RETAIL PRICE MAINTENANCE LAWS AND THE CONSUMER

The following statement of Robert A. Bicks, First Assistant, Antitrust Division, Department of Justice, on Federal "Fair Trade" Proposals was made before the House Committee on Interstate and Foreign Commerce on Monday, March 23, 1959, and formed the basis for the remarks he made at the CCI Conference.

I appear this morning to present Justice Department's views on H. R. 1253 -- typical of pending so-called Federal "fair trade" proposals. Treating this proposal, my plan is, first, to sketch how the pending bill would substitute Federal mandate for State or local discretion in the vital area of how much all Americans pay for products needed for daily living. Second, this obliteration of State discretion would be accomplished at the cost of higher prices to consumers. Third, these higher prices will not -- as "fair trade" sponsors urge -- benefit the small business community; in fact, to the contrary, "fair trade" advantages the prime competition today's small retailer faces -- discount houses and mass retailers with private brands. Finally, Federal "fair trade" signals the abandonment of our time honored free enterprise ideals for the distribution sector of our economy. Manufacturer's price dictate would supplant the individual retailer's independent business judgment. And this price dictate would have the force of federal law. For such reasons this Department opposes enactment of any Federal "fair trade" proposal.

I. THE PENDING BILL WOULD SUBSTITUTE RIGID FEDERAL MANDATE FOR THE PRESENT PATTERN OF STATE DISCRETION

At the present time the Federal Trade Commission Act prohibits certain unfair trade practices. Absent statutory exception, that Act and the Sherman Act bar resale price control agreements. However, amendment to the Federal Trade Commission Act section 5 by the 1952 McGuire Act -- the so-called "Fair Trade Act" -- exempted from antitrust certain resale price maintenance agreements. The McGuire exemption declares that State laws allowing resale price agreements within the State do not burden interstate commerce; and that, where State-approved, such agreements are no longer Federal unfair trade practices or antitrust violations.

Thus, present Federal exemption of "fair trade" is permissive, contingent on State policy. Left strictly to each State is the discretion to approve or disapprove resale price maintenance for its territory.

This individual State discretion the pending bill would destroy. For State policy, it substitutes an overriding Federal approval of private price control arrangements. And violation of such private controls would become a Federal offense.

Thus, paragraph (6) of the bill specifies that,

---if such merchandise is in commerce or is held for sale after shipment in commerce

it may be the subject of "fair trade" pricing. At present, to repeat, resale price-fixing is immune only if permitted by the laws of the State of resale. Paragraph (6), in contrast, would permit resale price controls by a manufacturer on sales in States rejecting resale price-fixing, provided only that the product has at some time been part of a "shipment in commerce." Thus, this bill would obliterate State discretion in this area. In its place Federal mandate would be imposed.

This despite the fact that 4 States have rejected "fair trade" and 16 more State high courts have held state fair trade provisions to transgress, in whole or substantial part, State fundamental law.[1] The effect of these 16 high State court decisions would be nullified. Equally important, the pending proposal's paragraph (7) specifies that "it shall be unlawful (i) for any distributor with notice of (a) stipulated resale price -- to sell, offer to sell, or advertise such merchandise in commerce, -- at a different price, or (ii) for any distributor with notice of an applicable minimum resale price so established" to do the same "at a lower price." This bill, to repeat, would amend FTC Act section 5 -- a "statute" which "condemns any method of competition in interstate commerce which is contrary to public policy. Ostler Candy Co. v. Federal Trade Commission, 10 Cir. 106 F. 2d 962, 965." (See Kritzik v. F. T. C. 125 F. 2d 351, 352 (7th Cir. 1942)). The bill could well mean, then, that the FTC would be obliged to enforce the very rights that 4 States have rejected and that an additional 16 high State courts have held to run afoul of State constitutions.

II. FEDERAL "FAIR TRADE" MEANS HIGHER PRICES TO THIS COUNTRY'S CONSUMERS

Such obliteration of State discretion would be at the expense of this country's consumers. For as one Federal "fair trade" proponent candidly put it before this Committee, "There will not be any price competition, and there should not be";[2] and that what we really want is that "a floor be fixed under prices."[3]

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[1]Courts of the following States have held unconstitutional the non-signer provisions of their so-called "fair trade" laws: Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, New Mexico, Ohio, Oregon, South Carolina, Utah, and West Virginia. In addition, Vermont, Texas, Missouri and Alaska have refused to enact Fair Trade Laws.

[2]Testimony of Edward Wimmer, Transcript of this Committee's Hearings, March 16, 1959, p. 38.

[3]Id. at 36.

Let me detail just what this "floor" means: In 1956, the Department of Justice conducted an extensive price survey. The survey covered eight non- "fair trade" cities ranging the country from Rutland, Vermont, to El Paso, Texas. The survey included 132 rapid turn-over, "fair trade," consumer items -- for example, drugs and prescriptions; toiletries; housewares and small appliances; camera and photographic supplies; jewelry and silverware; pens; waxers and cleaners. Within these product categories, specific brand items surveyed were selected at random.

The facts this survey revealed are striking. First, of the 132 items surveyed, an average of 119 were available in each city. Second, of the 119 items available some 77 on the average sold below the "fair trade" prices in each of the eight cities. Thus, consumers in the eight city non- "fair trade" trade area purchasing these 77 items could effect savings of 27% below their "fair trade" value of $2,033.20. And third, even if consumers in the eight city area purchased all 119 of the items available, items which include those selling at "fair trade" as well as below "fair trade" prices, consumers would, none the less still have effected an average saving of 19% below the "fair trade" figure of $2,279.34.

Apart from these overall figures, the survey revealed a rather wide range in price savings below "fair trade" levels in each of the eight cities. For example, consumers in Washington, D. C., could buy 121 items below their "fair trade" prices and effect savings on these items of 32%; Kansas City consumers had 73 items available below "fair trade" price for a saving of 31%; St. Louis -- 78 items available for 30% saving; in Houston -- 76 items, 26% savings; Dallas -- 99 items, 24% saving; in El Paso, 78 items, 23% saving; Rutland, Vermont -- 80 items available at a saving of 17% and in Burlington, Vermont consumers could buy only 13 items below "fair trade" prices, on which savings of only 7% were possible. For your record, I submit as Appendix I the source material for these statements. Small wonder then that the Consumers Union has stated that a federal price-fixing law "would turn the economic clock backward a half century or more" and "would impair over-all economic efficiency while reducing consumer standards of living."[1]

With such factors in mind, the Chairman of the Department of Economics and Business Administration of Geneva College has testified:

> "If this price-fixing bill is passed, it is estimated that it will cost the American consumers at the very minimum $1 billion annually, and a conservative maximum figure of $10 billion ..."[2]

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[1]Consumer Reports, May 1958, p. 241.

[2]Hearings, Select Committee on Small Business, U.S. Senate on Competitive Impact of Discount House Operations on Small Business June 23-25, 1958, p. 105.

III. FAIR TRADE IS AN INDISPENSABLE ELEMENT OF THAT MILIEU WHICH ENABLES PROSPERITY OF TODAY'S SMALL RETAILER'S PRIME COMPETITION - THE DISCOUNT HOUSE AND THE MASS RETAILER

And this added burden to consumers would not, as "fair trade" sponsors urge, produce commensurate benefits to small retailers.

As the Chairman stated opening these Hearings:

> "These bills have for their purpose aiding small business from the onslaught of unrestrained cut-throat competition of large chain store operations, department store operations, and discount houses, which have been flourishing as a result of a breakdown of effective state fair trade laws."

Amplifying the nature of "cut-throat competition," one "fair trade" proponent in these Hearings defined a "loss leader," presumably the prime weapon of the "cut-throat" competitor as "a product sold for the purpose of attracting trade away from somebody else." If that be so, then "cut-throat competition" means really any competition. And it is precisely "fair trade's" ban on price competition that enables discount houses and mass retailers to prosper.

On the one hand, "fair trade" comprises an indispensable element of that milieu which has given rise to discount houses. Thus "fair trade" -- urged by some as a benefit to the small independent retailers -- in fact facilitates the very discount house competition of which some small independent retailers now complain. On the other hand, apart from discount house operations, large mass retailers -- for example, Sears Roebuck and Macy's -- may perhaps use "fair trade" as an umbrella to preserve from competition their own private brands which smaller retailers cannot afford. Thus, even apart from the discount houses, in the mass retailing field "fair trade" again, may thwart rather than aid small independent retailers' ability to compete.

A. DISCOUNT HOUSES

Let me explain what I mean. First, why does "fair trade" really make possible the milieu in which discount houses may prosper?

This is why. Initially, "fair trade" gave discounters an unimpeachable nationally advertised price to cut. The buyer could clearly see the savings involved. Beyond that and more important, by attempting to stifle price competition, the "fair trade" laws created an economic vacuum into which the discount houses rushed.

This circumstance has been remarked by our business writers. As some have put it:

> Through the Fair Trade Laws -- and other devices, our legislators and courts have sought, in effect, to bottle up price competition, especially at the retail level. The discount house may be viewed as a manifestation of the explosive pressures which are likely to be generated as a result of an attempt to eliminate price competition in a competitive economy. It is not to be wondered at that the partial release of those pressures causes some sense of disquietude in the areas of the economy affected by their impact.[1]

And the survey just spelled out highlights the precise extent to which "fair trade" has created an umbrella under which discount houses can safely reside. No wonder, then, that one "fair trade" commentator recently wrote:

> "... it is more correct to say that the Fair Trade fracas is one between big retailers or price stores on the one hand, and big manufacturers or quality stores on the other, rather than one between big and little retailers. ...There are money and vested interest aplenty on both sides, (that commentator goes on) and the colorful drama, somewhat overdrawn, of the big foreign operator crushing the little local ... independent is a ... poetic legend more suitable for propaganda exploitation ... than the whole unvarnished reality ..."[2]

So much for "fair trade" and the small independent retailers' ability to compete with their larger rivals.

B. MASS RETAILERS OTHER THAN DISCOUNT HOUSES

More difficult to gauge is the impact of "fair trade" on small retailers' ability to compete with mass department store vendors, like Macy's and Gimbel's and large mail order sellers, like Sears Roebuck and Montgomery Ward. The discount house, as we have seen, prospers by selling nationally branded items with only more or less careful observation of "fair trade" restrictions. The large department stores or mail order house, in contrast, avoids "fair trade" prices largely through resort to private brands.

Let me highlight this point. Compare, for example, Macy's prices on vitamins and drug sundries with those of national brands, set forth in this leaflet, which I submit for your Committee's

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[1]Alexander & Hill, "What to Do about Discount Houses," Harvard Business Rev., Jan. - Feb. 1955, p. 57.

[2]Harms, Our Floundering Fair Trade (1956) pp. 26, 27.

record. For instance, Macy priced buffered aspirin (100's) at $0.89 compared with $1.23 for a comparable national brand, sterile cotton (1 lb.) at $1.78 compared with $1.98, antihistamine tablets (25's) at $0.84 compared with $1.08, and therapeutic multivitamin capsules (100's) at $7.99 compared with $13.95.

Thus, large department stores or mail order houses may well encourage manufacturers to "fair trade" national brand items -- virtually the only items which the small retailers can secure. At the same time, such mass sellers may market their own private brands -- substantially identical to nationally branded goods -- at prices lower than "fair trade" mark-ups for the nationally branded counterparts. The result could be to enable large retailers, by hampering their smaller competitors' ability to cut prices, to hold an umbrella over the market for their own private branded items.

IV. THIS BILL SIGNALS ABANDONMENT OF PRICE COMPETITION FOR A LARGE PORTION OF THIS COUNTRY'S COMMERCE

Initially, the bill's first four paragraphs apparently only restate the present McGuire Act exemptions. But they pointedly narrow the existing prohibition against agreements between firms otherwise in direct competition (See 15 U. S. C. Section 45 (5)), a competitive safeguard, necessity for which is underscored by the facts before the Court in McKesson-Robbins. U. S. v. McKesson-Robbins, 351 U. S. 305 (1956).

Beyond that, under bill paragraph (5), a manufacturer may unilaterally impose resale price controls on an article by notice on its label without agreement or assent by any wholesaler or retailer. Existing law at least would apply sanctions to a non-signer only when other retailers have already agreed with the manufacturer on the retail price.

Moreover, under the bill, the manufacturer's power is not limited to maintaining a single uniform retail price. He may establish different resale prices for different distributors, provided that the criteria of differentiation are "not otherwise unlawful." But present price discrimination safeguards, enacted when the problem was the price paid by the distributor, may not fully meet the new complexities of discrimination in the price distributors must charge others on resale.

Now, most local sellers can, within a wide range, retail a product to meet the peculiar requirements of their local area and their customers. This bill would transfer all price powers all the way back to the producer of the branded product. Each local distributor would have no choice but to accept the price judgment of the producer. This means each "proprietor" has the power -- perhaps backed by F. T. C. sanction -- to dictate how retailers may compete.

This transfer of the pricing function as to each product from the give-and-take, supply-demand judgments of local sellers and buyers, to the judgment of manufacturers remote from the point of sale, inevitably narrows the area of competition between all such products. The resultant rigid prices for each such product will be only remotely responsive to changes in local market conditions and wholly unresponsive to the bargaining power of any individual consumer.

Moreover, possible price competition between each of such products and others like it will be inevitably lessened. By confining enforceable price judgments to the few producers of similar items, a marked tendency toward uniform pricing becomes inevitable. Whether the uniformity is legally achieved or by outright agreement on a particular price, by agreement to follow the leader, or by passive unwillingness to upset the market, it is made far more probable by the drastic decrease in the number of persons whose decisions make the price. The result would be a sharp curtailing of free market control over prices.

Such centralized control over prices, the Committee for Economic Development has concluded, leads to:

> ...inefficiency, inequity, breakdown of respect for law and, most important, serious danger to our personal and political freedoms... . The American people will not deliberately embrace regimentation. But there is a risk of drifting into regimentation -- of accepting more and more controls in default of a positive program to reestablish free markets... .[1]

This legislation, to repeat, does away with price competition in a large portion of the country's commerce. And price competition is the core of that competition essential to a free enterprise economy. The Sherman Act, called the "charter of economic freedom," rests on a basic belief in the worth and necessity of a competitive free enterprise economy. This bill's elimination of competition, through exceptions to that Act so broad as to repeal it for a large share of the economy, poses squarely the decision whether the basic principle of our free enterprise economy is to be abandoned.

This decision is posed, moreover, at a time when all are concerned with the adequacy of available means to curb inflation and keep prices responsive to consumer demand. Prime tools in this task are the Government's monetary and fiscal powers. However, such powers cannot work where prices are kept inflexible in the face of sagging demand. As the economic advisor to the Federal Reserve Board recently put it:

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[1] Committee for Economic Development, The End of Price Control-How and When (1946) p. 4.

> ...An economic system cannot be expected to operate on the principle that a seller can always obtain any price he wishes to ask for his product. In order to maintain sustainable economic growth, it is the task of the seller to adjust his prices - so as to stimulate demand. Otherwise, it is to be expected that resources will be allocated to other uses, but this is a time-consuming process and results in unemployment.[1]

An equally fundamental issue is posed by the bill's provisions for enforcement of resale price controls against distributors who do not assent to price maintenance. While the less extensive similar provisions of the McGuire Act have never been squarely tested on federal constitutional grounds,[2] the highest courts in 16 States have held similar "non-signer" provisions of State fair trade acts unconstitutional, relying generally on "due process" clauses in the various State constitutions. Such State clauses, however, oftimes follow closely the language of the "due process" clause of the United States Constitution. Thus this legislation's permission to a manufacturer to establish resale prices merely by notice by mail or by attachment to merchandise or its containers, may raise questions under the Fifth Amendment's "due process" requirement.

CONCLUSION

To sum up, as the Attorney General's National Committee to Study The Antitrust Laws put it:

> ... the throttling of price competition in the process of distribution that attends "Fair Trade" pricing is, in our opinion, a deplorable yet inevitable concomitant of federal exemptive laws. Moreover, whatever may be the underlying legislative intent, any operative "Fair Trade" system facilitates horizontal price-fixing efforts on the manufacturing and each succeeding distributive level. And the prominent existence of a federal price fixing exemption not only symbolizes a radical departure from National antitrust policy without commensurate gains, but extends an invitation for further encroachment on the free-market philosophy that the antitrust laws subserve.[3]

Much to the point is the language of the Arkansas Supreme Court, without dissent, striking down Arkansas nonsigner provisions as afoul of the Arkansas constitution. As that High State Court put it:

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[1] Letter to The Washington Post, March 12, 1959, p. A25.

[2] Certiorari was denied in the one case directly presenting the issue. Schwegmann Bros. v. Eli Lilly & Co., 346 U.S. 856(1953)

[3] P. 154

> Included in the right of personal liberty and the right of private property ... is the right to make contracts for the acquisition of property ... If this right be struck down or arbitrarily interfered with there is a substantial impairment of liberty in the long established constitutional sense.[1]

And as that Court went on:

> If securing a contract with one dealer binds all others, then the corollary would be that, absent such contract, the others are not bound. It is frightful to think a device so easily concocted could destroy the constitutional bulwark protecting our personal liberties and the public welfare.[2]

Highlighting this conclusion, the Arkansas Supreme Court turned to the history of fair trade:

> Minimum resale price maintenance (that Court put it) was originally advocated by manufacturers of highly individualized, trademarked, trade-named, or branded products as a means of protecting them from unrestrained price cutting among dealers to whom the products were sold outright. When finally enacted by the states, and by the Congress, however, its enactment was urged almost entirely by a few well organized dealer groups as a means of eliminating price competition both of dealers using the same method of distribution and of dealers using new and different methods of distribution.[3]
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> It would seem apparent that the principal objective of minimum price maintenance is the protection of profit margins for retailers and distributors unable or unwilling to meet the pressure of competition.[4]

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[1] Union Carbide and Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 561 (1955).

[2] Id. at 562.

[3] Id. at 564.

[4] Id. at 568. The Arkansas Supreme Court noted (p. 563-564): "By far the most enthusiastic advocate of fair trade legislation is the retail druggist and the most active group in his association, the National Association of Retail Druggists. For over half a century this Association has been fighting for fair trade. Almost single handed it secured the adoption of the Miller-Tydings Act and most state laws...". On this point, perhaps relevant is that retail pharmacy has been called "practically depression proof" by the National Wholesale Druggists Association. Drug Topics, April 14, 1958. Drug store sales in 1958 were at a record (cont.)

For all these reasons the Arkansas Supreme Court struck down Arkansas' nonsigner provision on the ground that:[1]

> The Legislature has no power, under the guise of policy regulations, arbitrarily to invade the personal rights and liberty of the individual citizen, to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights.

Much the same considerations might well be borne in mind by this Congress -- now.

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[4](cont. from p. 64) high of $6,700,000,000 - 3.7% ahead of 1957 sales. Drug Topics, Jan. 5, 1959. Moreover, in 1957 only 29 drugstores failed per 10,000 in contrast to 52-per 10,000 retail stores generally. Drug Topics, March 31, 1958 Reasons for drug-store failure as suggested in this survey by Dun & Bradstreet include heavy withdrawals (high living, family illness, high store expenses), debt, personality problems, changes in neighborhood, new competition, faulty buying, badly planned expansion, poor bookkeeping, dingy appearance and inefficient employees. How is "fair trade" to help these situations?

[1]Union Carbide, Supra, at 566.