HD 2500
.M46
no. 11
c.1

THE FAIR TRADE LAWS

Address by

JAMES M. MEAD, CHAIRMAN

FEDERAL TRADE COMMISSION

Before the

NEW YORK STATE PHARMACEUTICAL ASSOCIATION

Saranac Lake, New York, June 11, 1951

Ladies and Gentlemen of the New York State Pharmaceutical Association:

It is indeed a very great pleasure for me to appear before you this afternoon and participate with you in the Seventy-Third Annual Convention of your Association. It is, of course, always a pleasure to return to New York and renew many long and valued friendships and acquaintances.

When I received your kind invitation, I began at once to think what subject we might discuss together so that some constructive contribution could be made to the deliberations of your convention. The Supreme Court of the United States gave us our subject. It was within a period of a few days of that time when the Supreme Court handed down its now celebrated opinion in the Schwegmann case in regard to fair trade law. I know that you are all vitally interested in that decision and its possible consequences, and I would like to discuss it with you.

Briefly, the facts were: Schwegmann Brothers, a super market in New Orleans, Louisiana, refused to sign a fair trade agreement with Calvert Distillers Corporation and the Seagram Distillers Corporation; Schwegmann Brothers sold fifths of Calvert Reserve whisky for $3.35 and Seagram for $3.51 when the distillers had agreed with other retailers in the State of Louisiana that the Louisiana minimum retail price for these brands should be $4.24. The distillers thereupon sought in the District Court to enjoin Schwegmann Brothers from selling these products at less than the minimum prices fixed by their agreements claiming that this marketing arrangement was legal under the Miller-Tydings Act. The District Court sustained the distillers and this decision was affirmed (2-1) in the Court of Appeals. Schwegmann Brothers thereupon appealed to the Supreme Court.

Fair trade laws have been enacted in forty-five States (the only States not having such laws are Vermont, Texas and Missouri, and also the District of Columbia). A very important clause, common to all such statutes, perhaps the keystone of fair trade laws, is the so-called nonsigner clause which provides that when a manufacturer has obtained the signature of even one retailer to an agreement not to sell the manufacturer's products below the prices he sets, all other retailers in that State, with knowledge, are bound by it.

The Miller-Tydings Act, a Federal enabling law, was passed in 1937, and provided that "nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale" of specified commodities when "contracts or agreements of that description are lawful as applied to intrastate transactions" under the local law. There is no nonsigner provision in the Miller-Tydings Act.

The issue before the United States Supreme Court in the Schwegmann case was whether a dealer who did not sign a fair trade contract is required to sell at the prices fixed in a fair trade contract, made between other persons, when the product which is sold touches interstate commerce.

The Supreme Court by a 6-3 decision said "no"; — that a manufacturer will no longer, by making a fair trade contract with one dealer, be able to fix the uniform price at which his product will be sold if the product

falls within the scope of interstate commerce. The Supreme Court held the non-signer provision to be outside the protection of the Miller-Tydings Act 1/ and that attempts to impose such restrictions on nonsigners in the sale of products touching interstate commerce remain a violation of the Sherman Act. The power of a contracting manufacturer and a contracting retailer to maintain a uniform price by imposing the price on non-contracting parties is a form of price fixing which is expressly excluded from the protection of the Miller-Tydings Act.

It is interesting to note that the original concept of fair trade protection was developed by manufacturers who felt that they had a proprietary interest in products carrying their trade name or brand. They wanted to protect their trade-marked products from competition with cheaper and perhaps less reliable products. Subsequently, with the development of large department stores, food chains, consumer cooperatives and super markets, the "little" retailers who had to compete with these larger outlets turned to the manufacturers demanding price protection. Thus it is noted that in the retail price movement, in addition to the manufacturers of trade-marked commodities, distributors also seek protection in a maintained resale price. Today, thousands of dealers maintain resale prices, involving many billions of dollars, of hundreds of manufacturers covering a wide variety of products, including liquors, drugs, proprietaries, foods, cosmetics, etc., up to consumer durables.

What effect will the Schwegmann decision have on these manufacturers, dealers and commodities?

There is no doubt that the sponsors of fair trade law have received a serious blow.

The decision will have no effect on manufacturers engaged in intrastate business. It is possible that intrastate distribution of a product made in another State might be unaffected by the decision.

1/The Court stated: "They (a distributor and one or more retailers) 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 resort to coercion.

"Much argument is made to import into the contracts which respondents make with retailers a provision that the parties may force nonsigners into line. It is said that State law attaches that condition to every such contract and that therefore the Miller-Tydings Act exempts it from the Sherman Act. Such a condition, if implied, creates an agreement respecting not sales made under the contract but other sales. Yet all that are exempted by the Miller-Tydings Act are 'contracts or agreements prescribing minimum prices for the resale' of the articles purchased, not 'contracts or agreements' respecting the practices of noncontracting competitors of the contracting retailers.

"It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a State compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids."

In order for the decision to have any effect, interstate commerce must be involved.

In certain States like New York the decision will have no effect on the maintenance of distiller-set minimum prices on liquor. State liquor authorities see to it that the prices posted with it by the distiller are maintained; no contracts are involved between the dealer and the distiller. The authority of State authorities in supervising the maintenance of liquor prices is claimed under the Twenty-First Amendment to the Constitution. This authority has never been judicially determined.

Some States permit fair trade prices to be set by agreement between a distributor of a product and a retailer. Thus, a manufacturer may empower his State distributor to set minimum prices, but retailers might legally challenge such a move because the distributor may be not really an independent contractor but merely an agent for the manufacturer.

Of course, if a manufacturer were able to obtain signed contracts from every dealer, the decision would not affect him; but probably to do so would be an impossible job of paper work.

Can a manufacturer refuse to sell his products to a retailer who will not sign a fair trade agreement? It is fundamental law that a manufacturer engaged in an entirely private business has a right freely to exercise his own independent discretion in the selection of his customers.2/

The Supreme Court has stated (Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441 [1922]) that it is not a violation of the Sherman Act for a trader to refuse to sell to others, and "he may withhold his goods from those who will not sell them at the prices which he fixes for their resale." However, since, as the Court stated, "he may not, consistently with the [Sherman] Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade," it may be quite difficult to devise a legal and practical and effective plan by which a large interstate, nation-wide business enterprise can police its customers to insure their abidance by the manufacturer's "suggested" prices. No doubt some plan or plans may be proposed.

For all practical purposes, it appears that the Schwegmann decision has seriously impaired resale price maintenance of nationally known trademarked products.

The remedy, if such be adviseable, must come from Congress. In order to bring the nonsigner provision within the scope of the Miller-Tydings Amendment, new legislation is required.

In this connection, it may be observed that the supporters of fair trade legislation are stronger today and more organized than they were in

---

2/ United States v. Colgate & Company, 250 U. S. 300, 307; Federal Trade Commission v. Beech-Nut Packing Company, 257 U. S. 441.

1937 when the Miller-Tydings amendement was passed. At that time, the organized effort in behalf of the Miller-Tydings Amendment was by the drug industry; since then other industries and organizations have come to the support of fair trade.

On the other hand, it is a matter of history that fair trade legislation made its great advance in the thirties when the country was coming out of a depression and when the emphasis was on the stabilization of the national economy at a higher level. Today we have a quite different situation.

In these times of national defense -- when the Economic Stabilization Agency is striving to curtail the rising cost of living which is now at an all-time high -- when price increases have added billions to the cost of the defense program and more billions to the cost of living of the general public -- it may be argued, on the grounds of politics and economics, that the present time is not conducive for the enactment of new fair trade legislation. I am merely pointing out this observation to you for your consideration. However, as I have stated, the decision rests entirely with Congress.

May I close with again expressing my sincere thanks for your kind invitation to be with you. It has indeed been a great pleasure to me. I want you to know that I sincerely hope and trust that your Association, under its able leadership, will continue to experience advancement and success in its contribution to your members and your industry.