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HISTORY AND IDENTITY OF THE
RELEVANT ANTITRUST STATUTES†

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The principal structure of antitrust law in the United States is erected about seven Acts of Congress adopted over a period of more than seventy years. These acts are commonly known as the Sherman,¹ Wilson-Tariff,² Clayton,³ Federal

†Material has been compiled and presented as a survey of the principal antecedents of the existing complex of antitrust laws. It is not meant to synopsise that law. Today, enforcement agencies exhibit marked preoccupation with problems of business structure; the law most frequently invoked is the Celler-Kefauver Act which recast the text of Section 7 of the Clayton Act relating to mergers and similar consolidations.

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Excerpts from a brief submitted in the cause of *Ben Hur Coal Co. v. Wells*, 242 F.2d 841 (10th Cir. 1957). For a related article by the author, see McDermott, *The Shift in Antitrust Objectives*, 19th. Oil & Gas Ins. 117-42 (1968).—Eds.

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¹ Act of July 2, 1890, ch. 647, 26 Stat. 209 (partially codified at 15 U.S.C. §§ 1-7 (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

² Act of August 27, 1894, ch. 349, 28 Stat. 570 (partially codified at 15 U.S.C. §§ 8-11 (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

³ Act of October 15, 1914, ch. 323, 38 Stat. 730 (partially codified at 15 U.S.C. §§ 12-27 (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

Trade Commission,⁴ Robinson-Patman,⁵ including the Borah-Van Nuys,⁶ Miller-Tydings,⁷ and McGuire Acts.⁸ There are other amendatory acts and enactments effecting special exemptions not within the scope of this article.

THE SHERMAN ACT

The first antitrust law was the Sherman Act.⁹ In general, it prohibited contracts, combinations, and conspiracies in unreasonable restraint of interstate trade.¹⁰ It punished monopolies and attempts to monopolize.¹¹ It made violation of its terms a crime,¹² authorized injunctive relief against violations at the suit of the government,¹³ and provided for treble damage actions by private suitors injured in consequence of a prohibited act.¹⁴ The Sherman Act consisted of eight sections in the original text, of which seven are reproduced intact as Sections 1 through 7 of Title 15 of the United States Code.¹⁵ The treble damage section¹⁶ was omitted from the

⁴ Act of September 26, 1914, ch. 311, 38 Stat. 717 (partially codified at 15 U.S.C. §§ 41-58 (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

⁵ Act of June 19, 1936, ch. 592, 49 Stat. 1526 (partially codified at 15 U.S.C. §§ 13, 13a-c, 21a (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

⁶ Act of June 19, 1936, ch. 592, 49 Stat. 1526 (partially codified at 15 U.S.C. § 13a (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

⁷ Act of August 17, 1937, ch. 690, 50 Stat. 673 (partially codified at 15 U.S.C. § 1 (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

⁸ Act of July 14, 1952, ch. 745, 66 Stat. 631 (partially codified at 15 U.S.C. § 45 (a) (1964)) [hereinafter cited to U.S.C. unless context requires the statute].

⁹ 26 Stat. 209 (1890).

¹⁰ 15 U.S.C. § 1 (1964).

¹¹ *Id.* § 2.

¹² *Id.* §§ 1-3.

¹³ *Id.* § 4.

¹⁴ 26 Stat. 209, § 7 (1890).

¹⁵ 15 U.S.C. §§ 1-7 (1964).

¹⁶ 26 Stat. 209, § 7 (1890).

Code in view of a subsequent and overlapping provision of the Clayton Act.¹⁷

Conditions in the national economy prompted the passage of the Sherman Act in 1890. Various segments of commerce had combined or were combining into colossi amounting to virtual monopoly with all its attendant evils.¹⁸ The Act was specifically aimed at combinations of railroads and at the Standard Oil Trust which had achieved a strangle hold upon the entire petroleum industry. After hundreds of decisions interpreting its meaning, the Sherman Act was finally held to prohibit only "unreasonable" restraints having a substantial and deleterious effect upon competition in interstate trade as a whole.¹⁹ In addition, it was held not to relate to specific acts between individual competitors which, though damaging to one or the other, were insignificant in the total flow of the commerce under study.²⁰ This early limited view of the Sherman Act has been significantly modified in recent years,²¹ although it was the adoption of the "rule of reason"²² and the

¹⁷ 15 U.S.C. § 15 (1964).

¹⁸ S. REP. No. 46, 49th Cong., 1st Sess. (1886). See *Standard Oil Co. v. United States*, 221 U.S. 1, at 50 (1911) [hereinafter referred to as the *Standard Oil Case*].

¹⁹ *Standard Oil Case*; *United States v. American Tobacco Co.* 221 U.S. 106 (1911) [hereinafter referred to as the *American Tobacco Case*], modifying *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Frt. Ass'n*, 166 U.S. 290 (1897).

²⁰ *Standard Oil Case*, citing *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *Hopkins v. United States*, 171 U.S. 578 (1898); *Anderson v. United States*, 171 U.S. 604 (1898). See also *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

²¹ See Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?*, 63 YALE L.J. 348 (1954); Kahn, *A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts*, 63 YALE L.J. 293 (1954). See also Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28 (1953).

²² *Standard Oil Case* at 59-60; *American Tobacco case* at 180.

exclusion of cases of "quantitative insignificance"²³ which led historically to the enactment of the Clayton and Federal Trade Commission Acts. The Sherman Act is still a very live and potent instrument of antitrust policy. Before private remedy will avail, it is still necessary in order to prove a violation to show a significant effect of the accused practice or contract upon and against the free flow of competitive commercial traffic and to show a significant injury to the public interest.²⁴

The Sherman Act has been amended by the Miller-Tydings Act,²⁵ and in the writer's opinion, significantly impaired by it.

THE WILSON-TARIFF ACT

The Sherman Act was followed very shortly by supplementary provisions contained in the Wilson-Tariff Act.²⁶ Sections 73 through 77 of this Act²⁷ are devoted to an extension of the prohibitions of the Sherman Act to import trade. These sections of the law deal with antitrust subjects and prohibit restraints of trade by contract and by combination or conspiracy between persons engaged in importing goods from a foreign country into the United States. Violation was made a crime,²⁸ injunctive relief was authorized at the suit of the government,²⁹ and a treble damage remedy to private suitors was provided.³⁰ The relevant portions of the Wilson-Tariff Act

²³ *Standard Oil Case*; *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *Hopkins v. United States*, 171 U.S. 578 (1898); *Anderson v. United States*, 171 U.S. 604 (1898).

²⁴ *Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165 (1915); *Shotkin v. Gen. Elec. Co.*, 171 F.2d 236 (10th Cir. 1948); *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir. 1948); *Bader v. Zurich Gen. Accident & Ins. Co.*, 12 F.R.D. 437 (S.D. N.Y. 1952).

²⁵ 50 Stat. 673 (1937).

²⁶ 28 Stat. 570 (1894).

²⁷ *Id.*

²⁸ 15 U.S.C. § 8 (1964).

²⁹ *Id.* § 9.

³⁰ 28 Stat. 570, § 77 (1894).

were included in the United States Code as Sections 8 through 11 of Title 15,³¹ but the treble damage section was omitted from the Code for the same reason that the similar section of Sherman was deleted.

The adoption of the Wilson-Tariff Act reaffirmed the Sherman policy and evidenced a determination to strike down all barriers to a free and competitive national economy.

THE CLAYTON ACT

In 1911, the Supreme Court of the United States decided the case of *Standard Oil Company v. United States*³² in which Chief Justice White declared the "rule of reason" referred to above. The result was to leave the government and private suitors without practical recourse against incipient practices which had not yet ripened to the quantitative significance said to be necessary to invoke the Sherman Act sanctions. As there were many trade practices which were short of the consequential magnitude demanded for cognizance under Sherman, Congress adopted the Clayton Act³³ and the Federal Trade Commission Act,³⁴ declaring them to be supplementary to existing antitrust laws.

The Clayton Act consisted of twenty-six sections of which only sixteen are reproduced in Title 15 of the United States Code. Sections 12 through 27 of Title 15 included all portions of the Clayton Act and were selected by the editor of the United States Code for inclusion in the antitrust chapter. Section 13 of Title 15³⁵ reflected a revision of Section 2 of the Clayton Act by the Robinson-Patman Act, and Sections 12a, 13b, and 13c³⁶ are additions or insertions which were never a

³¹ 15 U.S.C. §§ 8-11 (1964).

³² *Standard Oil Case* at 59-60.

³³ 38 Stat. 730 (1914).

³⁴ 38 Stat. 717 (1914).

³⁵ 49 Stat. 1526 (1936).

³⁶ 15 U.S.C. §§ 13a-c (1964).

part of Clayton but were derived from the Robinson-Patman Act and another enactment not relevant to this discussion. The excluded sections were of a procedural nature,³⁷ except one which denounced a specific crime,³⁸ and were classified to other titles by editorial decision. Such exclusions typify the extreme editorial liberty exercised in the compilation of the United States Code.

As was true of the restrictive early decisions under the Sherman Act, the Clayton Act addressed itself to particular trade abuses thought to have transgressed the substantial restraints and monopolies tests defined in Sherman. Discriminations in price between purchasers in competition with each other were prohibited "where the effect may be to substantially lessen competition or tend to create a monopoly".³⁹ Contracts or sales conditioned upon an agreement not to deal in the goods of a competitor were proscribed.⁴⁰ Corporations were prohibited from acquiring stock of another corporation where the effect would substantially lessen competition.⁴¹ By the Cellar-Kefauver Act of December 29, 1950, this provision was elaborated to prohibit the acquisition of assets in a competing corporation where the result again "may be substantially to lessen competition or tend to create a monopoly".⁴² Interlocking directorates of banks and certain other corporations were prohibited.⁴³ Purchases by carriers from other entities having common control were limited.⁴⁴ Though these particulars are not the whole subject matter of the Clayton Act, they do illustrate the character of specific abuse to which its terms were addressed. Sanctions still were limited by the proviso

³⁷ 38 Stat. 730, §§ 17-20 & 22-26 (1914).

³⁸ *Id.* § 21.

³⁹ 15 U.S.C. § 13 (1964).

⁴⁰ *Id.* § 14.

⁴¹ *Id.* § 18.

⁴² 64 Stat. 1125 (1950).

⁴³ 15 U.S.C. § 19 (1964).

⁴⁴ *Id.* § 20.

that the abuse denounced must "substantially affect" competition in interstate trade or "tend" toward the creation of a monopoly. Further particularization and amendment by the Robinson-Patman Act were to be the ultimate result.

Also included in Clayton was a provision allowing a private person injured in his business and property by anything "forbidden in the antitrust laws" to recover threefold his damages in a civil action before the United States Courts.⁴⁵ The words "antitrust laws" as used in this section were defined in Section 1 of the Clayton Act⁴⁶ to mean the Sherman Act, the Wilson-Tariff Act, and the Clayton Act. Section 12 of Title 15⁴⁷ purported to reflect this definition but it did not do so. Again, the editorial prerogative was exercised to a shocking degree. Section 12 said that the words "antitrust laws" meant all of Sections 1 through 27 of Title 15 of the United States Code.⁴⁸ These code sections included more material than was included in the definition quoted above from the original statute and specifically included Section 13a, 13b, and 13c which were not enacted until some twenty years later.⁴⁹ Section 13a was not within the defined limit of Section 15 of the Code as it appeared in the original statute, but apparently was within the edited version of Section 15 which now appears in the Code in substitution of the original text.

The Clayton Act received strict interpretation at the hands of the courts and the "quantitative significance" issue became of increasing concern in the decision of close cases.⁵⁰ Further,

⁴⁵ *Id.* § 15.

⁴⁶ 38 Stat. 730 (1914).

⁴⁷ 15 U.S.C. § 12 (1964).

⁴⁸ *Id.*

⁴⁹ 15 U.S.C. § 13a-c (1964).

⁵⁰ *Vonnegut Mach. Co. v. Toledo Mach. & Tool Co.*, 263 F. 192, at 200 (N.D. Ohio 1920), *rev'd* on issue of jurisdiction. See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921); *Duplex Printing Co. v. Deering Co.*, 254 U.S. 443 (1921).

there was confusion and uncertainty with respect to the interpretation of certain exculpatory provisos attached to the original Section 2 concerning quantity discounts and the like,⁵¹ all of which ultimately led to a review and revision of the price discrimination particulars of the Clayton Act in the Robinson-Patman law.

Perhaps it should be noted that there were no criminal sanctions included in the Clayton Act. Enforcement evidently was intended to be left to the actions of private suitors for treble damages,⁵² to actions for injunction by private suitors or by the government,⁵³ and to the Federal Trade Commission which was created at about the same date.⁵⁴

THE FEDERAL TRADE COMMISSION ACT

Concurrently with the enactment of the Clayton Act, Congress established the Federal Trade Commission.⁵⁵ The primary objective of Congress was to establish an administrative body with certain legislative powers to supplement the sovereign enforcement of the antitrust laws. Particular emphasis was placed on the area of the Clayton Act. However, the Federal Trade Commission statute also contained important substantive extensions of the antitrust laws and granted the Commission the legislative authority to define and determine the particulars of its own jurisdiction.⁵⁶ The Federal Trade Commission law, including its many amendments, is now coded as Chapter 2 of Title 15 of the United States Code, though its original extent was limited to Sections 41 through 58 of Title 15.⁵⁷

⁵¹ 38 Stat. 730, § 2 (1914).

⁵² 15 U.S.C. § 15 (1964).

⁵³ *Id.* §§ 25-26.

⁵⁴ 38 Stat. 717 (1914).

⁵⁵ 15 U.S.C. §§ 41-58 (1964).

⁵⁶ 38 Stat. 719, § 5 (1914).

⁵⁷ 15 U.S.C. §§ 41-58 (1964).

The Federal Trade Commission enactment denounced "unfair methods of competition" as unlawful, though without further definition. It also delineated administrative procedures for their prevention and correction. Due to its character as a legislative body with delegated powers, the Commission then undertook to define "unfair competition".⁵⁸ Its efforts thus far have largely survived constitutional attack.⁵⁹ The Act was first assumed to apply only to the subject matter of the Clayton Act, but very quickly it was held to contemplate violations of the Sherman and Wilson-Tariff Acts as well.⁶⁰ Violations of any of the antitrust laws have been held to come within the purview of "unfair competition" and to be accessible by the Commission and its administrative remedial processes.⁶¹ Moreover, the field of unfair competition has been held to extend beyond the offenses specifically defined in other antitrust laws. The Commission commonly has invaded the fields of trademark abuses,⁶² deceptive advertising,⁶³ and similar practices usually thought to adversely affect the freedom of competition.⁶⁴

⁵⁸ 1956 F.T.C. ANN. REP. 113-18. *But see* FTC v. Beech-Nut Co., 257 U.S. 441 (1921). *See also* FTC v. Gratz, 253 U.S. 421 (1919).

⁵⁹ Ostler Candy Co. v. FTC, 106 F.2d 962 (10th Cir. 1939); National Candy Co. v. FTC, 104 F.2d 999 (7th Cir. 1939); FTC v. McLean & Son, 84 F.2d 910 (7th Cir. 1936); National Mfrs. Ass'n. v. FTC, 268 F. 705 (6th Cir. 1920); Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919).

⁶⁰ FTC v. Cement Inst., 333 U.S. 683 (1948); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

⁶¹ Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

⁶² Bakers Franchise Corp. v. FTC, 302 F.2d 258 (3rd Cir. 1962); FTC v. Real Prods. Corp., 90 F.2d 617 (2d Cir. 1937); Fluegelman & Co. v. FTC, 37 F.2d 59 (2d Cir. 1930).

⁶³ 56 COLUM. L. REV. 1019 (1956). *See* Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957); Tractor Training Serv. v. FTC, 227 F.2d 420 (9th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); Prima Prods. v. FTC, 209 F.2d 405 (2d Cir. 1954).

⁶⁴ 1956 F.T.C. ANN. REP., *supra* note 58.

The Federal Trade Commission was authorized to investigate trade practices upon its own motion and to act with or without independent complaint.⁶⁵ Its findings of unfair practices were given effect by orders to offenders to "cease and desist".⁶⁶ Compliance with such orders could be exacted by application to an appropriate United States Court of Appeals for an order of enforcement.⁶⁷ The order of enforcement, when issued, could then be executed by contempt procedures.⁶⁸ The Act was an important step in the evolution of the antitrust structure. It expressed the policy determination of government that competition in commerce should be free of all unreasonable restraint so the public could enjoy the economic benefits of untrammelled offerings of goods upon the best terms of price, quality, and service.⁶⁹ The Act has been the subject of many amendments, including the controversial Celler-Kefauver Act relating to corporate mergers.⁷⁰ The activities of the Commission in this regard have been a vital part of antitrust enforcement.

THE ROBINSON-PATMAN ACT
and the
BORAH-VAN NUYS ACT

The Act of Congress approved June 19, 1936,⁷¹ is commonly called the Robinson-Patman Act, though it actually was the compound result of consolidation of the Robinson-Patman

⁶⁵ 15 U.S.C. § 46 (1964).

⁶⁶ *Id.* § 45 (a)-(c).

⁶⁷ *Id.* § 45 (d).

⁶⁸ *Id.* § 45 (1).

⁶⁹ *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923); *Florence Mfg. Co. v. Dowd & Co.*, 178 F. 73 (2d Cir. 1910).

⁷⁰ 15 U.S.C. §§ 18, 21 (1964). See *Celler, Corporation Mergers and Antitrust Laws*, 7 *MERCER L. REV.* 267 (1956); *Handler, Quantitative Substantiality and the Celler-Kefauver Act — A Look at the Record*, 7 *MERCER L. REV.* 279 (1956).

⁷¹ 49 Stat. 1526 (1936).

Bill⁷² with the Borah-Van Nuys Bill⁷³ by final legislative action in the United States Senate. The two bills had proceeded independently through the preliminary legislative stages and were consolidated only at final passage. They were distinctly different enactments although each dealt with overlapping subject matter. The original Robinson-Patman Bill was coded as Section 13 of Title 15 of the United States Code and was simply an amendment to Section 2 of the Clayton Act. Prohibited discriminations in price were redefined and certain discriminatory practices were specifically and additionally included in its terms.⁷⁴

On the other hand, the Borah-Van Nuys Bill⁷⁵ was a proposed new criminal law. As noted above, the Clayton Act carried no criminal sanctions. The Borah-Van Nuys Bill designated some but not all of the Clayton subject matter as crimes.⁷⁶ It then added certain new offenses not included in Clayton and also denounced them as crimes.⁷⁷ There was no denunciation of sales at "unreasonably low prices" in the Clayton Act nor in any of the other antitrust laws. Neither were there any provisions denouncing geographic price discrimination or specifically denouncing advertising allowances. These were entirely new proscriptions in the Borah-Van Nuys Bill.

Enforcement procedures under the Robinson-Patman Act (including the Borah-Van Nuys Bill) have been subject to doubt and controversy. Since Section 1 of the law was a frank amendment of Section 2 of the Clayton Act,⁷⁸ it was held not

⁷² S. Doc. No. 4, 74th Cong., 1st Sess. (1935); H.R. REP. No. 2679, 74th Cong., 2d Sess. (1936).

⁷³ S. REP. No. 4171, 74th Cong., 2d Sess. (1936).

⁷⁴ 15 U.S.C. § 13 (1964).

⁷⁵ S. REP. No. 4171, 74th Cong., 2d Sess. (1936).

⁷⁶ 15 U.S.C. § 13a (1964).

⁷⁷ *Id.*

⁷⁸ 38 Stat. 730, § 2 (1914). See H.R. REP. No. 2287, 74th Cong., 2d Sess. (1936).

to denounce its subject matter as criminal but to be enforceable only by order of the Federal Trade Commission or by civil action either public or private under the specific provisions of Clayton.⁷⁹ However, Section 3 of the Robinson-Patman Act contained its own criminal penalties and was therefore enforceable by indictment, trial, and sentence at the criminal bar.⁸⁰ This section did not purport to amend any law, contained only criminal sanctions, and was not enforceable otherwise than by fine and imprisonment.⁸¹ The same rule, together with others relating to statutory construction, precluded extension of the private treble damage remedies of the Clayton Act to Section 3.⁸² Confusion and uncertainty relating both to the constitutionality and the manner of enforcement of Section 3 was noted in the *Report of the Attorney General's National Committee to Study the Antitrust Laws*⁸³ which contained a recommendation for its repeal.

The clause of Section 3 which reads "... to sell ... goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor ..." ⁸⁴ has been challenged upon constitutional grounds and upheld when applied to sales below cost.⁸⁵ The Court pointed out that not "... Every sale below cost constitutes a violation of § 3. Such sales are not

⁷⁹ *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945).

⁸⁰ 15 U.S.C. § 13a (1964).

⁸¹ *Wilder Mfg. Co. v. Corn Prod. Ref. Co.*, 236 U.S. 165 (1915).

⁸² *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958); *Safeway Stores v. Vance*, 355 U.S. 389 (1958), *noted at* 42 MARQ. L. REV. 123 (1958), 32 ST. JOHN'S L. REV. 300 (1958), 11 VAND. L. REV. 938 (1958). See S. C. Council of Milk Producers v. Newton, 241 F. Supp. 259 (E.D. S.C. 1965), *rev'd*, 360 F.2d 414 (1966).

⁸³ ATT'Y GEN., REP. OF THE NAT'L COMM. TO STUDY THE ANTI-TRUST LAWS (1955), summarized in 23 *Law Week* 2501. See Wood, *Report of the Attorney General's Antitrust Committee Three Years After*, 26 GEO. WASH. L. REV. 669 (1958).

⁸⁴ 15 U.S.C. § 13a (1964).

⁸⁵ *United States v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29 (1963).

condemned when made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor".⁸⁶

THE MILLER-TYDING ACT

The Act approved August 17, 1937,⁸⁷ known as the Miller-Tydings Act, was an amendment to Section 1 of the Sherman Act. In brief, it excepted from the prohibitions of Section 1 (restraints of trade) resale price maintenance contracts, now popularly and argumentatively referred to as "Fair Trade Agreements", where the branded or trade-marked commodity was in free competition with other products of the same character. The exception was subject to a limiting proviso prohibiting horizontal price maintenance agreements of any kind between competing manufacturers, wholesalers, brokers, and retailers.⁸⁸ In effect, the Miller-Tydings Act was a loophole carved out of the Sherman Act permitting the manufacturer of branded or trade-marked goods to contract for minimum resale prices with his dealers or retailers in order to protect them from price competition with each other. The act was defended as permitting the manufacturer to protect his product against a claimed degradation by resale under its advertised price. Actually, the law was the result of political pressures exerted by associations of retailers, none of whom accepted price competition as a desirable facet of the national economy. The Miller-Tydings Act seriously weakened the Sherman law. Inconsistency with competitive principles led the Supreme Court to a narrow construction of its terms in

⁸⁶ *Id.*, at 36-37. See also *Ben Hur Coal Co. v. Wells*, 242 F.2d 481 (10th Cir. 1957).

⁸⁷ 50 Stat. 673 (1964).

⁸⁸ *Id.*; cf. *United States v. Frankfort Distilleries*, 324 U.S. 293, at 296 (1945), citing *United States v. Bausch & Lomb Co.*, 321 U.S. 707, at 719-23 (1944).

Schwegmann Brothers v. Calvert Distillers Corporation.⁸⁹ In this case, the Court held that the Miller-Tydings proviso exempted only the contracting parties to a Fair Trade Agreement. A provision of Louisiana law purportedly extending the contracted price limitation to non-signers who nonetheless dealt in the fair trade product was held wholly void as in contravention of the Sherman law. This decision effectively narrowed the Miller-Tydings loophole. The political forces which had sponsored its enactment immediately returned to Congress demanding that the banner of Fair Trade again be raised. The result was the passage of the McGuire Act in 1952.⁹⁰

THE MCGUIRE ACT

The purpose and effect of the McGuire Act⁹¹ was to restore to the fullest extent permitted by state fair trade laws the intended exemption of the Miller-Tydings Act. Its most practical consequence was to overrule the *Schwegmann* decision and permit enforcement of "non-signer" provisions of many state laws which bound all sellers of fair trade products to the terms of any single fair trade contract existing between a manufacturer and seller within the state. The anti-competitive effect of the Miller-Tydings Act and of the McGuire Act has long been recognized by advocates of the antitrust concept. The inconsistency of these two Acts with the objectives and purposes of the antitrust laws was frankly recognized in the *Report of the Attorney General's National Committee to Study the Antitrust Laws*.⁹² Pursuant to this report, the Attorney General recommended the repeal of both the Miller-Tydings Act and the McGuire Act.

⁸⁹ 341 U.S. 384 (1951).

⁹⁰ 66 Stat. 631 (1952).

⁹¹ 15 U.S.C. § 45 (a) (1964).

⁹² ATT'Y GEN., REP. OF THE NAT'L COMM. TO STUDY THE ANTI-TRUST LAWS, *supra* note 83.

OTHER ACTS

The foregoing do not comprise all the statutes making up the complex of antitrust law in the United States. There are numerous other statutes which bear narrow and specific application to trade regulation. Many of them are exemptions from the provisions of the principal antitrust laws—those exempting labor organizations, agricultural cooperatives, schools and charitable organizations, enterprises regulated by the Interstate Commerce Commission and similar regulatory bodies, and certain maritime rate conferences and other groups who have been able to generate the political force necessary to achieve exempted status. Provisions which have antitrust significance are found in the banking law, in the law relating to dealings in securities, and in other laws as well. Comment upon these subjects is not included since they are ancillary to the basic structure of antitrust policy.

PURPOSE and POLICY of the ANTITRUST LAWS

The antitrust laws were dedicated to the purpose of protecting competition in interstate trade. There is no doubt that the rapid growth of great trusts and corporate monopolies in the last quarter of the nineteenth century was responsible for the passage of the Sherman Act. Both the debates of Congress and a myriad of court decisions have pointed to the evils inherent in concentration of property and enterprises into utilities whose size and attributes free them from the discipline of competition.⁹³ The trade policy of the United States differs from that of its European contemporaries in this important respect: It is the only nation today which places reliance upon the free competitive efforts of its citizens for its economic health. None of its competitors in world markets regard competition as essential to healthy trade. A comparison of commercial experience in the past sixty years is all that is needed to justify this competitive policy.

⁹³ 21 CONG. REC. 2445-77, 2556-57, 2597-2616, 2639-2730 (1890).
See *Standard Oil Case*, *supra* note 18, at 83-106.

Fundamentally, the objective of all trade regulation is twofold: The first objective is to protect the public against enhancement of commodity price and against deterioration in quality of goods; the second objective is to preserve the vigor and volume of trade itself and this is best served by keeping trade freely open to new entrants and by extending prompt rewards to the innovator. Our political leadership in both great parties and in the Congress has been devoted to the principle that untrammelled competition is the best surety of these objectives. The antitrust laws, as they exist today, are a reflection of this belief and are even now sometimes referred to as an "article of faith" with respect to our national economic policy.

Competition has been acknowledged as the prime objective of the antitrust laws in many decisions by the Supreme Court of the United States. For instance, in *United States v. South-Eastern Underwriters Association*⁹⁴ the basic purpose of the statutes was republished and acknowledged as follows:

The purpose was . . . to make of ours, so far as Congress could under our dual system, a competitive business economy.⁹⁵

In *Times-Picayune Publishing Company v. United States*,⁹⁶ the same principle was redeclared in a decision which construed the purpose behind antitrust laws:

. . . Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take⁹⁷

⁹⁴ 322 U.S. 533 (1944).

⁹⁵ *Id.*, at 559.

⁹⁶ 345 U.S. 594 (1953).

⁹⁷ *Id.*, at 605.

In *Standard Oil Company v. Federal Trade Commission*,⁹⁸ the court made the following declaration:

The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent. (citation).'⁹⁹

Note here that the Robinson-Patman Act was included in the statutes which were aimed at protection of competition. A number of authorities have insisted that the devices of the Robinson-Patman Act are anti-competitive and that its import runs counter to the main theme of the preceeding antitrust acts.¹⁰⁰ But the Supreme Court said no. The Court adopted a construction contrary to the *Standard* case and, in fact, said:

. . . We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right to self-defense against a price raid by a competitor . . .¹⁰¹

In sum, the foregoing cases announce the requirement that all of the antitrust laws, including the Robinson-Patman Act, be read and interpreted in furtherance of a policy now become doctrine: Traders shall be free to price goods in response to competitive considerations.

⁹⁸ 340 U.S. 231 (1951).

⁹⁹ *Id.*, at 248-49.

¹⁰⁰ Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, at 1327-50 (1948); Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301 (1937); McAllister, *Price Control by Law in the United States: A Survey*, 4 LAW & CONTEMP. PROB. 273 (1937).

¹⁰¹ 340 U.S. 231, at 249 (1951).

COMPETITIVE PRICING IS THE SPECIAL
CONCERN OF THE ANTITRUST LAWS

In *Standard Oil Company v. Federal Trade Commission*,¹⁰² the court acknowledged trade consideration to be the prime ingredient it used to interpret the antitrust laws. In short, untrammelled competitive offering must fix the price of goods. This concept lies at the heart of antitrust policy.

It is frequently said that the modern history of the antitrust laws stems from the decision of the Supreme Court in *Standard Oil Company v. United States*,¹⁰³ commonly referred to as the first *Standard Oil* decision. In this opinion, Chief Justice White searched the background of congressional objectives and read into the stiff language of the Sherman Law what the advocates of competition argued was the real economic and social purpose of the antitrust laws; i.e., a discipline upon commerce. Discarding the strict historic meanings of the words "restraint of trade" and "monopolize", the Court found that Congress meant them to encompass nearly anything that interfered unreasonably with the free play of competitive forces. This is plainly stated in the following quotation from the opinion:

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and

¹⁰² 340 U.S. 231 (1951).

¹⁰³ *Standard Oil Case*.

developing trade, but on the contrary were of such a character as to give to the interference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy . . .¹⁰⁴

While *other wrongs* were mentioned, the Court's preoccupation was with "enhancement of prices" as the chief consequence of anti-competitive conditions. It was obvious that the hazard foremost in the minds of the Court was the danger to the public resulting from the power or disposition to immobilize price as an instrument of competition.

In an earlier portion of the same opinion, the Court enumerated the chief evils which gave rise to the repudiation of monopolies in the English law, as witness:

. . . The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.¹⁰⁵

Again, price fixing was the first concern. The evils of production limitation and quality deterioration were merely common instruments by which enhancement of ultimate price was achieved.

Many cases followed in which the substance of the quoted language was repeated. The price to the public remained the

¹⁰⁴ *Id.*, at 58.

¹⁰⁵ *Id.*, at 52.

most jealously guarded ward of the antitrust laws. As the decisions multiplied, it became apparent that no contract association or arrangement among traders which tended to enhance or immobilize price could be successfully defended under the law.¹⁰⁶ Thus, price fixing became the first *per se* violation of the antitrust acts. The "rule of reason" established by the first *Standard Oil* case for use in determining and defining "undue" restraint upon trade was held necessary to invoke the statute. The rule was soon seized upon in an attempt to defend fixed prices as "reasonable", but the Court promptly rejected the attempt. In *United States v. Trenton Potteries Company*,¹⁰⁷ the Court held that price fixing, whatever the price, was wholly incompatible with the fundamental doctrine of the antitrust laws, to-wit:

. . . But it does not follow that agreement to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by

¹⁰⁶ *Kiefer-Steward Co. v. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); *United States v. Line Material Co.*, 333 U.S. 287 (1948); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942); *United States v. Univis Lens Co.*, 316 U.S. 241 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918); *Boston Store v. Am. Graphophone Co.*, 246 U.S. 8 (1918); *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911); cf. Gibbons, *Price Fixing in Patent Licenses and the Antitrust Laws*, 51 VA. L. REV. 273 (1965).

¹⁰⁷ 273 U.S. 392 (1927).

the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever differences of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly of competition. (citing cases).

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies . . .¹⁰⁸

After the *Trenton Potteries* decision in 1927, price fixing became known as a *per se* violation of the antitrust laws.

¹⁰⁸ *Id.*, at 396-98.

The rule has persisted to this date that inquiry into the particulars or the substantiality of the arrangement is unnecessary if price fixing or price stabilization by contract or combination is involved.¹⁰⁹ Moreover, the *per se* rule has been extended far beyond mere contract in combination and is held to condemn any practice, arrangement, business method or other circumstantial condition which has the necessary or probable effect of fixing or immobilizing prices. Without attempting to detail the particular cases which have emerged from this pattern, certain particulars should be noted; e.g., conscious parallel pricing was condemned in the second *American Tobacco* case¹¹⁰ without proof of express concert; conformity to multiple freight basing point practices yielding identical delivered prices was proscribed in the *Cement Institute* case;¹¹¹ and the numerous *Trade Association* cases have made clear that even innocuous relations of commercial comity are suspect where the members apparently arrive at substantially identical pricing in their professed competition.¹¹² Every thread of antitrust policy delineated by the Supreme Court makes clear its devotion to free competitive pricing. The right to make a price, and to make a comparatively low price, is indeed the principal and primary weapon of competition.

The Robinson-Patman Act was interpreted in *Standard Oil Company v. Federal Trade Commission*¹¹³ to be in accord with the main policy of antitrust laws: Free pricing shall remain the principal weapon of competition. While the Act apparently prohibits discriminations in prices made by a seller to purchasers in competition with each other, this sanction

¹⁰⁹ Cases cited, *supra* note 106.

¹¹⁰ *American Tobacco Case*.

¹¹¹ *FTC v. Cement Institute*, 333 U.S. 683 (1948).

¹¹² *Symposium on Trade Ass'n*, 27 ABA ANTITRUST SECTION, 127 (1965); Brass, *Antitrust Div. Looks at Trade Ass'ns*, 30 J.B.A.D.C. 287 (1963); Wilson, *Fed. Trade Comm'n Looks at Trade Ass'ns*, 30 J.B.A.D.C. 297 (1963).

¹¹³ 340 U.S. 231 (1951).

was held not only to condone actual discrimination but to yield a burden upon the seller to meet lower competitive prices inasmuch as there exists an inherent necessity of one competitor to meet the price rate of his trade adversary.¹¹⁴ The solicitude for price competition carried over into the published interpretations of Section 13a of Title 15 of the United States Code, as is manifest in the case of *Balian Ice Cream Company v. Arden Farms Company*.¹¹⁵

To conclude, the import of these decisions is that the Borah-Van Nuys section of the Robinson-Patman Act, and the Robinson-Patman Act itself, must not be read nor interpreted to destroy the primary legislative policy which they subserve. Thus, an "unreasonably low price" may not be read to mean and include simply a reduced price.¹¹⁶ It may not be read to mean a price lower than a competitor's price,¹¹⁷ nor a price to which a competitor will not agree,¹¹⁸ nor a price at which a competitor is unable to make a profit.¹¹⁹ Any of these interpretations would result in freezing prices at the level of mutual competitor consent or at the level at which the weakest competitor was able to derive a reasonable profit. Any one of them, suffice to say, would largely defeat the principal objective to the antitrust laws and would specifically exclude price from the future field of competition. Together, they are the very antithesis of antitrust doctrine.

¹¹⁴ *Id.*

¹¹⁵ 104 F. Supp. 796, at 800-02 (S.D. Cal. 1952).

¹¹⁶ *Bruce's Juices v. Am. Can Co.*, 330 U.S. 743 (1947); *National Nut Co. v. Kelling Nut Co.*, 61 F. Supp. 76, at 82 (N.D. Ill. 1945).

¹¹⁷ *Balian Ice Cream Co. v. Arden Farms Co.*, *supra* note 115, at 801.

¹¹⁸ *Id.*

¹¹⁹ *Standard Oil Co. v. FTC*, 340 U.S. 231, at 246 (1951); *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, at 486 (10th Cir. 1957) *citing* *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, at 801 (S.D. Cal. 1952). See H.R. REP. No. 1422, 81st Cong., 1st Sess. (1949).