

fundamental notions determine present day civil liability in tort: (1) the retaliatory and educational sanction retained in the private law as a hang-over from its criminal law origin, and (2) compensation according to principles of economic distribution of loss. Since these two principles are realized within the one system of common law liability for negligence, the equivocal use of its concepts was inevitable. Thus the unconsciously interchangeable use of the term "foreseeability" in two entirely different senses, i.e., foreseeability by the wrongdoer of avoidable harm and foreseeability by an enterprise of unavoidable harm, has led in the administration of so-called negligence litigation to a confusion between two competing policies of liability for inadvertently caused damage. Recognition of this fact by our courts and legislatures should do much toward clarifying our so-called law of negligence and should obviate most of the confusion of thought revealed in learned disquisitions on "proximate cause" or on the extension and restriction of liability for inadvertently caused harm.

The administration of our common law negligence has become so arbitrary in spots that it repeatedly provokes the suggestion that a good deal of so-called negligence litigation be removed from the common law courts and be handled under appropriately drafted legislation by commissions acting without juries. Although this may be the best ultimate solution, the courts seem capable of achieving almost equally desirable results by openly recognizing the social needs and tendencies, as well as by consciously adopting the means of achieving and furthering them, set forth in this note.

With alterations along the lines suggested, the foreseeability test of the *Palsgraf* case may remain generally useful and Chief Justice Cardozo's opinion may attain the position of creative importance which it has never yet firmly achieved. Thus, perhaps, the "riddle of the *Palsgraf* case" can be solved without acceding to Professor Cowan's "motion to bury it."⁷⁴

COLLECTIVE BARGAINING BY RETAILERS UNDER THE FAIR TRADE ACTS

The Miller-Tydings amendment¹ to the Sherman Act² provides that nothing in the act "shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions . . . in any state . . . in which the commodity is to

⁷⁴ Cowan, *op. cit.* supra note 3, at 67.

¹ 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (Supp. 1940).

² 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (Supp. 1940).

be transported for such resale . . . ;³ *Provided further*, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, . . . or between wholesalers, . . . or between retailers. . . ." This amendment, passed in 1937, supplemented state so-called fair trade laws⁴ authorizing "vertical" resale price agreements as to commodities in intrastate commerce.⁵ The state acts provide that the price established in a fair trade contract is binding upon all vendors who have notice of the agreement.⁶

The amendment, in the words of its sponsor, Senator Tydings, was designed "to put into effect a federal sanction of loss leader [sic] as being inherently dishonest and being conducive to monopoly in the long run."⁷ The pressure for the legislation originated from drug, cosmetic and liquor merchants who were, however, anxious not only to end loss-leader sales but also to eliminate all price competition on advertised brands and to insure a fixed margin of profit on sales.⁸ The chain stores apparently supported the amendment, as a means both of preventing "cut-throat" competition among their ranks and of eliminating competition from independents who were dispensing fast selling merchandise at low prices made possible by minimizing overhead expenses.⁹ But the chains were aware that fair trade legislation would not prohibit them from raiding the independent merchants by cutting prices on their well-established private brands.¹⁰

Led by the powerful National Association of Retail Druggists, these merchants, prior to the adoption of the Miller-Tydings amendment, had secured the passage of resale price maintenance legislation in sixteen states, and, what is more, in the populous states of New York, New Jersey, Pennsylvania, and Illi-

³ Resale price restrictions had been held illegal under the Sherman Act prior to this amendment. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911); cf. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

⁴ For general discussions, consult Grether, *Price Control under Fair Trade Legislation* (1939); Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 *Yale L. J.* 607 (1940); *Resale Price Maintenance under State Statute*, 45 *Yale L. J.* 672 (1936).

⁵ The constitutionality of the fair trade acts was sustained by the Supreme Court on the ground that they protected the manufacturer's interest in his brand name. *Old Dearborn Distributing Co. v. Seagram-Distillers Co.*, 299 U.S. 183 (1936). But retailers, not manufacturers, have been the chief proponents of this legislation. Thus, the producer of Kraft cheese stated that it would establish fair trade minimums on its prices in California but allow the enforcement problems to be handled by retail grocery associations. *Fair Trade Tests*, *Business Week*, at 39, 40 (Nov. 9, 1940).

⁶ For a typical statute, see Ill. Rev. Stat. (1939) c. 121½, § 188.

⁷ Hearings of a subcommittee of the Senate Committee on the Judiciary on S. 100, 75th Cong. 1st Sess., at 33 (1937).

⁸ Grether, *op. cit. supra* note 4, at 9.

⁹ Grether, *op. cit. supra* note 4, at 248.

¹⁰ Final Report and Recommendations of the TNEC, S. Doc. 35, 77th Cong. 1st Sess., at 235 (1941).

nois they secured the passage of these bills without even a hearing.¹¹ By 1939 the retailers had procured the adoption of fair trade acts in forty-four states.¹²

The Anti-trust Division of the Department of Justice¹³ and the Temporary National Economic Committee¹⁴ have urged the repeal of the Miller-Tydings amendment. They contend that associations of retailers are using the fair trade laws not only to end loss leader selling but also to coerce manufacturers to grant larger markups on their products.¹⁵ Under the threat that retailers will cease pushing the manufacturer's product, these associations have attempted to insure all dealers, including the inefficient, at least a reasonable profit. In New York, for example, retail liquor dealers, acting through their powerful trade association, managed to secure a forty per cent markup on whiskeys.¹⁶

In response to these charges of price fixing, coercion, and boycott, the National Association of Retail Druggists answers that since the passage of fair trade laws, prices on fifty leading price-maintained items have declined one per cent;¹⁷ that the average markup under resale price contracts is less than that necessary to cover the expenses of the most efficient firm; and that the fair trade laws have rescued the independent merchant.¹⁸

The adequacy of the retailers' defense, however, is not to be determined by its accuracy, but rather by ascertaining whether Congress through the Miller-Tydings amendment made lawful the coercive activities of organizations of retailers. The amendment itself permits vertical resale price agreements only; that horizontal agreements among retailers fixing resale prices are left subject to the prohibitions of the Sherman Act is made explicit by the second proviso

¹¹ Hearings of a subcommittee of the Senate Committee on the Judiciary on S. 100, 75th Cong. 1st Sess., at 12 (1937). The Nat'l Ass'n of Retail Druggists does not claim that hearings were held in more than twenty-six of the forty-four states which have passed fair trade acts. Nat'l Ass'n of Retail Druggists, *State Fair Trade Laws and the Fair Trade Enabling Act*, Hearings of the Temporary Nat'l Economic Committee, Part 31-A, at 18,155 (1941).

¹² The exceptions are Delaware, Missouri, Texas and Vermont.

¹³ Final Report and Recommendations of the TNEC, *op. cit. supra* note 10, at 121.

¹⁴ Final Report and Recommendations of the TNEC, *op. cit. supra* note 10, at 33.

¹⁵ For an example, see *Rayess v. Lane Drug Co.*, 3 C.C.H. Trade Reg. Serv. (8th ed.) ¶ 25,602 (Ohio App. 1940) (what appears to be a retail trade association prevailed upon all the Ohio cigarette jobbers to raise the retail price one cent when the federal tax was increased one-half cent on July 1, 1940).

¹⁶ But the high prices and low volume led to a large scale price war which the manufacturers were reluctant to stop. Applegate, *Collapse of Liquor Price Fixing in New York May Improve Distillers' Positions*, 56 *Annalist* 430 (Oct. 3, 1940).

¹⁷ Nat'l Ass'n of Retail Druggists, *Fair Trade Laws and the Fair Trade Enabling Act*, *op. cit. supra* note 11, at 18,148. But the accuracy of the survey made by the association has been challenged because three of the non-fair trade areas were omitted, reports from large distributors were incomplete, and all factors affecting prices were not considered. *Is Fair Trade Fair?*, *Business Week*, at 42 (July 20, 1940).

¹⁸ Nat'l Ass'n of Retail Druggists, *Fair Trade Laws and the Fair Trade Enabling Act*, *op. cit. supra* note 11, at 18,143.

to the amendment. The type of collective bargaining in which retailers are now engaging results in vertical resale price contracts, but the bargaining process itself is effectuated by the horizontal agreements of the associated retailers. The legality of these agreements is not determinable from the provisions of the amendment; the question remains subject to the original provisions of the Sherman Act, which, as interpreted, make the legality of combinations depend on the reasonableness of the restraints they impose.¹⁹ It is possible that the major shift in policy effected by the enactment of the Miller-Tydings amendment will lead to different conclusions as to the reasonableness of the collective bargaining process than might have been reached when the objective of that process, vertical resale price agreements, was itself illegal.²⁰ Collective bargaining may now be lawful, even though it may restrain the trade of the manufacturer by raising retail prices and thus cutting volume.²¹ Examination into this question calls, first, for an inquiry into the attitudes manifest in Congress concerning the collective bargaining process and, second, for an analysis and appraisal of the effects of the various types of pressures which the associated retailers have been employing.

The Congressional hearings do not reveal clearly whether the purpose of the amendment was such that coercion of manufacturers should now be deemed reasonable. In 1936 Senator Tydings, testifying before a subcommittee of the Senate Committee on the Judiciary regarding a bill substantially similar to that which later became law, said: "All it [the bill] does is to provide that the manufacturer and the retailer may enter into agreements that the retailer shall not sell at less than cost and make it up on something else. . . ." ²² In 1937 when hearings were again held by the same subcommittee, Representative Cellers testified that the state acts were being used to coerce manufacturers: ". . . they [trade journals] publish what are known as 'A' manufacturers, who are fair; and the implication is quite strong that the others are not fair. . . . they that are not fair are boycotted, and beyond question there is ample proof of it as to those particular manufacturers who are not willing to jack up prices. . . ." Senator Austin avoided answering the charge by replying that the bill "permits government of local affairs by States."²³ When a representative of the Mail Order Association of America addressed Senator Tydings: "But, Senator Tydings, I don't want you to feel that I think you had any idea these price-fixing or coercive plans were involved in this bill," the sponsor merely replied, "You

¹⁹ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

²⁰ *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911); cf. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1918).

²¹ Cf. *Eastern States Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

²² Hearings of a subcommittee of the Senate Committee on the Judiciary on S. 3822, 74th Cong. 2nd Sess., at 22 (1936).

²³ Hearings of a subcommittee of the Senate Committee on the Judiciary on S. 100, 75th Cong. 1st Sess., at 9 (1937).

are entitled to your opinion."²⁴ On several other occasions the senator passed up opportunities to deny that the bill would permit coercion of manufacturers.²⁵

The debate in the Senate likewise is indecisive. The bill was appended as a rider to a District of Columbia appropriations bill, and Senator Tydings then added the proviso prohibiting horizontal resale price arrangements. He added, however, that "In my judgment . . . the amendment is unnecessary because the provision . . . allows none of the things which the amendment specifically eliminates. . . ."²⁶ After an uninformative debate on the proviso, during which Senator Vandenburg remarked that ". . . it is perfectly obvious that not 5 per cent of the membership of the Senate will know anything whatever about the amendment when the Senate votes upon it,"²⁷ the measure was passed.²⁸

The wording and legislative history of the amendment not being decisive as to the legality of the coercive practices of retailers acting in common, three possible views of the amendment may be suggested. The first is that the amendment permits retailers acting in common to coerce the manufacturer to set the resale price they desire. In support of this view it may be argued that since the amendment authorizes vertical resale price agreements, the actions of the retailers may be considered reasonable as being one stage in working out the agreements. That collective bargaining by manufacturers and retailers for minimum price arrangements is a reasonable restraint is indicated by the fact that the legislation was designed to benefit both retailers and manufacturers. That it is in addition reasonable for retailers to be represented in this process by strong associations may be inferred from the fact that the associations had sponsored the amendment, and that the individual retailer is usually unable to participate on equal terms with the manufacturer in the bargaining process. Since the legislators were aware of the coercive tactics being employed by the associations and did not specifically prohibit such activity,²⁹ there is additional ground for considering the conduct to be reasonable.

²⁴ Hearings of a subcommittee of the Senate Committee on the Judiciary on S. 100, 75th Cong. 1st Sess., at 23 (1937).

²⁵ E.g., Hearings of the Senate Committee on the District of Columbia on H.R. 3838, 76th Cong. 1st Sess., at 7, 21 (1939).

²⁶ 81 Cong. Rec. 7487 (1937).

²⁷ 81 Cong. Rec. 7492 (1937).

²⁸ 81 Cong. Rec. 7497 (1937). The President, after decriing the fact that the bill had been added as a rider at a time when the district was in urgent need of funds, stated that he hoped it would not boost prices to consumers as much as some of his advisers feared. *N.Y. Times*, col. 1, p. 26 (Aug. 19, 1937).

²⁹ At the hearings held by the subcommittee of the Senate Committee on the Judiciary in 1937, a witness related how the druggists' associations had organized an "under the counter" boycott of Pepsodent toothpaste when the maker of that product canceled its fair trade contracts in California. Pepsodent's sales fell off so alarmingly that it was forced to capitulate and later contributed \$25,000 to a war chest to further resale price maintenance legislation. Hearings of a subcommittee of the Senate Committee on the Judiciary on S. 100, 75th Cong. 1st Sess., at 21 (1937).

Under this view retailers may legally decide upon the resale price and force the manufacturer to adopt their proposal. Only if the manufacturer does not succumb to the pressure after the retailers have agreed upon a price among themselves would the retailers be subject to prosecution for violation of the anti-trust laws. Once the manufacturer accedes to the demands of the retailers, the horizontal agreement among the retailers is supplanted by a vertical arrangement that is permitted by the amendment.

Despite the merit of simplicity, this view does not seem desirable. Where retailers agree to a resale price and force the manufacturer to adopt it, the manufacturer is only the voice of the retailers. Such an agreement seems to be horizontal and thus expressly not legalized by the amendment. Further, tampering with prices, declared illegal in *United States v. Trenton Potteries Co.*³⁰ and *United States v. Socony-Vacuum Oil Co., Inc.*,³¹ does not seem to be made reasonable by legislation designed to eliminate loss-leader sales. So to hold would attach far greater significance to the amendment than probably had been anticipated. The realization of this fact gives rise to the second view of what retailers may legally do under the amendment: they may put pressure on the manufacturer to give them a larger margin of gross profit on the item, but they may not dictate the exact markup or the resale price. In practice the retailers usually do not demand a specific resale price, but rather a higher margin of profit, whether it be realized through a higher resale price or a lower invoice price. To coerce the manufacturer into granting better terms may be deemed reasonable, for an "oppressive" fair trade contract may be sufficient cause for remedial action by the retail group. Such coercion is somewhat remote from the price fixing and price tampering that has been ruled unlawful. On the other hand, demands for a specific markup or a certain resale price are more like illegal price tampering activities. Since in most cases the manufacturer accedes to a demand for a specific markup by raising the resale price, it may be possible to overlook the language in which the demands are couched and to consider them as an attempt to fix a certain price. It must be admitted, however, that it is difficult to distinguish between pressure for "a better deal" and pressure for a particular markup in price. After securing better terms, the retailers could continue their coercion until they obtained the price or markup they originally desired but did not expressly request.

A difficulty with this, the second view, is that as soon as one retail association is indicted under the Sherman Act for conspiring to set price or tamper with price through a horizontal agreement, all of the associations will be more careful in phrasing their demands to manufacturers. The pressure on the manufacturer will still be effective but the horizontal agreement will then be unpunishable.

³⁰ 273 U.S. 392 (1927).

³¹ 310 U.S. 150 (1940).

Furthermore, both of the views already presented ignore the fact that the Miller-Tydings amendment was supposed to be merely loss-leader legislation. The amendment, being an amendment to existing law, should be construed strictly and thus as legalizing only those coercive activities of retail associations designed to prevent loss-leader sales. This, the third view, means that retailers may reasonably place pressure on a manufacturer to set some resale price for his product, since loss-leader legislation was partly, if not mainly, for the benefit of retailers. But the amendment does not make it reasonable for retailers to combine and employ the fair trade acts as a lever in coercing manufacturers to set a price which the retailers demand or to allow higher profit margins on goods that are already sold under fair trade agreements.³²

Adoption of this view of the Miller-Tydings amendment would secure to manufacturers and retailers the benefits of loss-leader legislation, while retarding the operation of some of the forces that have resulted in price rigging and other monopolistic practices. If Congress wishes to legitimize the coercive activities of retail associations, it is free to do so. In view of the fact that Congressional discussion on the Miller-Tydings amendment indicates that most of the legislators had not considered whether this additional inroad on traditional anti-trust policy should be made, the courts should hesitate to construe the amendment as making the coercion reasonable and thus accomplishing this result indirectly.

If a particular activity of a retail group in obtaining a resale price is unlawful, is the resale price agreement itself unenforceable? On the one hand it may be argued that the privilege of fixing resale prices is designed in part to benefit the manufacturer; to refuse to uphold the price because of illegal coercion by retailers unreasonably denies to the manufacturer his privilege. If the manufacturer desires to terminate the resale arrangement, there is no legal bar to his doing so. Until that time the agreement should be enforced. Further, the amendment purports to legalize resale agreements which are vertical in nature, and it makes no exception for those involving coercion. On the other hand, it may be urged that the illegal coercive or horizontal element taints the otherwise lawful part of the resale-price arrangement. To argue that the manufacturer should be protected in the enjoyment of his privilege is unrealistic, since even if the retail association is proceeded against, the manufacturer will hesitate to terminate the arrangement for fear of reprisals by the retailers. In the interest of the consumer,

³² Another possible view is that group coercion of any sort upon manufacturers is unreasonable. The amendment, being an exception to the Sherman Act, is to be construed strictly. Such activity probably would have been bad under the Sherman Act even if resale price maintenance contracts had been held lawful. Since the debates fail to indicate clearly that some concerted activity is to be allowed, it may be argued that collective bargaining by retailers is still illegal. This position offers the consumer and the manufacturer maximum protection. To permit any form of coercion is to open the way for coercion designed to achieve monopoly prices.

it would perhaps be best to strike down the resale-arrangement and permit the manufacturer to decide anew whether he will enter into fair trade contracts.

If the courts do not adopt a view of the Miller-Tydings amendment which will permit terminating some of the alleged abuses, the words of Senator Tydings, spoken at a hearing in 1939 before a subcommittee of the Senate Committee on the District of Columbia, should be recalled. "I think that retail trade is on trial when they get the right to make these contracts, and if they are wise they will not abuse the privilege of making contracts, but if they do abuse them there is no doubt in the world in the course of time acts [sic] will have to be modified or different safeguards and restrictions thrown around."³³

³³ Hearings of the Senate Committee on the District of Columbia on H.R. 3838, 76th Cong. 1st Sess., at 15 (1939).