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ANTITRUST—RESALE PRICE MAINTENANCE—LEGALITY OF FAIR TRADE CONTRACTS MADE BY INTEGRATED FIRM—Defendant-appellee manufactures its own brand-name line of drug products and is also the largest drug wholesaler in the United States.[1] Its manufactured products are sold through appellee's own wholesale division and to independent wholesalers and retailers. In 1951 appellee entered into resale price maintenance contracts with these independent wholesalers, most of whom competed with appellee's wholesale divisions. The Government then brought an action for an injunction under section 4 of the Sherman Act,[2] restraining the further use of resale price contracts by appellee on the ground that these contracts constituted illegal price fixing under section 1 of the act.[3] The appellee argued that the Miller-Tydings and McGuire Acts[4] exempted these contracts from the Sherman Act prohibition. The Government, however, contended that these contracts came within the proviso excepting certain contracts from the Miller-Tydings and McGuire protection.[5] The lower court denied

[1] Principal case at 305.

[2] 26 Stat. 209 (1890), as amended, 15 U.S.C. (1952) §4.

[3] 26 Stat. 209 (1890), as amended, 15 U.S.C. (1952) §1.

[4] 50 Stat. 693 (1937), 15 U.S.C. (1952) §1 (Miller-Tydings Act); 66 Stat. 631 (1952), 15 U.S.C. (1952) §45 (McGuire Act).

[5] This proviso removes resale price maintenance contracts ". . . between manufacturers . . . or between wholesalers . . . or between retailers, or between persons, firms or corporations in competition with each other" from the protection of the Miller-

the Government's motion for summary judgment, stating that under the present case law it was unwilling to hold fair trade agreements illegal per se simply because the producer is also a wholesaler, unless there is a showing that there is an additional restraint on competition other than that which naturally results from resale price maintenance contracts.[6] On direct appeal to the Supreme Court, *held,* reversed, three justices dissenting.[7] Since appellee competes at the same functional level as the contracting independent wholesalers, the contracts are not protected by the McGuire and Miller-Tydings Acts, and are therefore illegal per se.[8] *United States v. McKesson and Robbins, Inc.,* 351 U.S. 305 (1956).

In the Miller-Tydings and McGuire Acts, Congress exempted vertical price-fixing agreements between a manufacturer of brand-name goods and its customers from the illegal per se prohibition of the antitrust laws.[9] These acts, however, except from their protection contracts "... between manufacturers ... or between wholesalers ... or between retailers, or between persons, firms or corporations in competition with each other."[10] The principal case raises the question whether fair trade contracts with independent wholesalers made by an integrated firm of the manufacturer-wholesaler type fall within the above exception and thereby become illegal per se. In answering this question affirmatively, the majority reasons, first, that since appellee is both a manufacturer and a wholesaler, it acts in both capacities and cannot say it acted solely as a manufacturer in making these contracts.[11] Therefore, as a wholesaler, appellee was clearly within the "between the wholesalers"[12] language of the proviso.[13] Secondly, and principally, since the statutory proviso is unambiguous,[14] legislative history[15]

Tydings Act. 50 Stat. 693 (1937), 15 U.S.C. (1952) §1. The McGuire Act contains essentially the same provision. 66 Stat. 632 (1952), 15 U.S.C. (1952) §45.

6 United States v. McKesson and Robbins, (S.D. N.Y. 1954) 122 F. Supp. 333, noted in 64 YALE L. J. 426 (1955).

7 Justice Harlan wrote the dissent, in which Justices Burton and Frankfurter concurred.

8 United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

9 Prior to the enactment of this enabling legislation the Supreme Court had held that resale price maintenance contracts were illegal per se. Dr. Miles Medical Co. v. John D. Park and Sons Co., 220 U.S. 373 (1911).

10 50 Stat. 693 (1937), 15 U.S.C. (1952) §1; 66 Stat. 632 (1952), 15 U.S.C. (1952) §45.

11 Principal case at 312.

12 50 Stat. 693 (1937), 15 U.S.C. (1952) §1; 66 Stat. 632 (1952), 15 U.S.C. (1952) §45.

13 The Federal Trade Commission has held that in the integrated situation it is a question of fact whether the manufacturer in entering into a fair trade contract is acting as a manufacturer, retailer or wholesaler. Eastman Kodak Co., Dkt. No. 6040, CCH Trade Reg. Rep. (transfer binder 1955) ¶25,291. In this case the integration was on the manufacturer-retailer level. For an informative and lucid legal and economic analysis of the problems involved in this area, see Weston, "Resale Price Maintenance and Market Integration: Fair Trade or Foul Play," 22 GEO. WASH. L. REV. 658 (1954).

14 It is difficult to agree with the majority's conclusion that the proviso is unambiguous in view of the problems of interpretation it has presented to others. In 52 HARV. L. REV. 284 (1938), the problem presented by the proviso was clearly recognized and a conclusion that the act did protect the integrated firm was reached. In Doubleday & Co., 3

need not be resorted to, and therefore the "crucial inquiry" is whether there is competition on the same functional level between the parties to the contract. The majority concludes that since appellee's own wholesale divisions compete with the independent contracting wholesalers, appellee's contracts with the independents are not exempted from the Sherman Act. This rationale seems erroneous, however, as pointed out by the dissent. Why should competition be made the crucial determinant, when under all resale price situations price competition as to the fair traded product will be eliminated at the purchaser's level?[16] Unless there is an *additional* restriction upon competition, as was required by the lower court,[17] it would seem that instead of being crucial the inquiry is immaterial. Had the majority looked to the policy of the fair trade acts, which is to protect the good will in the brand name of a product,[18] rather than relying on a literal interpretation of the proviso, a different result would seem to have been required. Neither the majority nor the legislative history indicates why an integrated firm has less claim to brand name protection than a non-integrated one.[19] As the dissent suggests, the evil aimed at in the proviso would seem to be the prevention of contracts between competitors limiting the price on competing brands.[20]

CCH Trade Reg. Rep. ¶11,515 (FTC 1953), respondent book publisher, who had his own retail outlets, made fair trade contracts with independent retailers. Reversing and remanding the hearing examiner's decision that respondent was still within the protection of the McGuire Act, the commission wrote three different opinions as to the proper construction of the proviso. Two commissioners advocated an examination of the contracts and the facts surrounding their making to determine in what capacity respondent was acting when he entered into the contracts. Two other commissioners required a finding of competition between the respondent's retail outlets and independents to remove the McGuire Act protection. A third commissioner held that the protection would be removed if there were a restriction of price competition between the retailers. Later in the Eastman Kodak Co. case, note 13 supra, the commission reversed everything that they had previously said contrary to their opinion in that case. Lastly, in Eastman Kodak Co. v. Schwartz, 133 N.Y.S. (2d) 908 (1954), where the same issue was presented, the New York Supreme Court construed the McGuire and Miller-Tydings Acts to permit integrated firms to engage in resale price fixing, relying mainly on an extensive examination of the legislative history of these acts.

15 For legislative history, see principal case at 313, footnote 17, and Eastman Kodak Co. v. Schwartz, note 14 supra. In 98 CONG. REC. 8717 (1952), Senator Douglas said that he knew of nothing which would prevent a manufacturer from purchasing his own retail outlet, making a resale price maintenance contract with it, and then enforcing the contract against all other retailers. See also the extracts of congressional debates in Eastman Kodak Co., note 13 supra.

16 Eastman Kodak Co. v. Schwartz, note 14 supra, at 922; United States v. McKesson & Robbins, note 6 supra. See also, Weston, "Resale Price Maintenance and Market Integration: Fair Trade or Foul Play?" 22 GEO. WASH. L. REV. 658 at 678 (1954).

17 United States v. McKesson and Robbins, note 6 supra.

18 Dissent in principal case at 316; 81 CONG. REC. 8141 (1937).

19 Eastman Kodak Co., note 13 supra, at p. 35,424; Eastman Kodak v. Schwartz, note 14 supra, at 922.

20 In reporting to the House of Representatives on the conference report on the Miller-Tydings bill Representative McLaughlin stated: "As an example, the act would not allow two manufacturers of similar trademarked articles, as, for instance articles of food or drugs . . . to agree between themselves as to the price at which their respec-

Under established methods of marketing[21] the effect of this decision will be to foreclose considerably the possible use of resale price maintenance. The general rule of the principal case is that if parties to a fair trade agreement compete on any level the agreement will be illegal. For example, the non-integrated manufacturer which sells directly to retailers can not, it would seem, have fair trade contracts with wholesalers.[22] The principal case prohibits the integrated manufacturer-wholesaler from making fair trade contracts with independent wholesalers, and if either the manufacturing or wholesaling division sells directly to consumers, then fair trade contracts with retailers may be forbidden.[23] An integrated manufacturer-retailer's fair trade agreements with wholesalers would seem to be permissible unless the wholesalers sold directly to consumers or the manufacturer's retail divisions sold to other retailers.[24] Thus, a manufacturer desiring to use fair trade contracts must make a thorough analysis of the market to determine whether or not it is competing with any of its own customers for sales.[25]

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tive articles shall be sold." 81 CONG. REC. 8141 (1937).

21 The extent of the area foreclosed to resale price maintenance can be appreciated by an examination of the following figures on marketing methods used by manufacturers:
26.5% of all manufacturers' sales are to wholesalers and jobbers.
25.2% of all manufacturers' sales are to industrial and other large users.
23.8% of all manufacturers' sales are to or through their own wholesale divisions.
19.9% of all manufacturers' sales are to retailers.
2.8% of all manufacturers' sales are to their own retail stores.
1.8% of all manufacturers' sales are to customers at retail.
Duncan, "Channels of Distribution for Consumers Goods," MARKETING BY MANUFACTURERS (Phillips ed. 1951) at 219. At page 19 of its brief to the Supreme Court, appellee offered the following figures: "The certified results of a survey made by American Fair Trade Council of known fair trading manufacturers reveals that 86% of all such manufacturers who responded to inquiries made of them sold 'fair traded' products to wholesalers. Of this 86% who sold to wholesalers, 82% also sold to retailers, 34% also sold to consumers, 10% also have wholly-owned or controlled subsidiaries that sell to wholesalers, 9% also have wholly-owned or controlled subsidiaries that sell to retailers and 4% also have wholly-owned or controlled subsidiaries that sell to consumers."

22 If any of the contracting wholesalers sold directly to consumers then the manufacturer would also seem to be precluded from engaging in direct sales to potential consumer customers of these wholesalers. A special problem is presented by the marketing method of "drop shipment," where the manufacturer ships goods directly to the retailer and the retailer is instructed to credit the sale to any of the wholesalers in the area with whom the manufacturer does business. This practice would probably be permissible even where the manufacturer has fair trade contracts with wholesalers, because in effect, there is no competition on the manufacturer's part as to this wholesale function.

23 Even if neither wholesaler nor manufacturer sells directly to consumers, there is still the possibility that some of the contracting retailers sell to other retailers and thereby create competition among the contracting parties.

24 Of course, the manufacturer-retailers' contracts with independent retailers fall directly under the rule of the principal case.

25 In note 66 in Weston, "Resale Price Maintenance and Market Integration: Fair Trade or Foul Play?" 22 GEO. WASH. L. REV. 658 at 680 (1954), the author suggests that manufacturers who engage in what is now considered illegal price fixing under the principal case are subject to treble damage suits by any non-signing competing dealer who can show actual damage. 38 Stat. 730 (1914), 15 U.S.C. (1952) §15.