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## Price Maintenance as Affected by the Schwegmann Decision

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ment points out, that Article 21.23 of the *Texas Insurance Code of 1951* destroys the alleged incentive to take life, and even assuming that the incentive continues to exist, it would certainly be no stronger where the transaction is with a legal reserve company rather than with a fraternal benefit society.

While the court recognizes the rule of *Cheeves v. Anders* as controlling, this recent decision clearly and strongly shows dissatisfaction with the doubtful doctrine and indicates that, with the aid of legislation, an opportunity to change it would be welcome. It is believed that it is time to get into step with the rest of the states on this important point.

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M. J. H.

#### PRICE MAINTENANCE AS AFFECTED BY THE SCHWEGMANN DECISION

**A**FTER working since the early 1900's to obtain federal approval of resale price maintenance, the proponents of price maintenance seemingly hit paydirt in 1937 when Congress passed the Miller-Tydings Amendment<sup>1</sup> to the Sherman Antitrust Act.<sup>2</sup> Passed in 1890, the Sherman Antitrust Act declared illegal every contract, combination, or conspiracy in restraint of interstate or foreign commerce. The common law recognized that competition cannot be unreasonably restrained, but in order to strike down unreasonable restraints someone had to become dissatisfied and file a suit. Under the Sherman Act the Attorney General could institute the action and protect the public from unreasonable restraints on trade. The United States Supreme Court applied the "rule of rea-

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<sup>1</sup> Act of Aug. 17, 1937, c. 690, Title VIII, 50 STAT. 673, 693; 15 U. S. C. 1946 ed. § 1.

<sup>2</sup> Act of July 2, 1890, c. 647, § 1, 26 STAT. 209; 15 U. S. C. 1946 ed. § 1.

son" to Section 1 of the Sherman Act. A restraint is valid if it is necessary to the reasonable protection of a property right which the law recognizes.<sup>3</sup> Under the statute the Supreme Court struck down resale price maintenance contracts concerning goods in interstate commerce as void. Applying the "rule of reason," the Court said the contracts were not reasonable as to the public nor limited to what was reasonably necessary for the protection of the coveantee.<sup>4</sup>

The 1933 depression, with its wave of price cutting, caused great pressure to be applied on state legislatures by manufacturers who had created a direct demand and goodwill for their products by extensive advertising and particularly by independent retailers who were threatened by the price-cutting practices of the chain and department stores.<sup>5</sup> Their complaints led to adoption of Fair Trade Acts by a majority of the states, under which retailers could be bound by a contract with a manufacturer to sell trade-marked or brand products at prices fixed by the manufacturer. Most states also included a nonsigner clause which similarly restricted retailers to sell at the manufacturer's price if they had knowledge that the article was a Fair Trade item.

At the time the Miller-Tydings Amendment became law, 42 states had passed Fair Trade Acts.<sup>6</sup> In 1936 the Supreme Court upheld nonsigner provisions in state Fair Trade Acts.<sup>7</sup> The system of price-fixing which these Acts embraced, however, did not hold up against competition of goods moving in interstate commerce, which were not subject to the price restrictions. Federal legislation was necessary to prevent sellers from avoiding the state Fair Trade Acts by obtaining and selling goods which had moved in interstate commerce.

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<sup>3</sup> *United States v. American Tobacco Company*, 221 U. S. 106 (1911); *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1 (1911); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898).

<sup>4</sup> *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 (1911).

<sup>5</sup> See Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945 (1928).

<sup>6</sup> *Schwegmann Brothers v. Calvert Distillers Corporation*, 341 U. S. 384, 398 (1951).

<sup>7</sup> *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936).

The Miller-Tydings Amendment excepted from the operation of the Sherman Antitrust Act "contracts or agreements" establishing minimum prices for the resale of trade-marked goods, in free and open competition with other goods of the same general class, which had moved in interstate commerce, if such contracts or agreements were valid under the law of the state where the goods were to be resold.

The resale price maintenance structure was very strong early in 1951. Forty-four states then had Fair Trade Acts. Only Florida, Missouri, Texas, Vermont, and the District of Columbia did not have such legislation.<sup>8</sup> Nonsigner provisions of state laws were not expressly mentioned in the Miller-Tydings Amendment, and the possibility had been considered that the Supreme Court of the United States might construe the Amendment not to validate the nonsigner provisions.<sup>9</sup> But decisions of lower courts had construed the Amendment to validate the nonsigner clauses.<sup>10</sup>

A crippling blow was dealt the price maintenance structure when, on May 21, 1951, the Supreme Court handed down its decision in *Schwegmann Brothers v. Calvert Distillers Corporation*.<sup>11</sup> A New Orleans retailer had been selling Seagram and Calvert whiskey, obtained from a wholesaler, for less than the minimum prices set in contracts between the distributors, Seagram and Calvert, and more than one hundred Louisiana retailers. Schwegmann Brothers refused to sign such a contract, but, having knowledge of the other contracts, was bound under Louisiana law<sup>12</sup> not to sell at less than the minimum prices established by the contracts. Seagram and Calvert brought suit to enjoin Schwegmann Brothers

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<sup>8</sup> The Florida Fair Trade Act was declared unconstitutional in 1950 because economic conditions did not justify such a use of the police power. *Seagram Distillers Corp. v. Ben Greene, Inc.*, CCH Trade Reg. Rep. (9th ed.) § 62,668 (Fla. Cir. Ct. 1950).

<sup>9</sup> Legislation, 51 Harv. L. Rev. 336, 344 (1937); Note, 16 N. Y. U. L. Q. Rev. 115 (1938).

<sup>10</sup> *Pepsodent Co. v. Krauss Co., Ltd.*, 56 F. Supp. 922 (E. D. La. 1944); *Eric Calamia v. Goldsmith Bros., Inc.*, 299 N. Y. 636, 87 N. E. 2d 50 (1949); 299 N. Y. 795, 87 N. E. 2d 687 (1949)

<sup>11</sup> 341 U. S. 384 (1951).

<sup>12</sup> LA. GEN. STAT. (Dart, 1939) § 9809.1 *et seq.*

from selling at a cut price. With three judges dissenting, the Supreme Court interpreted the Miller-Tydings Amendment to sanction only voluntary contracts or agreements and not nonsigner provisions in a state statute with respect to goods moving in interstate commerce.

The effect of the decision was immediate and drastic.

"The cool, august U. S. Supreme Court was responsible for New York's steamy May madness."<sup>13</sup> May 29, 1951, Macy's ran two-page ads in the *Times* and *Herald Tribune* announcing a 6% cut on 5,978 items of fair-trade goods. Gimbel's and other competing department stores met Macy's prices and tried to better them.<sup>14</sup> Shoppers were in their glory; customers, trying to push through the "In" and "Out" sides of a Macy's revolving door at the same time, knocked down the door.<sup>15</sup> Papers ran tables of typical price changes showing fair trade prices and opening and closing prices on certain appliances, radio and television equipment, clothing, stationery, and books.<sup>16</sup> Below is a table showing the change in prices on certain items at Gimbel's.<sup>17</sup> Macy's sold 400 Mixmasters in 45 minutes as compared with a previous average of 10 daily. Gimbel's sold 5,100 Palm Beach suits in three days; the normal sales were 150 a day.<sup>18</sup> To a lesser extent price

<sup>13</sup> *Life*, June 11, 1951, p. 26.

<sup>14</sup> 159 *Publishers' Weekly* 2289 (June 2, 1951).

<sup>15</sup> *Time*, June 11, 1951, p. 97.

<sup>16</sup> 159 *Publishers' Weekly* 2493, 2994 (June 9, 1951).

<sup>17</sup> *Life*, June 11, 1951, p. 26:

	Fair Trade Price	Tuesday				Thursday				Fri.	Sat.
Toastmaster.....	\$23.00	21.59	19.34	17.09	15.09	15.09	14.72				
Mixmaster.....	46.50	43.50	40.81	36.13	33.96	33.96	29.69	29.64	26.59†		
Vacuum Cleaner.....	89.95	84.50	79.43	75.14		75.14	66.39	58.63	52.97†		
Palm Beach Suit.....	29.95	28.14	26.44	24.84	23.34	23.34	21.94	19.38	17.94	17.94	16.94
Springweave Suit.....	49.50	46.50	43.71	41.11	38.64	38.64	34.14	30.17	29.69	29.69†	
Bestseller*.....	4.50	4.23	3.98	3.94		.94	3.13	2.49	2.44	2.44	1.94

\* From Here to Eternity

† Sold out

<sup>18</sup> *Time*, June 11, 1951, p. 97.

battles followed in Chicago, New Jersey, Albuquerque, Denver, New Orleans, Oklahoma City, and elsewhere.<sup>19</sup>

Gilbert E. Goodkind, executive secretary of the American Booksellers Association, characterized the Supreme Court decision as a "hydrogen bomb."<sup>20</sup> He stated the net profit in department store book departments averaged only  $\frac{3}{4}\%$ ; therefore, the only desire of the price-cutter was to ensnare the customer and expose him to over-priced non-fair-traded items. He prophesied the disappearance of the small retailer and the closing of book departments in department stores which did not cut prices.

The price-slashing did not go unchallenged. Bantam Books canceled all orders from New York City department stores participating in price-cutting on paper-bound books. June 15 it refused a rush order from Macy's for 2,500 books. Prices on 25-cent books had fallen as low as 11¢. Mr. Ian Ballantine, president of Bantam Books, said:

The low price of Bantam Books is made possible by mass distribution, a system which relies on 77,000 dealers, most of them small ones with an average sale of five or six books a day.

These dealers depend on a fair-traded retail price and a reasonable margin of profit. Any price-cutting move threatens the heart of our distribution system.

Therefore, Bantam Books is discontinuing all sales efforts to and is refusing all orders from dealers participating in price-cutting.<sup>21</sup>

Bayer Aspirin also discontinued the sale of products to stores participating in price-cutting; the 59-cent 100-tablet bottle had dropped to 4¢. Sterling Drug, Incorporated, of which Bayer Company is a division, ran advertisements in the New York City papers in which Mr. James Hill, Jr., chairman and president, stated that he considered the exploitation of Bayer Aspirin's good name as "jungle tactics." He stated the stores were not philanthropists but hoped to induce the customers to believe the other

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<sup>19</sup> Newsweek, June 18, 1951, p. 68; U. S. News & World Report, June 8, 1951, p. 13.

<sup>20</sup> 159 Publishers' Weekly 2290 (June 2, 1951); *id.*, p. 2464 (June 16, 1951).

<sup>21</sup> *Id.*, p. 2537 (June 23, 1951).

goods were also bargains and thus recoup their loss on Bayer Aspirin. June 16 Gimbel's and Bloomingdale's ran out, but customers were lined up back to the book department in Macy's, where clerks were offering them novels to read while they waited.<sup>22</sup>

Eversharp, Goodall Fabrics, and Salton Manufacturing Company refused to make any more shipments to Macy's until the store adhered to their price lists.<sup>23</sup> Under the decision of the Supreme Court in *United States v. Colgate*<sup>24</sup> there is no doubt that manufacturers have the right to refuse to sell to price-cutters.

Sheaffer Pen Company sent its distributors a letter appealing to them to keep the price up, and closed with the statement that no more shipments would be made to any dealer who refused to abide by their pricing policies.<sup>25</sup> McKesson and Robbins Laboratories proposed to show on all their customers' invoices the following:

FAIR TRADE AGREEMENT. Purchaser, by accepting delivery from seller of any fair traded commodity, agrees not to re-sell such commodity, by direct or indirect means, at less than the prescribed net retail minimum price published by the Producer or Distributor whose trademark, brand or name appears on the commodity. This agreement not applicable to sales in non-fair trade states or District of Columbia.<sup>26</sup>

Sunbeam Corporation filed suit against Macy's for \$6,000,000 (triple damages) under the Sherman Antitrust Act for damage to the trademark of "Mixmaster." The Mixmasters Macy's sold were manufactured in New York. Macy's sold the Mixmaster for \$26.48; the list price was \$46.50; the wholesale price was \$29.70. Sunbeam charged that Macy's had 3.3% of the market in New York City before the price war and 56.2% during the price war. Sunbeam had 97,000 out of 110,000 dealers under contract.<sup>27</sup>

If lower prices to consumers is a bad thing, the effect of the

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<sup>22</sup> *Ibid.*

<sup>23</sup> Newsweek, June 11, 1951, pp. 75, 76.

<sup>24</sup> 250 U. S. 300 (1919).

<sup>25</sup> 159 Publishers' Weekly 2462 (June 16, 1951).

<sup>26</sup> *Id.*, pp. 2462, 2463.

<sup>27</sup> Business Week, Nov. 10, 1951, pp. 137, 138.

*Schwegmann* case was obviously undesirable. But the fact that prices were so drastically cut bears out the basic assumption of the Supreme Court that vertical price-fixing does restrain competition at the retail level.

A question not answered by the *Schwegmann* decision is whether a nonsigning retailer in the home state of the manufacturer is bound if the manufacturer does interstate business. Cases decided in the state courts since the *Schwegmann* case are not in accord.<sup>28</sup> Even if the nonsigner provision as to goods in intrastate commerce is valid, its effect will be weakened by the ability of the retailers to bring in comparable goods from outside the state and sell them at any price they choose.

It has been suggested that if a pre-*Schwegmann* fair trader lowers his price to meet an undercutting nonsigner and is sued by the manufacturer, the retailer may have a defense of mutual mistake as to the validity of the nonsigner provisions.<sup>29</sup> A recent New York decision, however, has held the signer would not be released merely because he was being undersold by nonsigners.<sup>30</sup>

The expected reaction to the *Schwegmann* decision has been a renewed effort to obtain relief from Congress. There is at present a bill before Congress to incorporate the nonsigner provision into the Sherman Antitrust Act.<sup>31</sup>

The *Schwegmann* decision, and its aftermath, raise again the question as to the relationship of fair trade legislation to the American concept of free competitive business enterprise. Texas and other non-fair trade states have attained high levels of business activity and prosperity without statutory protection of vertical

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<sup>28</sup> *Bulova Watch Co. v. S. Klein on the Square, Inc.*, 105 N. Y. S. 2d 175 (Sup. Ct. 1951), *temp. inj. ref.*; *Rothbaum v. R. H. Macy & Co.*, 105 N. Y. S. 2d 638 (Sup. Ct. 1951), *temp. inj. granted*.

<sup>29</sup> Note, 65 Harv. L. Rev. 107, 121 (1951). This would be a mutual mistake as to the law. Some states allow such a defense; others do not. 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1582.

<sup>30</sup> *Emerson Radio & Phonograph Corp. v. Standard Appliances, Inc.*, CCH Trade Reg. Rep. (9th ed.) § 62,870 (N. Y. Sup. Ct. 1951).

<sup>31</sup> H. R. 4662, 82d Cong., 1st Sess. (1951). The bill has been referred to the House Judiciary Committee.

price-fixing. It is doubtful whether in truth consumer opinion of trade-marked goods is lessened merely because they are available at a bargain. Fundamental principles of justice and fair play strengthen the view that one contract between a manufacturer and a retailer should not be permitted to govern every other retailer in the state if the goods have moved in interstate commerce. Instead of amending the Miller-Tydings Act to make it applicable to nonsigners, in the long run the preferred solution would be the repeal of state Fair Trade Acts.

*John G. Street, Jr.*