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Trade Regulation - Resale Price Maintenance - Validity of Fair Trade Act Non-Signer Clause Under Federal Anti-Trust Law

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TRADE REGULATION—RESALE PRICE MAINTENANCE —VALIDITY OF FAIR TRADE ACT NON-SIGNER CLAUSE UNDER FEDERAL ANTI-TRUST LAW

The recent "Fair Trade Acts Case,"[1] decided by the United States Supreme Court last May and which made the front page headlines of newspapers across the nation, came as a rather sudden surprise not only to lawyers and judges but to businessmen and the general public as well. This notoriety in lay circles, concerned as it is with merely the economic aspects and results of the decision, serves more to cloud than to clarify the legal principles involved in the case. Recognizing that a great amount will be written from the lay point of view of general disinterest to lawyers concerned primarily with those principles, it shall be the purpose of this article to investigate and largely confine itself to the legal questions raised by the decision.

The Fair Trade Acts Case

The case was a suit for injunctions by two liquor distributors against a Louisiana liquor retailer. The plaintiffs sold their products to wholesalers in Louisiana who is turn sold to retailers. The plaintiffs attempted to maintain uniform retail prices by the use of a price-fixing arrangement pursuant to which retailers were urged to sign price-fixing contracts whereby the latter promised not to sell at prices below those specified in the plaintiffs' schedules. The defendant retailer refused to sign such a contract and sold plaintiffs' products at cut rates. Whereupon the plaintiffs sought these injunctions under the Louisiana "Fair Trade Act,"[2] which, like similar acts in almost all of the states, provided for these "fair trade contracts" and, in addition, provided that when one such contract had been executed between a manufacturer or distributor and a retailer within the state, all other retailers with knowledge of it were bound by it and could be enjoined from violating it. The Federal District Court granted the injunctions, the Court of Appeals for the 5th Circuit, with one dissent, affirmed,[3] and the Supreme Court granted certiorari. The Supreme Court reversed and held, with three dissents, that the non-signer provisions of the state acts were invalid as contrary to the Sherman Anti-Trust Law, not being within the Miller-Tydings Amendment to that law.

The Background of the Problem

The principal case represents the climax of a long effort on the part of "cut-rate" retailers to strike down the so-called "fair trade

[1] Schwegmann Bros. et al. v. Calvert Distillers Corp. and Schwegmann Bros. et al. v. Seagram Distillers Corp., 71 Sup. Ct. 745 (1951).
[2] Act. No. 13 of 1936, La Gen. Stat. §§9809.1 et seq., LSA-RS 51:391 et seq.
[3] 184 F.(2d) 11 (5th Cir., 1950).

acts." An exhaustive historical treatment of that effort, or a discussion of the constitutional questions involved in any great detail, would be far beyond the scope of this comment.[4] However, it is necessary to at least examine in passing some of the background of the present conflict between the fair trade acts and the Sherman Act in order to properly appreciate this latest decision.

The fair trade acts, now in effect in the great majority of states, were first adopted back in depression days to prevent the sale of trademarked or branded articles by cut-rate retailers at prices below those established by the manufacturer or distributor. Manufacturers, complaining that "cut-rate" or "loss leader" practices were destroying the good will built around their trade-marks and brand names and driving "legitimate" retailers from stocking their merchandise, presented cut-rate selling to the state legislatures as a great evil in dire need of correction. The results were the fair trade acts,[5] which emerged with the

[4] Discussions of the constitutional problems involved in resale price maintenance may be found in Buer, *Right of Manufacturer, Wholesaler or Producer to Control the Resale Price of Trade Marked or Branded Commodities,* 21 MARQ. L. REV. 88 (1937); Harnik, *The Florida Fair Trade Act Case,* 7 WASH. AND LEE L. REV. 28 (1950); *Right of Manufacturer, Producer or Wholesaler to Control Retail Prices,* 103 A.L.R. 1331 (1936), 104 A.L.R. 1452 (1936), 106 A.L.R. 1486 (1937).

[5] These acts, adopted in the great majority of states, are all identical or very similar. The Wisconsin Act, contained in WIS. STATS. (1949) Sec. 133.25, is cited exclusively in this article and is illustrative of all the fair trade acts. It provides as follows:

"(1) This section may be cited as the 'Fair Trade Act.'

"(2) As used in this section 'producer' means grower, baker, maker, manufacturer, and 'commodity' means any subject of commerce.

"(3) Except as provided in subsections (4) and (6), no contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed a contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce by reason of any of the following provisions contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(b) That the vendee or producer shall require that any person to whom delivery of a commodity is made for the purpose of resale shall agree that the latter will not, in turn, resell except at the price stipulated by the vendor or vendee.

"(4) Every contract containing the provisions referred to in subsection (3) shall include the provision that such commodity may be resold without reference to such contract in the following cases:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(5) Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract referred to in subsection (3), whether or not the person so advertising, offering for sale or selling is a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

"(6) This section does not apply to any contract between producers or between retailers as to sale or resale prices.

"(7) (Provides for administrative and judicial review of 'fair trade contracts.')"

announced policy of protecting the manufacturer's property right in the good will created by his brand name or trade-mark and of protecting the public from "unfair methods of competition."[6] The acts covered only branded or trade-marked commodities which were in free and open competition with commodities of the same general character produced by others. Thus the fair trade acts did not authorize "horizontal" price-fixing, price maintenance agreements between competing manufacturers or between wholesalers and retailers handling competing brands. They authorized only "vertical" price-fixing, that is, price-fixing contracts between a manufacturer and his own wholesalers and retailers.[7] In addition to providing for the contracts, the state acts went one step further and included the non-signer clause.[8] In essence these clauses provided that when one "fair trade contract" establishing minimum prices had been executed by a manufacturer and a retailer within the state, all retailers with knowledge of it were bound by it and could be enjoined from violating it.

The fair trade acts were first attacked on constitutional grounds. The leading case treating the constitutional objections to the acts is *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*,[9] wherein the United States Supreme Court sustained the Illinois Fair Trade Act in a suit by a wholesale distributor under the non-signer provisions of the act to enjoin a retailer, not a party to the "fair trade" contracts enterd into between the distributor and other Illinois retailers, from selling at cut rates. The Court held that the Act did not violate the due process and equal protection clauses of the 14th Amendment to the Federal Constitution and that the problem, from the constitutional viewpoint, was a question of legislative policy with which the courts could not interfere.[10] Similar results were reached by most state

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[6] The policy of the Wisconsin Act is set forth in WIS. STATS. (1949) Sec. 133.27 thus: "The intent . . . is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented . . ." Just how the Wisconsin Act (and the identical or almost identical acts of other states) were to accomplish the above results remains highly questionable, but it apparently was thought, or the legislatures were led to believe, that cut-rate selling was in the long run injurious to the public. See Max Factor & Co. v. Kunsman, 5 Cal.(2d) 446, 55 P.(2d) 177 (1936), affirmed 299 U.S. 198, 57 Sup. Ct. 147, 81 L.Ed. 122 (1936), where the California court recognizes that argument and points out that the acts, in allowing only vertical price-fixing, adequately protect the public from the evils of horizontal price-fixing and allow for free competition between different manufacturers of similar products.

[7] Horizontal price fixing is expressly prohibited in WIS. STATS. (1949) Sec. 133.25(6), *supra*, note 5.

[8] WIS. STATS. (1949 Sec. 133.25(5), *supra*, note 5.

[9] 299 U.S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1486 (1936), noted in 21 MARQ. L. REV. 88 (1937).

[10] A more detailed discussion of the decision may be found in 21 MARQ. L. REV. 88 (1937); see also Notes in 103 A.L.R. 1331 (1936), 104 A.L.R. 1452 (1936), 106 A.L.R. 1486 (1937).

courts,[11] but a number of acts have been found unconstitutional by state high courts.[12]

VERTICAL PRICE-FIXING AND THE ANTI-TRUST LAWS

Failing, for the most part, in their constitutional attacks upon the fair trade acts, those seeking to upset them turned one step beyond the constitutional level. They sought to show that the acts were violative of the federal anti-trust laws. The principal case is the reward of their efforts.

The conflict between vertical price-fixing and the anti-trust laws goes back to the 1911 landmark decision of the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[13] In that case a manufacturer of trade-marked medicines sought to enjoin a wholesaler from selling its products at cut rates in violation of price-fixing contracts entered into between the manufacturer, wholesalers and retailers. The Court held that the scheme, in that it tended to stifle all competition on the retail level in the sale of the drugs, amounted to a restraint of trade, was invalid at common law, and, with regard to interstate commerce, under the Sherman Act. Thus the proponents of "fair trade" legislation were faced with the necessity of amending the federal anti-trust laws before the state acts, attempting to accomplish precisely what the *Dr. Miles* case had declared illegal under federal law, would have any efficacy as applied to interstate commerce. The Miller-Tydings amendment to the Sherman Act, passed in 1937, was the result,[14] and it was thought that the last bar to widespread application of "fair trade" policy had disappeared.

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[11] The Wisconsin Fair Trade Act was found constitutional in Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N.W. 426 (1937); see also Ed. Schuster & Co., Inc., v. Steffes; Herzfeld-Phillipson Co. v. Steffes, 237 Wis. 41, 295 N.W. 737 (1941).

[12] Recently the Florida Supreme Court found the act of that state unconstitutional as not within the scope of the police power, as an unlawful delegation of that alleged power to private individuals, and as a denial of equal protection. Liquor Store, Inc., v. Continental Distilling Corp., 40 So.(2d) 371 (Fla., 1949), noted in 7 WASH. AND LEE L. REV. 28 (1950).

[13] 220 U.S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911).

[14] The Sherman Anti-Trust Act of 1890, as amended by the Miller-Tydings Act of 1937 (the text of the 2 provisos), provides as follows: "Every contract, 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 providing 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

The principal case now raises the problem of whether the non-signer clause, the very club of the fair trade acts providing for enforcement of price contracts against cut-rate retailers unwilling to sign them, is within the Miller-Tydings Amendment and thus without the Sherman Act. The issue is vital and the arguments on both sides weighty, as is attested by the sharp division of eminent jurists on the question.

The Sherman Act (absent the Miller-Tydings Amendment) prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . ."[15] The Miller-Tydings Amendment excludes from the operation of the broad provision above "contracts or agreements providing minimum prices for the resale" of branded or trade-marked competitive commodities when such "contracts or agreements . . . are lawful as applied to intrastate transactions" under state law.[16] The question then is: Does the language of the amendment, which without question excludes from the Sherman Act the contracts and agreements contemplated by the state acts, extended to the "non-signer" clause also? Six justices of the Supreme Court and one judge of the Court of Appeals answered in the negative; three justices and two judges answered in the affirmative.

Arguments From the Face of the Statute

The Miller-Tydings Amendment does not expressly include a non-signer clause, so the problem is one of legislative intent. A majority of the Court of Appeals felt that the clause was within the amendment. Chief Judge Hutcheson, writing the majority opinion, declared that an express inclusion of such a clause within the amendment was unnecessary. He argued that, since the authority to enact fair trade laws stems not from Congress but from the State's inherent sovereign power, the Miller-Tydings Amendment was not an act granting to the states power to pass such laws but was merely the removal of a federal barrier to their operation upon interstate commerce, and, consequently, it is immaterial that the amendment deals only with "contracts and agreements" and does not in terms grant to the states power to make those laws effective against non-signers of such contracts."[17] The power to bind non-signers was always possessed by the states, and "in comprehensively and competely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according*

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." Act of July 2, 1890, c. 647, §1, 26 Stat. 209; Act of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; 15 U.S.C.A. §1.

[15] *Ibid.*

[16] *Ibid.*

[17] *Supra*, note 3, at p. 15.

to the law of a state, the amendment removed every prohibition from or impediment in the way of, the enactment by the states of fair trade laws, binding alike upon signers and non-signers."[18]

Reading between the lines of Chief Judge Hutcheson's opinion, one may come to the conclusion that he felt that the words "contracts or agreements" in the Miller-Tydings Amendment are synonymous with the words "contract, combination, or conspiracy" in the Sherman Act proper.[19] This was the view of Mr. Justice Frankfurter, dissenting in the principal case in the Supreme Court. He said:[20]

> "It would appear that insofar as the Sherman Law made maintenance of minimum resale prices illegal, the Miller-Tydings Amendment made it legal to the extent that state law legalized it. 'Contracts or agreements' immunized by the Miller-Tydings Amendment surely cannot have a narrower scope than 'contract, combination . . . or conspiracy' in the Sherman Law. The Miller-Tydings Amendment is an amendment to §1 of the Sherman Law. The category of contract cannot be given different content in the very same section of the same act, and every combination or conspiracy implies an agreement."

It is submitted that this position is far from untenable. Under it, it readily appears that the amendment successfully excluded from the Sherman Act everything necessary for the full operation of the state statutes, including the non-signer clause, upon interstate commerce. It has strong appeal because it attempts to go behind the verbage of the statutes and arrive at some concrete conclusion as to what the words mean.

Judge Russell in the Court of Appeals and the majority in the Supreme Court were not of this view. Judge Russell wrote thus:[21]

> "The amendment deals only with 'contracts and agreements' and in the absence of any enlarging provision, furnishes no basis for incorporating as an exemption from the Sherman Act any provision of a State Statute which restrains interstate commerce by provisions applicable to those who have not made the 'contracts and agreements.' My position is illustrated by the observation that the Miller-Tydings Amendment goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions (citing the *Dr. Miles* case)[22] as is removed by section 1 of the Louisiana Act now in question as to intrastate transactions. Section 1 of the Louisiana Act[23] relates, as likewise does the Federal Act, only to establishing the legality of the contracts in question. That far the two

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[18] *Ibid.*
[19] *Supra,* note 14.
[20] *Supra,* note 1, at p. 752.
[21] *Supra,* note 3, at p. 16.
[22] *Supra,* note 13.
[23] *Supra,* note 2. Section 1 of the Louisiana Act is identical to WIS. STATS. (1949) Sec. 133.25(3), *supra,* note 5.

> statutes are in *pari materia.* Section 2 of the Louisiana Statute,[24] upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement. I believe it may not be successfully contended that without section 2, the provisions of section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by section 1. The terms of the Federal Amendment no more embrace section 2 of the Louisiana Act than does section 1 of that Act. Thus Congress has legalized the *contract* validated by the state law, but not every provision of the statute."

This argument is squarely met by the opposition. Mr. Justice Frankfurter, while not expressly referring to it, refutes it when he states:[25]

> "The words of the . . . statute (referring to the non-signer clause of the California Act) make it clear that it was not, like the Miller-Tydings Amendment, designed to remove the bar of an anti-trust act. It was enacted to give an affirmative right to recover from nonsigners, something the Miller-Tydings Amendment does not purport to do. In such a statute, specific language referring to nonsigners would of course have to be used."

This observation of the learned Justice considerably weakens the argument of Judge Russell, which at first reading appears well neigh impregnable. It involves a consideration of the purposes and effects of the state and federal acts. These will be seen to be entirely different. The state acts, while they are amendatory of the state anti-trust acts and to that extent parallel to the Miller-Tydings Act, go one step beyond. The states, in the exercise of their sovereign power, created an affirmative right against non-signers. The Miller-Tydings Amendment was not to do this. It was not a federal interstate fair trade act creating, under federal law, a power to bind non-signers, but was merely an enabling act designed to give full effect to state fair trade laws in the realm of interstate commerce. Congress could have enacted its own fair trade law, and in such case a non-signer provision would have been necessary. But instead Congress chose merely to legalize local interstate price fixing through an amendment to the anti-trust law.[26] Chief Judge Hutcheson seems to skirt this concept when he speaks of the Miller-Tydings Act as affecting only the Sherman Act as an amend-

[24] *Supra,* note 2. Section 2 of the Louisiana Act is identical to WIS. STATS. (1949) Sec. 133.25(5), *supra,* note 5.

[25] *Supra,* note 1, at p. 753.

[26] The purpose and intended effect of the Miller-Tydings Amendment is clearly indicated by the House and Senate committee reports. The Senate Report states: ". . . the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws." S. REP. No. 2053, 74th Cong., 2d Sess. The House Report declares: "This legislation merely seeks to help effectuate a public policy . . . fixed in a State." H. R. REP. No. 382, 75th Cong., 1st Sess. The entire text of the reports should be read to fully appreciate the purpose of the legislation, but special attention

ment thereto and as neither prohibiting nor authorizing state non-signer clauses.[27] Upon that basis, and recognizing the inherent power of a state to enact a non-signer clause, it can be seen that a federal non-signer clause was unnecessary, the purpose and effect of the federal act not being, like the state acts, to create a right against non-signers, but only to clear the way for full operation of the state-created rights upon interstate commerce.

The Supreme Court majority does not believe this distinction a proper basis for decision as to the scope of the amendment. It is the Court's view that the omission of an express non-signer clause from the federal act is fatal to the contention that the state clauses are within it. To hold otherwise, the Court feels, would be "to perform a distinct legislative function by reading into the act a provision that was meticulously omitted from it."[28] Mr. Justice Douglas, writing the majority opinion in the principal case, stated:[29]

> "A refusal to read the nonsigner provision into the Miller-Tydings Act makes sense if we are to take the words of the statute in their normal and customary meaning. The Act sanctions only 'contracts and agreements.' If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. Their contract, combination, or conspiracy—hitherto illegal—is made lawful. They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price-fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is a resort to coercion."

This paragraph from the majority opinion points up the essential conflict between the majority and dissenting views, namely the definition of the phrase "contracts and agreements" in the Miller-Tydings Amendment. The majority holding that coercive price-fixing is without the Amendment is based upon a restrictive definition of the elusive phrase, a definition invoking the common meaning of "contract" as a voluntary undertaking. The dissent contends for a broader definition, co-extensive, insofar as retail price maintenance is concerned, with the phrase "contract, combination or conspiracy" in the Sherman Act proper, upon the ground that all these words mean "contract" and that

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is called to the above quoted passages and also to the passages quoted *infra* in the argument on legislative intent as to the scope of the act, as they are also helpful on this more general question.

[27] *Supra*, note 3, at p. 15. The Chief Judge's clever dialogue between a non-signer and the Sherman Act, from which the former is seeking aid, is especially helpful.

[28] *Supra*, note 1, at p. 747.

[29] *Ibid.*

that word cannot be given two different meanings in the same section of the same act.

Despite a certain virtue which may be inherent in definitions based upon "common meanings," it is submitted that the second view is of greater merit. If coercive price fixing can be within the prohibition of the Sherman Act, expressed in terms of three synonyms for voluntary agreement, why can it not be within the exemption of the Miller-Tydings Act, expressed in terms of two synonyms for the same? It is a rule of statutory construction too axiomatic to require citation that a court will desert the letter in favor of the spirit of a statute when the effectuation of the legislative intent so requires. It would seem reasonable here, in view of the use of "contract" in the Sherman Act proper and the very persuasive argument against attaching two meanings to the same word in the same section of the same act, that a dictionary definition of "contract and agreement" is not the solution to this difficult problem of statutory construction. If any doubts remain, the reader is referred to the evidences of legislative intent contained in the legislative history of the Amendment, discussed *infra.*

Digressing for a moment from the main argument, it is probably proper to insert at this point a second argument offered by Mr. Justice Douglas. He points to the fact that the Miller-Tydings Act expressly continues the Sherman Act prohibition against "horizontal" price fixing,[30] and then states:[31]

> "Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids . . . Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual 'vertical' agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing. A real sanction can be given the prohibitions of the proviso only if the price maintenance power granted a distributor is limited to *voluntary* engagements. Otherwise, the exception swallows the proviso and destroys its practical effectiveness."

It is submitted that this position is difficult to comprehend. The non-signer provisions of the state acts surely cannot be within the prohibition against "horizontal" price-fixing merely because they are coercive in nature. That is to confuse the distinction between "horizontal" and "vertical" price-fixing. The distinction is not between methods of price-fixing, but between the status of the parties fixing the prices. When a manufacturer resorts to the non-signer clause

[30] *Supra*, note 14. The Miller-Tydings Act prohibition against "horizontal" price-fixing is contained in the second proviso of 15 U.S.C.A. §1.
[31] *Supra*, note 1, at p. 748.

to force a retailer "into line" that is "vertical" price-fixing, the fact that the prices were fixed by an injunction rather than by voluntary agreement being immaterial insofar as the type of price-fixing is concerned. But the state acts give a cause of action against non-signers to anyone damaged by their cut-rate policies,[32] and thus a retailer might enjoin another retailer. Would this be "horizontal" price-fixing within the proviso? Since the proviso uses the same phrase, "contracts or agreements," in prohibiting "horizontal" fixing as does the main clause of the amendment in allowing "vertical" fixing, one is faced with the problem of the scope of the words "contracts or agreements" in the proviso roughly running parallel to the problem with respect to the same words in the main clause of the Miller-Tydings Amendment. It is interesting to note here that Mr. Justice Douglas, while contending for a restricted meaning for "contracts and agreements" in the main clause, would here reverse himself and adopt the broad meaning urged by the opposition, a meaning embracing the non-signer clause. For it is his contention that the non-signer clause is within the proviso against "horizontal" fixing. Of course the state acts (which also contain express prohibitions against "horizontal" *contracts*)[33] are of no assistance here. Quite clearly the "horizontal prohibitions of the state acts, specifically referring to contracts, do not embrace the *express* ("affirmative right") non-signer clause.

Arguments From Legislative History

The above has been an attempt to discuss the problem only from the standpoint of the arguments adduced "from the face of the statute." Still remaining is the problem of and the arguments arising from the legislative history of the Miller-Tydings Act. While the Court of Appeals did not believe a resort to legislative history was necessary to ascertain the legislative intent, seven Justices of the Supreme Court felt it was. Unfortunately, the scope of this article does not permit an examination of this conflict between the Circuit and Supreme Courts.

The history of federal price maintenance legislation, or rather attempted legislation, begins in 1929 with the Capper-Kelly fair trade bill.[34] It is to be noted that this bill, which did not pass, was introduced before any state had passed a fair trade act. The Capper-Kelly bill contained no non-signer clause. Had it become law its only effect would have been to legalize voluntary price maintenance contracts theretofore contrary to the Sherman Act under the *Dr. Miles* decision.[35] The Capper-Kelly bill served as the model for the first state act, the

[32] Wis. Stats. (1949) Sec. 133.25(5), *supra*, note 5.
[33] Wis. Stats. (1949) Sec. 133.25(6), *supra*, note 5.
[34] S. 240, 71st Cong., 1st Sess.; H.R. 11, 71st Cong., 1st Sess.
[35] *Supra*, note 13.

California Fair Trade Act of 1931,[36] which likewise contained no non-signer clause. The second Capper-Kelly bill,[37] introduced in Congress after California had, in 1933, amended its law to include a non-signer clause,[38] did not contain such a clause. And the first bill offered by Senator Tydings,[39] after Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington and Wisconsin had passed laws with non-signer provisions,[40] contained no such provision. The Supreme Court majority feels that this failure to write a non-signer clause into the federal bills after the states had adopted them indicates that the intention of the sponsors was merely to give effect to voluntary agreements and not to the coercive features of the state acts. Said Mr. Justice Douglas:[41]

> "They (the federal bills) all followed in this respect the pattern of the Capper-Kelly bill as it appeared before the first non-signer provision was written into state law. The 'contract' concept utilized by Capper-Kelly before there was a non-signer provision in state law was thus continued even after the non-signer provision appeared. The inference, therefore, is strong that there was continuity between the first Tydings bill and the preceding Capper-Kelly bills. The Tydings bills built on the same foundation; they were no more concerned with non-signer provisions than were their predecessors. In view of this history we can only conclude that if the draftsman intended that the non-signing retailer was to be coerced, it was strange indeed that he omitted the one clear provision that would have accomplished that result."

This argument is necessarily based upon the prior acceptance of Mr. Justice Douglas' argument that the words "contracts and agreements" in the amendment mean only voluntary engagements, for if we once accept Mr. Justice Frankfurter's view of the scope of that phrase as including the non-signer clause the majority argument is meaningless, for certainly no legislative intent can be garnered from the draftsman's economy of words and omission of mere surplusage. But Mr. Justice Douglas cites this argument from legislative history as supporting his prior argument.[42] We thus find him in the position, so to speak, of pulling his contention up by its own bootstraps. Mr. Justice Frankfurter, on the other hand, answers this argument with the same

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[36] Calif. Stat. 1931, c. 278.
[37] S. 97, 72d Cong., 1st Sess.; H.R. 11, 72d Cong., 1st Sess.
[38] Calif. Stat. 1933 c. 260.; BUSINESS AND PROFESSIONS CODE, PT. 2, c. 3, §16904.
[39] S. 3822, 74th Cong., 2d Sess.
[40] Ill. Laws 1935, p. 1436, ILL. REV. STAT. 1949, c. 121½, §188 et seq.; Iowa Laws 1935, c. 106, I.C.A. §550.1 et seq.; Md. Laws 1935, c. 218, §1; N.J. Laws 1935, c. 58, §2, N.J.S.A. 56:4-6; N.Y. Laws 1935, c. 976, §2; Ore. Laws 1935, c. 295, §2; Pa. Laws 1935, No. 115, §2, 73 P.S. §8; Wash. Laws 1935, c. 177, §4; Wis. Laws 1935, c. 52, WIS. STATS. (1949) Sec. 133.25.
[41] *Supra*, note 1, at p. 749.
[42] *Ibid.*, at p. 748.

proposition that he uses to answer the prior argument of the majority, namely that no legislative intent can be deduced from the fact that the federal bills contained no non-singer clause after the states adopted them because of the essential difference in the purposes of the federal and state bills and acts, the former being merely an enabling act, the latter creating affirmative rights against non-signers.[43]

Over and above the history of the bills introduced in Congress and their contents, both sides attempt to find support for their views in the congressional committee reports.[44] These reports, containing the most general of language, must be picked apart and read and reread before the reader can come to any conclusion as to the legislative intent they supposedly manifest. Upon such a picking apart and piecing together, this writer has come to the conclusion that the reports support Mr. Justice Frankfurter's dissenting view that the Miller-Tydings Act includes in its purview the non-signer clauses.

The reports do not once expressly state that the object of the proposed legislation was to legalize the interstate operation of state fair trade policy with respect to non-signers. But the House Report[45] mentions the non-signer feature and quotes the entire Illinois Act, including the non-signer clause. This indicates at least an awareness of the non-signer clauses which, when coupled with what follows, assumes a greater importance. The House Report also states:[46]

> "The sole objective of this proposed legislation is *to permit the public policy of States having 'fair trade acts' to operate with respect to interstate contracts for the resale of goods within those states.*" (emphasis added)

Now the public policy of those states having fair trade acts was to bind non-signers and create a right against them in favor of signers. If the purpose of the Miller-Tydings Act was to permit this public

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[43] *Supra*, note 25.

[44] H. R. REP. No. 382, 75th Cong., 1st Sess.; S. REP. No. 2053, 74th Cong., 2d Sess. The issue is further complicated by the fact that these reports are not the reports on the bill that actually was passed by the 75th Congress as the Miller-Tydings Amendment and became law. The bill that was passed was attached as a rider to a revenue bill for the District of Columbia. The Senate Report discussed here is the report on the Tydings bill introduced in the 74th Congress. The Senate Committee attaching the rider referred the Senate to this report. There was also another Tydings bill pending in the 75th Congress, the report of which merely reprinted the report herein used. The House Report treated here is the report on the Miller bill intoducd in the 75th Congress. That bill contained almost identical language to the bill which finally passed as the rider, and the report on it was before the House at the time that the rider (the report of which, H. R. REP. 1413, 75th Cong., 1st Sess., contains only 5 lines) was debated. For these reasons the reports are considered authoritative by both the majority and dissent. (However, when some of the language of the House Report apparently conflicts with his views, Mr. Justice Douglas, despite his general reliance on the report, does point to the fact that it was not the report of the bill that was passed. 71 Sup. Ct. 745, at pp. 749-750.)

[45] *Supra*, note 44.

[46] *Ibid.*

policy to operate with respect to interstate transactions, it seems inescapable, to this writer at least, that the intention was to give interstate effect to the non-signer clauses. The Report further states:[47]

> "Your committee respectfully submit that sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to effectuate their own public policy with regard to their internal affairs."

Without legalizing the non-signer clause, the Miller-Tydings Act fails to a great extent to so assist the states, for one of the main purposes of the fair trade acts, aside from merely legalizing voluntary price-fixing contracts, was to stamp out cut-rate selling by persons who would never enter such a contract.

The Senate Report[48] contains language such as this:

> "The Congress is not called upon to pass upon the effectiveness of the remedy (adopted by the states to curb price-cutting), but it should not put obstacles in the way of efforts of the individual states to make the remedy effective."

What is this "remedy" referred to above? Surely it embraces the non-signer clause. For while it is true that part of the remedy is in the recognition of the price-fixing contracts as legal, the real force of the remedy lies in the non-signer clause. Creation of a mere ability to legally maintain prices by voluntary contract is not the remedy with which the fair trade acts were primarily concerned. They were aimed at cut-rate non-signers. To believe otherwise is to completely miss the whole point of the state acts, *acts which were found completely ineffective and useless until non-signer clauses were added.*[49]

The Senate Report concludes with this statement:[50]

> "In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the states themselves have declared lawful."

While it is true that the Report could have clarified the matter by saying "the enforcement of contracts against signers and non-signers," nevertheless the language used surely supports the dissenting view, since it is concerned with enforcing fair trade contracts to the limit allowed by state law. That limit includes non-signers.

Mr. Justice Douglas' arguments indicate that he draws from the reports an intention to extend the Miller-Tydings Amendment only

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[47] *Ibid.*

[48] *Supra,* note 44.

[49] The first state act, enacted by California in 1931 (*supra,* note 36), contained no non-signer clause. The act was found completely ineffective, since cut-rate retailers could not be bound to the "fair trade contracts" without their consent, consent which obviously would never be given. This resulted in the 1933 amendment to the California act (*supra;* note 38) which enacted into law the first non-signer clause.

[50] *Supra,* note 44.

to voluntary agreements upon the grounds of a failure of the reports to expressly state an intention to include the non-signer clause and of a constant reference to price maintenance "by contract."[51] But no one will question that the price maintenance is "by contract." It is by the contracts of the manufacturer with his retailers. The non-signer clause only enters on the question of *against whom the contracs may be enforced,* and Mr. Justice Douglas ignores the constant reference to full enforcement of the contracts, a reference which, if it has any meaning at all, must include the non-signer clause.

It would be merely cumulative and would no doubt extend this note to undue length to discuss the last phase of legislative history considered by the Supreme Court in arriving at its decision, namely the remarks of the sponsors of the Miller-Tydings Act on the floor of Congress. The remarks are much the same as the committee reports, and the arguments from them parallel to a great extent the arguments from the reports, and thus it is felt that a complete treatment is not sacrificed by a failure to include this phase of the problem.

CONCLUSION

Before concluding, it might be interesting to note another viewpoint from which some insight into the legislative intent might be gotten. The Miller-Tydings Amendment was the crowning achievement, insofar as legislation is concerned, of a long effort by the proponents of "fair trade-ism" to overcome the anti-trust obstacles in the path of such a movement. It was to give interstate, national effect to the fair trade policies locally in effect in the vast majority of states. The great weapon of the "fair traders" was the ingenious non-signer clause. Would the members of Congress interested in advancing the movement intend to exclude from the act which was to remove the bar of the Sherman Act that which gave it its great force? Did they intend to restrict their most potent weapon to mere intrastate efficacy, as indeed it is restricted under the present decision? Did they intend to leave out the non-signer clause despite their experience with fair trade acts not containing such clauses? These are the results of the majority view. Activity against non-signers is limited to intrastate transactions beyond the prohibitory power of the Sherman Act.[52] That this was was the legislative intent seems most unlikely.

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[51] *Supra,* note 1, at p. 750.

[52] Of course, under the decision in the principal case, manufacturers and distributors may still attempt to maintain interstate "fair trade" policies through the medium of the voluntary agreement. Some degree of success along that line is certain, but the problem of cut-rate retailers who would refuse to sign such contracts is not solved unless manufacturers and distributors can refuse to sell to such retailers without violating the anti-trust laws. It would seem that, under the federal anti-trust laws, this can be done. The proposition that a manufacturer may select his customers and refuse to sell to them, either

It is with some regret that the writer has arrived at the conclusion that he has, for he is far from convinced as to the wisdom and propriety of the state fair trade acts. But an effort has been made to push all prejudice which might result from such an attitude to one side and, recognizing that the acts are a constitutional exercise of state power and that the wisdom of the legislation is a question for the legislature, to inquire into the legal questions involved without influence from that quarter. The conclusion reached may attest to the success of the attempt or may result from an overzealousness in pushing aside these political considerations as to the wisdom of the laws, but at any rate the writer has been convinced, and it is respectfully submitted, that the principal case was wrongly decided by the Supreme Court.

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absolutely or conditionally and regardless of motive, seems basic. (36 AM. JUR., MONOPOLIES, §29, and a great number of cases cited in footnote 19, p. 504.) It has been often held lawful for a producer or wholesaler to refuse to sell to retailers who will not maintain prices. (36 AM. JUR., MONOPOLIES, §29, and cases cited in footnote 6, p. 512.) A clash with the anti-trust laws does not appear to take place until several manufacturers combine and refuse to sell to a retailer. Then it is the combination, not the mere choice of one to refuse to sell, which is illegal. (36 AM. JUR., MONOPOLIES, §29, and cases cited in footnote 8, p. 512.)