or impede any juror, witness, or officer in the discharge of his duty, or obstruct the due administration of justice.

1. Defendant corporation consists of a single manufacturing division and 74 wholesale outlets. Its total sales for the fiscal year ending March 31, 1954, were $338,000,000. The self-manufactured products furnished only $11,000,000, or slightly more than 3% of the total sales. United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

2. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952). See text supported by note 6 *infra* for the pertinent provision of this section.

3. Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952); McGuire Act, 66 STAT. 632, 15 U.S.C. § 45 (1952).

4. United States v. McKesson & Robbins, Inc., 122 F. Supp. 333 (S.D.N.Y. 1954).

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

6. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952).

7. 221 U.S. 1 (1911).

8. 220 U.S. 373 (1911).

9. The illegal per se rule was rigidly adhered to by the Court. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (price fixing illegal

began to receive state legislative and judicial recognition,[10] and by 1937 Congress had passed the Miller-Tydings Act[11] which, in effect, permits *vertical*[12] resale price maintenance, commonly referred to as "fair trade."[13] Under federal[14] and supplemental state fair trade legislation[15] a manufacturer may, by contract or agreement, prescribe minimum or stipulated prices[16] at which a wholesaler or retailer must resell the manufacturer's product.[17] A proviso preserves the illegality

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per se even though only maximum prices were fixed); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950) (even though prices were not mandatory); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (without consideration as to reasonableness).

10. New Jersey first legalized resale price maintenance by requiring sellers of goods to sell the commodities at prices established by the manufacturer. N.J. Laws 1913, c. 210. In Robert H. Ingersoll & Brother v. Hahne & Co., 89 N.J. Eq. 332, 108 Atl. 128 (1918), a retailer was enjoined from reselling products at a price below that fixed by the manufacturer. In 1931 the California legislature passed the first fair trade statute which validated resale price maintenance *contracts*. Cal. Laws 1931, c. 278. Two bills legalizing resale price maintenance were introduced into Congress shortly after the *Miles* case, but neither came to a vote. OPPENHEIM, FEDERAL ANTITRUST LAWS 384-85 (1948).

11. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

12. "[V]ertical price fixing [is] . . . the practice of fixing a price at which one person must sell a commodity to another person at a different level of the distribution system." 1 CCH TRADE REG. REP. ¶ 3001 (1954).

13. "Resale price maintenance laws (bearing the euphemistic title of 'Fair Trade') permit the manufacturer or producer of a trade-marked commodity to establish by contract minimum or stipulated wholesale and retail prices. . . ." Weston, *Resale Price Maintenance and Market Integration: Fair Trade or Foul Play?* 22 GEO. WASH. L. REV. 658, 659 (1954).

14. In 1952 the Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952), was supplemented by the passage of the McGuire Act, 66 STAT. 632, 15 U.S.C. § 45 (1952), which provides that parties may by contract or agreement "prescribe minimum or stipulated prices for the resale of a commodity" and that such contracts are binding on "persons who are not parties thereto." Many state fair trade laws contain similar provisions. See, *e.g.*, ILL. ANN. STAT. c. 121½, § 189 (1955). These "nonsigner" statutes are essential to effective fair trade legislation since without such measures a manufacturer would be forced to execute agreements with every outlet in the state in order to effectively fair trade his product.

The passage of the McGuire Act was precipitated by a Supreme Court decision which held that the Louisiana nonsigner provision was unenforceable as to goods in interstate commerce. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The Supreme Court later denied certiorari when the McGuire Act was challenged on constitutional grounds. Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 346 U.S. 856 (1953). An Illinois nonsigner provision was held constitutional as applied to goods in intrastate commerce. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936). See 1 CCH TRADE REG. REP. ¶ 3085 (1956) for developments concerning state constitutionality of nonsigner provisions.

For a concise history of fair trade in the United States, and for the English origins of fair trade, see Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825-49 (1955).

15. The federal statutes authorize fair trade only as to goods in interstate commerce which are resold in states having fair trade legislation. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952); 66 STAT. 631, 15 U.S.C. § 45 (1952). Forty-five states have enacted fair trade legislation. For complete texts of these statutes, see 2 CCH TRADE REG. REP. ¶¶ 10001-5532 (1956).

16. The Miller-Tydings Act merely authorized the fixing of minimum prices through fair trade agreements. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952). The McGuire Act permits the parties to a fair trade agreement to *stipulate* the price at which the commodity must be resold. 66 STAT. 631, 15 U.S.C. § 45 (1952).

17. See notes 12-13 *supra*.

of *horizontal* price fixing, *i.e.*, price maintenance agreements between competitors.[18] Since a vertical, partially integrated corporation, such as defendant, combines two or more successive stages in the manufacturing-distribution system and relies, for distribution, not only upon its own outlets but also upon competing[19] independent outlets,[20] the agreements in the principal case squarely presented the Court with the issue whether contracts having both vertical and horizontal aspects were within the Miller-Tydings exception to section one.

In the principal case, the majority opinion considered the issue as "a narrow one of statutory interpretation,"[21] and stated that the contracts fell squarely within the proviso to Miller-Tydings which continues the proscription against price fixing agreements "between wholesalers . . . or between persons, firms or corporations in competition with each other."[22]

There are certain immediate consequences of the instant decision which may be considered to be unfair to a partially integrated corporation. From the adoption of the Miller-Tydings Act in 1937 until 1952 there seemed to be no question as to the validity of fair trade contracts executed by these corporations:[23] the antitrust division had never assailed such agreements, and the Federal Trade Commission had recognized their validity.[24] During this period, many corporations had de-

18. "[H]orizontal price fixing . . . concerns the fixing of prices by persons who are in competition with one another, that is, persons at the same level of distribution." 1 CCH TRADE REG. REP. ¶ 3001 (1954).

19. Defendant conceded that it was in competition with the wholesalers with whom it executed the fair trade agreements. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 312 (1956); Brief for Appellees, p. 3, *ibid.*

20. Weston, *supra* note 13, at 673 & n.50. See also Hale, *Vertical Integration: Impact of the Antitrust Laws Upon Combinations of Successive Stages of Production and Distribution*, 49 COLUM. L. REV. 921 (1949).

21. 351 U.S. at 309. The Court refused to consider any economic or policy arguments in construing the statute. 351 U.S. at 315-16.

The dissenting opinion suggests that the majority was motivated in its decision by a distaste for fair trade generally. "Lack of sympathy with an Act of Congress does not justify giving to it a construction that cannot be rationalized in terms of any policy attributable to Congress." 351 U.S. at 316 (dissenting opinion).

Clearly there exists a sharp conflict as to whether fair trade is a desirable economic policy. A substantial portion of the country's informed opinion condemns fair trade. See FTC Report on Resale Price Maintenance *passim* (1945); ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 149-55 (1955); *The Not-So-Fair-Trade Laws*, Fortune, Jan. 1949, p. 70. The Miller-Tydings and McGuire Acts are sometimes cited as results of expert and lavish lobbying techniques by the drug trade, rather than as evidence of deep-rooted congressional convictions. See Weston, *supra* note 13, at 658 & n.2. In addition, it is to be noted that Congress has never deemed it desirable to enact a fair trade law for the District of Columbia.

22. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

23. For example, Eastman Kodak Company, a partially integrated corporation, had obtained 39 injunctions enforcing its fair trade contracts against retailers in various jurisdictions. Weston, *supra* note 13, at 665.

24. Eastman Kodak Company, a partially integrated corporation, instituted an action to vacate a previous cease and desist order of the FTC which had pre-

veloped an effective distribution system through partial integration[25] and, through the adoption of fair trade, had also protected a property interest in their products, viz. goodwill.[26] The principal case forces these corporations to make a choice between undertaking a costly distributive reorganization or discontinuing resale price maintenance.[27] Since fair trade agreements between partially integrated corporations and their competing outlets are now held to violate the Sherman Act, another consequence of the decision in the principal case is that such corporations presumably are liable for treble damages to anyone injured[28]—at least insofar as the statute of limitations will permit.[29]

Not expressly relying on these hardships to partially integrated corporations, but apparently on the theory that a literal interpretation of the statute would produce inconsistent results, the dissenting opinion

vented the company from fair trading one of its products. The FTC vacated the previous order. 1 CCH TRADE REG. REP. ¶ 3154.75 (1954). One writer believes it extremely unlikely the FTC would have lifted the ban had it believed that these fair trade agreements were illegal. Weston, *supra* note 13, at 661 n.14.

25. U.S. News & World Report, Aug. 13, 1954, pp. 68, 71.

26. There are said to be two principal justifications for the adoption of fair trade. (1) It allows manufacturers to protect their property interest in their products, viz. goodwill, by preventing the "cheapening" effects of price cutting, Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 193 (1936); Weston, *supra* note 13, at 659; (2) It protects small business from the superior buying power of large chains, Bowman, *supra* note 14, at 833; Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967, 973-74 (1955); 2 U.S. CODE CONG. & AD. NEWS 2192-94 (1952).

27. In a proceeding before the FTC it was noted that the construction of the Miller-Tydings and McGuire Acts contended for by the government counsel came rather late. It was stated that to construe these statutes in a manner rendering fair trade agreements by partially integrated corporations unlawful "would require thousands of manufacturers, if they want to fair trade, to make major changes in their present marketing methods with uncertain, but admittedly large economic consequences." Eastman Kodak Co., FTC Complaints, Orders, Stipulations 1954-1955 ¶ 25291, at 35423 (FTC 1955). See also Weston, *supra* note 13, at 680, 676 n.58 (statistics showing "tremendous" amount of partial integration today).

There are possibly three methods by which a partially integrated corporation may effect resale price maintenance without the use of fair trade: (1) by increased forward integration, United States v. Columbia Steel Co., 334 U.S. 495 (1948); (2) by refusing to deal unless prices are maintained, FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Rahl, *Antitrust Policy in Distribution*, 104 U. PA. L. REV. 185, 193 (1955); (3) by consignment or agency selling, United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. General Elec. Co., 272 U.S. 476 (1926).

28. 38 STAT. 731 (1914), 15 U.S.C. § 15 (1952); Weston, *supra* note 13, at 679.

29. Another syllogism which lends support to the dissenting opinion is that: partial integration was widely utilized when the Miller-Tydings and McGuire Acts were passed; Congress is presumed to be aware of contemporaneous conditions when it enacts legislation; therefore, Congress intended to allow partially integrated corporations to fair trade. Eastman Kodak Co., FTC Complaints, Orders, Stipulations 1954-1955 ¶ 25291, at 35422-24 (FTC 1955). Most of the cases cited in support of this logic, however, deal with Congress's knowledge of contemporaneous events *which were sought to be corrected* by the legislation. See, *e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457 (1891). The syllogism would seem to find support in Weston, *supra* note 13, at 680 where it is stated that since there is no legislative history to the contrary, the partially integrated concern should be permitted to fair trade.

stated that there should be a departure from what appears to be "clear" statutory language so that a consistent and rational intent would be attributed to the legislature.[30] Thus, the dissenting opinion in the instant case reasoned that: resale price maintenance by a non-integrated corporation, e.g., one engaged solely in manufacturing, is clearly lawful under Miller-Tydings; the immediate economic effect of resale price maintenance is the same whether it is utilized by a non-integrated or by a partially integrated corporation—in either case resale price competition of the fair-traded product is eliminated; therefore, to discriminate against the partially integrated corporation by holding its fair trade agreements illegal is to attribute inconsistencies to the congressional intent. Thus, the dissent concluded that the statute should not be literally construed, but rather, the purpose and policy underlying the statute should be determined and effectuated.[31] This rationale is further supported by the fact that the only pertinent legislative history would seem to indicate that perhaps Congress intended to allow fair trading by such corporations.[32]

However, there appears to be some uncertainty as to whether elimination of resale price competition is the only economic effect of fair trading by a partially integrated corporation. It has been asserted that the use of fair trade by such a corporation is conducive to further integration and that it may be used as a lever to "squeeze out" competitors at another functional level.[33] It has been further asserted that since either use increases the likelihood of eventual monopoly,

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30. 351 U.S. at 316. The dissenting opinion also seemed to indicate that since the statute was ambiguous, to look behind the statutory wording in construing it was justified. 351 U.S. at 318-19 (dissenting opinion).

31. *Id.* at 316-18 (dissenting opinion). The FTC, considering the precise issue involved in the principal case, had reached a result contrary to that of the majority opinion. One of the factors considered by the commission was that the effect of the fair trade agreements in question would be the same whether the corporation involved was partially integrated or non-integrated, *i.e.*, in either case there would be uniformity of resale prices. Eastman Kodak Co., FTC Complaints, Orders, Stipulations 1954-1955 ¶ 25291, at 35423 (FTC 1955).

32. Speaking in support of the McGuire Act, which contains a proviso almost identical to that contained in Miller-Tydings, Senator Humphrey stated:

> Under the bill, such firms [partially integrated corporations] may make resale price-maintenance contracts . . . because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade marked or branded commodity. . . .

98 CONG. REC. 8870 (1952). The majority opinion attributed little significance to the statement, noting that the Senator was not in charge of the bill, and that he was not a member of any committee which considered the bill. Moreover, the McGuire Act originated in the House, and was passed there prior to Senator Humphrey's discussion. 351 U.S. at 313-14. See also Taft, C.J., in Railroad Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563, 589 (1922) (legislative history is not pertinent when the statutory language is clear to the Court).

33. Note, *Use of Resale Price Maintenance by Integrated Manufacturers: A New Loophole for Abuse of Monopoly Power*, 64 YALE L.J. 426 (1955).

partially integrated corporations should not be allowed to utilize the fair trade device.[34] In rebuttal, it has been said that since one of the prime objectives of integration—the power to control prices—can be effectively achieved through fair trade, the likelihood of further integration is reduced by the use of this price fixing device.[35] Very little material has been found in which the economic effects of allowing the combination of fair trade and partial integration have been considered. The few articles which attempt to examine the topic merely serve to call attention to *possible* economic effects of allowing the combination and are decidedly inconclusive.[36]

Thus, in the absence of a thorough, intensive study of the total economic consequences of fair trading by a partially integrated corporation, it would appear that it cannot be accurately stated that to extend the use of fair trade to such a corporation is or is not the same as to allow a non-integrated corporation to utilize this marketing device.[37] Such a study would seem desireable before a departure from clear statutory language would be justified on the basis of economic effects.[38] Since a determination of these effects would involve a consideration of many complex economic issues, it would be appropriately conducted by the legislature through the use of its extensive investigatory processes. It is submitted, therefore, that the majority of the court was correct in refusing to depart from the clear wording of the statute on the basis of a consideration of total economic effects when

34. *Ibid.*

35. Weston, *supra* note 13.

36. See Weston, *supra* note 13; Note, 64 YALE L.J. 426 (1955); Recent Developments, 54 COLUM. L. REV. 282 (1954).

37. The district court apparently realized that there may be economic consequences other than the mere elimination of resale price competition of the fair traded article. The Court stated that the fair trade agreements executed by partially integrated corporations are not conclusively within Miller-Tydings, but that the illegal per se rule would not be applied to the contracts without a showing of "some additional" restraint of trade other than the mere elimination of resale price competition. United States v. McKesson & Robbins, Inc., 122 F. Supp. 333 (S.D.N.Y. 1954). In effect, the district court attempted to create a third group of price fixing contracts which would or would not be illegal, depending upon whether, in a particular case, there was "some additional" restraint of trade. The Supreme Court rejected such an approach, stating that there is no basis in the statute for attributing to Congress an intent to create a third category of contracts: the legislature clearly intended to establish only two classes of price fixing contracts—those unlawful under the illegal per se rule and those lawful under the Miller-Tydings Act. 351 U.S. at 310-11.

38. The dissenting opinion apparently felt that a departure from the statute was justified by considering only the immediate economic effects of allowing the partially integrated corporation to fair trade, *i.e.*, the removal of resale price competition on a particular commodity, rather than considering the total economic consequences flowing from extending the marketing device to partially integrated concerns. If this value judgment were to be accepted, the argument advocating departure from the literal wording of the statute becomes very convincing, for in that case it must be admitted that inconsistent results are being reached under the statute.

conflicting, inadequately-supported economic arguments were presented.[39]

The majority holding is further supported by the doctrine of the "plain meaning rule" which requires that where statutory language is clear and a literal construction of the statute will not lead to "absurd"[40] results, "the words employed are to be taken as an expression of the meaning intended."[41] In addition, since Miller-Tydings is an exception to a basic policy against any price fixing, the Court's narrow construction of the statute was justified.[42] If the principal case is not in accord with the legislative intent, or if Congress should determine that the instant decision places an onerous burden on partially integrated corporations, it now has the opportunity to make its intention clear.

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39. The conflicting economic arguments offered to the Court were apparently based on a student note, Note, 64 YALE L.J. 426 (1955), and an article, Weston, *supra* note 13.

40. Even if the approach of the dissenting opinion is adopted—that inconsistent results are reached under the statute—it does not seem that the results are "absurd" under the plain meaning rule. See Marshall, C.J., in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819) (absurdity must be so momentous that all mankind would without hesitation reject application of rule); United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868) (absurdity must shock general moral and common sense).

41. United States v. Missouri Pac. Ry., 278 U.S. 269, 278 (1929). On the plain meaning rule, see generally 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 4701-06 (3d ed. 1943). See Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2 (1939) for an evaluation of the plain meaning rule and its application. The author is of the opinion that the rule may be of little value.

42. 2 SUTHERLAND, *op. cit. supra* note 41, § 4933.