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FAIR-TRADE UNDER STATE AND FEDERAL LAW

Introduction

Fair-trade may be described as a system of permissive legislation authorizing producers of trademarked or branded commodities to fix the resale price of such commodities by contract. These laws, now in effect in the vast majority of states, were adopted in the depression days to prevent ruinous price wars. Since that time the battle of fair-trade has been fought out in the legislatures and more often in the courts. The two lines of attack have centered around the federal anti-trust laws and the state and federal constitutions. It is the burden of this paper to trace the legal landmarks of this conflict and to present the picture of fair-trade as it exists today.

Background

At common law, in England\(^1\) and in this country prior to trade regulating statutes,\(^2\) price setting contracts were valid when designed to protect the interests of the parties,\(^3\) and did not constitute unreasonable restraints on trade.\(^4\) After the passage of the Sherman Anti-Trust Act,\(^5\) the Supreme Court decided Dr. Miles Medical Co. v. Park & Son Co.,\(^6\) in which price maintenance contracts, so far as they affected interstate commerce, were held to be restraints on trade and violative of the Sherman Act. This holding did not preclude a manufacturer from refusing to sell to dealers who would not voluntarily adhere to his preannounced price listings\(^7\) or from fixing prices with outlets which were "genuine agents" of the manufacturer.\(^8\) Neither of these alternatives, however, afforded the means for an effective price maintenance program.\(^9\)

3. Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345 (1869).
4. Supra n. 2.
6. 220 U. S. 373 (1911).
9. "There were disadvantages to the use of refusal-to-sell and agency methods of price fixing. The former method was never really effective since the manufacturer could not always prevent the retailer from securing his product from another source. The latter method was more effective but subjected the manufacturer to much expense and market risks, which, otherwise, would have been distributed over many independent retailers." 1 Bflo. L. Rev. 166 (1951).
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Since the Dr. Miles decision reached only interstate commerce, nothing prevented price maintenance in intrastate commerce, and state legislation sanctioning price maintenance began with a New Jersey statute in 1916. Other states soon followed. For practical purposes, the early statutes proved inadequate, for they covered only actual parties to the contract. An effective price setting scheme requires that all dealers of the product be bound, and in 1933 California enacted the first "nonsigner clause." Under such a provision, all dealers having notice of a fair-trade price on a product are bound by that price equally with the actual parties to the contract which set the price. Such provisions were held constitutional by the Supreme Court in Old Dearborn Distributing Co. v. Seagram Distillers.

In the meantime, legislation to validate fair trading in interstate commerce was attempted. Two bills were introduced in Congress as early as 1914 but were not approved. And at every session of Congress from 1917 to 1933 fair-trade legislation was proposed but never enacted. In 1937 success was achieved with the passage of the Miller-Tydings Act. This bill took the form of an amendment to the Sherman Act and the Federal Trade Commission Act. It simply stated that these federal anti-trust acts should not apply to "contracts and agreements" prescribing a minimum resale price, so long as they were valid under state law. Though the amendment spoke in terms of "contracts and agreements" its applicability to nonsignors was not questioned for fourteen years. Then the Supreme Court decided Schwemm Bros. v. Calvert Distillers Corp. and held that the Miller-Tydings Amendment, since it sanctioned only "contracts and agreements," did not validate nonsigner provisions. Consequent-

11. Today, forty-five states (all except Texas, Vermont and Missouri) and the territories of Hawaii and Puerto Rico have fair-trade statutes. The District of Columbia does not.
13. The California nonsigner provision reads: "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract, entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person aggrieved thereby."
18. Despite the absence of an express nonsigner clause in the Miller-Tydings Amendment, the Department of Justice assumed its applicability to nonsignors and discontinued prosecutions against fair-traders as violators of the Sherman Act. Before the Temporary National Economic Committee, Assistant Attorney General Thurman Arnold referred to the terrific import of the act, and called for its repeal, because it legalized state nonsigner clauses. TNEC HEARINGS, pp. 18162-18163.
ly, state nonsigner clauses, insomuch as they affected interstate commerce, were void as violative of the Sherman Act. About the same time, another severe blow was struck at fair trade legislation. In the case of Sunbeam v. Wentling, the Third Circuit held that the Pennsylvania fair-trade statute should be construed to apply only to intrastate commerce. Since the prices set in different states can, and do, differ the court concluded that interstate sales could not be ordinarily transacted, and held that the interstate flow of goods was thereby affected. Since state legislation cannot interfere with interstate commerce, the statute had to be construed as applying to intrastate commerce only, in order to be valid at all.

With these two catastrophic decisions, fair-trade was set back forty years and rendered virtually ineffective. Without the ability to set the price of goods in interstate commerce, no price maintenance scheme can succeed. The very existence of the practice depended on favorable Congressional action. Such was forthcoming.

New Federal Legislation

Proponents of fair-trade, scattered in the sudden aftermath of the Schwengmann and Wentling cases, closed ranks and on October 17, 1951, introduced the McGuire bill; it became law July 14, 1952.

The McGuire Act may be characterized as an enabling act. It does not purport to declare practices to be unfair competition under federal law. It confers no new powers upon the Federal Trade Commission to proceed against violators. In reality it simply removes the barrier of federal anti-trust law from the application of state fair-trade legislation where interstate commerce is involved. In the words of its sponsor:

20. Since the Miller-Tydings Amendment was construed as not sanctioning the nonsigner provisions, such clauses had to fall. State legislation, in and of itself, can in no way legalize a violation of the Sherman Act. Northern Securities Co. v. United States, 193 U.S. 197 (1904).

21. 185 F.2d 903 (3d Cir. 1950), vacated 341 U. S. 944 (1951), opinion on remand, 192 F.2d 7 (1951).


24. It is interesting to note that the General Statement of the House Committee on Interstate and Foreign Commerce summarizing the hearing of its subcommittee, favorably recommended passage of the bill on the ground that the survivorship of small business was politically desirable despite strong economic and legal arguments against the bill. H. Rept. 1437.

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The McGuire bill is merely permissive. It says to the States, in effect, that the Congress recognizes the rights of the States to enact and make effective policies respecting unfair competition. This is all the McGuire bill does and that is all it is intended to do. (26)

It is clear that Congress has declared no new policy of its own, except in so far as it recognizes the dichotomous policies of the various States. In this sense the new legislation is stopgap. But for the immediate future the McGuire Act marks the end of the interstate commerce problem in resale price maintenance.

Declaration of Purposes

An analysis of the Act’s declaration of purposes reveals that the new law is designed (1) to protect the rights of the various States to regulate their own internal affairs, (2) to enact laws and to adopt policies which authorize resale price maintenance agreements, (3) to extend the binding effect of such agreements to nonsignors, and (4) to permit the enforcement of such agreements in interstate commerce.

An Amendment to the Federal Trade Commission Act

§ 2 of the new law rewrites, or rather adds to, former § 5 (a) of the Federal Trade Commission Act, as follows. § 5 (a) (2) with two exceptions referred to below, is substantially the same as the first proviso of the Miller-Tydings Amendment. In substance this paragraph provides that neither the Federal Trade Commission Act nor any of the antitrust acts 27 shall invalidate contracts fixing minimum or stipulated prices for the resale of brand name commodities which are in free and open competition with commodities of the same general class produced by others when and only when such contracts are lawful under applicable state law. Thus, if resale price maintenance agreements are valid under any state law, ipso facto, they are valid under the federal antitrust laws. The test of validity as far as federal law is concerned, is the same in both the McGuire Act and the Miller-Tydings Amendment. From the standpoint of federal antitrust law, such agreements are valid if under applicable state law they “are lawful as applied to intrastate commerce.” 28

But § 5 (a) (2) differs from the Miller-Tydings Amendment in two respects:

28. Supra n. 16, 25.
It expressly covers contracts which prescribe "minimum or stipulated prices"; the Miller-Tydings Act only expressly covered contracts prescribing "minimum prices."²⁹

(2) It included a provision expressly covering contracts "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices"; the Miller-Tydings Act only referred to "contracts or agreements prescribing minimum prices for the resale of a commodity."²⁹

§ 5 (a) (3) is new. It completely destroys the holding of the Schwegmann case. In substance it provides that neither the Federal Trade Commission Act nor the federal anti-trust laws shall be construed or applied to render unlawful the "exercise or the enforcement of any right or right of action" created by the nonsigner sections of the various state fair-trade laws. Since the Schwegmann case ruled that resale price maintenance agreements were unenforceable against nonsignors because of the anti-trust laws—even though enforceable in intrastate commerce under state law—this section directly overcomes that holding.³¹ § 5 (a) (4) is new. It is designed to resolve any doubt as to the future effect of the Wentling case.³² In substance the section provides that neither the making of resale price maintenance agreements, as outlined in § 5 (a) (2), nor their enforcement against nonsignors, as described in § 5 (a) (3), shall constitute an unlawful burden or restraint upon or interference with interstate commerce. § 5 (a) (5) is substantially the same as the second proviso of the Miller-Tydings Amendment. It simply reiterates the prohibition of horizontal price fixing, i. e., by parties on the same level of distribution.

The importance of the McGuire Act is that it restores to federal anti-trust law the intent of the framers of the Miller-Tydings Amendment; that the interstate commerce problem be eliminated from the resale price maintenance picture. This the new law does in most certain terms.

²⁹ Some state laws authorize "stipulated" prices, others "minimum." A minimum price statute does not authorize a stipulated price, since it permits sales above but not below the minimum price. But the states have judicially determined that a minimum price will be enforced under a stipulated price statute. Pepsodent Co. v. Krauss Co. Ltd., 200 La. 959, 9 So. 2d 303 (1942); Mennen Co. & Meyers Co. v. Kraus Co. Ltd., 134 F. 2d 348 (5th Cir. 1943). Hence, a minimum resale price may be prescribed in all fair-trade states but not necessarily a stipulated price. The new McGuire Act will recognize either method of price fixing if valid under applicable state law.

³¹ See infra n. 55.

³² Supra n. 21.
Constitutionality

Fair-trade statutes, insomuch as they validate price-setting contracts, present no constitutional problem, for they merely provide for the enforcement of contract terms against the parties to the contract. On the other hand, the constitutionality of nonsignor provisions has been continually attacked. The new federal act, however, presents little difficulty, for it is merely an enabling act in respect to interstate commerce. In and of itself, it presents no constitutional question. Furthermore, since the McGuire Act does expressly only what the Miller-Tydings Act intended, but failed to do, and since the Miller-Tydings Act has never been challenged constitutionally since its enactment in 1937, it is very doubtful whether either of these federal acts is vulnerable to constitutional attack. State nonsignor statutes, on the other hand, have provided a large body of litigation, both under the Federal Constitution and under respective state constitutions.

Validity of State Legislation under the Federal Constitution

The innovation of nonsignor provisions in state fair-trade statutes immediately raised objections under the Federal Constitution. The Supreme Court decided these issues and established state legislation as constitutional in Old Dearborn Distribution Co. v. Seagram Distillers Corp. The two basic constitutional objections made were that such legislation denied due process and equal protection. The defendant nonsignor argued that as owner of the product he was deprived of his property right to sell at whatever price he chose. The court answered this, first of all, by pointing out that defendant acquired the product with knowledge of the restriction, which ran with and conditioned the acquisition of the product. Beyond this the court said, “We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears . . .” This additional element represented the “good will” of the manufacturer, the protection of which constituted a legitimate police power objective. The court went on to hold that the phrases “free and open competition,” “any commodity,” and “any contract entered into” were not so vague as to render the statute unconstitutional.

The second basic objection took the position that the statutes conferred a privilege on owners of goods identified by trademark,

33. Supra n. 14.
34. Supra n. 14 at 194.
35. “The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.” Supra n. 14 at 193.
brand, or name, but denied the privilege to owners of unidentified goods. The court stated a basic doctrine to the effect that states may resort to classification for the purposes of legislation.\[^{38}\] This doctrine is limited by the requirement that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ". Inasmuch as the statute was designed to protect good will, the classification satisfied this test. Products identified by a trademark or brand name carry good will, whereas unidentified goods do not.

Validity of State Legislation under State Constitutions

Attacks on state fair-trade statutes under the respective state constitutions have taken sundry forms. The most frequent have been due process\[^{38}\] and equal protection.\[^{39}\] These have generally been answered in the same manner as the Supreme Court did in the Old Dearborn case. Few state courts upholding fair-trade against due process and equal protection objections fail to cite the Old Dearborn decision.\[^{40}\] Another frequent argument is that the statute unconstitutionally delegates legislative authority to individuals without adequate standards. The answer to this has been that there is no delegation at all.\[^{41}\] The statute is definite and complete as enacted,\[^{42}\] and merely removes a barrier to certain business practices.\[^{43}\] No legislative authority emanates from the statute.\[^{44}\] Courts have found little difficulty with the further objection that such statutes amount to legislative price fixing.\[^{45}\] Fair-trade statutes permit parties to set prices but in no way require them to.\[^{46}\] Finally, we find incorporated in several state

\[^{37}\] Id. at 422.
\[^{38}\] See Max Factor & Co. v. Kunsman, 5 C. 2d 446, 55 P. 2d 177 (1936); Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950); Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So. 2d 303 (1942); Auto Rental Co. v. Lee, 35 Hawaii 77 (1939).
\[^{40}\] See cases collected at 19 A. L. R. 2d 1139.
\[^{42}\] Max Factor & Co. v. Kunsman, supra n. 38.
\[^{44}\] Sears v. Western Thrift Stores of Olympia, 10 W. 2d 372, 116 P. 2d 756 (1941).
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constitutions a clause forbidding monopolies in ordinary businesses. Courts in states whose constitutions contain such a clause are frequently confronted with the argument that their fair-trade act contravenes such a provision. However, such arguments have been universally rejected on the grounds that fair-trade statutes permit vertical and not horizontal price fixing and that the product must be in free and open competition with other commodities of the same general class. Consequently, this type of price maintenance does not lead to monopoly.

One or more of the theories of constitutional validity herein set out represents the law in all states having fair-trade statutes, except two. Recently the highest state court of Michigan accepted the argument that the manufacturer's property right in good will does not extend to the resale stage; consequently, the court concluded that fair-trade legislation did not constitute a legitimate exercise of the police power. Florida has likewise ruled that its statute is outside the scope of the police power on the ground that economic conditions have so changed since the 1930's that resale price maintenance no longer bears a reasonable relation to the public welfare. More explicitly, the Florida court took the position that resale price maintenance serves particular groups, namely, retailers, by restricting competition. Conceding that fair-trade may also protect good will, the court, nevertheless, held that the vantage was personal and not public and that the statute was therefore unconstitutional.

Fair-Trade in New York

The laws of the jurisdictions which sanction fair-trade are essentially similar. The New York Fair-Trade Law, modeled after the California act, is found in General Business Law §§ 369 (a)-(e). Its title indicates a threefold purpose:

269 (E. D. La. 1953), felt that Schweigmann Bros. v. Calvert Distillers, supra n. 19, overruled the Old Dearborn case inasmuch as the latter case held that there was no coercion in a fair-trade statute. This might open a breach for new attack; however, two recent state courts which considered the issue failed to recognize the argument as valid. Frankfort Distillers Corp. v. Liberto, 190 Tenn. 478, 230 S. W. 2d 971 (1950); Borden Co. v. Schoeder, supra n. 45.
49. Ibid.
50. Ibid.
53. GRETHE, PRICE CONTROL UNDER FAIR-TRADE LEGISLATION 403-461 (1939).
An Act to protect trade mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

§ 369 (e)\(^{54}\) excludes horizontal resale price maintenance agreements from the operation of the statute. § 369 (a)(1)\(^{55}\) permits vertical price fixing. In substance it authorizes the “producer or owner” of a brand-name commodity which is in fair and open competition with similar commodities produced by others to fix by contract a stipulated resale price, or require any dealer who may resell his commodity to agree not so to sell except at the price stipulated. § 369 (b)\(^{56}\) is the nonsignor provision. In substance it declares that wilfully and knowingly advertising, offering for sale or selling a commodity at less than the price stipulated by any contract pursuant to § 369 (a) is unfair competition and actionable by any person damaged thereby, whether the violator is or is not a party to the contract. § 369 (d) contains definitions and § 369 (e) a separability clause.

New Statutory Right of Action

Since § 369 (b) extends to nonsignors the common law right of a manufacturer to enforce vertical resale price fixing agreements in intrastate commerce, it is clear that it creates new rights.\(^{57}\) This right or right of action is not limited to the contractual liability of signors. What the statute makes actionable is not termed a breach of contract but “unfair competition.” Violations are actionable by “any person” damaged. Aside from contract lia-

\(^{54}\) “This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to the sale or resale price.”

\(^{55}\) “Price fixing of certain commodities permitted: ”

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.”

\(^{56}\) “Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.”

\(^{57}\) Alexander’s Department Stores Inc. v. Ohrback’s Inc., 180 Misc. 18, 40 N. Y. S. 2d 631 (Sup. Ct. 1943).
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bility, the statute creates a new cause of action—the intentional tort of unfair competition.58

Elements of the Contract

The maintenance of a stipulated resale price will not be enforced without a contract. Thus, the pleading and proof of the existence of such a contract at the time of the alleged violation are imperative.59 The agreement may be oral and unilateral. But difficulties of proof would seem to dictate the desirability of a written bilateral contract.60 No particular form is required although most agreements contain identical basic provisions.61 Satisfaction of the statutory requirement of a "contract" has been given a liberal judicial construction.62 The agreement must be supported by consideration; any consideration sufficient to support a simple contract is sufficient.63 To fulfill this requirement an express clause in the contract whereby the owner or producer promises diligently to enforce its terms against violators would seem desirable, although an implied promise to do so is sufficient when found.

Usually the contract is made terminable by either party after a certain number of days' notice. But termination by a dealer does not end his obligation to observe the stipulated resale price, if there are still in effect in the state other fair-trade contracts covering the same commodity.64 To invoke the statute it is not necessary to enter into agreements with all or substantially all the dealers in a community. It is enough that one agreement is made indicating an intent to resort to the provisions of the act.65

The most essential term of the contract is the resale price. § 369 (a) permits a "stipulated," not a "minimum" price.66 The resale price need not be the market value but where the price fixed is not related to the market value equitable enforcement may be de-

61. For model forms, see supra n. 60 at 175-186; Oppenheim, UNFAIR TRADE PRACTICES 1482 et seq. (1950); Grether, supra n. 53 at 343 (1939).
63. Ibid.
64. Borden Co. v. Schoeder, supra n. 45.
66. For the importance of the distinction, see supra n. 29.

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The price must be actually and definitely fixed by the contract. A suggested or recommended price will not do. But the incorporation of the price by reference to a current monthly catalogue, in order to meet fluctuating market conditions is permissible. Usually the contract provides that the price be a stated amount plus all applicable sales and excise taxes. In the absence of this expressed provision, a tax, which is imposed and collected from the customer, would automatically add to the fixed price. But federal excise taxes would not be so added. The difference depends upon whether the tax statute imposes the tax upon the seller or the buyer.

The contract may provide for trade-in allowances. A reasonable standard for determining the allowance must be set by the contract. A defense that the contract is too vague in this respect will not be stricken as frivolous.

The New York Fair-Trade Law does not specifically require uniformity of the resale price but such uniformity, at least within a given competitive area, is implicit in the statute. Even though the contract by its terms applies to all resales, signors and nonsignors are bound only to the extent which the statute prescribes. § 369 (a) (2) lists four exceptions which are deemed to be expressed or implied conditions in every agreement.

**Capacity to Fix Price**

§ 369 (a) (1) expressly permits the “producer or owner” to initiate price fixing agreements. § 369 (d) defines “producer” to mean “a grower, baker, maker, manufacturer or publisher.” In about 22 other states, statutory capacity is given a “distributor.”

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67. *Joseph Triner Corp. v. McNeil*, supra n. 39; *Liquor Stores, Inc. v. Continental Distilling Corp.*, supra n. 52. The Wisconsin statute provides that if the price provisions of the contract are unfair and unreasonable, the contract may be declared a restraint of trade. *Wis. Statutes* 133.25, subd. 7, *Laws of 1935* c. 52.


73. “(a) In closing out the owner’s stock for the purpose of discontinuing delivery of any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By an officer acting under the orders of any court.

3. Sales or offers of sale to the state of New York or any administrative department thereof, political subdivision, municipality, public corporation or authority, college or university, library or any public library board of regents . . .”
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Both the Miller-Tydings Amendment and the McGuire Amendment refer to a "producer or distributor." Any difference would seem nominal. But what is important is that only those within the terms of the statute may fix resale prices. In New York, this does not include a wholesaler or a retailer. It has been held that an exclusive sales agent in New York when authorized by the manufacturer may fix resale prices.

Notice Requirements

Notice is required to bind all against whom the contract is sought to be enforced. The words "wilfully and knowingly" in § 369 (b) are the source of this requirement. Notice is required not only of direct changes in price but also changes in discounts and other general business practices reflected in the price of a commodity. Signors, by the fact that they are parties to the agreement, have notice. As to nonsignors it must appear that they had notice of the price fixing and all changes at the time of the alleged sale. No particular form of notice is necessary; the requirement merely serves as a basis of proof that the defendant "knowingly" violated the contract.

Notice does not mean notice of the existence of any particular contract. All that is required is that the defendant knew that the resale price of the commodity had been fixed by contract.

All commodities purchased before receipt of notice may be sold at any price even though such sales are made after receiving notice. To hold otherwise would seem to render the statute unconstitutional. While the Court of Appeals has reserved decision on the question, the lower courts have expressly adopted a constitutional construction. Thus, the pleadings must allege that

76. Calvert Distillers Corp. v. Nussbaum Liquor Store, supra n. 65.
79. Seagram-Distillers Corp. v. Seyopp Corp., supra n. 78.
82. Fort Chester Wine & Liquor Shop v. Miller Bros., supra n. 58.
83. "The entire theory of the statute is that it applies only to merchandise acquired after knowledge. Were it otherwise, the statute would permit price fixing by fiat, and it is due to the fact that this is not the tenor of the statute that it is constitutional." Supra n. 78 at 552.
the defendant, having notice when he acquired the goods, wilfully offered, advertised or sold below the stipulated price.\footnote{Katz v. Gevirtz, supra n. 59.}

**Commodities Covered**

Not every owner or producer of a commodity may fix its resale price by contract, despite the fact that § 369 (d) defines "commodity" as "any subject of commerce." § 369 (a) (1) only applies to a commodity "which bears . . . the trade-mark, brand, or name of the producer or owner . . . ." The first fundamental limitation of all fair-trade legislation is that it only applies to commodities with good will.\footnote{Identical provisions are found in the McGuire and Miller-Tydings Acts.} Moreover, not every producer or manufacturer along the successive stages in the fabrication of such a commodity may fix its resale price. Only the producer of the "finished or ultimate product" may do so.\footnote{United States v. Univis Lens Co., Inc., 316 U. S. 241 (1942); United States v. Bausch & Lomb Optical Co., 321 U. S. 241 (1944).} The finished products test is a judicial limitation. It is qualitative in nature. If future processes will result in a new and different commodity, the present fabricator may not fix its resale price.\footnote{Mallison Fabrics Co. v. R. H. Macy, 171 Misc. 875, 14 N. Y. S. 2d 213 (Sup. Ct. 1939); cf. Guerlain Inc. v. F. W. Woolworth, 171 Misc. 990, 14 N. Y. S. 2d 163 (Sup. Ct. 1939).} Thus, only the owner or producer of a finished commodity which is branded, trade-marked, or contains the name of the producer may qualify under § 369 (a) (1).

The second major limitation on qualification under § 369 (a) (1) is the requirement that the commodity be "in fair and open competition with commodities of the same general class produced by others . . . ." This requirement is found in all fair-trade legislation.\footnote{The McGuire and Miller-Tydings Amendments differ only in that they use the term "free," rather than "fair," and open competition.} The theory behind this is that the price set by the contract will be influenced by competition on the market. Thus, even though a commodity may be given a fixed price by its producer, such price is itself a result of competition.

The existence of fair and open competition must be proven. No exact test has been laid down. Generally, such competition may be said to exist if the resale price, when set too high, would result in the producers' loss of trade due to the competition of other similar articles.\footnote{Eastman Kodak Co. v. Federal Trade Commission, 158 F. 2d 592 (2d Cir. 1946).} Equally relative is the problem whether a commodity is of the "same general class." If two articles are "generally similar" they may be said to be of the same general

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85. Identical provisions are found in the McGuire and Miller-Tydings Acts.
88. The McGuire and Miller-Tydings Amendments differ only in that they use the term "free," rather than "fair," and open competition.
89. Eastman Kodak Co. v. Federal Trade Commission, 158 F. 2d 592 (2d Cir. 1946).
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class even though one or both have unique or distinctive characteristics which cannot be exactly reproduced by a competitor. 90

Violations

§ 369 (b) covers not only actual sales but also advertising and offering for sale; this feature is common to all forty-five state statutes. No actual sale is necessary to give rise to a cause of action. 91

Who May Enforce the Contract

§ 369 (b) states that a violation is actionable by "any person" damaged. These terms have been held to include "all parties vendee," whether a distributor, wholesaler or retailer. 92 A nonsignor may sue signors or nonsignors. 93 A trade association may sue. 94

Remedies

Although there is no specific statutory authority for injunctive relief, the general power of equity to protect property rights in good will is sufficient to authorize this remedy. 95 Thus, recovery may be money damages, or injunction against future violations, or both. 96

The first problem lies in that phrase of the statute which gives the cause of action. The difficulty is in establishing damages. The only practical method of enforcement is by way of injunctive relief. 97 To obtain such relief the producer must establish the existence of good will and unlawful price cutting. No proof of actual or specific money damages is required; injury to good will, actual or threatened, is presumed. 98 New York does not require proof of pending irreparable injury. 99 This first aspect of a suit to enforce a fair-trade price has been based on the premise that a valid and enforceable cause of action exists, and no defenses are encountered.

92. Auto Rental Co. v. Lee, supra n. 38.
93. Port Chester Wine & Liquor Shop v. Miller Bros., supra n. 58.
94. Iowa Pharmaceutical Ass'n v. May's Drug Stores Inc., 229 Iowa 554, 294 N. W. 756 (1940). New York has refused to sanction the incorporation of a membership corporation, the purpose of which was to assist in the enforcement of the fair-trade law. In re Fair-Trade Enforcement Service Inc., 100 N. Y. L. J. 1337, CCH Trade Reg. Serv., Par. 25,165 (Kings 1939).
96. Port Chester Wine & Liquor Shop v. Miller Bros., supra n. 58.
99. Ibid and supra n. 65. Cf. Ely Lilly & Co. v. Schweigmann Bros., supra p. 46, where proof of irreparable injury was required.

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There are several defenses available, even though the defendant has in fact sold below the fair-trade price. The defendant may show that the contract does not meet the requirements of § 369 (a); or lack of knowledge under § 369 (b).

In equitable actions a producer must show "clean hands." Where the price cutting is general and long-continued, failure to take effective enforcement measures will be regarded as a waiver or abandonment of such rights as the contract and statute confer. The inequitable conduct of the producer must occur after the contract has been entered into. However, where previous enforcement was merely lax, the court will grant the injunction upon condition that the producer continue its present vigorous enforcement policies. A producer is not required to sue every violator nor all violators simultaneously. But if he does not resort to legal action, he is required to use reasonable diligence to see that none of his products continues to be sold to one who cuts prices.

Mere delay in enforcement, not amounting to an estoppel, may bar recovery for damages but will not preclude injunctive relief. The mere fact that some but not all of the producer's commodities are price-fixed is no defense. Injunctive relief to protect all the price-fixed products of a manufacturer will issue even though a dealer has only cut prices on one.

The task of a competitor who becomes a plaintiff is even more difficult. He must prove that the price cutting of the defendant, on a product which may be only one of many which he handles, has materially affected his business. Here again injunctive relief is the only practical remedy. It should be noted however, that the retailer's right of action is not derivative from that of producer or owner. His action is not precluded because the producer has not actively enforced the trade. The courts have refused to grant a retailer a declaratory judgment that a producer has

100. Automotive Electric Service Corp. v. Times Square Stores Corp., supra n. 74; Seagram Distillers Corp. v. Ackerman, 263 App. Div. 1016, 33 N. Y. S. 2d 937 (2d Dep't 1942).
102. General Electric v. R. H. Macy, supra n. 68.
103. Seagram Distillers v. Ackerman, supra n. 100; Calvert Distillers v. Stockman, 26 F. Supp. 73 (E. D. N. Y. 1939).
106. Ibid.
abandoned his contract on the ground that price cutting may still be actionable by another person damaged thereby.\textsuperscript{109} This is important, since even though the producer may never effectively enforce the contract, individual competitors may, nevertheless, still restrain damaging price cutting within their locality. Only when the retailer himself has violated the contract will his cause of action fail.\textsuperscript{110}

The fact that a retailer is also a member of a retail association which polices the trade, or that the relative size of the enterprises is lopsided, or that the state of price enforcement is in chaotic confusion is irrelevant if clean hands are shown. Whether a party has clean hands is not simply an issue of actual or probable injury but also involves issues of moral intent and good faith.\textsuperscript{111}

A provision for liquidated damages for each violation would seem desirable. This would tend to eliminate some of the enforcement problems. The courts have not passed upon the validity of such a clause although there is evidence of its usage.\textsuperscript{112} The traditional test is whether the clause was inserted to compensate the injured party for damage suffered or to secure performance of the contract. Of course, the amount must be reasonable.\textsuperscript{113} A provision for reasonable attorney fees may also be valid.\textsuperscript{114} All such clauses however are only good against actual parties to the contract—since a nonsignor’s liability is statutory. Once an injunction issues, any future price cutting subjects the violator to contempt proceedings.\textsuperscript{115}

Another interesting aspect of enforcement is the difference in theory of the action when the suit is by a competitor rather than a producer. The courts have recognized the twofold purpose of the statute to protect the producer’s good will and also competitors and the general public from unfair competition. These interests are not the same; the theory of action is not the same.\textsuperscript{116} While the courts are unanimous in presuming damage where a producer shows good will, does this presumption operate when the retailer initiates the action? Do competitors have a

\textsuperscript{111} Ibid.
\textsuperscript{112} Supra n. 60 at 116-119.
\textsuperscript{113} 3 Williston, CONTRACTS, §§775-6 (rev. ed. 1936).
\textsuperscript{114} Id.
\textsuperscript{116} 25 NOTRE DAME LAW. 529 (1950).
property in the producer's good will? The damages suffered by a competitor would seem to be loss of business rather than injury to good will. However, one case has held that a retailer does have an "interest" in the producer's good will. Another court granted the retailer an injunction upon a finding that damage was "obvious," without indicating whether the damage went to loss of good will or loss of business. Regardless of the precise theory of the presumption of damage, in the case of retailers, the presumption is nevertheless present, and the courts have constantly granted equitable relief at their behest.

Conclusion

In respect to the interstate problem, which has troubled fair-trade since 1911, it seems that the new federal statute is a near cure-all. The holdings of the Schwegmann and Wentling cases have been neutralized. The statute is clear to the effect that non-signor clauses in interstate commerce are valid and operative. It is equally clear that state fair-trade legislation shall hereafter constitute no burden on interstate commerce legally. It would seem, therefore, that fair-trade is now soundly established and is to enjoy a bright future. Reflection reveals, however, the possibility of difficulty. The constitutionality of fair-trade statutes under the Federal Constitution is based on the theory that fair-trade protects the good will of the producer. If, upon reexamination of this premise, it should appear that such legislation is now propounded for other reasons, perhaps because of changed economic conditions, the force of the Old Dearborn case would wane and perhaps completely fail. The Federal District Court in Ely Lilly & Co. v. Schwegmann Bros., expressly and properly, left the problem for the Supreme Court.

Under existing circumstances, however, fair-trade ultimately depends for its validity and existence, on the law of the respective states. The federal scheme aids only such fair-trade legislation as is valid under state law. Until recently, such validity was justly assumed; however, the action of Michigan and Florida, in declaring their statutes unconstitutional, is to be noted. A prediction as to whether these two decisions indicate a developing trend would be wholly premature. For the present, fair-trade legislation is valid in forty-three of the forty-five states which have such statutes.

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119. Supra n. 46.

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