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THE FLORIDA FAIR TRADE ACT—THREE STRIKES AND YOU'RE OUT; OR ARE YOU?

DALE A. HECKERLING*

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In the continuum of written law, the fair trade acts are of comparatively recent origin. In the lifetime of the Florida act there has been much litigation and controversy. The purpose of this paper is to update this continuing debate and to outline possible means of finalizing the status of the Florida Fair Trade Act.

I. THE LEGAL ECONOMICS OF FAIR TRADE

Fair trade laws have been enacted to enable merchants and manufacturers to contract with each other to set the prices at which merchandise may be sold. There is little doubt that such fair trade legislation can have a sizeable impact on consumer prices. If the theory behind federal antitrust legislation is, at least in part, a lowering of prices for the consumer,¹ Congressional approval of fair trade acts, which are antithetical to antitrust, would seem anomalous.² The answer to this apparent paradox is found in our profit motivated economy.

Resale price maintenance is supported by two economic interest groups: (1) producers or trademark owners, and (2) retailers. Producers and trademark owners argue that price cutting detracts from the goodwill of their product. They maintain that if their product is advertised or sold at less than the set retail price, the consumer would refuse to pay more than the lowered price. As a result, other retailers would have to lower their prices to compete. The higher overhead of some retailers would make it unprofitable to handle the product at the lower price, with the result that the producer would lose his retail outlets. The net result would be that the owner's and producer's exposure to the public would be reduced, which may cause a corresponding decline in sales.

Retailers who oppose price cutting argue that it results in harmful price wars. These businessmen are content to sell at a higher price provided competitors also sell at the same price or at a higher price. On the

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1. U.S. CODE CONG. & AD. NEWS, 2182 (1952).

2. *Id.*; 15 U.S.C. § 45(3) (1964).

other hand, consumers generally oppose regulation of competition by fair trade legislation because lower prices are believed to result from unfettered competition. Thus, while the net result of fair trade laws is the prevention of disastrous price cutting and the subsequent destruction of goodwill, these results are achieved at the expense of the consumer.

II. FAIR TRADE ACTS IN GENERAL

Prior to the passage of the Sherman Antitrust Act of 1890, vertical trade agreements³ which fixed the prices of trademarked goods were generally considered lawful.⁴ Under Section 1 of the Sherman Act, however, such vertical trade agreements constituted an unlawful restraint of trade.⁵ Since the Sherman Act was directed only at interstate commerce, states, beginning with California in 1931,⁶ began enacting fair trade laws to legalize vertical trade agreements designed to fix prices in intrastate commerce. The United States Supreme Court considered the constitutionality of these state acts in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*⁷ In *Old Dearborn*, the Illinois Fair Trade Act, which was almost identical to the California act, was assailed as being violative of the due process and equal protection clauses of the fourteenth amendment.⁸ The Court upheld the Illinois act, thus establishing precedent for state regulation in this area.

In 1937, Congress introduced further federal legislation by enacting the Miller-Tydings Amendment to the Sherman Act.⁹ This amendment sanctioned vertical price-fixing agreements in interstate commerce and allowed states to promulgate legislation under the protection of the act.

Included in the Florida act and in a majority of the state acts, was a "non-signer" provision.¹⁰ The purpose of this provision was to create a cause of action for unfair competition against any business in the state which, having notice of the fair trade contract between the seller and any other merchant, knowingly sold the commodity at a price lower than that stipulated in the contract. Thus, sellers who were not parties to the contract but who had notice of the contract were bound by the price set in the contract. The "non-signer" clauses resulted in extensive litigation. In twenty states the clause has been declared invalid on a variety of grounds.¹¹

3. Vertical Trade agreements are those made between the retailer and the manufacturer or distributor.

4. *Fowle v. Park*, 131 U.S. 88 (1889).

5. 15 U.S.C. § 1 (1964).

6. CAL. LAWS 1931, ch. 278, amended CAL. LAWS 1933, ch. 260.

7. 299 U.S. 183 (1936).

8. *Id.* at 188.

9. This amendment is the first provision of 15 U.S.C. § 1 (1964).

10. See e.g., FLA. STAT. § 541.07 (1969).

11. See e.g., *Quality Oil Co. v. E. I. duPont de Nemours & Co.*, 182 Kan. 488, 322 P.2d

In 1951, the United States Supreme Court was asked to decide the constitutionality of the Louisiana "non-signer" clause in the landmark case of *Schwegmann Brothers v. Calvert Distillers Corp.*¹² The Court held that the non-signer provisions of the state legislation fell under the proscription of the Sherman Act and did not fall under the exception of the Miller-Tydings Amendment.¹³ The Court reasoned that if Congress had desired to eliminate the consensual element required in fair trade contracts by allowing one retailer to bind others by the use of a non-signer clause, it could easily have included a non-signer provision.¹⁴ The year after this decision Congress responded by adopting the McGuire Act, which amended the Federal Trade Commission Act by adding a non-signer provision.¹⁵ The McGuire Act is an almost verbatim adaptation of the California clause which had previously been upheld by the Supreme Court.¹⁶

The passage of the McGuire Act was not accomplished without protest or controversy. Among the opponents of the amendment was the Federal Trade Commission.¹⁷ The proponents of the bill argued that its passage would result in lower prices for the consumers in those states which enacted such a provision. The proponents also urged that fair trade was beneficial to small business; and that the law was designed to affect vertical trade channels, not horizontal, and, was therefore, no different than similar legal practices.¹⁸ Businessmen further warned that

731 (1958); *Liquor Store, Inc. v. Continental Distill. Co.*, 40 So.2d 371 (Fla. 1949). See also 2 TRADE REG. REP. ¶ 6041.

12. 341 U.S. 384 (1951).

13. *Id.*

14. *Id.* at 390.

15. Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law or public policy now in effect in any state, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price of prices prescribed in such contracts or agreements whether the person so offering for sale, or selling is or is not a party to such a contract or agreement in unfair competition and is actionable at the suit of any person damaged thereby.

15 U.S.C. § 45(3) (1964).

16. *The Pep Boys of California v. Pyroil Sales*, 299 U.S. 198 (1936).

17. Following is part of a letter written by James M. Mead, Chairman of the FTC to Edwin C. Johnson, Chairman of the Senate Committee on Interstate and Foreign Commerce, concerning the amendment:

The principal purpose of the proposed legislation is to overcome the effect of the recent decision of the Supreme Court in the *Schwegmann* case. . . .

The new principle introduced by this bill is that Congress shall specifically approve the so-called non-signer clause. Thus, if the bill is enacted, a private contract, the provisions of which would be determined without public hearing and apart from any public supervision as to reasonableness, would be made binding on all dealers and the consuming public.

The effect of adding the non-signer clause to resale price maintenance is the de facto nullification of our Federal antitrust laws prohibiting horizontal conspiracy to fix prices. . . .

U.S. CODE CONG. & AD. NEWS, 2182 (1952).

18. *Id.* at 2192-94.

price cutting was one of the strongest forces that could be used to develop monopolies. Another group of supporters noted that such a law was "the very essence of States Rights Legislation."¹⁹

The McGuire Act gave congressional approval to the state non-signer clauses already existing and extended their effect into the area of interstate commerce. The Act has withstood constitutional attacks in several of the federal courts of appeal²⁰ and would undoubtedly be held constitutional by the Supreme Court in light of its decisions upholding essentially identical state statutes.²¹

III. THE FEDERAL RATIONALE FOR THE FAIR TRADE ACTS

The rationale supporting the constitutionality of fair trade legislation is found in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*²² As indicated above, the particular question before the Court was the constitutionality of the Illinois Fair Trade Act which included among its terms a non-signer provision. The plaintiff, Seagram-Distillers Corporation, brought suit to enjoin Old Dearborn from selling liquor below the prices agreed to in contracts made between Seagram and other retailers in Illinois. Seagram argued that the result of the price cutting was a diminution in sales by it to other retailers, and fewer sales by other retailers to the public, during the price cutting period. Some retailers had ceased to display Seagram's products and had notified Seagram that they would not compete with Old Dearborn. They also informed Seagram that they would discontinue handling Seagram's products until the price cutting ceased. One of the retail contracts made pursuant to the act was signed by the officers of Old Dearborn prior to the price cutting action.

Old Dearborn attacked the statute on two fronts, one of which was that the act denied due process of law. The Court responded to this contention by noting that the act is not "so arbitrary, unfair or wanting in reason as to result in a denial of due process."²³ The Court reasoned that since Old Dearborn purchased only the commodity, it did not own the trademark or goodwill of the company which the trademark symbolized.²⁴ The Court concluded that redressing any possible injury to the goodwill of a product would be proper subject for legislation:

It is well settled that the proprietor of the goodwill is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade mark without his consent and authority.²⁵

19. *Id.*

20. *Parke, Davis & Co. v. Health Cross Stores, Inc.*, 364 F.2d 214 (4th Cir. 1966); *Norman M. Morris Corp. v. Hess Bros.*, 243 F.2d 274 (3d Cir. 1957).

21. *See Hudson Distrib. Co., Inc. v. Eli Lilly*, 377 U.S. 386 (1964).

22. 299 U.S. 183 (1936).

23. *Id.* at 194.

24. *Id.*

25. *Id.* at 194-95.

Old Dearborn's second contention was that the act was violative of the fourteenth amendment equal protection clause. This argument was, in essence, that the act conferred a privilege on the production and ownership of goods identified by a trademark, brand, or name, while denying the same privilege to unidentified goods. The Court rejected the argument and held that the equal protection clause did not preclude a state from resorting to reasonable classifications for the purpose of legislation.²⁶ The equal protection clause only requires that the classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."²⁷

As a result of the holdings in *Old Dearborn*, a large number of states enacted fair trade laws patterned after the Illinois price maintenance statute. Most of the acts included a non-signer clause. Presently, fair trade contracts are enforceable against non-signers in 19 states and against contracting parties in 39 states.²⁸

IV. THE FLORIDA FAIR TRADE LAW: A CASE HISTORY

Since fair trade laws are enacted at the state level, the state may within constitutional limits control the effect of the law on both intrastate and interstate commerce. The effects of the Florida Fair Trade Act²⁹ are typical: the existence of the act creates an almost schizophrenic attitude among retailers, distributors and manufacturers. Retailers, distributors, manufacturers, and even lawyers still are not completely certain as to the effect of the Florida act or, even more disturbing, whether the act has any real vitality. For 31 years, the Florida courts have struggled with the legislature and with manufacturers and retailers over the Florida Act.³⁰

Florida statutes relating to price-fixing fall into three separate categories. The first category allows prices to be fixed by a board.³¹ The second category relates to price-fixing agreements for a particular business.³² The third category includes the fair trade act which applies to all trademarked and branded commodities.³³ In cases involving all three categories, the Florida Supreme Court has upheld price-fixing only in

26. *Id.* at 197.

27. *Id.*

28. 2 TRADE REG. REP. ¶¶ 6021 and 6041 contains a survey of the decisions on constitutionality of fair trade legislation.

29. FLA. STAT. ch. 541 (1969).

30. The first FLORIDA FAIR TRADE ACT was enacted in 1937 as Fla. Laws 1937, ch. 18395.

31. *E.g.*, Fla. Laws 1935 ch. 16799 (empowered a board of barber examiners to fix minimum prices to be charged by barbers in Florida). This statute was held unconstitutional in *Fulton v. Ives*, 123 Fla. 401, 167 So. 394 (1936).

32. *E.g.*, Fla. Laws 1941, ch. 21001 (allowed for fair trade contracts and minimum resale prices for liquor). This statute was held unconstitutional in *Scarborough v. Webb's Cut Rate Drug Co.*, 150 Fla. 754, 8 So.2d 913 (1942).

33. FLA. STAT. ch. 541 (1969).

those cases where the delegation of the price-fixing power was effectuated for a public purpose,⁸⁴ or in response to emergency conditions having an adverse effect on the public health, safety, morals, or general welfare.⁸⁵

The history of fair trade in Florida has been rather stormy. In less than two decades, three separate acts were promulgated and during the same period all or part of each of the three acts were declared invalid or unconstitutional.

In 1937, Florida enacted its first fair trade act in response to the passage of the Miller-Tydings Amendment.⁸⁶ The Act included a non-signer provision which became the subject of litigation in *Bristol-Myers Co. v. Webb's Cut Rate Drug Co., Inc.*⁸⁷ The trial court went further than deciding the constitutionality of the non-signer provision. The court held that the title of the Act was misleading and invalid under a Florida constitutional provision requiring the subject matter of statutes to be briefly expressed in the title.⁸⁸ The Florida Supreme Court, in affirming the trial court, concluded that there was nothing in the title of the act which would put the public or members of the legislature on notice of the non-signer clause included in the act and the novelty of such a provision, so contrary to the common law, required that a warning be expressed in the title.⁸⁹

The constitutionality of the subsequent Fair Trade Act of 1939⁴⁰ was attacked in *Liquor Stores, Inc. v. Continental Distilling Corp.*⁴¹ The factual situation, essentially analogous to *Bristol-Myers*,⁴² involved the sale of liquor produced by Continental at prices below that set by contracts entered into by other retailers. The Supreme Court of Florida concluded that this legislation was not within the scope of the state's police powers.⁴³ Such legislation would be valid only if it applied to the general public as distinguished from any member or class of the private sector.⁴⁴ The court viewed the act as "a price-fixing statute" which operated to vest the price-fixing power in individuals who were not public officials.⁴⁵ The court reached the conclusion that the Act was "arbitrary and unreasonable" and violated the right to own and enjoy property.⁴⁶

34. *E.g.*, *Miami Laundry Co. v. Florida Dry Cleaning and Laundry Bd.*, 134 Fla. 1, 183 So. 759 (1938) (regulation of cleaning, dying, and laundry industry by authorized board upheld as within public interest).

35. *E.g.*, *Miami Home Milk Prod. Ass'n v. Milk Control Bd.*, 124 Fla. 797, 169 So. 541 (1936).

36. Fla. Laws 1937, ch. 18395.

37. 137 Fla. 508, 188 So. 91 (1939).

38. *See* FLA. CONST. art. III, § 16 (1885).

39. 137 Fla. 508, 09, 188 So. 91, 92 (1939).

40. FLA. STAT. ch. 541 (1941) (amended 1949).

41. 40 So.2d 371 (Fla. 1949).

42. 137 Fla. 508, 188 So. 91 (1939).

43. 40 So.2d 371, 374 (Fla. 1949).

44. *Id.* at 375.

45. *Id.* at 374. The court noted that "[t]he effect of this act is to grant by indirection sovereign power to one person (not necessarily a citizen) to be exercised against another." *Id.* at 374-75.

46. *Id.* at 375.

Although the majority in *Liquor Stores* did not reflect on any of the antitrust economics of the act, Justice Barnes in his concurring opinion provided an in-depth examination of the effects of the Act on commerce. Justice Barnes noted that to hold the Act valid would be to say that horizontal agreements and contracts fixing prices or tending to stifle competition are void, while at the same time, vertical agreements relating to the same commodities are not only valid and binding on the parties who execute them, but also apply to anyone advised or informed as to the price fixed by the distributor.⁴⁷

As was the case in *Bristol-Myers*, only the validity of the non-signer clause was before the court, but again the court took advantage of an opportunity to strike down the entire act. Such action taken together with the five-to-one majority decision certainly suggested a strong distaste for the legislation.⁴⁸

Following the *Liquor Stores* decision the Fair Trade Act of 1949 was enacted.⁴⁹ The "new act" was merely a reenactment of the 1939 Act preceded by certain "legislative findings of fact" that attempted to nullify the dictum of *Liquor Stores*.⁵⁰

Challenges to the new act were quick in coming. In 1951, *Seagram-Distillers Corp. v. Ben Greene, Inc.*⁵¹ raised the question of whether the "findings or recitations of fact and declaration of necessity as to the State's economic policy made by the legislature" incorporated in the new act saved its constitutionality. The court noted that even though findings of fact made by the legislature are presumptively correct, the findings lose the presumption of validity "if they are obviously contrary to proven and firmly established truths of which courts may take judicial notice."⁵² The court concluded its opinion by stating that "except for such so-called findings of fact . . . there is no material difference between said Act and [the 1939 Act]."⁵³ Since the defendant was a non-signer, and inasmuch as the United States Supreme Court had recently decided in *Schwegmann Brothers v. Calvert-Distillers Corp.*⁵⁴ that the interstate application of non-signer clauses was invalid under federal legislation, the court based its decision on these federal antitrust laws and found for the defendant.

Unfortunately, for the present laws, the court in *Ben Greene*,⁵⁵ did not specifically state that the 1949 Act was unconstitutional. If the specific issue had been before the court, it would probably have invalidated the

47. *Id.* at 380-81.

48. See, Note, *The Florida Fair Trade Act: Constitutional or Unconstitutional?*, 2 U. FLA. L. REV. 408 (1949).

49. Ch. 25204, Acts of 1949 (FLA. STAT. ch. 541 (1949)).

50. 40 So.2d 371 (Fla. 1949).

51. 54 So.2d 235 (Fla. 1951).

52. *Id.* at 236.

53. *Id.* at 236-37.

54. 341 U.S. 384 (1951).

55. 54 So.2d 235 (Fla. 1951).

Act. This conclusion is easily deduced from the dictum of the court.⁵⁶ If, as the court emphasized, the legislative findings did not save the Act, the Act would still be unconstitutional.

The effect of the McGuire Act, which was passed in 1952 in response to the *Schwegmann Brothers* case,⁵⁷ was among the main issues before the Florida Supreme Court in *Miles Laboratories, Inc. v. Eckerd*.⁵⁸ The court was asked whether the principles enumerated in *Seagram-Distillers Corp. v. Ben Greene*⁵⁹ and *Liquor Stores, Inc. v. Continental Distilling Corp.*,⁶⁰ declaring the non-signer clause unconstitutional, had been superseded by the McGuire Act.⁶¹ The court pointed out that its decisions interpreting the Constitution of the State of Florida were supreme and "will not be overthrown by an act of Congress or the federal courts unless some Federal Constitutional question is involved."⁶² The court, in unequivocal language, reemphasized its opposition to the entire act when it said: "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."⁶³ Even though as with the *Liquor Stores*,⁶⁴ decision, the controversy actually involved only the non-signer clause (which again was held unconstitutional), the court nevertheless felt compelled to comment on the "findings of fact," not a part of the non-signer provision, saying: "Legislative 'findings of facts' as to the policy behind the law, does not remove the lack of the 'yard stick standard.'"⁶⁵ The clear implication of the court's language here, as in *Ben Greene*,⁶⁶ is that the entire act was unconstitutional.

On the same day that the court decided *Miles Laboratories*, it also heard the case of *Sterling Drug Inc. v. Eckerd's of Tampa*.⁶⁷ As in previous cases, the constitutionality of the non-signer clause was directly in issue and, as before, the clause was declared invalid. *Sterling Drugs* and *Miles Laboratories*⁶⁸ are the most recent cases in this area decided by the Florida Supreme Court.

Sunbeam Corp. v. Chase & Sherman, Inc.,⁶⁹ decided by a Dade County Circuit Court, in contrast to the litigation before the Florida

56. *Id.* at 236.

57. 341 U.S. 384 (1951).

58. 73 So.2d 680 (Fla. 1954). *Noted*, 9 MIAMI L.Q. 234 (1955).

59. 54 So.2d 235 (Fla. 1951).

60. 40 So.2d 371 (Fla. 1949).

61. 15 U.S.C. § 45(3) (1964).

62. 73 So.2d 680, 681 (Fla. 1954).

63. *Id.* The authority cited by the court for this statement included both the *Liquor Stores*, 40 So.2d 371 (Fla. 1949) and the *Ben Greene*, 54 So.2d 235 (Fla. 1951) cases.

64. 40 So.2d 371 (Fla. 1949).

65. 73 So.2d 680, 682 (Fla. 1954).

66. 54 So.2d 235 (Fla. 1951).

67. 71 So.2d 156 (Fla. 1954).

68. 73 So.2d 680 (Fla. 1954).

69. 1953 Trade Cas. 67,524 (Dade Co., Fla. Cir. Ct.).

Supreme Court, involved a contract which had been signed by the defendant. All retailers dealing with Sunbeam were required to sign similar contracts. Chase & Sherman, Inc. violated its contract by selling below the contract price despite warnings by Sunbeam. Sunbeam finally brought suit for an injunction against the violations. The constitutionality of the entire act was put in issue. The trial judge, citing *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*⁷⁰ held that "the Florida Fair Trade Act does not offend the Federal Constitution."⁷¹ In reply to defendant's contention that the Florida Supreme Court had previously declared the act unconstitutional, the judge noted that "the unconstitutionality of the second Florida Fair Trade Act⁷² . . . has never been passed upon by the Supreme Court."⁷³ The court further stated that

the only concern Florida has is (1) that no manufacturer shall eliminate all its competitors so that our citizens have no other choice, or (2) that the manufacturers shall not conspire or horizontally contract with each other and agree to charge the same price so that our citizens have to pay a monopoly price.⁷⁴

The trial court then entered a preliminary restraining order against the defendant.

Chase & Sherman is the *only* Florida case upholding the constitutionality of *any* of the Florida acts. Despite the apparent significance of this case certiorari was denied by the Florida Supreme Court during the January 1954 term (the same term it decided *Sterling Drugs* and *Miles Laboratories*).⁷⁵ The denial may have been the result of the fact that the court already had before it two cases dealing with the same subject matter. Even though both *Sterling Drugs*⁷⁶ and *Miles Laboratories*⁷⁷ related to non-signer clause situations, the court, as evidenced by its discussion in *Liquor Stores, Inc. v. Continental Distilling Co.*,⁷⁸ could have upheld the constitutionality of the remainder of the act. Instead, as noted above, the Florida Supreme Court chose in *Miles Laboratories*⁷⁹ to re-emphasize its opposition to the idea of fair trade acts.

In 1955, the federal and state courts rendered decisions which added to the uncertainty surrounding the validity of the 1949 Act. The Circuit Court of Dade County again upheld the Act (except for the non-signer clause).⁸⁰ On the federal level, the Court of Appeals for the Fifth Circuit

70. 299 U.S. 183 (1936).

71. 1953 Trade Cas. 67,524 (Dade Co., Fla. Cir. Ct.).

72. FLA. STAT. ch. 541 (1941) (amended 1949).

73. 1953 Trade Cas. 67,524 (Dade Co., Fla. Cir. Ct.).

74. *Id.*

75. 73 So.2d 714 (Fla. 1954).

76. 71 So.2d 156 (Fla. 1954).

77. 73 So.2d 680 (Fla. 1954).

78. 40 So.2d 371 (Fla. 1949).

79. 73 So.2d 680 (Fla. 1954).

80. *Union Underwear Co., Inc. v. Rayvis*, 1955 Trade Cas. 68,051.

was asked to decide the constitutionality of the entire act in *Sunbeam Corp. v. Masters of Miami*.⁸¹ Sunbeam argued that the Florida Supreme Court had retreated from its "consistent and unequivocal" opposition on constitutional grounds to the fair trade act by denying certiorari without opinion in the *Chase & Sherman* case.⁸² The court of appeals pointed out that this was not really a retreat inasmuch as the contract in *Chase & Sherman* was enforced only *inter partes*.⁸³ Sunbeam also contended that the defendant retailer was guilty of an intentional interference with contract by inducing contract signers to breach the contract provisions by selling fair traded items to the defendant below the contract price.⁸⁴ The court also rejected this argument. Commenting on the later Dade County Circuit Court decision,⁸⁵ the federal court stated that in its view the discussion by the circuit court was entirely contrary to the rule of public policy set out in case after case by the Florida Supreme Court.⁸⁶

Based on the authority of *Master's of Miami*,⁸⁷ in 1955 it was reasonable to conclude that the Florida Fair Trade Act of 1949 was unconstitutional. If that were the case, all *federal* antitrust legislation would have been in full force. This determination precipitated the litigation in *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*⁸⁸ in which plaintiff alleged violations of the Clayton Act as amended by the Robinson-Patman and Sherman Acts. In holding for the defendant, the Fifth Circuit reversed its decision in *Master's of Miami*⁸⁹ and, in so doing, threw the question of the constitutionality of the fair trade act back into a state of turmoil. The reversal was based on the misinterpretation of the denial of certiorari by the court in *Chase & Sherman*.⁹⁰ In *Master's of Miami*⁹¹ the court had construed the denial of certiorari as having no implication as to the merits of the case, and accordingly, the federal court was not required to regard the circuit court decision as the ruling law of Florida.⁹² The federal court in the *Miami Parts & Spring* case re-examined the question of what effect, as precedent, the denial of certiorari by the Supreme Court of Florida would have. It concluded that its earlier decision as to the effect of denial of certiorari had been contrary to the holdings of the Florida Supreme Court. Pursuant to this re-examination, the court read the Florida law on the effect of a denial of certiorari under Rule 34⁹³ to

81. 225 F.2d 191 (5th Cir. 1955).

82. 1953 Trade Cas. 67,524 (Dade Co., Fla. Cir. Ct.).

83. 225 F.2d 191, 195 (5th Cir. 1955).

84. *Id.* at 196.

85. *Union Underwear Co., Inc. v. Rayvis*, 1955 Trade Cas. 68,051.

86. 225 F.2d 191, 196 (5th Cir. 1955).

87. 225 F.2d 191 (5th Cir. 1955).

88. 364 F.2d 957 (5th Cir. 1966).

89. 225 F.2d 191 (5th Cir. 1955).

90. 1953 Trade Cas. 67,524 (Dade Co., Fla. Cir. Ct.).

91. 225 F.2d 191 (5th Cir. 1955).

92. *Id.* at 196.

93. FLA. SUP. CT. R. 34 (1942). This form of certiorari is commonly called "rule certiorari."

be an adjudication on the merits.⁹⁴ Consequently, the court concluded that it should follow the Dade County Circuit Court and hold the fair trade act, without the non-signer clause, constitutional and effectual.⁹⁵

In 1968, the Fifth Circuit emphasized its decision in *Miami Parts & Spring*⁹⁶ by expressly upholding the constitutionality of the Florida act.⁹⁷

V. IS THE FLORIDA FAIR TRADE ACT OF 1949 UNCONSTITUTIONAL?

Despite all of the litigation and case law involving the Florida Fair Trade Act the question of its constitutionality under the Florida Constitution remains unanswered. The federal decisions have held the act constitutional. On the other hand, the pronouncements of the Florida Supreme Court undeniably express a view that the entire Act is invalid and void. The dicta in *Seagram-Distillers Corp. v. Ben Greene, Inc.*⁹⁸ and in *Miles Laboratories v. Eckerd*⁹⁹ suggest that the Florida Supreme Court would have held the act unconstitutional; moreover, the language of these cases at least implies this position to be the law of Florida.

In *Miami Parts & Spring*¹⁰⁰ the court concluded that the denial of certiorari under Rule 34 was an affirmance of the lower court decision. Under Rule 34, certiorari could be granted to a decree in chancery. However, since in *Sunbeam v. Chase & Sherman, Inc.*¹⁰¹ the issue was not the constitutionality of the fair trade act, but whether a restraining order should have been issued by the court, a denial of certiorari should have only the effect of upholding the granting of the temporary order. It does not follow that the denial of certiorari is a concurrence in any other findings made by the court.

The "rule certiorari" procedure is only designed to expedite and simplify appellate review of decrees in chancery.¹⁰² Moreover, the general rule provides that where an appeal is available, certiorari does not lie, and it cannot be used in lieu of an appeal.¹⁰³ As evidenced by several of the related state cases discussed above, appeal was available.¹⁰⁴ It is entirely conceivable that the federal court in *Miami Parts & Spring* once again misinterpreted the Florida law as to the effect of the denial of certiorari.¹⁰⁵

Even assuming that the Fifth Circuit correctly applied Florida law

94. 364 F.2d 957, 966 (5th Cir. 1966).

95. *Id.* at 967.

96. 364 F.2d 957 (5th Cir. 1966).

97. 404 F.2d 250 (5th Cir. 1968).

98. 54 So.2d 235 (Fla. 1951).

99. 73 So.2d 680 (Fla. 1954).

100. 364 F.2d 957 (5th Cir. 1966).

101. 1953 Trade Cas. 67,524 (Dade Co., Fla. Cir. Ct.).

102. 5 FLA. JUR. *Certiorari* § 38 (1955).

103. 5 FLA. JUR. *Certiorari* § 5 (1955).

104. *Seagram-Distill. Corp. v. Ben Greene*, 54 So.2d 235 (Fla. 1951), was an appeal from the circuit court to the Florida Supreme Court.

105. 364 F.2d 957 (5th Cir. 1966).

to the certiorari issue, an equally important question is "what weight should have been given to the circuit court decision?" In the recent case of *Commissioner of Internal Revenue v. Bosch*,¹⁰⁶ the United States Supreme Court, following the rationale of *Erie Railroad Co. v. Thompkins*,¹⁰⁷ stated that "while decrees of 'lower state courts' should be 'attributed some weight . . . the decision [is] not controlling. . . ' where the highest court of the State has not spoken on the point."¹⁰⁸ The *Bosch* court also pointed out that:

An intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by the federal court *unless it is convinced by the other persuasive data that the highest court of the state would decide otherwise . . .*¹⁰⁹

The Court's references were to cases which had been decided prior to the date that the Fifth Circuit decided *Master's of Miami*.

The above becomes particularly interesting in light of a statement by the circuit court in *Chase & Sherman*¹¹⁰ to the effect that

[I]t is clear that no appellate decision on the constitutionality of the present Florida Fair Trade Act, binding on this court, is now in existence. Nor have the courts of this state ever been called upon to determine the validity of our Fair Trade Act with respect to a signed contract.

This language, coupled with the statements by the United States Supreme Court in *Bosch*, suggest that the circuit court dictum upholding the constitutionality of the Florida act was not controlling, but merely persuasive in an action in a federal court. As indicated above, the decisions of the Florida Supreme Court are also persuasive indications that the court would have held the Act unconstitutional. The United States Supreme Court's language seems to instruct other federal courts to follow the persuasive dicta from the highest court when the only other authority is a decision of a lower appellate court. Therefore, it is debatable whether the court of appeals should have reached the decision that it did with respect to the Florida law.

VI. ACTION BY RETAILERS AND CONSUMERS

The practical effect of the uncertainty surrounding the Florida Fair Trade Act of 1949 on retailers and consumers is substantial. A limited survey¹¹¹ of the merchants in the state revealed several contracts were

106. 387 U.S. 456 (1967).

107. 304 U.S. 64 (1938).

108. 387 U.S. 456, 465 (1967).

109. *Id.* (emphasis added).

110. 1953 Trade Cas. 67,524 (Dade Co., Fla. Cir. Ct.).

111. The survey was made in 1970 by the author, who, by telephone, contacted various Florida merchants and questioned them as to the effect of the fair trade act.

made pursuant to the Fair Trade Act. Several merchants indicated that without the contract goods would be sold below the retail price set by the manufacturer. Other merchants expressed the view that the manufacturers who used the contracts were aware of the possible invalidity of the contracts. However, in all cases the retailer signed the contract in order to receive the merchandise.

For the consumer, the contracts can only mean higher prices. The contracts eliminate competition and the lower prices which result therefrom.

Until further litigation occurs, the law of Florida appears to uphold fair trade contracts. Since both the retailer and the consumer are adversely affected by the law, either would have standing to test its validity. The retailer could easily precipitate a lawsuit by selling goods at a price below that set in his contract with the manufacturer. However, most manufacturers who supply Florida merchants with durable goods are from out of the state. If litigation were to develop over a contract, if there were diversity of citizenship between the parties, and if the jurisdictional amount were met, the manufacturer could remove the case to the federal courts where the Act would conceivably be upheld.¹¹²

If the retailer were to bring a suit alleging that the contract violated the federal antitrust laws, not only would the manufacturer probably seek removal of the case based upon the federal question involved,¹¹³ but the retailer could expect to lose his franchise to sell the goods covered by the contract as a result of retaliation by the manufacturer.

Another alternative for the retailer would be to bring an action under Florida Statutes Section 542.05 (1969), which is the state counterpart to Section 1 of the Sherman Act. Florida Statutes Section 542.10 (1969) declares that any contract made in violation of any provision of Chapter 542 is void. Any adjudication of the validity of the contract would necessitate a decision as to the constitutionality of the Fair Trade Act (Florida Statute Ch. 541 et seq.) since Florida Statutes Section 542.05(5)(a) (1969) makes an exception for any contract made pursuant to Chapter 541.

The consumer also has an opportunity to initiate inquiry in this area. Under the Florida Declaratory Judgment Act,¹¹⁴

Any person claiming to be interested or . . . whose rights, status or other equitable or legal relations are affected by a statute . . . may have determined any question of construction or validity arising under such statute . . . and obtain a declaration of rights, status or other equitable or legal relations thereunder.

The consumer, as a person who is certainly "interested" in the validity

112. 28 U.S.C. § 1332 (1964).

113. 28 U.S.C. § 1331 (1964).

114. FLA. STAT. § 86.021 (1969).

of the Fair Trade Act and who is primarily affected by the relations between the parties to the contracts made pursuant to the fair trade laws, undoubtedly would be within the class contemplated by the statute.¹¹⁵ Under the declaratory judgment procedure, the question of constitutionality would be appealable to the Florida Supreme Court, where, the validity of the fair trade act would finally be determined.

VII. CONCLUSION

The Florida Fair Trade Act of 1949 has had an interesting, although somewhat volatile existence. After 15 years of uncertainty, the Act remains in the Florida Statutes. It is unfortunate that such a far-reaching law should continue to exist only because the federal courts insist that the Florida law is other than what the Florida Supreme Court appears to think it is. The only apparent solution is for the interested parties to have the constitutionality of the law decided by the Florida Supreme Court through one means or another. Any forthcoming litigation can only help the consumer. The longer the public waits, the more it will cost.

115. Although there have been no Florida cases under the Declaratory Judgment Act which have dealt with consumers, there is authority for a declaratory judgment proceeding being brought to adjudicate the validity of a statute. *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445 (Fla. 1952).