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CONSTITUTIONALITY OF THE FLORIDA FAIR TRADE ACT AND CONTINUING MYTHS OF RESALE PRICE MAINTENANCE

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Throughout recorded history, men subject to the economic laws of competition have endeavored to limit and overcome the restrictive effects of these laws by obtaining non-competitive advantages. One of the techniques frequently employed to achieve this end has been collective price-fixing.[1] As a result of its incompatability with the concept of free competition, price-fixing was one of the first practices to be condemned under the antitrust laws.[2] In stark contrast to the vigorous antitrust policy against price-fixing, special laws have been enacted by the federal and state governments, which specifically exempt certain vertical price-fixing agreements. In light of the obvious contradictions of policy between these so-called "fair trade" laws and the antitrust laws, it is not surprising that since their enactment during the depression of the 1930's, the fair trade laws have generated a continuing debate and persistent litigation on their constitutionality as well as their purported and actual effects on the American economy. The fact that the Florida Fair Trade Act has already been declared unconstitutional three times, twice on essentially anti-competitive grounds, is illustrative of this controversy.[3]

This article will examine the constitutionality of the present Florida Fair Trade Act and the economic validity of the arguments supporting fair trade laws. In addition, it will be necessary to examine the economic and legal origins and evolution of fair trade, the litigation concerning the Florida Fair Trade Act, and the principal arguments for and against fair trade's continued application.

BACKGROUND AND DEVELOPMENT OF FAIR TRADE

Fair trade is designed to permit what is variously referred to as resale price maintenance, resale price fixing, or vertical trade agreements.[4] In

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1. *See* Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382-85 (1965).

2. Standard Oil Co. v. United States, 221 U.S. 1, 59-62 (1911).

3. The Florida Fair Trade Act was first held unconstitutional in 1939 on what must be considered a technicality. Bristol-Myers Co. v. Webb's Cut-Rate Drug Co., Inc., 137 Fla. 508, 188 So. 91 (1939). The act was again ruled unconstitutional in its entirety in Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949), largely on anti-competitive grounds. The nonsigner clause was held unconstitutional on similar grounds in Miles Laboratories, Inc. v. Eckert, 73 So. 2d 680 (1954).

4. Vertical trade agreements should be carefully distinguished from "horizontal" trade agreements. Horizontal agreements are between persons of the same class or level, such as between manufacturers or between wholesalers. Horizontal agreements are illegal under the Sherman Act. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 190 (1936).

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essence, it allows the manufacturer of a brand name product to fix the minimum or "stipulated" price[5] at which the product must be sold[6] by subsequent wholesalers and retailers.[7] Because the retailers are restricted from selling below this minimum or, in the case of stipulated price, at any other price, the vertical price-fixing agreement serves to eliminate "intra-brand"[8] competition among the retailers of the product.

While vertical trade agreements were allowed at common law when they did not constitute common law unfair competition,[9] the Sherman Antitrust Act of 1890[10] raised doubts about their legality. The doubts were confirmed in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[11] wherein in 1911 the United States Supreme Court declared such vertical price-fixing agreements to be an unlawful restraint of trade under the Sherman Act. Apparently, the *Dr. Miles* case had precluded the possibility of resale price maintenance,[12] but in 1919 *United States v. Colgate & Co.*[13] reopened the question by expanding the right to refuse to deal.[14] In *Colgate* the Supreme Court recognized a producer's right to set conditions under which he would deal with a retailer—including a stipulation of a minimum

5. Fair trade acts in some states authorize the manufacturer to fix minimum resale prices, while others authorize absolute or "stipulated" resale price-fixing. The Florida Fair Trade Act allows only minimum resale price maintenance. *See* 2 CCH TRADE REG. REP. ¶6041, at 9087 (1971).

6. For examples of fair trade contracts see 2 CCH TRADE REG. REP. ¶¶6051-52, at 9101-04 (1971).

7. Legal means other than fair trade used by manufacturers to control prices are vertical integration with retailer outlets, franchise selling, direct selling by the manufacturers to consumers other than in retail outlets, and true consignments in which the risk of loss is on the manufacturer.

8. "Intra-brand" competition refers to competition between retailers with respect to a single product. "Inter-brand" competition, on the other hand, refers to competition between producers of different brand name products. The latter is said to be unaffected by fair trade laws.

9. Fowle v. Park, 131 U.S. 88 (1889). *But see* Brown, *Early English Hostility Toward Monopolies — An Argument for Voiding Fair Trade Laws*, 33 ALBANY L. REV. 136 (1968).

10. Sherman Antitrust Act, ch. 647, §1, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §1 (1970).

11. 220 U.S. 373 (1911).

12. The Court rejected the contention that a manufacturer is entitled to maintain the restrictions by virtue of the fact that they relate to products of his own manufacture. The Court stated that to sustain such restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it be limited to what is fairly necessary. But *agreements* or *combinations* between dealers, having for their sole purpose the destruction of competition and the *fixing of prices*, are injurious to the public interest and void. The Court had reviewed the retail agency contract and concluded that the so-called "retail agents" were not agents at all but were purchasers who buy to sell again as retail dealers. *Id.* at 398-406.

13. 250 U.S. 300 (1919).

14. This simple unilateral action is a privilege that had been guaranteed by section 2 of the Clayton Act in 1914. That section provides in part that "persons engaged in selling goods, wares or merchandise in commerce [have the right to select] their own customers in *bona fide transactions* and *not in restraint of trade*," 15 U.S.C. §13(a) (1970) (emphasis added).

price at which his product is to be sold. If the retailer did not adhere to these prices the manufacturer could refuse to sell to him in the future. However, subsequent decisions declared that if the right to refuse to deal was employed as part of a resale price maintenance scheme, it was illegal.[15] The path to resale price maintenance was again effectively blocked.

Throughout the 1910's and the 1920's the manufacturers of brand name products, working through the American Fair Trade League, endeavored to promote state "fair trade" laws, which would permit vertical price agreements. These laws were necessary, according to the manufacturers, to protect what they believed to be a legitimate property interest in the consumer appeal of their brand names from the purported evils of loss-leader merchandising. Producers argued that such price cutting created an aura of cheapness, which destroyed the "goodwill" they had built up through costly advertising.[16] Although protection of manufacturers' goodwill was to become one of the principal arguments in favor of fair trade laws, it was insufficient by itself to motivate the state legislators into accepting the fair trade laws.

With the advent of the economic depression of the 1930's the number of small retailers declined, while the number and size of large chain and cutrate stores offering limited services and lower prices increased.[17] This decline was a predictable economic result of the depression, but with the unforeseen expansion of large department and chain stores, the small retailers found a scapegoat on which to blame their economic plight.[18] Apparently believing that relief from the consequences of the depression and the challenge of the emerging chain stores lay in restrictive legislation, the independent retailers and wholesalers, particularly in drugs, became the new champions of fair trade.[19] The small retailers hoped that resale price maintenance would serve to considerably restrict the price competition from the larger retailers, which they believed to be the cause of their dwindling profit margins. But being understandably apprehensive that efforts so blatantly opposed to antitrust policy would not receive public

15. Albrecht v. The Herald Co., 390 U.S. 145 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); FTC v. Beech-Nut Co., 257 U.S. 441 (1922); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).

16. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 194 (1936).

17. The statistics indicate there was an over-all decline of the number of retailers between 1929 and 1933, but by the end of 1934 the number of retailers climbed back up to its 1929 level and has continued to increase to date. HISTORICAL STATISTICS OF THE UNITED STATES, *Colonial Times to 1957*, at 4-12, 570 (ser. V, 1969). For discussions of the rise of the large chain and cutrate stores *see* T. MAHONEY & L. SLOANE, THE GREAT MERCHANTS 1-18 (1966); N. STACEY & A. WILSON, THE CHANGING PATTERN OF DISTRIBUTION 126-64 (1965). *See also* text accompanying notes 154-159 *infra.*

18. For a discussion of the effects of price competition on retailers *see* text accompanying notes 154-159 *infra.*

19. Organized attempts at price maintenance by the drug industry date to 1876 when the predecessor of the National Wholesale Druggist's Association was formed to curb "excessive" competition. Bowman, *The Prerequisites and Effects of Resale Price Maintenance,* 22 U. CHI. L. REV. 825, 826 (1955).

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support, the retailers developed the rationale that the fair trade laws were necessary to prevent "predatory competition,"[20] which would soon leave only a few giant distributors, who would then charge monopolistic prices.[21] Fair trade laws were, therefore, soon being touted as "anti-monopolistic," an ironic twist of words for such an anti-competitive device.[22]

Under the great pressure exerted by retailer organizations, particularly the National Association of Retail Druggists (NARD),[23] state legislatures began to respond to the suggested restrictive legislation that the small retailers hoped would inhibit the growth of chain stores. In 1931 California became the first state to enact a statute[24] allowing vertical price-fixing contracts of the type declared invalid in *Dr. Miles.*[25] In 1933 the California statute was further strengthened by the addition of a "nonsigners clause,"[26] which made it unlawful for any retailer to knowingly and willfully sell below the contract price *even though he had not signed the contract himself.* This nonsigner clause is considered to be the heart of the fair trade laws.[27] Without the clause "fair trade contracts in any state would be meaningless, because the firms who precipitate price wars are the very ones who would not sign the fair trade contract."[28]

Despite the concerted efforts of NARD and the emotional cries of "predatory competition," "monopoly," and "unfair trade," the actual results of the campaign were minimal. The state legislatures apparently re-

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20. For a more complete account of the efforts to conceal the true nature of fair trade acts *see* Edwards, Memorandum for the Assistant Attorney General, *Re* Grounds for the Repeal of Miller-Tydings Amendment Which Authorizes Resale Contracts (1941), *reprinted in Hearings on H.R. 4365 Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 82d Cong., 2d Sess. 436 (1952) [hereinafter cited as *Celler Comm. Hearings*].

21. For a discussion of the degree of monopolization of the retail markets *see* text accompanying notes 162-170 *infra.*

22. Fair trade laws were only one of several remedies pushed through state legislatures by retail organizations. Tax legislation that discriminated against high volume retailers, so-called "anti-chain store acts," was also enacted. *See, e.g.,* Cal. Stat. ch. 849 (1935); N.M. Laws Spec. Sess. ch. 33 (1934). Such laws were soon held unconstitutional as violations of equal protection guarantees. *See, e.g.,* Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). Additionally, "unfair sales acts" or "unfair trade practices acts" were enacted to outlaw sales *at less than cost* to divert trade or injure competitors. *See, e.g.,* MINN. STAT. ANN. §325.04 (1966). Such laws are still in effect in many states. The manifest purpose of both types of legislation was to provide the small retailer legal shelter against his larger competitors. The distinction between these acts and "fair trade laws" is primarily one of scope. Fair trade laws allow resale price maintenance while the acts are more specifically aimed at "sales below cost" with the intent to monopolize or injure competitors.

23. NARD has claimed credit for the passage of the majority of the state fair trade acts during the 1930's and the Miller-Tydings Amendment of 1937. *Celler Comm. Hearings* 797, 799. *See also* E. GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 83-106 (1939).

24. CAL. BUS. & PROF. CODE §16902 (West 1964).

25. Actually, a 1913 New Jersey statute, N.J. STAT. ANN. tit. 56, §§4-1, -2 (1964), was the first to provide for a form of resale price maintenance if notice of the price restriction was affixed to the goods. However, the act proved to be largely ineffective.

26. CAL. PROF. & BUS. CODE §16904 (West 1964).

27. *E.g.,* Humbach, *Fair Trade: the Ideal and Reality,* 27 OHIO ST. L.J. 144, 145 (1966).

28. *Celler Comm. Hearings* 602.

mained apprehensive about the holding of *Dr. Miles* and realized that most contracts entered pursuant to a state fair trade law would still be in violation of the Sherman Act. These apprehensions were no doubt compounded when the New York Court of Appeals in 1936 held New York's fair trade law to be unconstitutional in violating due process, denying equal protection, and constituting an unlawful delegation of legislative authority.[29]

However, later that same year the United States Supreme Court ruled in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*[30] that the Illinois Fair Trade Act[31] did not violate any federal constitutional provisions. Recognizing the implications of *Old Dearborn,* the increasing public sentiment favoring fair trade legislation, and the continuing pressure of retail organizations, Congress seemingly gave its approval to price maintenance by enacting the Miller-Tydings Amendment[32] to section 1 of the Sherman Act. It is significant that the Miller-Tydings Amendment failed to muster sufficient support to be passed on its own. Instead, it was hurriedly passed as a "rider," without careful consideration of the merits of the controversial aspects of the subject, to a revenue and appropriations bill for the District of Columbia.[33] President Franklin D. Roosevelt said he signed the bill with regrets.[34]

Specifically, the Miller-Tydings Amendment exempts from the operation of section 1 of the Sherman Act certain types of minimum resale price maintenance, non-"horizontal" agreements[35] (relating to trademarked, branded, or otherwise identified products sold in interstate commerce) when such agreements are lawful in intrastate transactions under a state's fair trade act. Thus, it effectively overrules the holding of the *Dr. Miles* case. The Amendment also provides that the making of such contracts or agreements shall not constitute an unfair method of competition under section 5 of the Federal Trade Commission Act.[36] The Amendment is thus a federal *enabling statute,* which purportedly gives neither federal approval nor disapproval of fair trade, but rather leaves it to the discretion of the individual states to enact fair trade acts or to refrain from enacting them.[37]

29. Doubleday, Doran & Co. v. R.H. Macy & Co., 269 N.Y. 272, 199 N.E. 409 (1936).

30. 299 U.S. 183 (1936).

31. ILL. ANN. STAT. ch. 121-½, §§188-91 (Smith-Hurd 1960).

32. Miller-Tydings Amend., 15 U.S.C. §1 (1970) (this amendment laid the foundation for nationwide use of resale price maintenance in interstate commerce).

33. For an account of the legislative history of the Miller-Tydings Amendment *see* Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (E.D. La. 1944).

34. *See* G. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 710 (3d ed. 1966).

35. No law, state or federal, directly permits horizontal price-fixing agreements between competitors on the same functional level. *But see* text accompanying notes 173-174, 199-207 *infra.*

36. Fed. Trade Comm'n Act ch. 311, §5, 38 Stat. 719 (1914), *as amended,* 15 U.S.C.A. §45 (1970).

37. Federal control was thus abdicated to what proponents of the Amendment styled as the sovereign will of the states. *See Hearings on S. 3822 Before Subcomm. of the Senate Comm. on the Judiciary,* 74th Cong., 2d Sess. 5 (1936) (testimony of NARD spokesman, Edward S. Rogers).

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However, its net effect is to give legal sanction to that which was previously in violation of the Sherman Act; it, therefore, impliedly approves fair trade laws.[38]

Despite the mere "enabling-act" status of the Miller-Tydings Amendment, the states interpreted it, in conjunction with *Old Dearborn,* as an expression of complete federal approval of fair trade; within one year of its passage twenty-eight states, including Florida, had adopted fair trade statutes[39] and by 1941, forty-five jurisdictions had fair trade laws.[40]

The fair trade laws adopted by these states generally exempted certain specified resale price maintenance contracts or agreements from common law antitrust prohibitions. For the next fifteen years the fair trade laws were to enjoy their greatest period of popularity. However, in 1951 the Supreme Court again struck a blow against resale price maintenance in *Schwegmann Brothers v. Calvert Distillers Corp.*[41] by declaring the "nonsigners clause" violated the Sherman Act in being an unlawful restraint of trade, and that the clause was not within the protection of the Miller-Tydings Amendment.[42] Proponent retailers and manufacturers, realizing that fair trade laws without "nonsigner clauses" were considerably less effective, responded to *Schwegmann* with immediate pressure on Congress for additional exemptive status. Support for the subsequent McGuire Act[43] came principally from organized groups of distributors and retailers.[44] In fact, the fair trade program was characterized "as the small shop-keeper's minimum wage law,"[45] and a "retailer's show with a manufacturer's sign or label over it."[46] Significantly, the proposed McGuire Act was vigorously opposed by the Department of Justice and the Federal Trade Commission[47]

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38. *See* Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (E.D. La. 1944).

39. Consideration of the new fair trade laws by the state legislatures was so superficial that gross stenographic errors were overlooked by seventeen states that adopted NARD's proposed fair trade law. *Celler Comm. Hearings* 436.

40. Alaska, Missouri, Texas, Vermont, and the District of Columbia never adopted fair trade laws. For a current listing of the states with fair trade acts, the type and provisions of their acts, and a listing of their constitutional status see 2 CCH TRADE REG. REP. §§6017, 6041, 6047 (1971). *See also* FLA. STAT. ch. 541 (1969).

41. 341 U.S. 384 (1951).

42. Fair trade laws were also undermined by Sunbeam Corp. v. Wentling, 185 F.2d 903, *aff'd on rehearing,* 192 F.2d 7 (3d Cir. 1951). The court held the Pennsylvania fair trade act could not be used to force a Pennsylvania mail-order house to adhere to minimum resale prices when selling outside that state because it would constitute an unlawful restraint of interstate commerce. However, the subsequent McGuire Act was to negate the effect of this decision.

43. McGuire Act, 15 U.S.C. §§45 (a) (2)-(5) (1970).

44. NARD was again a principal proponent of fair trade through its newly organized Bureau of Education on Fair Trade. For other supporters see H.R. REP. No. 1292, 82d Cong., 2d Sess. 22, 23, 38 (1952) [hereinafter cited as SMALL BUSINESS REPORT].

45. *Hearings Before the Subcomm. of the Comm. on Interstate and Foreign Commerce on H.R. 5767,* 82d Cong., 2d Sess. 143 (1952) [hereinafter cited as *Commerce Comm. Hearings*].

46. *Celler Comm. Hearings* 438.

47. *Celler Comm. Hearings* 75.

as well as by labor, farmer, and consumer organizations;[48] many department stores and mail order houses; and even independent retailers and manufacturers who found fair trade impracticable.[49] After extensive hearings on the fair trade problems,[50] Congress, in 1952, enacted the McGuire Act, which exempted nonsigner clauses from Sherman Act coverage.[51] The McGuire Act, like the Miller-Tydings Amendment, is merely a federal enabling statute that purportedly does not represent federal approval or disapproval of resale price maintenance. It is also similar to the Miller-Tydings Amendment in its express condemnation of all "horizontal price fixing agreements."[52]

The McGuire Act was held to be constitutional by the Fifth Circuit in 1953.[53] The Supreme Court decision in *Hudson Distributors v. Eli Lilly & Co.*[54] would seem to provide reassurance to proponents of fair trade that, absent congressional action, the competition-fostering Sherman Act will not return to haunt future fair trade agreements.

While fair trade now appears to be safe from further judicial attack at the federal level, its position is considerably less secure at the state level. Since the 1950's a definite trend in the state courts has developed to invalidate the fair trade laws—particularly the nonsigner provisions—on state constitutional grounds. Three states have held their fair trade acts to be unconstitutional *in toto*.[55] Courts in another twenty states, including Florida, have struck down the nonsigner provisions as violating their state constitutions.[56] But perhaps most important, in addition to the four states that

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48. SMALL BUSINESS REPORT 23.

49. *Celler Comm. Hearings* 594.

50. For a discussion of the hearings leading up to the McGuire Act *see* Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954).

51. In addition to the points covered by the Miller-Tydings Amendment, the McGuire Act accomplishes four results: (1) it overturns the rationale of the *Schwegmann* case and specifically allows enforcement of resale price maintenance against nonsigners *where permitted by state law*; (2) it makes express provision for contracts that prescribe stipulated as well as minimum prices; (3) it provides expressly for contracts requiring a vendee to enter into another contract (with a subvendee), which prescribes minimum or stipulated prices; (4) it negates the implications of *Sunbeam Corp. v. Wentling*, 185 F.2d 903 (3d Cir. 1950), *vacated*, 341 U.S. 944, 192 F.2d 7 (3d Cir. 1951), by providing that neither the making nor the enforcement of a resale price maintenance contract lawful under state law shall constitute an unlawful burden or restraint upon, or interference with, interstate or foreign commerce.

52. *See* note 35 *supra*.

53. Schwegmann Bros. v. Eli Lilly Co., 205 F.2d 788 (5th Cir.), *cert. denied*, 346 U.S. 856 (1953).

54. 377 U.S. 386 (1964).

55. The highest state courts of Alabama, Montana, and Utah have held their entire act to be unconstitutional. *See* cases cited in 2 CCH TRADE REG. REP. §6021, at 9039, 9049, 9054 (1971).

56. Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Washington, West Virginia, and Wyoming have all had their fair trade act's nonsigner clauses declared unconstitutional by their highest state court, except Idaho whose district court handed down the ruling. *Id.* ¶6021, at 9039-56.

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never adopted fair trade laws,[57] six states in the past twelve years have repealed their entire fair trade acts,[58] while two other states have repealed their nonsigner clauses.[59] This leaves a total of only fifteen states with full fair trade acts[60]—a significant decline from the high of forty-five. Generally, state courts have invalidated all or part of their fair trade laws on the grounds that the acts either exceed the police power of the state, deny due process, unlawfully delegate legislative authority, or deny equal protection of the laws.[61] Rhode Island's recent repeal exemplifies a typical situation. Its legislature seemed to rely primarily on the fact that fair trade results in higher prices for the consumer and serves only a small fraction of the manufacturers and retailers.[62] Whatever the reasons, there is unquestionably a trend against fair trade.

HISTORY OF FLORIDA FAIR TRADE

The Fair Trade Acts of 1937 and 1939

Florida passed its first fair trade act in 1937[63] following the enactment of the Miller-Tydings Amendment. But two years later the entire 1937 act was held unconstitutional in *Bristol-Myers Co. v. Webb's Cut-Rate Drug Co.*[64] because of a defect in its title. The Florida supreme court ruled that the title[65] of the fair trade act did not give sufficient notice of the existence of a "nonsigners clause" in the act, and therefore was misleading.[66] Sig-

57. *See* note 40 *supra*. Although Congress has sanctioned the use of such laws for the states through the Miller-Tydings and McGuire Acts, it is perhaps ironic that Congress never enacted a fair trade law for the District of Columbia. *Id.* ¶6019, at 9036 (1971).

58. The entire state fair trade act was repealed by Hawaii (1967), Kansas (1963), Mississippi (1970), Nebraska (1959), Nevada (1965), and Rhode Island (1970). *Id.* ¶6017, at 9032.

59. Virginia (1958) and Ohio (1959) enacted new fair trade laws without the traditional nonsigner clause. *Id.* ¶6017, at 9032.

60. Full fair trade acts still exist in Arizona, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Tennessee, and Wisconsin. *Id.* ¶6021, at 9038-56.

61. For a complete list of cases and grounds on which state statutes have been held unconstitutional *see* 2 CCH TRADE REG. REP. ¶6021, at 9038-66 (1971).

62. Hackett, *Repeal of Fair Trade Law Urged, Opposed*, Providence (R.I.) Journal March 30, 1970, at 1, col. 2.

63. Fla. Laws 1937, ch. 18395, at 1278.

64. 137 Fla. 508, 188 So. 91 (1939).

65. "An Act To Protect Trade-Mark Owners, Producers, Distributors and the General Public Against Injurious and Uneconomic Practices in the Distribution of Competitive Commodities Bearing a Distinguishing Trade-Mark, Brand or Name, *Through the Use of Voluntary Contracts* Establishing Minimum Resale Prices and Providing For Refusal To Sell Unless Such Minimum Resale Prices Are Observed." Fla. Laws 1937, ch. 18,395, at 1278 (emphasis added).

66. The lack of sufficient notice of a nonsigners clause in the title was in violation of FLA. CONST. art. 3, §16 (1885), which provides in part: "[E]ach law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title . . . ."

nificantly, the title of the 1937 fair trade act was evidence that the legislature viewed the protection of manufacturers' "goodwill" to be the primary purpose of the act. It did not mention the protection of small retailers from the "predatory competition" of larger retailers as being one of its purposes (NARD's retailer protection theory). The Florida Fair Trade Act was subsequently amended to remove these objections of the original act and was reenacted.[67]

The 1939 Florida Fair Trade Act was again held to be unconstitutional in its entirety in *Liquor Stores, Inc. v. Continental Distilling Corp.*[68] Because *Liquor Stores* is the latest decision to hold the entire act unconstitutional and because it has never been overruled, it stands as substantial precedent for any further consideration of the constitutionality of the present fair trade act,[69] which was enacted six weeks after the decision in the *Liquor Stores* case.

The factual situation in *Liquor Stores* is similar to that in *Bristol-Myers.* Continental Distilling Corporation, a liquor manufacturer, had sold certain trademarked whiskies to a distributor under a "vertical trade agreement," which stated that the liquor was not to be resold to the public at less than a minimum price to be set by Continental. Liquor Stores, Inc., retail liquor dealers, purchased some of these whiskies from the distributor *with* notice of the resale price agreement, but did not sign the agreement and therefore was a nonsigner. Continental, thereafter, brought suit under the 1939 Florida Fair Trade Act, specifically invoking the nonsigner provision to enjoin Liquor Stores, Inc. from advertising and selling the whiskies bearing plaintiff's trademark at a price below the minimum set by plaintiff.[70] Although the Florida supreme court again might have limited itself to a consideration of the validity of the nonsigner provisions alone, the court instead deemed it appropriate to examine the entire act.[71]

The supreme court first concluded that the fair trade act was not within the scope of the state's police power because: (1) the act failed to demonstrate a general public purpose; rather it served a private purpose to the detriment of the general welfare,[72] and (2) it failed to exhibit the requisite

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67. The 1939 fair trade act simply omitted the phrase "through the use of voluntary contracts" and stated that selling below the established prices was prohibited whether the person selling was or was not a party to the contract. *See* Fla. Laws 1939, ch. 19,201, at 407.

68. 40 So. 2d 371 (Fla. 1949).

69. *See* FLA. STAT. ch. 541 (1969).

70. The facts are set out in Justice Barns' concurring opinion. 40 So. 2d at 376-77.

71. The court observed that the fair trade act was: "[A] species of the relatively recent national recovery legislation. It was conceived at a time when there were surpluses and general need for such a law in certain basic commodities. *The courts approving similar acts scarcely had an opportunity to observe its effects other than as its proponents visualized its operation in futero.* We are in a more favored position as we have the benefit of the actual consequences flowing from its application. *Id.* at 374 (emphasis added). Presumably, it was for this reason that the court deemed it appropriate to examine the entire act, rather than limit itself to the nonsigner clause.

72. The court refuted the contention that the statute was in the public interest or concerned with the public's general welfare, when it noted that the actual effects of the

"public necessity" to justify a private purpose.[73] Second, the statute was held to be unconstitutional on equal protection grounds, because it benefited a particular group or class—producers and distributors of trademarked, branded, or named commodities—to the detriment of consumers, retailers, and other manufacturers.[74] Third, the act was an unconstitutional delegation of legislative authority to one person or class to be exercised against another.[75] As a result, the act also violated due process of law in vesting this price-fixing authority without any legal provisions to regulate the reasonableness of the prices fixed.[76]

The 1949 Fair Trade Act

Despite the Florida supreme court's suggestion that the circumstances under which the fair trade act would be constitutional were virtually nonexistent, the statute was amended and reenacted six weeks after the *Liquor*

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act had been to the detriment of consumers. Furthermore, could it be claimed to be for a public purpose when by its inherent nature the act was designed to provide special privileges and immunities only to a particular group or class of producers and distributors of trademarked, branded, or named products? Since the act failed to meet the requisites of public purpose and public interest, the court concluded the act was not within the constitutional limits of the legislative police power. *Id.* at 375.

73. The court implied that although an act essentially served a private purpose, it might have been upheld if it could be demonstrated that the act also served the general welfare in meeting some public necessity. To meet this exception it was not sufficient that the act merely show a public concern; rather, "there must be some semblance of public necessity for the act." *Id.* Justice Barns argued, in a concurring opinion, that while the fair trade act may have been a reasonable exercise of the police power during the depression years because of the special economic circumstances that existed then, "[t]he present [economic] conditions are now somewhat reversed" from those of the depression. *Id.* at 383 He concluded that the continued application of the fair trade act was no longer a reasonable exercise of the state's police power because the public necessity for such a private purpose law no longer existed. *Id.*

74. "The statute cannot be the means of leveling unequal fortunes, neither can it favor one segment of the people at the expense of another." *Id.* at 374.

75. "Constitutional law never sanctions the granting of sovereign power to one group of citizens to be exercised against another unless the *general welfare* is served." *Id.* The court laid the foundation for yet a third basis on which the fair trade act was unconstitutional – it was an unlawful delegation of legislative authority because "[t]he effect of this act [was] to grant by indirection sovereign power to one person (not necessarily a citizen) to be exercised against another." *Id.* at 374-75. In substantiating this conclusion the court asserted: "The power to fix the price is vested in an interested person who is not an official. There is no review of his act. He is required to consult with no one and in no sense is required to take into consideration the cost of the article or the reasonableness thereof." *Id.* at 375.

76. The court asserted that the authority to fix prices can only be vested with a duly constituted price-fixing agency, which must give due notice of its action. Moreover, the "prices fixed must have some regard to reason besides having a public concern." *Id.* To allow prices to be fixed otherwise, such as under the fair trade act, would constitute not only an unlawful delegation of legislative authority, but would also be in violation of the due process guarantee as well.

Stores decision.[77] Presumably, the new statute was designed to overcome the constitutional objections and holding of the *Liquor Stores* decision. On its face, such an objective must be accepted as a valid goal. However, the resultant product of this attempt raises doubts as to the legislature's success in achieving this goal and as to its sincerity in attempting to meet it. The new act suggests that rather than making a genuine effort to bring the fair trade law within the constitutional limits outlined in *Liquor Stores,* the legislature was content with merely making the law sound constitutional.

The first factor raising doubts is the manner in which the act was amended. The amended act contains, in addition to its previous unaltered provisions, a preambulary "findings of fact"[78] and a provision permitting, not requiring, the attorney general to bring suit to restrain the enforcement of any resale price maintenance contract covering a product that is not found to be in free and open competition with commodities of a like kind and quality.[79] These amendments do not effect any substantive changes but, in essence, endeavor to justify the previous act. As subsequent legal and economic analysis will emphasize, the amended act is substantially the same law the Florida supreme court had ruled unconstitutional.

The only significant addition is the "findings of fact,"[80] which purport to establish the act's constitutionality by rebutting conclusions of the supreme court in *Liquor Stores.* However, their initial credibility is marred by their history, which suggests that the findings were not the result of a careful examination of all the relevant information that would have established the validity of fair trade and the constitutionality of the act. The house bill was in committee for twelve days, the senate bill only three.[81] There is no record of the actual time the committees spent considering these bills, but the records show there was no discussion of the bills on the floor of either house.[82] It appears that the legislature gave little credence to Justice Hobson's admonition: "It is the failure to first investigate and make a determination of public necessity which causes such legislation to be fraught with shocking possibilities. An act of this type must be subjected to close scrutiny with respect to its constitutionality. Its genesis must find justification in, and its life depend upon, public necessity."[83] By comparison, the federal legislature, when faced with the similar issue in considering the McGuire Act, spent several weeks in hearing testimony on the pros and cons of resale price maintenance,[84] and its effects on the manufacturers, retailers, and consumers. This comparison would suggest that the Florida Legislature's examination of the pertinent material was cursory, at best.

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77. The amended Florida fair trade act was signed into law by Governor Fuller Warren on June 1, 1949. Fla. Laws 1949, ch. 25,204, at 466.

78. FLA. STAT. §541.001 (1969).

79. FLA. STAT. §541.09 (1969).

80. FLA. STAT. §541.001 (1969).

81. *See* FLA. H. JOUR. 446, 663 (1949); FLA. S. JOUR. 313, 354 (1949).

82. FLA. H. JOUR. 446, 663 (1949); FLA. S. JOUR. 313, 354 (1949).

83. 40 So. 2d at 386-87.

84. *See* Fulda, *supra* note 50.

The question remains: Did the legislature succeed in overcoming the constitutional objections of the former fair trade act? It will be seen that the answer of the subsequent court decisions is wholly inconclusive. The nonsigner clause was later held unconstitutional by the Florida supreme court,[85] but the balance of the fair trade act has never been before the court.[86]

Findings of Fact

The amended act's principal changes are the seven findings of fact.[87] Several of the findings attempt to show that the act serves the public welfare and establishes a public purpose, and thus brings it within the requisites of the police power.[88] Some of these findings simply declare that the act serves the public welfare or is within the police power,[89] while others state that large businesses' predatory pricing practices will destroy small merchants and thereby lead to monopolistic market conditions.[90]

Can a law credibly be accepted to be within the police power just because the legislature declares it to be? The Florida supreme court has indicated that to be valid these findings must be based on economic realities.[91] Thus, the validity of the 1949 act depends on the correctness of economic assumptions that monopolies will take over the retail markets in the absence of fair trade, and that fair trade is an effective means of preventing such a result. These assumptions will be considered in the economic section of this article.

An additional finding asserts that "predatory price cutting is . . . also injurious to the goodwill and business of the producer and the distributor . . . ."[92] This has been commonly referred to as the "manufacturer's goodwill-protection theory" and was specifically rejected as a private purpose by the supreme court in *Liquor Stores*. This finding then would not seem to constitutionally justify the statute.

Another finding declares that public interest requires the "permissive or optional maintenance of minimum resale price . . . at all times, including periods of deflation or inflation."[93] By declaring the statute to be optional, the legislature seems to be rebutting the court's ruling that the fair trade law is a price-fixing statute. This assertion, however, fails to recognize that from the unwilling retailer's point of view the necessity of accepting a fixed resale price or not selling that product at all may be an economically unviable alternative. As a legal issue this finding, unless based

85. Miles Laboratories, Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954).
86. *See* text accompanying notes 116-117 *infra*.
87. FLA. STAT. §541.001 (1969).
88. FLA. STAT. §§541.001 (1)-(4), (7).
89. *Id.* §§541.001 (1), (7).
90. *Id.* §§541.001 (2), (3), (4).
91. Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So. 2d 235 (Fla. 1951).
92. FLA. STAT. §541.001 (4) (1969).
93. FLA. STAT. §541.001 (6) (1969).

on fact, could not overrule the judicial determination.[94] This finding declares fair trade to be public policy during all phases of the economic business cycle.[95] This would be contrary to the court's conclusion that fair trade might be justified only in periods of severe economic crisis.[96]

The additional amendment to the 1939 Florida Fair Trade Act was a provision[97] permitting the attorney general to bring suit to restrain performance of any price-fixing contract when he deems the commodity covered by the agreement not in free and open competition with other commodities of the same general class. This was an apparent attempt to overcome the supreme court's holding that the fair trade act was an unconstitutional delegation of legislative authority. The court's objections, however, were that, in violation of due process, there were no guidelines that would insure that the prices fixed by the vertical trade agreement were reasonable. This provision only purports to insure that horizontal collusion will not be allowed. Moreover, it is not even mandatory that the attorney general take any action, but rather the act "permits" him to request a restraining order. At best, this provision provides a procedure for the enforcement of the Florida antitrust laws. It hardly seems to remove the objections that the fair trade law was an improper delegation of legislative authority and is in violation of the due process clause.

In reviewing the over-all changes in the 1939 fair trade act, it becomes apparent that the legislature's primary concern was in demonstrating that the act was within the police power by endeavoring to establish the public purpose or necessity for resale price maintenance. Actually, the only new theory offered to substantiate the public purpose or necessity was the small retailer protection-anti-monopoly theory. The economic validity of this theory may be questioned.

Furthermore, none of the purported changes would correct the inherent operational effects, which were found to be in violation of the equal protection and due process guarantees of the Declaration of Rights of the Florida constitution.[98] Because of the inherent nature of resale price maintenance, it appears that nothing short of repealing the fair trade act would cure the inequities it promotes. As a result it may be concluded that even if the findings are accepted as validly justifying the act's public purpose, they are insufficient to remove the remaining constitutional objections. Therefore, the present fair trade law is just as unconstitutional as the previous act.[99]

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94. *See* note 91 *supra*.
95. FLA. STAT. §541.001 (6) (1969).
96. 40 So. 2d at 286 (Hobson, J., concurring).
97. FLA. STAT. §541.09 (1969).
98. FLA. CONST. Decl. of Rights §§1, 12.
99. The present act, in short, is still violative of the equal protection and due process guarantees of the Florida constitution, even if it serves a public necessity and is a proper delegation of the legislature's authority under the police power.

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Litigation of the Constitutionality of the 1949 Florida Fair Trade Act

This issue of the 1949 fair trade act's constitutionality first reached the Florida supreme court in *Seagram-Distillers Corp. v. Ben Greene, Inc.*[100] *Ben Greene* involved a nonsigner, as did *Bristol-Myers*[101] and *Liquor Stores.*[102] But contrary to these earlier decisions the *Ben-Greene* court found this fact to be a distinguishing element and the controlling factor in the decision.

Initially, the court noted that the 1949 fair trade act, under which the action was brought, was distinguishable from the previous fair trade act ruled unconstitutional in *Liquor Stores.* The court distinguished the acts by the addition of "the findings or recitations of fact and declaration of necessity as to the State's economic policy made by the legislature"[103] to the 1949 act.

The court, commenting on these findings of fact, stated:[104]

> The general rule is that findings of fact made by the legislature are presumptively correct. However, it is well recognized that the findings of fact made by the legislature *must actually be findings of fact.* They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry. Moreover, findings of fact made *by the legislature do not carry with them a presumption of correctness if they are obviously contrary to proven and firmly established truths of which courts may take judicial notice.* If the subject upon which the legislature makes finding of fact is one which is *fairly debatable, the presumption of correctness attaches and remains extant until and unless such findings are challenged and disproved in an appropriate proceeding* . . . .

After making these observations on the circumstances under which the findings would be accepted as valid, the court noted that the chancellor in the initial proceeding had held the 1949 fair trade act unconstitutional. Writing for the court Justice Hobson held, however, that the issue of whether the findings were invalid in the absence of any pleading directly challenging and proof refuting the legislature's findings of fact would be reached "if it were not for the fact . . . that Ben Greene, Inc., was a 'nonsigner' and except for the recent opinion of the United States Supreme Court in . . . *Schwegmann Brothers* . . . ."[105] The court was not clear, though, in stating what grounds or authority they considered invoked by

100. 54 So. 2d 235 (Fla. 1951).

101. 137 Fla. 508, 188 So. 91 (1939).

102. 40 So. 2d 371 (Fla. 1949); *see* text accompanying notes 68-78 *supra.*

103. 54 So. 2d 235 (Fla. 1951).

104. *Id.* at 236-37 (emphasis added). Except for the addition of these findings of fact, there is no material difference between the 1939 and 1949 Acts.

105. *Id.*

Schwegmann[106] as being controlling. The *Schwegmann* decision held that the nonsigner clause was in violation of the Sherman Antitrust Act because it was not within the exemptive status of the Miller-Tydings Amendment. Apparently the court was implying that the Florida Fair Trade Act's nonsigner provision was void as a violation of the Sherman Act. Arguably, the supreme court need not have limited itself to consideration of the nonsigner clause because the court had taken the entire act under examination in both *Bristol-Myers* and *Liquor Stores,* even though only a nonsigner was involved in both those cases.

The *Ben Greene* case is significant, nonetheless, in two important respects. First, the court by implication ruled that the findings of fact, unless shown to be false, were successful in removing all constitutional objections to the former fair trade act. It must be contended that the court in so holding receded from its strong position in *Liquor Stores.* Even assuming that the findings of fact are entitled to a presumption of correctness, the court could have held that the findings did not cure the constitutional objections of the act's denial of due process and equal protection they had found in *Liquor Stores.* Second, the supreme court made it clear that if the findings of a fact are successfully challenged and disproved in an appropriate proceeding, the act will again be declared unconstitutional.[107]

A challenge to the fair trade act's constitutionality again reached the Florida supreme court in 1954 in *Miles Laboratories, Inc. v. Eckerd.*[108] Since the court's decision in *Ben Greene* Congress had enacted the McGuire Act,[109] which specifically exempted nonsigner clauses from the Sherman Act. The effect of *Schwegmann* was therefore negated.

Eckerd, a nonsigner, had challenged the constitutionality of the entire fair trade act, but the supreme court again chose to limit its consideration to the nonsigner clause because of Eckerd's nonsigner status. The court first dismissed the assertion that the McGuire Act superceded its decision in *Liquor Stores* and *Ben Greene* by noting the McGuire Act's status as an enabling statute.[110] The supreme court then discussed the constitutional validity of the nonsigner clause by stating:[111]

> This Court has expressed its views on fair trade and similar acts and has consistently and unequivocally rejected, on constitutional grounds, both the underlying theory and the economic facts on which they are sought to be predicated.

The court rejected the "goodwill" protection theory of the findings of fact in declaring:[112]

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106. 341 U.S. 384 (1951); *see* text accompanying note 41 *supra.*
107. *Id.*
108. 73 So. 2d 680 (Fla. 1954).
109. 15 U.S.C. §45 (a) (2)- (5); *see text* accompanying note 43 *supra.*
110. 73 So. 2d at 681 (Fla. 1954).
111. *Id.*
112. *Id.* at 682 (emphasis added).

> [T]he real effect of the non-signer clause is anti-competitive price fixing; not the protecting of the good will of trade marked products *as other courts have held.* Good will, it has been said, should be determined by the price which the goods can command in a competitive market, and not by the ability of the manufacturer to sell at a pegged retail price which he himself selects.

The public necessity and due process protection of the fair trade act's nonsigner clause was found to be absent when the court concluded:[113]

> *Except in times of economic emergency* such inflexible price arrangements which the act sanctions are not in line with our traditional concepts of free competition, which have traditionally been the "yard-stick" for protection of the consuming public. The real vice of the non-signer clause is the absence of that standard, and the decisions of this Court cited herein so hold. In removing the said standard the non-signer clause must fall as an invalid use of the police power for a private, not a public purpose.

Relying on the dicta of *Ben Greene,* Justice Hobson declared that the actual findings of fact were not entitled to a presumption of correctness because they were contrary to proved and firmly established truths of which courts could take judicial notice.[114] These conclusions rejecting the validity of the findings of fact would appear to restore the entire fair trade act to its unconstitutional status.

While the court limited its objections to the nonsigner provision, it is apparent from the court's reasoning that if a "signer" had been before it, the court would have declared the entire act unconstitutional. This in-

113. *Id.* (emphasis added).

114. "Legislative 'findings of fact' as to the policy behind the law, does not remove the lack of the 'yardstick' standard, *neither does the delegation of the power to the attorney general provide such administrative supervision in the public interest as will overcome the innate vice in the act." Id.* (emphasis added). This language would seem to indicate that the supreme court found the findings of fact insufficient to overcome the constitutional objections to the fair trade act raised in the *Liquor Stores* case. This inference is further evidenced by Justice Hobson's specially concurring opinion in which he declared: "*[T]he only finding of fact which would have been, but was not, made by the legislature which could ever be said to sustain the validity of the 1949 Act . . . would have been a finding that at the time of the passage . . . the economic structure of this state was seriously endangered and that 'extremities requiring it [the fair trade law] exist[ed] as a matter of fact.'* Such a finding, had it been made by our legislature in 1949 or in 1953, would obviously have been contrary to the self-evident fact that this state and its people were enjoying unprecedented prosperity and the economic structure of this sovereign state was as sound as it has ever been at any stage of its history. *A finding of fact to the contrary had it been made could not be said to be fairly debatable for our courts may and should take judicial notice of a matter of common knowledge,* to-wit: *that exigencies which might require such legislation in the interest of the summum bonum* —the greatest good for the greatest number—*did not exist either in 1949 or 1953*" (emphasis added). *Id.* at 683.

ference can be made from the constitutional objections raised which by their nature were not limited to the nonsigner clause but were objections to the entire act and its effects. If the nonsigner clause, for instance, had been declared invalid only for lack of consent by the nonsigner to the fixed prices, then it might not be contended that the court found the entire act to be unconstitutional. The court, however, did not limit its objections to such narrow grounds but instead referred to defects that had been discussed in *Liquor Stores,* such as a lack of administrative supervision and lack of public necessity.[115]

After the *Eckerd* case in 1954 no constitutional challenge of the Florida Fair Trade Act has reached the Florida supreme court. For reasons not at all apparent the supreme court in 1954 rejected an opportunity to consider the entire act by denying certiorari to a case that involved a "signer."[116]

Both state and federal courts in subsequent cases interpreted this denial of certiorari as a ruling on the merits and, therefore, considered the Florida fair trade act to be constitutional.[117] However, the inconsistency of the lower court cases has been indicative of the uncertainty that remains—an uncertainty that the supreme court should confront in the near future.

ECONOMICS OF FAIR TRADE AND THE FINDINGS OF FACT

The examination of the legal changes and litigation of the 1949 Florida Fair Trade Act has revealed that the present act's constitutionality is primarily dependent on the economic validity of the findings of fact.[118] Since the findings center primarily on the small retailer protection theory, it is appropriate to begin with an examination of this theory and then proceed to the manufacturer's arguments.

Although the principal advocates of fair trade have been retailers and

115. This point is further emphasized by Justice Drew's specially concurring opinion, which stated: "Since the Legislature made its findings in 1949 in Chapter 25204, Florida in general and its merchants in particular have enjoyed economic success to a degree without parallel in its history. *This is monumental evidence sustaining the conclusions of this Court that the emergencies alluded to there* [in the findings of fact] *were not real but fanciful and that, in the guise of public necessity the police power of this sovereign State had been invoked for purely private purposes.*" *Id.* (emphasis added).

116. Chase & Sherman v. Sunbeam Corp., 73 So. 2d 714 (Fla. 1954). Certiorari was denied by the Florida supreme court during the same term it heard the *Eckerd* case. In the *Chase & Sherman* case, which involved a "signer," the Dade County Circuit court upheld the constitutionality of the fair trade act. In view of the apparent significance of this case and the Florida supreme court's attitude toward the fair trade act, it is difficult to understand why the court denied certiorari. However, a plausible reason for refusing to hear the appeal was that the court already had before it the *Miles* case and Sterling Drug, Inc. v. Eckerd, 71 So. 2d 156 (Fla. 1954), which was heard the same day. In each case the nonsigner clause was held to be invalid. Erroneously, the supreme court believed these cases would dispose of all the issues involved.

117. For a complete discussion of the subsequent court interpretations of the supreme court's denial of certiorari in *Chase & Sherman, see* Heckerling, *Florida Fair Trade Act — Three Strikes and You're Out: Or Are You?,* 25 U. MIAMI L. REV. 227 (1971).

118. *See* text accompanying notes 100-117 *supra.*

manufacturers, it is significant to note that support has by no means been unanimous. In fact, the small percentage of commodities that are fair traded, estimated at less than four per cent,[119] and the number of manufacturers who use fair trade, significantly less than one per cent of all producers,[120] would seem to indicate that manufacturers have not found fair trade to be everything it is purported to be. As a result, the subsequent arguments referred to as those of proponents should not be taken as representing the position of all, or even of a large percentage of retailers and manufacturers.

Fair Trade and the Retailer

As noted previously, resale price maintenance was originally promoted by manufacturers and producers following *Dr. Miles* as a means of protecting the goodwill of their brand names, with retailers and distributors picking up the banner for fair trade with the advent of the depression of the 1930's.[121] The small, independent retailer's concern then, as now, has been the threat posed to the traditional structure of retail marketing by the ever-increasing number of discount stores, department stores, and other large retailers, even though the proponents of fair trade claim that small retailers do not need protection from normal price competition, but only from the "unfair," "deceptive," or "predatory" price competition.[122]

The Loss-Leader as a Form of Predatory Competition. The principal form of "unfair" or "predatory" price competition, which fair trade is said to prevent, is the practice of loss-leader pricing. Loss-leader selling generally refers to the practice of selling of a well-known, branded product at a price substantially below its "normal price" in order to attract bargain-conscious consumers. While the fact findings do not specifically refer to loss-leader pricing, it is presumed that it is essentially this practice to which they refer when they speak of "predatory cuttings of established prices."[123]

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119. Herman, *A Statistical Note on Fair Trade*, 4 ANTITRUST BULL. 583 (1959). Even at the height of fair trade's popularity in 1959 it is estimated that no more than 10% of all retail sales were of fair trade items. *Id.* at 587. In view of the increased number of adverse decisions and legislative repeals of fair trade laws since that time, it is likely that the number of retail goods fair traded is less than 1%.

120. *Id.* at 584.

121. *See* text accompanying notes 17-31 *supra*; *Celler Comm. Hearings* 369; N. STACEY & A. WILSON, THE PATTERN OF DISTRIBUTION 128 (1965).

122. *Commerce Comm. Hearings* at 27.

123. FLA. STAT. §541.001 (3) (1969). However, the meaning of the term "established prices," is not clear. It might refer to any one of the following: (1) selling the specific product in question at less than the customary markup in the trade; (2) selling at less than the seller's markup on other goods; (3) selling at less than invoice cost plus distribution cost; or (4) simply selling at less than invoice cost. If the legislature uses "established prices" in either of the first two ways, its criticism would seem hard to justify, since there is no reason why all dealers should use the same markup on a certain product or why any dealer should apply the same markup to all his goods. To hold otherwise would seem a violation of the basic capitalistic tenets of freedom of choice and enterprise. In addition, if "established price" means invoice cost plus distribution cost, the term becomes

Why should this practice be objectionable? Loss-leader selling is essentially a simple form of sales promotion. If a dealer wishes to increase his sales he may either spend his promotional money on advertising or on selling something for less than it costs. In the first case the consumer would receive some sort of magazine, radio, or television advertisement. Whereas, in the latter case the consumer would receive a product at a lower price.[124] Nonetheless, the objection to the latter practice as stated in the "findings" by the assertion that *"predatory cutting of established prices . . . [is] a deceptive means of unfairly luring from competitive merchants their customers,* and for other purposes, has been the *most potent weapon* to which *the great and destructive trusts have resorted most frequently, thereby to weaken and destroy their smaller competitors financially* unable to endure resultant losses."[125]

The loss-leader is said to be "unfair" because it is used as a decoy to lure customers into the stores of unscrupulous retailers.[126] It is claimed that the unprincipled retailer may not intend to sell the price-cut item at all, but rather hide it, "run-out early," and then switch the customer to something "just as good."[127] However, even if the retailer does not resort to such original deceptions the contention is that the customers are further deceived by the false impression that comparable savings are to be obtained on the other products of the unprincipled retailer. Arguably, the consumer operating under such a false impression is misled into making purchases of additional items on which the retailer realizes a substantial profit. As a result the consumer does not save at all, but ends up paying a higher total net price. The findings assert that the logical results of these continued practices will be the destruction of small retailers and the evolution of "virtual monopolies."[128]

This reasoning suffers from several inconsistencies and fallacious premises. First, the findings imply that loss-leaders of predatory price-cutting practices are the exclusive tool of "great and destructive trusts."[129] There is nothing in the nature of loss-leader that would prevent the small retailers from utilizing its "customer-attracting" advantages. Certainly, it would not entail

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imprecise because of the subjective judgments involved in computing distribution costs. However, if "established price" means invoice cost, the meaning becomes somewhat more precise, although there are differences in wholesale prices due to such factors as quantity purchased or geographic area of purchase and sale.

124. To the extent that selling below invoice or actual cost can be shown to be detrimental to the general welfare, a law prohibiting such below cost sales might be more appropriate rather than a fair trade law, which gives the manufacturer a license to set the resale price at whatever level he wishes. A limited number of states have such laws. *E.g.*, CAL BUS. & PROF. CODE §17044 (West Ann.); IDAHO CODE ANN. ch. 48-404 (1948). *See also* 2 CCH TRADE REG. REP. ¶¶6571, 6601, 6621 (1971).

125. FLA. STAT. §541.001 (3) (1969) (emphasis added).

126. *Commerce Comm. Hearings* 26 (statement by the Bureau of Education on Fair Trade).

127. *Id.*

128. FLA. STAT. §541.001 (3) (1969).

129. *Id.*

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enduring the losses of the price-cut name-brand item because fair trade proponents claim that the unprincipled retailer more than makes up for these losses with the additional sales of his high markup items.

An even more immediate fallacy is the implication that the retail market has been plagued by "great and destructive trusts." While the period since the 1930's has seen the increase of discount stores, department stores, and other large retail outlets it can hardly be claimed that any of these have evolved into great and destructive trusts. To the extent that great and destructive trusts have evolved at all, they have been limited almost entirely to the manufacuring and production levels of the economy.[130] Even to the extent that monopoly is a threat, the antitrust laws, when adequately enforced, are a more appropriate means of dealing with such problems.[131] In fact, the Federal Trade Commission Act, section 5, specifically deals with deceptive pricing practices,[132] and the Sherman Act, section 2, deals with conspiracies to monopolize.[133]

The essential question is whether loss-leader selling is, in fact, deceptive or unfair. The argument is that once the consumer is "lured" into the unprincipled retailer's store he will make additional purchases of high markup items and end up paying a higher total net price.[134] If the consumer, however, is such an astute bargain hunter as to be attracted by the loss-leader in the first place, it would seem that the consumer must be credited with some knowledge of normal prices. This being the case it appears doubtful that the consumer could be so easily misled into accepting cheap substitutes or additional high markup items.[135]

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130. *See* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS, CASES AND COMMENTS 210-314 (3d ed. 1968).

131. *See* text accompanying notes 173-182 *infra*.

132. 15 U.S.C. §45 (a) (5) (1970).

133. 15 U.S.C. §§1, 2 (1970), which deals with attempts and conspiracies to monopolize, has been included within and expanded by section 5 of the Federal Trade Commission Act, 15 U.S.C. §45 (a) (1) (1970), which condemns "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . . ." *See also* FLA. STAT. ch. 542 (1969). For a discussion of the ability of these laws to handle such pricing policies when coupled with an interest to monopolize, *see* United States v. New York Great Atl. & Pac. Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). *See also* FLA. STAT. §541.001 (3) (1969).

134. *Commerce Comm. Hearings* 26.

135. *Id.* The rather dramatic and unconvincing answer of a NARD spokesman was: "A druggist cannot take higher markup on dresses or yard goods when he is forced to sell national brands of drug products below cost in a price war," [and] [that] . . . most book shops do not sell millinery." The fallacious implications of such an answer are: (1) that drug stores are in competition with stores that sell high-markup millinery; (2) that millinery is the only product subject to high markups. Such a claim is particularly preposterous from a representative of the retail drug industry, an industry with one of the highest average markup rates of all retail stores. The retail druggist has more than his share of alternative high markup items to compensate for his low profit items. The average margin on drug proprietaries is about 33% as compared to 16% on food products. *Celler Comm. Hearings* 396. Profit margins for retail druggists on some products range as high as 300 to 1000%. For example: aspirin, 340%; prophylactics 450%, and; phenobarbituates, 1000%.

Of further doubt is the question of whether the discounter or other unscrupulous retailer must sell the non-loss-leader items at exorbitant markups to make up for his losses on the loss-leader. A basic economic principle is that when a seller increases his volume of sales, a lower average cost per sale will normally result.[136] Therefore, if a discounter is also able to increase the sales volume on his non-loss-leader items he will be able to increase his total profits without increasing his over-all price. Perhaps he may even cut his prices slightly.

In examining the proponents' arguments it becomes difficult to see the inherently deceptive nature of loss-leaders.[137] Since fair trade laws make no distinction between predatory price competition and normal price competition, but rather uniformly eliminate all retailer-level price competition, it would seem that a more accurate characterization of the retailers' motives would be the elimination of profit-trimming competition in general.[138]

Price Cutting, Price Wars, and Fair Trade. In addition to preventing the evils of loss-leader pricing, fair trade is said to be necessary to prevent price wars and price cutting that result in the destruction of the small retailer. One of the fair trade advocates' favorite examples of the purported seriousness of this problem in the absence of fair trade has been the price war,[139] which followed the 1951 *Schwegmann* decision.[140] The price war, which lasted only two or three weeks, was centered primarily in New York City and several other metropolitan areas.[141] The time proximity of the price war to the *Schwegmann* decision has been offered by fair trade advocates as evidence that price cutting and price wars are inevitable in the absence of resale price maintenance. This evidence coupled with the assertion that price cutting and price wars tend to destroy the small, independent retailer played an important role in the congressional hearings in 1952, which preceded passage of the McGuire Act.[142]

The facts surrounding this price war raise substantial doubts about both the purported evidence and the validity of the assertion it is said to support. Three conditions set the stage for the 1951 price war. First, retailers had accumulated abnormally large stocks of inventories. Second, retail sales of

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Hearings on H.R. 10527 Before the House Comm. on Interstate and Foreign Commerce, 85th Cong. 2d Sess. 676 (1958).

136. P. SAMUELSON, ECONOMICS 441-46 (8th ed. 1970).

137. After all, loss-leaders are essentially a form of sales promotion like advertising. Interestingly, for all the fair traders' zeal in fighting the purported deceptiveness of loss-leaders and price-cutting, they have not ventured to attack deceptive advertising or support legislation that would curb its well-known abuses. C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 386 (rev. ed. 1960).

138. Comment, *Fair Trade; The Idea and Reality*, 27 OHIO ST. L.J. 144, 172 (1966).

139. *Celler Comm. Hearings* 257-58, 575.

140. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). *Schwegmann* disclosed that "nonsigner's clauses" were in violation of the Sherman Act.

141. Frankel, *Price Maintenance, Price Wars, and the Distributor*, 15 CURRENT ECON. COMMENT 16, 18 (1953).

142. Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175, 177, 178, 196 (1954).

both consumer durable and nondurable goods had been on the decline during the first and second quarters of 1951. Third, there had been widespread price cutting while fair trade was still in full force. Economic analysis suggests that the price war was the result of these three factors and not the *Schwegmann* decision.[143]

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143. The existence of abnormally large inventories in the hands of retailers has always been a condition that lends itself to price cutting. It is simply a case of supply exceeding demand, which leads to undesired surpluses. The most expedient way to reduce such surpluses or swollen inventories has always been to reduce prices so as to increase consumer demand. Adams, *The* Schwegmann *Cases: An Economic Comment*, 15 U. DETROIT L.J. 15, 16 (1951). The Commerce Department's seasonally adjusted figures for January 1951 showed retail inventories to be almost 25% above those of 1950. The inventories continued to increase through February and March, and by the end of April had climbed by an additional 9%. Inventories of durable goods showed an even greater increase with January 1951 figures 40% above the previous year. Stocks climbed an additional 11% by April. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, S-9 (March, June 1951). A considerable portion of the subsequent price cutting must be attributed to these excessively large inventories. The fact that retail sales were declining during this same time period also accounts for the decrease in prices. Retail sales of nondurable goods fell from a seasonally-adjusted annual rate of $113.1 billion in the first quarter of 1951 to $111.6 billion in the second quarter; and durable goods sales fell from $31.2 billion to $26.5 billion, a decline of over 15%. Frankel, *supra* note 144, at 19. Such declines in retail sales reflect a decrease in consumer demand, which causes further increases in the gap between the excess of supply over demand. Again, the natural competitive response is that of reducing prices so as to attract the diminishing number of consumer dollars. The third and perhaps most important factor is that price cutting had been common and frequent long before the *Schwegmann* decision. One of the main sources of such activity had been the discount houses. This everyday price cutting by the discount houses is, of course, what the small retailers hoped to eliminate. However, the fair trade laws were powerless then as now to prevent a large percentage of this price cutting because 95% to 99% of the manufacturers refused to apply resale price maintenance. It is the effects of the use of fair trade by the other 1% with which we are here concerned. Their normal, everyday prices were 15% to 30% off the list prices, including fair traded goods. The consumer was obviously interested in these lower prices, as the popularity of discount houses was increasing rapidly. *Don't Discount the Discount House*, RETAILING DAILY, Dec. 7-10, 1948. Co-ops, "buying clubs," and similar organizations also offered merchandise at discount prices. In addition, small, independent retailers frequently engaged in price-cutting, although their activities were less conspicuous and seldom brought to public notice because of their size and dispersion. The importance of this widespread price cutting lies, of course, in the fact that it controverts the contention that the price-cutting that followed the *Schwegmann* decision was a sudden and atypical phenomenon not to be found when fair trade laws are in full force. In fact, the effect of *Schwegmann* was to increase the number of stores that participated in price reductions on fair trade products. This was especially true of the large metropolitan area department stores that formerly had adhered to the resale prices because of their conspicuous size and concomitant susceptibility to fair trade enforcement. With fair trade effectively restricted, *Schwegmann* served as a psychological catalyst for what appears to have been an imminent trend. This is actually a very basic theory of the cause of economic events. When the public expected price-cutting to occur in the absence of fair trade, it actually served to promote its occurrence through such expectations. A similar phenomenon has been seen recently in the case of "demand-pull inflation." Consumers who buy more today than they ordinarily would because they expect prices to be higher tomorrow, are increasing the excess aggregate demand and thereby serving to further increase inflationary pressures through their expectations of higher prices.

Despite the attention given to the price war by fair trade advocates and the predictions that this was the beginning of the end for small retailers, there is no recorded evidence of the price war having forced a single firm into or appreciably nearer to bankruptcy. In fact, the magazine *Drug Topics* reported that drug store sales in 1951 had climbed to the record shattering total of nearly $4 trillion and that there had been a steady increase in sales from June through December[144] in the period following the *Schwegmann* decision. This expansion was not limited to the drug industry,[145] despite the fact that legislation restoring effective fair trade was not enacted for almost a year. These facts would seem to considerably undermine the dramatic allegations that without fair trade laws "insatiable greed . . . threatens . . . to eliminate the small entrepreneur."[146]

While the fact that price cutting was already widespread prior to the *Schwegmann* decision casts substantial doubt on the basic premise that fair trade prevents price cutting, it should not be concluded that fair trade has nothing to do with price cutting and price wars. Rather, it illustrates that contrary to the traditional assertions, resale price maintenance is a principal cause of price cutting. This conclusion is supported by several additional factors.[147]

First, when products are sold at a fixed price under fair trade, the consumer will become conditioned to a product-price relationship. That is, the consumer will come to expect that he can obtain the fair trade product at a specific fixed price regardless of the type of retail outlet patronized, the extra services received, or the area in which purchased. As a result of this product-price conditioning, the consumer will be able to immediately recognize a price cut and therefore will be especially responsive to it.[148]

The fact that the majority of fair-traded products are standardized[149]

The large retailers in the urban centers were already involved in a very competitive situation, but under the increased public attention, they each apparently felt constrained to demonstrate that they had the lowest prices on fair trade goods. The fact that the most conspicuous price reductions occurred on previously fair traded items has been frequently referred to as illustrative of proponents' contentions. However, subsequent analysis will demonstrate that this fact actually substantiates opposite conclusions.

144. *Celler Comm. Hearings* 143-44.

145. Testimony was also given as to increased sales by retail jewelers in Baltimore in November 1951 as compared to pre-*Schwegmann* sales in November 1950. *Id.* at 250.

146. *Id.* at 111-12 (statement by Nat'l Ass'n of Tobacco Distributors, Inc.).

147. Frankel, *supra* note 141, at 20-21.

148. The terms "price cut" and "price cutting" are meaningful only to the extent that there exists some "established price" against which the price reduction can be measured. An established price, of course, is less likely to develop in the absence of fair trade because of factors that operate in the normal competitive market to determine price. Thus, it becomes all the more curious that the findings refer to "predatory price cutting of established prices," when they are not as likely to exist in the first place in the normal competitive market.

149. "Standardized" in this context means that the specific product of a particular manufacturer will be uniform in specifications and quality. For example, all cans of Right Guard spray deodorant will have essentially the same chemical composition, even though the product is "differentiated" from other spray deodorants through both advertising and intrinsic qualities. Product standardization is to be distinguished from the situation in

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serves to compound their vulnerability to price cutting. That is, it becomes a matter of indifference to the consumer which retailer he purchases from, since he knows that the product will be the same wherever he purchases it. National and regional advertising by the manufacturer further reduces the necessity of selling and promotional activities by the retailer because the consumer will have already obtained an idea about what he wants before he goes to the retailer. The retailer's role, being reduced by these two factors, increases the consumer's indifference with whom he patronizes. As a result, price differences become more important to the consumer—pressure is imposed on retailers to cut fair trade prices.

A third factor that greatly increases the likelihood of price cutting under fair trade is the level at which prices are set. Manufacturers have a tendency to fix fair trade prices at levels above the normal competitive price to encourage the retailer to push their products rather than similar products that do not yield comparable profits.[150] However, simple economic principles dictate that higher prices will normally reduce the demand,[151] except in unusual cases.[152] A retailer, therefore, may actually receive greater total profits if he sells at a lower price because the increased volume more than offsets the reduced gain per product.

In reviewing these three factors, the surprising thing is not that price cutting occurred prior to the *Schwegmann* decision, but that it was not even greater than it was during this period. This can, in part, be explained by the fact that even at its peak only ten per cent of the consumer goods were fair-traded.[153] Obviously, the majority of retailers and manufacturers must have recognized that fair trade did not prevent price cutting, or we could have expected that a much greater percentage of the products would have been fair traded.

Price Cutting and Its Effects on Retailers. Thus, two principal assertions have been found to be of highly dubious merit. First, that loss-leaders are a deceptive practice. To the extent that they are used as a part of a larger scheme to monopolize there are the antitrust laws to curb their abuse. Second, it appears that fair trade, rather than preventing price competition, serves to promote its utility and profitability. But what if fair trade did successfully stop all price cutting? What would be the benefit provided to the small retailer if general price competition were eliminated at the retail level by fair trade?

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which the products of all manufacturers are essentially the same. For example, salt or sugar. Yet it should be noted that even producers of such industry-wide standardized products will attempt to differentiate their products. For example, salt: "When it rains it pours."

150. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. LAW & ECON. 86, 90 n.5 (1960).

151. *Id.* at 90.

152. Certain products, luxury goods and status symbols, have artificial, price-induced reputations. Demand for these goods, paradoxically, decreases as prices drop. These are the only products that actually benefit from fair trade protection.

153. Herman, *supra* note 119, at 586.

To answer this question the nature of competition itself must first be examined briefly. Competition is deemed to be a desirable goal, for even the findings state: "Prohibiting the unfair and discriminatory practice of price cutting . . . will foster and encourage free and honest competition."[154] Competitive selling is the state of economic affairs that exists when there are numbers of independent retailers vying with one another to attract the limited number of consumer dollars by offering the goods and services demanded by the public at the lowest possible prices. The inherent advantage of price competition, economic efficiency, is promoted because each retailer will endeavor to minimize his costs so as to maximize his profits. This result is forced because the dispersion of economic power prevents any one supplier from being able to set an arbitrarily high price that would yield an unreasonably high profit. As a result, competition is the regulatory force in the capitalistic economy. The minimum price that is forced by price competition ensures maximum purchasing power for the consumer as well as maximum efficiency in the production and distribution processes.

To the individual retailer, on the other hand, higher prices mean greater average profit per unit sold, and the greater the volume the greater the total profit. With the normal consumer demand curve, however, volume will increase only when the price is lowered. For most products, at given levels of consumer demand, therefore, profits will be maximized only when price is minimized.

However, in the long run the higher prices of the less efficient retailer will cause his sales volume to continually decline. Ultimately, if his competitors can charge substantially less because of their greater efficiency, the inefficient, high-priced retailer will be forced to improve his efficiency, take lower profits, or go out of business. Competition, therefore, is only a threat to the inefficient retailer.

However, it is an entirely different matter to say that inefficient retailers fail because of competition than to state that small retailers are forced into bankruptcies by loss-leading and price wars. Because so many variables determine the success or failure of the retailer, it is indeed difficult to differentiate and pinpoint the actual causes of losses and failures. Nonetheless, the congressional committee hearings, prior to passage of the McGuire Act, were replete with extravagant claims and assertions as to the destructive effects of loss-leading and price wars. Yet for all the mass of data presented, the assertions remain largely unsubstantiated.[155]

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154. FLA. STAT. §541.001 (5) (1969).

155. *Commerce Comm. Hearings* 30, 116, 135-41, 170. The limited evidence presented, typically, is such that it is difficult to determine whether the losses or failures were in fact due to price-cutting and price wars, or other economic factors. In the majority of instances the evidence indicates it was more likely that those factors that contribute to a retailers inefficiency were the causes of the retailers difficulties. However, where losses did appear attributable to price-cutting, the amounts were not substantial. Furthermore, there was no evidence as to actual business failure due to price-cutting or price wars. The facts presented do not establish that there was a problem of sufficient severity to warrant public intervention and justify the attempted elimination of all retailer level price competition through fair trade legislation.

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For the small retailer to ever be seriously harmed, price cutting must: (1) endure over long periods of time or recur frequently, (2) take place on products forming a substantial percentage of the retailer's sales, and (3) persistently reach levels well below merchandising and operating costs.[156]

Unless these requisites are met, nothing stops the small retailer from meeting the prices of his larger rivals. Additionally, the retailer's experience in the free trade states indicates that these requisites are rarely, if ever, met. For one thing, price wars are characterized by their brevity of duration, not their endurance. Furthermore, unless the price war is generating extra volume on the non-price cut items, the large retailers will find the price was no more profitable than the small retailers. While small retailers may find price cutting unpleasant, they rarely will find it fatal. The exception, of course, is the inefficient retailer who cannot meet the everyday low prices of his more efficient competitors.

The fallacy to which fair trade advocates have succumbed is to associate any and all competitive situations with destructive or unfair competition. Yet it is only natural that the high cost, inefficient seller be eliminated from the marketplace. The fair trade advocates have further erred in identifying the competitive pressures from large retailers with the symptom of price competition on nationally advertised brands. Loss-leading and price competition are not the cause of the small retailer's demise. His problems, instead, arose because the techniques of production have changed tremendously over the past forty years. The strength of the large retailing outlets lies not in select predatory cutting of national brands as the findings would claim. Rather, their advantage lies in improved, more sophisticated retailing practices,[157] including pricing policies that are more consonant with lower cost merchandising techniques that meet the changing consumer needs, tastes, and preferences. In a word, they have become more efficient.

This fallacy in identifying the true causes of the small retailer's demise probably arose in part because large retail outlets began to develop during the Depression, a time of severe and persistent price cutting.[158] But while price cutting was rampant during the 1930's, and many small and some large retailers were forced to close, the cause of this severe price cutting was due to a severe fall in aggregate demand and a resulting excess of product supply over consumer demand at prevailing prices.[159] In such circumstances the fall of prices is inevitable.

However, the emergence of large retailers was not entirely coincidental. Economic circumstances, such as the Depression, put a premium on efficiency and dictate the survival of the most efficient.

The Evolution of Retailer Monopolies. The conclusion that small retailers are not any more susceptible to price competition and loss-leader practices, in the absence of fair trade, is supported by several statistics. Contrary to

156. Frankel, *supra* note 141, at 23.

157. *See* text accompanying note 215 *infra*.

158. *See* note 17 *supra*.

159. Frankel, *supra* note 141, at 28.

the dismal predictions by fair trade advocates that the small retailer would soon perish in the absence of fair trade protection, it was found in 1948 that the free trade areas, those without fair trade laws, had forty-five drug stores per million people, whereas the fair trade states had only thirty-seven drug stores per million.[160] Actually, the number of retail drug stores declined slightly in both the fair trade and free trade areas between 1935 and 1948. In both cases the decline was less than one per cent.[161] Such uncomplicated statistics indicate that thirteen years without fair trade in the free trade areas had failed to discernibly affect the vitality of drug retailers in those areas.[162] That is, the predicted monopolization of the retail markets was not proceeding any faster in the free trade areas than in those states where retailers were protected by fair trade. A more accurate statement would be that the effect of unencumbered competition in eliminating the inefficient retailers was no greater in free trade areas than where supposed small retailer protection was in effect. Furthermore, the alarmist predictions are no closer to validity today than they were in 1948.[163]

Recent figures from the 1970 *Statistical Abstract of the United States* indicate that retail trade in the free trade states is thriving. In fact, between 1958 and 1967 the number of retail establishments in the free trade areas *increased* by 5 per cent, while the number of retailers in the full fair trade states *decreased* by more than 2 per cent.[164] Also, between 1968 and 1969 the number of commercial failures in the free trade states declined by 12

160. *Celler Comm. Hearings* 508.

161. *Id.*

162. Texas and Missouri ranked 6th and 11th, respectively, in population in 1950. Both were among the ten states with the greatest number of drug stores and the highest volume of drug store sales. *Id.* at 146-47, Similarly, in 1948 Texas and Missouri ranked 6th and 11th in number of retail jewelry stores, while according to volume of annual sales of jewelry stores Texas ranked 5th and Missouri again 11th. *Id.* at 236, 238-39. The average drug store sales in the District of Columbia, also a free-trade area, were higher than the average of any state, and Texas had the largest number of proprietary stores. *Id.* at 445.

163. There were, on the average, 272 drug and proprietary stores (these stores are no longer listed separately as they were when the data was presented to the pre-Maguire Act congressional hearings) per million persons in the United States in 1967. Texas and Missouri (4th and 14th in population) maintained their rank in number of drug and proprietary stores at 4th and 11th in 1967. The full-fair trade states, see note 60 *supra,* had an average of only 253 drug and proprietary stores, while the original free trade states, see note 40 *supra,* had an average of 299 drug and proprietary stores per million people. Such statistics again verify that those areas that have done without fair trade for the past 30 years have not been subject to a monopolization of their retail markets. In fact, they still enjoy a larger number of retail stores than the fair trade states. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES No. 1179, at 740-41 (1970).

164. U.S. BUREAU OF THE CENSUS, *supra* note 163, at 740-41. The free-trade areas for which data was calculated included only those areas without fair trade in 1958: Vermont, Missouri, Texas, Alaska, and the District of Columbia. The full-fair trade states included the fifteen states with full-fair trade acts today, *see* note 60 *supra,* and Rhode Island and Mississippi, which had full-fair trade acts in 1967 (only those states that had full fair trade acts throughout the measured period were used). The statistics used the total number of retail establishments in these areas during 1958 and 1967, not just those stores with payrolls.

per cent while in the full fair trade states commercial failures declined only by 7 per cent.[165] Not only did the free trade areas experience an increase in the number of retail establishments rather than a monopolization of their retail markets, but those states with the benefit of resale price maintenance suffered declines in the number of retailers. Similarly, the decrease in commercial failures was actually greater in the free trade states than in the fair trade states.

Additionally, in considering the bankruptcies in all states, those of retailers worth less than 100,000 dollars decreased by 31 percent between 1955 and 1969, while bankruptcies of retailers worth 100,000 dollars or more increased by over 177 per cent.[166] It appears that it is the large retailer who has been falling into an increasing number of bankruptcies, not the small one; a result contrary to what the fair trade advocates had alarmingly predicted. Furthermore, while per capita sales by all retail stores increased over 27 per cent between 1964 and 1969, the percentage of these sales by multi-unit organizations (chain stores) increased from 26.1 per cent to only 29.3 per cent.[167] The single unit retailer still accounts for over 70 per cent of all retail sales in the United States. A fact that often seems to be overlooked is that the larger retailer need not grow at the expense of the small retailer. As the population continues to grow the retail market expands. Even though the multi-unit stores increased their percentage of total market, the single unit retailer's total sales continued to increase, although at a lower rate than the multi-unit stores.

The 1968 Dun and Bradstreet report on business failures also indicated that retailers in all major lines of trade continued to have a dwindling number of failures that reached a sixteen-year low in 1968.[168] For a period that also saw nine additional states reject fair trade all together, there is cause to believe they did not err in repealing these laws. Of even greater interest is the list of the underlying causes of the 9,636 business failures in 1968. They include: neglect, fraud, lack of experience in the line, lack of managerial experience, experience not well rounded in sales, finance and purchasing incompetence, and natural disaster.[169] Nowhere is there any mention of failure due to predatory price cutting, the purported omnipotent killer of small retailers.

The statistics, thus, seem to verify the conclusions as to the fallacies of the fair trade advocates' assertions. Monopolization has not been the trend in either the free trade or fair trade states. Price cutting is not a phenomena to be expected only in the absence of fair trade, and to the extent that it exists it does not destroy the small retailer. Only his own inefficiencies can do that.

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165. *Id.* at 484.

166. *Id.* at 485. Commercial failures of retailers worth less than $100,000 decreased from 5,158 to 3,570 per year, while bankruptcies of retailers valued $100,000 or more increased from 181 to 500 per year.

167. *Id.* at 734.

168. DUN & BRADSTREET, THE FAILURE RECORD THROUGH 1968, at 2 (1969).

169. *Id.* at 12.

Even if the absolute number of retail establishments were decreasing, which the statistics indicate is not the case,[170] there would probably be more competition today than in an era of more small single retailers. This is due to the increased mobility of today's consumer. Ironically, the consumer of the 1930's who was effectively limited to patronizing the neighborhood store was actually being subjected to a virtual monopoly that the findings refer to so disparagingly. As a consequence of increased mobility, today's shopper has a greater number of establishments within his effective radius than ever before. These increased alternatives have actually increased competition since 1935, despite the slight decrease in the absolute number of retailers per million persons.[171]

Furthermore, the possibility of virtual monopolies replacing the current retail market structure is not only a legal impossibility due to the antitrust laws, but it is essentially impossible in a physical and practical sense because of the regulatory laws of competition.[172]

Fair Trade as an Appropriate Remedy for Monopoly. The 1949 legislature, perhaps inadvertently, implicitly recognized the regulatory function of competition and its ability to prevent monopolistic prices by asserting the need to protect the small retailer—for what else would be the advantage of having a large number of small retailers, rather than virtual monopolies, if not to promote price competition and its inherent advantages. However, by introducing fair trade the legislature has effectively limited the usefulness of having a large number of small retailers because fair trade eliminates the small retailers' primary mechanism of competing—price competition. Fair trade requires formerly competing retailers to maintain uniform prices set by the manufacturers and, thereby, facilitates the creation of monopoly power by allowing the retailers to act as a single marketing unit for the fair trade product. Since the retail giant can still use many other merchandising techniques that are not available to the small retailer,[173] the small retailer, without his most powerful weapon—price competition—is placed in a more vulnerable position under fair trade. Thus, fair trade serves to promote that which it purports to ward against—monopoly power. In spite of this fact, small retailers have not vanished in the fair trade states because

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170. Although there was a slight decrease in the total number of retail establishments in the United States between 1958 and 1963, there has been a steady increase since that time. This change corresponds with business cycle fluctuations. It appears that the growing number of establishments is responsible for business failures. *See* text accompanying notes 158-159 *supra*. *See also* U.S. BUREAU OF THE CENSUS, *supra* note 163, at 740-41.

171. *See* text accompanying notes 160-162 *supra*.

172. First, because retailing, unlike perhaps manufacturing, requires less capital and physical facilities, it is relatively easy for competitive merchants to enter the retail market. Second, there are limits, both legal and physical, to the economies of scale that can accrue to being large. Should a large retailer ever be able to establish a "virtual" monopoly in a certain market, the easiest way to combat the possibility of his subsequently charging extortionist prices would be the entry of a new competitive merchant who could offer the price competition. *See generally* P. SAMUELSON, ECONOMICS 22-25, 462 (8th ed. 1970).

173. *See* text accompanying notes 178-180 *infra*.

less than four percent of all commodities are fair traded. Thus, the small retailer is still able to engage in price competition on the majority of his products.

Nevertheless, fair trade proponents have contended that it neither destroys competition nor deprives the consuming public of competition's advantages. First, it is argued that fair trade only prevents predatory or unfair price competition—not useful, healthy competition. As discovered, however, there is substantial doubt whether any degree of deceptive competition among retailers is not already covered by antitrust laws. Furthermore, fair trade fails to make any distinction between unfair and normal competition. Instead, it unformly eliminates *all* price competition at the retailer level, "unfair" and "normal." Second, competition is said to be promoted by the requirement that the products fair traded must be in free and open competition with commodities of a like kind and quality.[174] Presumably, this requirement is designed to insure that inter-brand competition among the manufacturers is not stifled, even though intra-brand price competition is eliminated. As proof of this assertion the Bureau of Education on Fair Trade submitted lists of fair traded articles to the Commerce Committee Hearings in 1952. These lists show wide variation in prices of many competing brands of silverware, soap, face powder, fountain pens, electric toasters, mixers, shavers, irons, and other commodities. For example, the list indicates there were 14 brands of automatic electric toasters with fair trade prices ranging from $9.75 to $24.50 and 56 brands of face powder with prices from 9 cents to $1.20 per ounce.[175] While the Bureau obviously intended to show by these lists that price competition still existed, they actually supported a contrary conclusion because the products cited were highly differentiated and thus were not in price competition with each other. The products were in monopolistic competition. That is, because of differences among the products, some real, some created artificially (as by advertising), consumers were willing, within limits, to pay more for one brand than for another.[176] However, the courts have considered the statute's competition requirement to be satisfied by the existence of competing goods of the same general class, regardless of the extent of product differentiation.[177]

Thus, a consumer buying a fair trade product may be left with neither retailer nor producer price competition to assure him that he is getting the maximum purchasing power from his limited number of consumer dollars. But to acknowledge lack of manufacturer-level competition is probably to miss the more basic point—the consumer is entitled to competition among retailers as well as manufacturers. The price paid for warehousing and distributing the product should be subject to competitive pressures, just as the price paid for producing the product is purportedly subject to pro-

174. This requisite is stated in the "findings of fact" no less than four times. FLA. STAT. §§541.001 (1), (2), (5), (7) (1969).

175. *Commerce Comm. Hearings* 22-23.

176. C. MCCONNELL, ECONOMICS 509-10 (4th ed. 1969).

177. Eastman Kodak Co. v. FTC, 158 F.2d 592, 594 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947). *See also* Eastman Kodak Co., 44 F.T.C. 14 (1947).

ducer competition. To excuse the elimination of retailer competition by asserting the continued presence of manufacturer competition is irrational. This same conclusion was reached by the Federal Trade Commission in its study of resale price maintenance over twenty-five years ago.[178]

A further reason to doubt the ability of fair trade to protect the small retailer and to stymie the purported evolution of monopolies is found in the considerable, though unpublicized, support given fair trade by large retailers.[179] One explanation may be that although price competition is eliminated, a variety of modern merchandising techniques are available to the large distributor. Some examples are: specialists for advertising and display purposes, widespread and frequent advertising, credit facilities, repair services when necessary, ability to seek and purchase merchandise at the cheapest source, quantity buying, stocking and promoting his own private brands, and self-service and mail-order shopping.[180] With these numerous merchandising techniques it becomes unnecessary for the large distributor to rely on loss-leader selling. Additionally, the large retailer may circumvent the fixed resale price on expensive items, such as cameras, stereo equipment, and appliances by offering overly generous trade-in allowances on exchanged equipment. While such technique is also available to the small retailer, the larger dealer with his greater volume will normally be better equipped to handle sales of the used trade-ins. Moreover, there are many nationally known, brand named products, which are not fair traded, that may be reduced in price for promotional purposes. Thus, even conceding the inability to cut some fair trade prices, there would be little to prevent the large distributor from using an aggressive merchandising policy.

In fact, rather than limiting his ability to compete, fair trade may actually assist the large distributor. It gives the large retailer a standard against which to push his private brands, just as resale price maintenance gives the price cutter an established price against which to measure his price cutting. The larger retailer can establish prices on fair trade products, which will give his private brands an advantageous comparison without fear of price competition from the fair traded products. The small retailers, unable to afford private labels of their own, are powerless *if they abide by the price minimums* to meet this competition. As a result, fair trade serves to handicap the small retailer by removing one of his most viable means of competition—price competition.

In reviewing the above factors it becomes readily apparent that fair trade is inappropriate to remedy the purported evolution of retail monopoly. Not only does it eliminate retailer price competition, leaving the consuming public with a dubious amount of producer-level price competition, but it assists the large distributor while handicapping the small retailer. With

178. FEDERAL TRADE COMMISSION, RESALE PRICE MAINTENANCE, SUMMARY AND CONCLUSIONS LXIV (1945).

179. *See* Edwards, *Memorandum for the Assistant Attorney General, Grounds for the Repeal of Miller-Tydings Which Authorize Resale Contracts* (1941), *reprinted in Celler Comm. Hearings* at 436.

180. Frankel, *supra* note 141, at 26-27.

price competition virtually eliminated, emphasis shifts to nonprice competition, an area in which the large retailer tends to excel because of his greater resources. Rather than preventing the growth of the large retailers, fair trade serves to encourage their development.

Fair Trade and the Manufacturer

It will be recalled a basic economic maxim is that a retailer will maximize output by minimizing retail prices because consumer demand normally increases as prices decrease. Therefore, the immediate paradox is why manufacturers would ever wish to maintain artificially fixed resale prices.[181] A certain number of manufacturers have supported fair trade in an effort to stop what they consider to be detrimental price competition. The rationale for this apparent inconsistency is twofold. The manufacturer is said to suffer from price competition and price wars because: (1) price competition impairs the product's image or "goodwill," and (2) it reduces the product's per unit profitability and the retailers' resulting willingness to carry the product.[182]

Fair Trade as a Tool of the Monopolistically Competitive Producer. First, it is significant that less than one per cent of the manufacturers use fair trade and that number is even declining.[183] The reason is that producers in the competitive industries are unable to affect the market prices of their products because each producer accounts for such a small portion of the total market supply.

However, if a product is sufficiently unique in some economically relevant respect from competing products and consumers have indicated a preference for the product, the producer may find it possible to demand a higher price than his competitors without reducing consumer demand. Such a situation has been seen to exist in the monopolistically-competitive markets where product differentiation enables certain producers to determine price levels of their products.[184]

It is only those manufacturers with a certain degree of monopoly control over their prices who will be able to utilize resale price maintenance. The competitive producer will find it virtually useless. This practical requisite to a manufacturer's employment of fair trade is an ironic and disturbing fact in light of the fair trade act's purportedly anti-monopolistic goals. Yet, statistical studies verify this hypothesis. A study done in 1954 indicated that approximately sixty-three per cent of the fair trade sales, accounting for only eleven per cent of the total number of manufacturers in the sample, were made by the largest manufacturers.[185] In addition, a substantial number

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181. *See generally* Telser, *supra* note 150.
182. Frankel, *supra* note 141, at 25.
183. Herman, *supra* note 119, at 584.
184. *See* text accompanying notes 176-177 *supra*.
185. This ability to effect price is further reinforced if a product characteristic known

of small retailers submitting returns to a congressional committee reported they considered fair trade an expensive luxury beyond their means and available to only the very large producers who can afford the expensive enforcement costs.[186]

Actually, the principal benefits of fair trade accrue to the large manufacturers because effective loss-leader selling requires use of well-known, heavily advertised brands, and such price cutting has primarily been of concern to the large, well-established manufacturers who produce these brand-named products. As a result, it can be argued that because fair trade is primarily protecting the reputation of the larger manufacturers' products from the purported depredations of price competition, fair trade is serving to consolidate the market position of the larger manufacturers at the expense of the small producers who remain subject to normal price competition.[187]

Fair Trade and Product Goodwill. The next question of issue is whether the large manufacturer actually needs the protection that fair trade purportedly supplies. Will the reputation or image of his product really be destroyed or depreciated by loss-leader selling as contended? Economic analysis suggests that it will not.

The manufacturers' contentions stem from the assertion that reduced prices lead the consumer to believe the quality of the product has deteriorated and therefore cause him to reduce his purchases.[188] Consumer reliance on price as an indicium of quality has been found, however, to be of primary relevance only where the product is comparatively unknown and the consumer has no other basis of judging its merits.[189] A "brand-name" product, on the other hand, need not rely on price as an indicium of quality, as the product-quality relationship has already been established in the consumer's mind by advertising or his use of the product, or both. Price is only one of many indicia of quality. In addition, the consumer will have come to recognize the product-price relationship, which has evolved as the branded product's quality reputation developed. Since these two established relationships are necessary prerequisites to the product's usefulness as a loss-leader, the consumer will respond to a price cut on the branded product only *because* it is recognized as being a quality product and a "good buy." Consequently, it is inconsistent to assert that at the same time the consumer is considering

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as "inelastic demand" exists. This means essentially that despite fluctuations in price, the demand for the product remains relatively stable. For instance, if a person is sick and needs a certain medication, he is likely to purchase the product regardless of whether the price is two dollars or eight dollars. Conversely, should the price of the medication decrease from $8 to $2 the person is not likely to purchase the product when he is healthy. In other words, consumer demand is largely unaffected by price. Drugs and cosmetics are two of the best examples of this economic situation. This serves to explain why 46% of the fair traded items are drug store products. Herman, *A Statistical Note on Fair Trade*, 4 ANTITRUST BULL. 583, 585 (1959).

186. *Id.* at 589. *See also* Telser, *supra* note 150, at 87.

187. Herman, *supra* note 185, at 591.

188. Frankel, *supra* note 141, at 25.

189. *Id.*

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his increased purchases a good buy his opinion of the product is depreciating. If the consumer's opinion of the product were actually depreciating he would not be buying more of the product as a loss-leader. The manufacturers' contention underestimates the sophistication of today's consumer and the rationality of his distributing retailers.

The above conclusion is subject to one possible exception—products with "negative price elasticity." Products with this unique characteristic will generate an increase in consumer demand as their prices are increased.[190] Luxury goods and status symbols are the most frequent candidates for this aberration of the normal price-demand maxim. Because of this direct price-demand relationship a price cut may impair the exclusiveness or snob appeal that such a product has attained by virtue of its high price.

Aside from the issue of whether such a limited class of products should be afforded the special protection of a vertical price fixing agreement, there is doubt as to whether a rational retailer would ever use such a product as a loss-leader, realizing that a price cut would diminish its exclusiveness and reduce, rather than increase, his number of sales. Such retailer action seems highly unlikely, and consequently the laws of economic self-interest will serve to protect the negative-price-elastic product from price cuts.

It becomes apparent that the manufacturer's protection of product goodwill argument is without basis. The small manufacturer of the relatively unknown product does not need price protection because his product lacks the requisite characteristics necessary for successful use as a loss-leader. Those branded products that are useful as loss-leaders will have established quality reputations that are not subject to the price as an indicium of quality syndrome. And the retailer's economic self-interest will also protect negative-price-elastic products. Consequently, product goodwill is not a viable justification for fair trade.

Fair Trade and Retailer Goodwill. A manufacturer's second line of reasoning supporting fair trade is: (1) price cutting renders relatively unprofitable margins for some retailers who become reluctant to stock the product, reducing the producers' distribution outlets;[191] and (2) where sales volume at the retail level depends not only on retail prices but also on retailer services related to the specific product, fair trade is necessary to protect margins sufficient to insure these services are rendered.[192] These arguments concerned with retail distribution are referred to as the "retailer goodwill" argument to be distinguished from the "consumer or product goodwill" argument just discussed.

Proponents of retailer goodwill argue for the protection of retailer profits in order to preserve the maximum number of retail outlets for distribution. Fair trade, however, may actually be harmful to the manufacturers' interests because the argument assumes, perhaps fallaciously, that the larger

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190. *See* Comment, *Fair Trade: The Ideal and Reality*, 27 OHIO ST. L.J. 144, 153 (1966).

191. Frankel, *supra* note 141, at 25.

192. Telser, *supra* note 150, at 89.

the number of retail outlets the greater the total volume of sales, which is the manufacturers' primary concern.

The rationale of the argument is: First, the retailer will have a tendency to push those items that yield higher margins rather than those with low margins.[193] Second, because price cutting lowers margins, retailers will not push the affected product and may eventually drop the item altogether if the price cuts are too great and too frequent. It is then asserted that the logical result is reduced sales for the abused manufacturer. Therefore, fair trade is necessary to protect profit margins from price cutting.

This argument, however, is not without conceptual weaknesses. Although retailers may push high-margin products, low-margin items may push themselves, since the lower priced products will tend to have a greater sales volume. If the product has normal or high elasticity of demand the increased sales will more than offset the low margin and yield a higher profit. As a result, the low-margin product may not only push itself, but a retailer realizing that his total profits on the product are higher may also tend to push the low-margin product. The fallacy of the first rationale is that although retailers who refuse or are unable to reduce prices (because of their higher costs) may suffer a decrease in sales as they lose customers to the competing stores, the manufacturer will benefit from over-all greater volume.[194]

Because of the lower price some of the present consumers will be willing to buy more of the product than before, and still others who previously could not afford the product at all will be able to buy the product. Fair trade would have prevented this price competition that has resulted in an increased sales volume. Thus, rather than protecting the manufacturer's interest, fair trade would have worked to his detriment in preventing an increase in sales volume.

The second part of the retailer goodwill theory is the service argument. This aspect is relevant only to those products whose sales volume is said to be directly related to the rendering of special services, such as pre-sale demonstrations or special repaid services.[195] If the margins are not fixed by fair trade, proponents argue that some retailers would not provide the services, cut prices and thereby lure customers from the retailer who purportedly induced the customer to buy the product by rendering the special pre-sale services. The argument concludes that the retailer who has suffered from this diversion will eventually drop the special services, and the manu-

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193. A survey of retailers found that 56% admitted to "pushing" fair traded lines. *Report of the Select Comm. on Small Business on a Study of Fair Trade*, S. Rep. No. 2819, 84th Cong., 2d Sess., 19-20 (1956).

194. Over one-half of the retailers who quit stocking fair traded items did so because of poor enforcement. *Id.* at 14.

195. These special services should be distinguished from the general services. Special services are specifically related to a particular product and will only affect that product. General services, such as air conditioning the premises, storewide guarantee on all merchandise, or smiling clerks would presumably affect all brands in the same way. Manufacturers would not be interested in fair trade to protect these general services as there is no direct benefit to the producer. *See* Telser, *supra* note 150, at 89.

facturer's sales will purportedly fall.[196] In essence, fair trade is actually being used as a promotional device and the only thing being protected is the manufacturer's sales and profits.

Placed in this perspective, several criticisms can be raised. First, the protected high margins and resulting higher prices will result in a decrease in demand, unless it is a differentiated product with a good quality reputation and a price that is controlled solely by the producer. The standardized product of the competitive producer would only lose sales with the higher price, regardless of the special services.[197] This results because the retailer can more easily push the well-known product. The small manufacturer must rely instead on price competition rather than guaranteed price margins. Inter-brand competition, consequently, is again decreased rather than promoted.

Second, the fixed margin will allow the retailer who still does not provide the services to make extraordinarily high profits.[198] Thus, it is questionable whether fixing the price will really induce all the retailers to provide the desired special services when the extra margin can just as easily be used for extra profits.

Moreover, the fixed, fair trade margin may serve to promote deceptiveness in that the high-margin incentive to push the product also creates a considerable temptation to mislead the consumer or over-sell the product. Since public control is virtually non-existent, this could be a very real and ironic problem for a purportedly anti-deceptive law. A final reason manufacturers adopt fair trade is to escape economic coercion in the form of organized retailer boycotts in which retailers either refuse to stock products or to advertise and promote them effectively. This might be called "negative retailer goodwill."[199]

The importance of this situation is twofold. First, without questioning the morality of retailer boycotts it is evident that in this case fair trade is being used as a camouflage for horizontal price fixing among retailers[200]

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196. *Id.*

197. Herman, *supra* note 185, at 591.

198. Telser, *supra* note 150, at 92.

199. In the words of an executive of a druggists' association: "All the druggists in California refused to sell Pepsodent . . . . They put it in the basement. Some were enthusiastic enough to throw it in the ashcan." *See Celler Comm. Hearings* 93. The classic case of this coercion was the vicious and destructive campaign waged by the National Association of Retail Druggists against Pepsodent when the latter decided to drop its program of resale price maintenance. The coercion was so successful in cutting Pepsodent out of the California toothpaste market that it was finally forced to readopt resale price maintenance. NARD was later placated by a $25,000 donation to be used in the promotion of fair trade legislation. *Id.* at 98.

200. This same conclusion was reached by the Attorney General's National Committee To Study the Antitrust Laws. In addition, they found that fair trade (1) goes further than is necessary to control loss-leader selling by eliminating all price competition on such commodities, (2) reduces incentive for efficiency in distribution, (3) is unnecessary to prevent monopolization of distributive outlets, and (4) deprives consumers of the benefits of price competition in the distribution of goods. They concluded that the Miller-Tydings

despite the adamant assertions of proponents that fair trade allows only vertical price fixing. That is, fair trade is being used to facilitate the exercise of monopoly power among retailers. This is expressly contrary to the fundamental concepts of antitrust law and is also contrary to the findings, which specifically prohibit this conduct.[201]

Enforcement Problems of Fair Trade. Additional complications arise in enforcement. Although any person damaged by a willful violation of the fair trade price can bring suit against the violator,[202] in reality, only the larger manufacturers can afford to enforce resale price maintenance because of the extremely high costs and often prolonged litigation involved.[203] With such expenditures it becomes readily understandable why small manufacturers referred to fair trade as a luxury available only to the largest manufacturers[204] and have doubted the profitability of fair trade.[205]

These enforcement problems, having undoubtedly resulted in uneven enforcement of price minimums, will have additional ramifications on the retailers.[206] Large retailers can be more easily policed than smaller retailers who do not advertise their prices as much and who tend to deal with their customers on a more personal basis. Consequently, smaller retailers are more likely to cut prices without detection.[207] Since some small retailers do not exercise this inadvertent advantage the consequences are paradoxical. Those who do cut prices achieve a so-called "discriminatory advantage," while those adhering to the resale price minimums are unable to meet this price competition. The violator thus benefits from fair trade while others, including large rivals, are handicapped in meeting competition by the law that was supposedly designed to protect them. Since large retailers will have a wide array of merchandising techniques available, the real loser becomes the small retailer who has neither.

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and McGuire Acts should be repealed and fair trade eliminated. OP. ATT'Y GEN. 153-55 (1955).

201. The findings assert that without fair trade "the monopolist may extort at will from the consumer, while *dictating prices* and product quality dilutions *to the producter*, all contrary to the general welfare and public interest . . . ." FLA. STAT. §541.001 (3) (1969) (emphasis added).

202. FLA. STAT. §541.07 (1969).

203. Reports of annual enforcement costs have been as high as $750,000 and $900,000. S. REP. No. 2819, *supra* note 193, at 18.

204. *See* note 193 *supra*.

205. When conditions strongly favor price competion, even large and prosperous manufacturers may find the enforcement of fair trade prohibitively expensive. Thus, in 1955 a spokesman for the Sheaffer Pen Company observed, that despite a two-year campaign of tracking down and carrying out legal proceedings against price cutters and repurchasing pens from discount houses at a cost in excess of $1 million, "we found that Sheaffer merchandise still found its way into discount houses . . . . We found that we couldn't enforce our program vigorously enough so that small retailers were in a position to compete with the discount houses and other [mass] merchandisers." *Sheaffer Says It Dropped Fair Trade So It Could Get Into Discount Houses*, ADVERTISING AGE, Dec. 12, 1955, at 1, 8.

206. Frankel, *supra* note 141, at 24.

207. *Id.*

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Fair Trade and the Consumer

It should be evident at this point that the primary effect of fair trade on the consumer will be somewhat higher prices than those that would prevail in the absence of fair trade. While the empirical data on this subject is conflicting,[208] the most objective and reliable studies have shown prices in the fair trade states to be generally higher than those in free trade states.[209] Additionally, the real motives of retailer and manufacturer support for fair trade appear to lay not in preventing deceptiveness or unfair practices, but in assuring the profitability of the present marketing structure by endeavoring to protect retail margins from the pressures of natural price competition; that the profit motive is ultimately behind support for fair trade should come as a surprise to no one. Furthermore, the costs of enforcing such an artificial price structure are great and the burden of these expenditures ultimately rests on consumers in terms of higher prices.[210]

If fair trade were to succeed in achieving its latent purposes, it would serve to protect the inefficient, high cost retailer. In paying the artificially maintained price the consumer is, in effect, being taxed to subsidize these inefficient retailers and the undesired services they provide. While the industrious retailer may increase his profitability by further reducing his costs, and widening his profit margin, he will be unable to pass the benefits on to the consumer.

Summary of Economic Findings on Fair Trade

In reviewing the economic analysis of fair trade it seems appropriate that a new summary of the findings of fact be drawn up on resale price maintenance. A more accurate list would be:

(1) Loss-leader selling is not an unfair or deceptive practice. It is an alternative form of sales promotion available to the small retailer as well as to the large.

(2) Loss-leader selling does not deteriorate the image of the bona fide quality product. Quality is based on performance and utility, not on price.

(3) Price cutting and price wars do not destroy the efficient retailer. Retail failures are due to inefficiency and incompetency, not to price cuttings.

(4) Fair trade does not prevent price cutting, but instead serves to increase its utility and profitability. The violator of fair trade is given an inadvertent advantage over those adhering to its restrictions because enforcement is uneven.

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208. *See* Frankel, *The Effects of Fair Trade: Fact and Fiction in the Statistical Findings,* 28 J. Bus. 182-94 (1955).

209. *See Celler Comm. Hearing* 433-35, 595, 899.

210. Bowman, *The Prerequisites and Effects of Resale Price Maintenance,* 22 U. Chi. L. Rev. 825, 849 (1955); Frankel, note 240 *supra.*

(5) To the extent that deceptive and unfair practices exist, antitrust laws are not only sufficient but are more appropriate. Fair trade does not distinguish between unfair and normal price competition. It eliminates *all* retailer price competition and thus destroys incentive to be efficient.

(6) Price competition is the small retailer's most viable and powerful competitive tool against the large retailer. Since fair trade eliminates all retailer level price competition, it gives an advantage to the larger retailer who is more adept at non-price competition. Consequently, fair trade is an inappropriate means of remedying monopoly power, because fair trade serves monopoly power.

(7) Loss-leaders, price cutting, and price wars have not led to the creation of virtual monopolies or great destructive trusts in the retail markets of the free trade states or the fair trade states.

(8) The increasing mobility of today's consumers has actually increased competition among retailers.

(9) The requirement that fair trade products be in "free and open competition with commodities of the same general class" is a virtually meaningless assurance that competition still prevails in view of the extent of product differentiation today. The consumer is entitled to both retailer and manufacturer levels of price competition.

(10) Most competitive manufacturers cannot use resale price maintenance because it requires a certain degree of monopoly control of prices. As a result, fair trade consolidates the position of the large manufacturers.

(11) Fair trade is useful only in protecting the artificially price-induced image of the negative price elastic product. A valid quality reputation does not need resale price maintenance.

(12) Fair trade is not necessary to protect the manufacturers' retail distribution.

(13) Fair trade is useful only for protecting the special services of the monopolistically-competitive producers.

(14) High resale price maintenance margins may promote deceptive pushing of fair trade products.

(15) Fair trade facilitates monopolistic coercion of manufacturers by retailer association.

(16) Fair trade is a guise for horizontal price fixing among retailers.

(17) Fair trade is expensive to enforce. This serves to further limit the utility of fair trade to the larger manufacturers. Enforcement costs also increase resale prices.

(18) Fair trade encourages higher than necessary profit margins and resale prices. The high fair trade prices have a regressive effect on the low-income consumer.

(19) Fair trade serves only the interest of an extremely limited number of retailers and manufacturers. It is detrimental to the interest of the majority.

(20) Fair trade is detrimental to consumer interests.

(21) Fair trade generally has monopolistic predilections.

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(22) Fair trade is an inappropriate public policy during both depressionary and inflationary periods. There is no economic or social justification for fair trade.

Legal Conclusions as to the Constitutionality of the Florida Fair Trade Act

The summary of the economic findings of fact on resale price maintenance make it evident that fair trade is virtually void of any purpose or public interest. It unfairly protects a select group of large manufacturers and retailers at the expense of the majority of producers, retailers, and consumers. Being void of any public purpose and detrimental to the general welfare of the citizens of Florida, fair trade is not within the police power of this state.

Despite the elimination of the nonsigner clause, the Florida Fair Trade Act continues to have sufficient vitality to level unequal fortunes of the citizens of Florida in violation of the equal protection and due process guarantees of the Florida Constitution. The Florida Fair Trade Act is just as unconstitutional today as it was April 5, 1949. The inescapable economic and legal conclusion is that the Florida Fair Trade Act should be abolished as soon as possible. This misnamed statute has been on the books thirty-four years too long.