

UNIVERSITY OF NEWARK LAW REVIEW

Vol. VI

OCTOBER, 1941

No. 2

FAIR TRADE AND THE COURTS

I

The principles underlying the legislation popularly known as "Fair Trade Acts" (enacted by forty-five states) are a part of the evolution of the law of unfair competition. They give a right of action for a type of appropriation of the good will identified with articles marketed under trademarks, and provide a remedy both for manufacturers and for distributors injured by the un-

1. Those states which have not enacted fair trade acts are as follows: Vermont, Missouri and Texas.

The full text of the New Jersey Fair Trade Act (Secs. 56:4-3 to 56:4-6 New Jersey Statutes) is as follows:

56:4-3 Definitions.

As used in this article:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

"Library" means the following nonprofit organizations administering a collection of books for nonprofit purposes: the national, State, county or municipal governments; universities, colleges, schools, archives offices, museums; and literary, educational, professional, scientific, fine arts or religious societies.

56:4-4. Application of article.

This article shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices. This article shall not apply to, or fix or limit prices at which any books may be sold or offered for sale to a library located in this State.

56:4-5. Contracts deemed valid; construction thereof.

(1) No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to consumers bears, the trade-mark, brand, or the name of the producer or owner of such commodity and which is in fair and open com-

fair competition.¹ With the Miller-Tydings Act,² they clear up the confusion which arose as a result of the decisions in the Miles, Colgate, Schrader and Beechnut cases³ and which for many years puzzled the courts and plagued manufacturers and merchants.

A glance at some of the considerations leading to the adoption of the fair trade laws may not be amiss.

As has often been recognized, a trademarked article carries with it something not sold either to the merchant or the consumer, i.e., the brand or trade name, and the good will associ-

petition with commodities of the same general class produced by others shall be deemed in violation of any law of this state by reason of any of the following provisions which may be contained in such contract:

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

(b) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

(2) Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity;

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

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

56:4-6. What constitutes unfair competition; civil liability.

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 56:4-5 of this Title, 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 the producer or distributor of such commodity or at the suit of any retailer selling such commodity at not less than the price stipulated in any contract entered into pursuant to the provisions of section 56:4-5 of this Title.

(The New Jersey Act was originally enacted in 1935 as Chap. 58, Laws of 1935; it has since been amended.)

2. *Infra* note 18.

3. These cases are commented on later in the text.

ated therewith. These remain the property of the producer, no matter to whom the article bearing the trademark is sold nor how many hands it passes through in the process of sale. The trademark serves to identify and denote the origin, kind and quality of the goods to which it is affixed; in it is involved the skill, reputation and good will of the maker.

Trademarked articles have furnished to the so-called predatory price-cutter a cheap and easy method of building up a reputation for low prices. The loss-leader or bargain-lure operator could not, of course, use unidentified articles for his purpose, for consumers are not familiar with their quality, value or usual price, and do not know who stands behind them. He seizes upon popular trademarked goods whose reputation, value and general price are known and, by slashing the prices to cost or less, seeks to create in the mind of the public an impression that all of his goods are sold at like low prices. Of course, this cannot be true, for expenses of operating the business, including wages, rent, heat, light and other miscellaneous items of general overhead, must be met from some source. The more of the trademarked articles he sells at or below cost the more the loss-leader operator loses on such items. Therefore, he has no interest in developing volume on these products; his interest lies in using their reputation to draw customers to his store, that he may sell them articles on which he does make a profit. The use of trademarked articles as bargain-lures has a tendency to create in the mind of consumers an impression that they are worth less than is generally asked for them, and thus to injure their reputation; also to make prospective customers believe that the regular dealer not using such practices is either a profiteer or an inefficient merchant. A wide range of trademarked articles may be appropriated for loss-leader or bargain-lure purposes, by using certain articles as bait one day, another list the following day, and so on.

By his skill, and the expenditure of time, research, money and effort, the manufacturer produces an article, puts it on the

market under his trademark or brand, and develops good will for it. In getting the item to the public he must utilize the services of a great many dealers. A part of the foundation and growth of the good will is due to gaining acceptance of the article by retailers and securing their efforts in introducing and selling it to the public. The distributor will need to know how much the article is expected to sell for to the public. He knows the inexorableness of taxes, wages, rent and general expenses and if he is to help establish the market, he must be able to realize his expenses and something for his work. In putting out a trademarked item and seeking dealer and consumer acceptance, the producer must consider the various manufacturing and marketing cost elements, as well as the price at which commodities of like type are sold to the consumer; and the price arrived at for his article must be one that is competitive with items of the same general class produced by others, reasonable to the public and fair to the distributor. If these conditions are met, the efforts and facilities of the distributors can be enlisted to get the item to the public and develop volume on it; but a large or even adequate number of outlets cannot be expected to supply their services in marketing the product if its distributive value (i.e., the carrying of its own expenses of distribution) is ruined by irresponsible or destructive price-cutting. In such case the price-cutter is simply absorbing and draining off for his own purposes the good will value developed for the product.

When the bargain-lure operator pounces on a trademarked item for bait, the regular retailer must either meet the price or cease to handle the article. Its economic value to him is lost, since the article will not produce a margin, or even carry its own expense; and of course he can have no interest in pushing sales of such merchandise. In addition, even if he tried to adopt the loss-leader methods of bargain-lure competitors, under the manufacturer's right to refuse to supply those who fail to get his resale price, recognized long prior to the fair trade laws, the regular dealer, buying directly from the producer or through

known wholesalers, would be subject to having his supplies of the merchandise cut off, while the price-cutter who secured his merchandise from unknown or frequently changed sources could not be so controlled.

Judge Brandeis remarked that a single prominent price-cutter can ruin a market for both the producer and the regular retailer.⁴

Judge Holmes spoke vigorously against price-cutting for ulterior purposes; and stated that he did not believe the public would profit from such practices.⁵

Mr. Darrow reported that cut-throat competition and ruinous price-cutting were major features in the commercial collapse, restrained trade and tended to monopolistic control of distribution, and that loss-leaders and compensatory predatory practices deceived and mulcted the consuming public.⁶

The economists E. R. A. Seligman and Robert A. Love reached the conclusion that the practices to be corrected by price maintenance had no justification either in economics or ethics; that price-cutting involving the leader policy, the sale below cost, and the necessity of devious methods of securing supplies from others than the producer, however profitable to the individual, were open to criticism as constituting destructive competition, and as being economically unsound and therefore ethically unjust. "Price-cutting of this kind," they said, "is in short, a form of unfair competition; price maintenance is a step toward fair competition".⁷

This view has been adopted by forty-five states.

4. The Social and Economic Views of Mr. Justice Brandeis (Vanguard Press, 1930), pages 405-6.

5. Dissent in *Dr. Miles Medical Co. v. John D. Park & Sons.*, *infra* note 8.

6. Second Darrow Report; N.R.A.; published June 12, 1934.

7. Price-Cutting & Price Maintenance (Harper, 1932), page 276.

II

Despite considerable public supposition to the contrary, the fair trade acts did not give birth to price maintenance. The right of the manufacturer to fix a resale price on his merchandise and to refuse to sell to dealers who failed to maintain such price existed long before the enactment of the fair trade acts. But seemingly conflicting decisions bewildered manufacturers, merchants and the courts; and the lack of an equitably operating and easily administered remedy (such as was afterwards supplied by the fair trade legislation) led to very imperfect protection of the manufacturer's trademarked rights and often to unfair and oppressive action against distributors willing to deal fairly with respect to branded merchandise; while those who sought to turn the good will and reputation of the trademarked goods to their own purpose could not be prevented from making use of the practices which the fair trade legislation was enacted to correct.

In the *Miles* case,⁸ the United States Supreme Court (over the strong dissent of Judge Holmes) held that where the maintenance of the resale price to be charged for an item, though manufactured under a private formula and sold under a brand name, was sought to be effected by an express contract between the manufacturer and the distributor, the agreement was in violation of the Sherman Act and void as against public policy.

But in the *Colgate* case,⁹ the Supreme Court approved the principle that a manufacturer might announce his resale prices in advance, give notice thereof to his distributors and refuse to deal with any one who failed to maintain them.

Following this decision the lower courts seem at first to have understood that the manufacturer might also receive the assur-

8. *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373, 56 L. Ed. 502 (1911).

9. *U. S. v. Colgate & Company*, 250 U.S. 300, 63 L. Ed. 992 (1919).

ance of the dealer that he expected to get the specified resale price, in order to buy the goods initially and to be able to continue to purchase them. Indeed in the *Schrader* case, the lower court¹⁰ indicated that there was no substantial difference between the method condemned in the *Miles* case and that approved in the *Colgate* case, the one accomplishing its object by express contract and the other by an understanding, which for all practical purposes was the equivalent of an express agreement. The District Court therefore held that, on the authority of the *Colgate* case, uniform contracts for the maintenance of resale prices were valid.

However, when this case got to the United States Supreme Court,¹¹ the lower court was reversed, the Supreme Court indicating that in the *Colgate* decision it had not intended to overrule the *Miles* case, but only to recognize the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.

The refusal to deal with price-cutters would necessarily involve, it would seem, knowing or finding out who were cutting prices. Yet difficulty over this arose in the *Beechnut* case, where the Circuit Court of Appeals for the third circuit¹² had before it a situation not involving contracts, but the use of correspondence, reports and control numbers to ascertain what dealers were cutting prices so as to place them on a refusal-to-sell list. While finding it hard to see any essential distinction between a written contract and the same result arrived at through cooperation and acquiescence, the court took the view that in the *Colgate* case a method of price control less drastic than by express contract had been approved, and on the authority of that decision, dismissed a Federal Trade Commission complaint.

10. *U. S. v. Schrader's Sons*, 264 Fed. 175 (D. C. N. D. Ohio, 1919).

11. 252 U. S. 85, 64 L. Ed. 471 (1919).

12. *Beech-Nut Packing Co. v. Federal Trade Commission*, 264 Fed. 885 (C. C. A. 3rd, 1920).

On appeal of the Beechnut case, the United States Supreme Court¹³ said that under its previous decisions a manufacturer is not guilty of violating the Sherman Act who fixes resale prices on his merchandise and withholds his goods from those who will not sell them at the prices so fixed. The Court, however, held that a system of correspondence, reports, control numbers and information as to price-cutters was restrainable under the Federal Trade Commission Act.

In commenting on these various decisions, Judge Dennison, in *Toledo Pipe Threading Machine Company v. Federal Trade Commission*, said that "the state of the law as to price maintenance may rightly be said to be in confusion."¹⁴ After reviewing a number of decisions, he goes on to suggest that a conclusion ought to be reached either allowing price maintenance with a proper remedy or abolishing it altogether, saying, "It may be that ultimately either the principle that price maintenance is an evil, and may not be accomplished in any manner, or the principle that such a system may be established and enforced in any non-oppressive way, will clearly prevail."¹⁵

In some of the cases, producers of articles manufactured under patents claimed that the exclusive rights granted them included protection against depreciation of the value of their patents by price-cutting of the articles made and sold under them, and permitted them to maintain their prices by express contract, directing the court's attention to the difficulties and injustices which would result from a contrary view. The United States Supreme Court indicated that if the holders of exclusive rights desired to have a proper remedy for the maintenance of their resale prices, it should be sought not by asking the courts

13. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 66 L. Ed. 307 (1922).

14. 11 F. (2d) 337, 340 (C. C. A. 6th, 1926).

15. *Id.* at page 342.

to extend the patent laws by implication, but by invoking "the curative power of legislation."¹⁶

But up to the time of the fair trade acts the confusion still existed, and the curative power of legislation had not intervened. A manufacturer might write a dealer that he would not allow him to buy merchandise if he continued to cut prices; the dealer might acquiesce and observe the resale prices; but the same results could not be accomplished by uniform contracts acting equally on all dealers. The manufacturer might cut off a dealer buying directly from him or through a known wholesaler, but if the dealer's price-cutting competitor secured his merchandise from unknown sources or frequently switched his source of supply, the manufacturer might not be able to cut him off; nor, could he take action such as was prohibited in the Beechnut case to find out where the real offender was getting the goods. A dealer buying directly from the manufacturer for a number of stores might find a competitor on a corner opposite one of his stores cutting prices on a particular item, and reduce the price in his nearby store to meet the competition. Unless he returned to the regular price, the manufacturer could refuse to ship supplies to his warehouse, which would cut him off from all his stores; at the same time the producer might not be able to prevent the competing retailer from cutting the price, if he did not know such dealer's source of supply. As to his established trade, doing business directly with him or through ordinary channels, he might make effective his policy of retail price maintenance, but as against a competitor of any of these dealers the remedy of cutting off the merchandise might be totally ineffective. Where a manufacturer had refused to supply a price-cutting retailer, the cutter could buy a few items of the article at retail from a dealer observing the price and not cut off from supplies, and continue to offer the article at cut prices. Instances

16. *Boston Store of Chicago v. American Graphophone Company*, 246 U.S. 8, 26, 62 L. Ed. 551, 559.

were also known where a manufacturer had established an exclusive dealer agency for his merchandise and to create an illusion of lower prices, a competitor might buy at retail from the agent, and, then placing the few items so acquired on sale in his store, cut the price when the exclusive agent could not do so.

By the passage of the State Fair Trade Acts and the Miller-Tydings bill, the legislative bodies declared contracts stipulating resale prices on trademarked articles, in fair and open competition with commodities of like class, to be consonant with public policy; defined it as unfair competition wilfully and knowingly to sell at prices lower than the stipulated prices, whether the offender was a party to the contract or not; and gave to any person injured by such unfair competition an effective remedy.

In cases arising from Illinois and California, the Supreme Court of the United States, reviewing prior decisions, held the fair trade statutes legal and binding both as to signatories and non-signatories with notice; commented that the states had declared their public policy, and that the legislative determination taking the view that price-cutting is not only injurious to the good will and business of the producer and distributor of unidentified goods but injurious to the public as well, was conclusive on the courts; noted that these statutes were a legislative recognition of a rule which had been accepted by many of the state courts as valid at common law; observed that the Supreme Court had itself indicated that the correction of a situation deemed unjust to the holders of exclusive rights was a matter for legislative action; and held that the terms of the act were sufficiently definite, did not confer any unlawful delegation of price-fixing authority, did not deny due process or equal protection of the law, and were constitutional and valid.¹⁷

17. *Old Dearborn Distributing Company v. Seagram Distillers Corporation*, and *McNeil v. Joseph Triner Corp.*, 299 U.S. 183, 81 L. Ed. 109 (1936) involving the Illinois Fair Trade Act; followed in *Pep Boys v. Pyroil Sales Co.* and *Kuns-*

Supplementing the state fair trade acts is the Federal statute known popularly as the Miller-Tydings Act. This is an amendment to Section 1 of the Sherman Act, allowing, as applied to interstate transactions, agreements of the type permitted under the state fair trade acts when such agreements are lawful under the law of the state in which the resale is to be made or to which the commodity is to be transported for resale.¹⁸

The method of invoking operation of the fair trade law is comparatively simple—a contract establishing a minimum price and notice to those who are not contracting parties. As in the case of other branches of unfair competition law, the courts have had to apply general equity principles, having in mind the purpose of the act as well as the fact situation in the particular case. Varied questions have arisen, which the courts have had to solve and resolve in the light of the law and the equities, and it is interesting to observe how the broad pattern of the act has been interpreted in some of the situations thus far presented.

III

Under the fair trade acts it is requisite that there be a contract whereby a party to whom a sale is made engages to observe

man v. Max Factor & Company, 299 U.S. 198, 81 L. Ed. 122 (1936) involving the California Fair Trade Act. The New Jersey Fair Trade Act was held constitutional in *Johnson & Johnson v. Weissbard*, 121 N.J.Eq. 585, 191 A. 873 (Errors & Appeals, 1937); see also *Gaine v. Burnett*, 122 N.J.L. 39, 4 A. (2d) 37 (Sup. Ct., 1939) holding constitutional a statute empowering liquor commissioner to make rules and regulations prohibiting liquor sales within the State in violation of any fair trade contract.

18. 15 U. S. C. Sec. 1, as amended by Public Act No. 314, 75th Congress, approved and effective August 17, 1937. The exemption granted by the Miller-Tydings Act relates not only to Sec. 1 of the Sherman Act, but also to Sec. 5 of the Federal Trade Commission Act. This amendment does not legalize price maintenance agreements within the District of Columbia.

the minimum resale prices.¹⁹ There is no necessity for a multiplicity of contracts; a single bona-fide agreement fixing the minimum resale price is sufficient to set the price restriction in operation as to all having notice thereof.²⁰ Thus, one of the principal inequalities existing when refusal to sell was the only remedy is overcome; non-signatories aware of the price restriction are subject to the same conditions as contracting parties, and the same rights and remedies are available against persons obtaining the manufacturer's trademarked goods from unknown sources as against those buying directly, or through known wholesalers; so that all dealers are on exactly the same footing with respect to the maintenance of minimum resale prices. All are bound by the same conditions.

That a contract is necessary does not mean that there must be any special consideration for the engagement to adhere to the minimum price. The resale price stipulation is simply one of the conditions under which the goods are sold, and a part of the general agreement of sale.²¹

The contract must cover the price restriction sought to be enforced. Thus, where the contract relates solely to minimum prices to be charged on sales by retailers to consumers, a sale of a quantity of merchandise by one retailer to other dealers below the established retail price to consumers does not violate the price clause, since in the particular instance the contract

19. *Associated Gasoline Dealers of Nassau County, Inc. v. Hartnett*, 102 N. Y. L. J. 261, Col. 2, August 1, 1939 (Sup. Ct.); see also *Hunter Baltimore Rye Distillery, Inc. v. Bloomingdale Bros., Inc.*, 103 N. Y. L. J. 108, Col. 3, January 8, 1940 (Sup. Ct.).

20. *Revlon Nail Enamel Corporation v. Charmley Drug Shop*, 123 N.J.Eq. 301, 197 A. 661 (Chancery, 1938).

21. *Houbigant Sales Corporation v. Woods Cut Rate Stores*, 123 N.J.Eq. 40, 196 A. 683 (Chancery, 1937); cf. also *Hunter Baltimore Rye Distillery, Inc. v. Bloomingdale Bros., Inc.*, *supra* note 19.

did not contain a provision covering wholesale transactions, or sales to dealers, but only sales by retailers to consumers.²²

Prior to the fair trade laws, it was not unusual for catalogs and price lists to contain the expression "suggested retail price," for sales below which the producer could refuse to sell. An agreement to adhere to a minimum price schedule being necessary under the fair trade acts, the use of so-called "suggested prices" or "price policies" without a contract is not sufficient to avail oneself of the benefits of the act.²³ However, this does not mean that the use of the word "suggested" prevents the prices named from being the minimum prices below which the buyer has agreed not to sell. As in other contracts, the intention of the parties is the controlling factor; and it has been held that binding minimum prices are established by a price list captioned "Suggested Resale Price," sent out in conjunction with fair trade agreements and bearing a statement that it was "issued pursuant to fair trade agreements of this Company."²⁴

As in other contracts, it is, of course, necessary that the agreements be sufficiently definite and certain, and these are

22. *Lucien Lelong, Inc. v. H. Mohr & Co., Inc.*, 169 Misc. 560, 8 N. Y. S. (2d) 131 (Sup. Ct., 1938) affirmed no opinion 257 A. D. 820, 12 N. Y. S. (2d) 998 (First Dept., 1939); cf. also *Office Machine Dealers Association of New York, Inc. v. L. C. Smith & Corona Typewriters, Inc.*, 105 N. Y. L. J. 131, Col. 7, January 9, 1941 (Sup. Ct.)

23. *Magazine Repeating Razor Co. v. Weissbard*, 125 N.J.Eq. 593, 597, 7 A. (2d) 411, 413 (Chancery, 1939); *Schenley Products Co. v. Franklin Stores Co.*, 122 N.J.Eq. 69, 192 A. 375 (Chancery, 1937) reversed on other grounds, 124 N.J.Eq. 100, 199 A. 402 (Errors & Appeals, 1938); *Charmley Drug Shop v. Guerlain, Inc.*, 113 Fed. (2d) 247 (C. C. A. 3rd, 1940) reversing 31 Fed. Supp. 410 (D. N. J. 1940).

24. *Hiram Walker, Inc. v. Goldman, C. C. H. Trade Regulation Service*, 8th Ed., Vol. 3, Par. 25,137 (Wisconsin Circuit Court, Milwaukee County, April 1, 1938). The court not only relies upon the wording of the price list, but in addition refers to the fact that the retailers who had signed contracts had regarded the prices as the minimum prices and that, therefore, a practical construction had been given to the contracts which were binding upon the defendant, as a non-signing retailer.

important considerations to be borne in mind when a price schedule involves allowances for trade-ins.²⁵

The statutes provide that the unfair competition consists in wilfully and knowingly selling *below* the stipulated price.²⁶ From this it would seem clear that the producer may stipulate minimum prices; indeed, this is the very purpose of the law and the contract. In a very recent case in the U. S. District Court for Louisiana,²⁷ it appeared that the manufacturer had provided in its fair trade contracts that the retailer would not sell any of the manufacturer's commodities at a price "less than the minimum retail sale price or resale price in effect at the time of the sale for such" commodity. Surprisingly enough, the court held that such a contract was not contemplated within the terms of the Louisiana Fair Trade Act for the reason that that Act permitted contracts which provide that the buyer will not resell the commodity "except at the price stipulated by the vendor."²⁸ It would seem that the court fails to appreciate the purpose of the fair trade act. The act is primarily concerned with allowing a contract for prices below which the trademarked article will not be sold, and eliminating unfair price-cutting competition, and its attendant evils. It was not the purpose of the fair trade acts to freeze prices, but to permit a party, who so desires, to establish a level below which prices should not fall. The use of the word "stipulated" in the statutes does not preclude setting a "stipulated" minimum price. By common rules of construc-

25. For a situation involving trade-ins see *Schimpf v. R. H. Macy & Co.*, 166 Misc. 654, 2 N. Y. S. (2d) 152 (Sup. Ct. 1937); reversed memorandum opinion 254 A. D. 835, 6 N. Y. S. (2d) 328 (First Dept., 1938); cf. also *Ray Kline, Inc. v. Davega-City Radio, Inc.*, 168 Misc. 185, 187, 4 N. Y. S. (2d) 541, 543 (Sup. Ct., 1938).

26. See sec. 56:4-6 N. J. Act, *supra* note 1.

27. *Mennen v. Krauss Ltd.*, 37 Fed. Supp. 161 (E. D. La., New Orleans Div., 1941).

28. Cf. the same language in the N. J. Act; see sec. 56:4-5, subdivision 1(a) and 1(b), *supra* note 1.

tion, it would seem clear that the stipulated minimum prices are the stipulated prices, for selling below which there is a cause of action by an injured party. The statute is remedial, and should be given the construction which will effectuate its purposes. The position taken by the District Court of Louisiana would seem to be wrong in principle.

The court should take cognizance of the common trade practices as to notification of price changes. As in other contracts, the agreement may consist of more than one document or of a major instrument and schedules or lists. Thus, the body of the contract need not include the prices if they are adequately referred to and identified, and it has been held sufficient to describe the prices as those set out in the catalogs or price lists issued by the producer or wholesaler from time to time.²⁹

There need not be correlation between the price of a certain quantity and the same amount split into fractions. For example, a manufacturer of an item such as perfumes, wishing to preserve the high quality reputation of the product and desiring that none of it should be sold for less than a certain sum, stipulated that for an ounce or less of the perfume the price shall be fifty cents. A retailer purchased the perfume repackaged in small vials, each of which contained less than one-fifth of an ounce, and sold the small vials separately at ten cents each. The combined selling price of each five vials made the price of the perfume contained therein more than fifty cents per ounce; but in selling the vials separately the price was less than fifty cents for a quantity of less than an ounce. The producer was permitted to enforce the price restriction imposed by him for the fractional quantities sold separately.³⁰ The practice of

29. *Schill v. The Remington Putnam Book Company*, 17 A. (2d) 175, 181 (Md. Court of Appeals, 1941).

30. *Lentheric, Inc. v. W. T. Grant Co.*, 257 A.D. 348, 13 N. Y. S. (2d) 169 (First Dept. 1939) *aff'd* no opinion, 282 N. Y. 638, 25 N. E. (2d) 982 (1940). *Accord*:—*Lentheric, Inc. v. F. W. Woolworth Company*, 338 Pa. 523, 13 A. (2d) 12 (1940); *aff'g*, 35 Pa. D. & C. 572 (1939); *Lentheric, Inc. v. F. W. Woolworth*

the retailer in selling less than an ounce at below the manufacturer's stipulated price for such a quantity injured the good will value of the trademark by cheapening it in the minds of the public. The court observed that to permit the retailer to engage in this practice would in effect circumvent the very purpose of the fair trade act, that is to protect the good will of the producer.³¹

Some fair trade acts specifically provide against the violation of the price restriction by the giving away of premiums with fair trade merchandise.³² The premium question, in the absence of any specific reference in the statute, was considered in *Bristol-Myers Company v. Litt Brothers, Inc.*,³³ arising under the Fair Trade Act of Pennsylvania. It appears that the defendant, a retailer who had not signed a fair trade contract, engaged in the practice of giving away trading stamps which, when a number had been accumulated representing \$99.00 in purchases, were redeemable for a premium having a retail value of \$1.75.

Co., C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, PP 25,419 (Calif. Superior Court, Los Angeles County, March 29, 1940); *F. S. DeVoin v. W. T. Grant*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,106 (Calif. Superior Court, Los Angeles County, February 11, 1938).

31. *Lentheric, Inc. v. W. T. Grant Co.*, *supra* note 30. In *Guerlain, Inc. v. F. W. Woolworth Co.*, 170 Misc. 150, 9 N. Y. S. (2d) 886 (Sup. Ct. 1939) a preliminary injunction was issued, but on the final hearing (171 Misc. 990, 14 N. Y. S. [2d] 163) the court, while recognizing the controlling effect of the decision in *Lentheric, Inc. v. W. T. Grant Co.*, nevertheless dismissed the complaint on the ground that no damage was shown. In the *Grant* case other dealers had complained to the plaintiff that the practice of selling in small vials was damaging the high quality and reputation of plaintiff's products and injuring their business.

32. See, for example, the Virginia statute. Cf. also *Ed. Schuster & Company, Inc. v. Steffes*, 295 N. W. 737 (Wisconsin Supreme Court, 1941) holding constitutional a Wisconsin statute prohibiting giving away premiums in connection with the resale of any goods with knowledge that its resale price has been fixed by the producer or distributor when the resale price less the redemption value of the premium is below the fixed or established price; violation of this provision subjects the offender to a penalty of fine or imprisonment.

33. 336 Pa. 81, 6 A. (2d) 843 (1939) *aff'g* 33 Pa. D. & C 52; 530 (1937).

The practice had been engaged in by the defendant for a number of years. The stamp book had the legend, "Yellow trading stamps are not something for nothing but something instead of nothing—A discount for the money you spend with the storekeeper"; also, "Refusing to take yellow trading stamps from the storekeeper is like forgetting your change—Always ask for them." In affirming the lower court's denial of an injunction, the Pennsylvania Supreme Court held that to violate the act there must be a direct cut in price or a device which was palpably a subterfuge for the purpose of circumventing the law, and that such was not the case with the trading stamps in the instant suit. Further, the court felt that there was no damage shown by the plaintiff because, assuming that all purchases were confined to plaintiff's products, the amount by which the price would be reduced would be extremely small (four-tenths mills on a twenty-five cent purchase). As is pointed out in the dissenting opinion, however, the fact that the stamps were of small value is immaterial. It remains that there is a reduction in price not available to competitors strictly observing the stipulated price. Further, as is disclosed by the dissenting opinion, the customers evidently thought the stamps of value judging by the high percentage which were redeemed.³⁴

The point of view expressed in the dissent was followed in the California case of *Weco Products Co. v. Mid-City Cut Rate Drug Stores*.³⁵ Here the retailer gave away, with any purchase

34. The lower court made reference to the fact that amendments had been introduced in other states to specifically cover trading stamps, thereby indicating that the proponents of the fair trade act were not too sure of their position that the act precluded trading stamps from being given away in connection with the fair trade merchandise. As to the weight to be given to this argument, the dissent in the Supreme Court (*id.* page 99, Pa., page 852, A. (2d) rightly quotes from Justice Holmes in *U. S. v. Sicho*, 262 U. S. 165, 169, 67 L. Ed. 925, 927, that "there is no canon against making explicit what is implied, and adding a little emphasis to the endeavors to make the proposition broad."

35. C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,477 (Superior Court, Los Angeles County, June 21, 1940).

of ten cents, a stamp having a discount value of two mills, two stamps being given away on double stamp days. The stamp book bore the legend, "This book, when filled with our Stamps, will be redeemed for \$1.25 in Mdse. or \$1.00 in cash." The court held that giving away of the stamps constituted a discount on purchases, rejecting the contention of the defendant that the practice is a general expense of the store³⁶ and is the same as granting store services such as parking facilities; in these the service is given regardless of the size of the purchase or the type of merchandise purchased—whether fair trade or not.

It would seem that for a retailer to give away premiums in connection with the sale of fair trade merchandise sold at the minimum price cannot fairly be interpreted except as a sale below the minimum price. What the dealer is doing is selling the item plus something else at the minimum price stipulated by the manufacturer to be secured for the item alone; or conversely, securing less than the minimum price for the article. The fact that the premium given with each transaction, as in the case of trading stamps, is small, is immaterial. Where is the line to be drawn as to when the premium has become of sufficient value to constitute a violation of the minimum price? The invitation for other dealers to compete on the same basis might produce a rivalry in the giving away of premiums which would circumvent the contract, and lead to a reproduction of the chaotic conditions and unfair practices sought to be corrected by the fair trade acts. As to the suggestion in the *Litt* case that there is no damage when the undercut is small, a like argument could be made in many cases of price-cutting. The difference between the minimum resale price stipulated and that of the

36. Cf. *Bristol-Myers Company v. L. Bamberger & Co.*, 122 N.J.Eq. 559, 195 A. 625 (Chancery, 1937), *aff'd* 124 N.J.Eq. 235, 1 A. (2d) 332 (Errors & Appeals, 1939), on the practice of charging as a store administrative expense the amount by which employee sales were made below fair trade prices; an injunction was granted.

cut retail selling price may, in any given instance, be only a few cents; the next competitor might reduce the price a few cents more, other dealers would have to meet the cuts, and soon all except one might find it highly unprofitable to handle the item at all, and the manufacturer might be left with but one distributor, and that one, using the article for bait, uninterested in advancing the sale of the products. The test of damage is not the price differential represented by the cut; the sale below the fixed minimum is a threat to the good will of the trademarked item, and it is this good will that is sought to be protected.³⁷ It may be noted, too, that if one merchant were given the exclusive right to cut prices, even in the smallest degree, this would be a privilege of immense value to him and capable of great damage to his competitors.

Where local sales taxes or like taxes are in effect, a question is presented as to whether the adherence to the minimum price restriction requires the seller to add the amount of the tax to the established price. For example, a state imposes a "sales tax" which is called a privilege tax upon the person doing business

37. Whether Federal jurisdictional amount of \$3,000 is present is not to be determined by five sales involved;—the test of the jurisdictional amount is the value of the right to be protected; *Miles Laboratories v. Seignious*, 30 Fed. Supp. 549 (E. D. S. C., 1939). Here the court concluded, from the amount spent by the plaintiff in advertising and the resulting substantial volume of its products, that the value of plaintiff's right to distribute the product in question in South Carolina was substantially in excess of the jurisdictional amount. Note also *James Heddons' Sons v. Callendar*, 28 Fed. Supp. 643 (D. Minn., 1939) and *Stockman v. National Distillers Products Corp.*, 104 N. Y. L. J. 1169, Col. 4, October 19, 1940 (Sup. Ct.) to the effect that amount in controversy exceeded \$3,000. Cf. also *Calvert Distillers Corp. v. Nussbaum Liquor Store*, 166 Misc. 342, 2 N. Y. S. (2d) 320 (Sup. Ct., 1938)—"The only practical method of securing any kind of enforcement of the statute as now drawn is by way of injunctive relief. To obtain such relief under the statute it is unnecessary, generally speaking, for the owner or producer to prove the actual damage sustained. It is sufficient to establish that there is in existence a 'good will' to be protected and injury thereto will ordinarily be presumed if there is unlawful price-cutting." (Page 347, Misc., page 325 N. Y. S.).

at retail, without obligation on the part of the retailer to pass the tax on to the consumer. It has been held that to make a retailer add the tax to the established price, even though this practice may be widespread, would be employing the fair trade act to make mandatory what under the taxing statute is permissive.³⁸ Where, however, under the particular taxing statute the collection of the tax from the consumer is mandatory, the absorption of such a tax would be giving something of value to the vendee, and if the result were to bring the net price below the stipulated minimum, it would follow that there would be a violation of the price restriction.

The fair trade acts relate to commodities bearing "the trademark, brand or the name of the producer or owner of such commodity . . ." ³⁹ Since the act is designed to protect the good will identified with the trademark, brand or name appearing on the commodity, it would follow that if the mark or brand is removed the act would have no application.⁴⁰ However, where goods are repackaged and the label indicates this, giving the name of the producer, as well as that of the party repackaging, the goods are still under the identifying name of the producer and they are subject to the minimum price restriction imposed by the producer.⁴¹ Further, if by reason of some provision of law a trademark or label cannot be removed from a commodity, this does not operate to exclude the commodity from the price re-

38. *Miles Laboratories, Inc. v. Simon*, 33 Fed. Supp. 962 (E. D. Mich., 1940).

39. See sec. 56:4-5, subdivision 1, N. J. Act, *supra* note 1.

40. *Old Dearborn Distributing Company v. Seagram Distillers Corporation*, 299 U. S. 183, 195, 81 L. Ed. 109, 120 (1936). To the same effect see *Johnson & Johnson v. Weissbard*, 121 N.J.Eq. 585, 586, 191 A. 873 (Errors & Appeals, 1937). Some of the statutes specifically provide that the act does not apply when the trademark, brand or name is removed; see, for example, the statute in Indiana and Utah.

41. *Guerlain, Inc. v. F. W. Woolworth*, 170 Misc. 150, 9 N. Y. S. (2d) 886 (Sup. Ct., 1939)—application for injunction *pendente lite*.

striction.⁴² Prohibition against removing a label should not become the means of allowing anyone to injure the trademark good will of another.

The New Jersey Act specifically covers commodities sold from vending equipment, that is to say, if the "vending equipment from which said commodity is sold to consumers bears" the mark, name or brand of the producer or owner of the commodity, the commodity may be the subject of price restriction under the fair trade act.⁴³ This, of course, removes any doubt that items such as motor fuel sold from vending pumps are covered by the act, although by a liberal construction the same result could be achieved without a specific reference to vending machines.⁴⁴ It may be observed also that the fair trade act applies only to the commodity in the form sold, so that the producer of one of the materials going into its manufacture cannot control its resale price. For example, a producer of cloth cannot control the price of a dress where the material is sold to another party who manufactures the dress, even though the finished garment bears a card indicating that the cloth is the product of the first manufacturer. The "commodity" in such case is the dress, and not the material of which it is made.⁴⁵

42. See *Schenley Products Co. v. Franklin Stores Co.*, 124 N.J.Eq. 100, 104, 199 A. 402, 404 (Errors & Appeals, 1938).

43. See sec. 56:4-5, subdivision 1, of N. J. Act, *supra* note 1. The reference to vending machines was introduced by amendment in 1938.

44. Some of the statutes, *e.g.* Virginia, specifically refer to the "commodity which bears, or the label or container of which bears," the mark, brand or name of the producer; others like New York (and also New Jersey) use the expression "content" where "container" is used. It would seem that the good will of the producer or owner is as much identified with a product sold from a vending machine bearing his brand or name as in the case of ordinary merchandise where the brand or name is affixed to the article itself. See *Schumer v. Essar Gas Stations, Inc.*, 100 N. Y. L. J. 1125, Col. 6, October 14, 1938 (Sup. Ct.) where an injunction was granted under the New York Act for motor fuel; the New York Act has no specific reference to vending machines. See also *LePage v. Automobile Club of New York, Inc.*, *infra* note 118.

45. *Mallinson Fabrics Corporation v. R. H. Macy & Co.*, 171 Misc. 875, 14

The fair trade act requires that a trademarked commodity within its purview must be in "fair and open competition with commodities of the same general class produced by others."⁴⁶ While it is the purpose of the fair trade act to protect the good will identified with a branded item, it is intended to prevent and not to create monopoly. Hence, this provision, as well as the one prohibiting horizontal agreement, i.e., between producers, wholesalers or retailers.⁴⁷ Are commodities produced under a limited monopoly granted by law entitled to protection under the fair trade acts? Recently the Supreme Court had occasion to repeat that the patent laws as such do not confer any right to control the resale price of a patented article.⁴⁸ Likewise, the copyright laws as such do not confer any right to control the price of copyrighted items.⁴⁹ The test, therefore, is whether the patented or copyrighted article is produced under the trademark, brand or name of the producer and is in fair and open competition with commodities of the same class produced by others.⁵⁰ The question of the applicability of the fair trade laws

N. Y. S. (2d) 203 (Sup. Ct. 1939); comment, 1940, 40 COLUMBIA LAW REVIEW, page 345. Cf. also *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, *infra* note 50.

46. See sec. 56:4-5, subdivision 1, N. J. Fair Trade Act, *supra* note 1.

47. See sec. 56:4-4, N. J. Fair Trade Act, *supra* note 1.

48. *Ethyl Gasoline Corporation v. U. S.*, 309 U. S. 436, 84 L. Ed. 852 (1940); to same effect see *Boston Store v. American Graphophone Company*, 246 U. S. 8, 62 L. Ed. 551 (1918). The New York courts had at one time apparently taken the opposite view; see, for example, *Park & Sons Co. v. National Druggists Association*, 175 N. Y. 1, 67 N. E. 136 (1903).

49. *Bobbs-Merrill Co. v. Straus Stores*, 210 U. S. 339, 28 Sup. Ct. 772, 52 L. Ed. 1086 (1906). For a contrary point of view by the New York courts compare *Straus v. American Publishers Association*, 177 N. Y. 472, 69 N. E. 1107 (1904).

50. In *Weco Products Co. v. Mid-City Cut Rate Drug Store*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,523 (Calif. Superior Court, Los Angeles County, August 29, 1940) the defendant contended that since the tooth-brushes involved in that suit were made of a patented synthetic material, they were therefore not within the scope of the fair trade act. The court rejected this

to copyrighted items was considered recently in the Maryland case of *Schill v. Remington Putnam Book Co.*⁵¹ It was the contention of the defendant that the act did not apply to a copyrighted book, since such a book is in competition only with the same book. The court rejected this viewpoint. It is to be observed that a too narrow interpretation of the concept of competition will restrict the field in which the fair trade laws are to operate. Merely because no one but the copyright owner can control publication of a particular literary work should not deprive the producer of the right to prevent that item being made the subject of predatory price-cutting. Where there are other books being offered for sale, he is as much interested in not seeing his books offered as a bargain-lure or loss-leader as is the case of a cosmetic manufacturer or the producer of whiskey or any other producer of a branded article. It is only necessary to think of mystery stories or to look at magazines and periodicals displayed on newsstands to realize how much these works are in competition with others of the same class.

Some statutes permit only the owner of the mark, brand or name, or a distributor specifically authorized by such owner, to set the price restriction with reference to a commodity.⁵² The question remains as to the position of a wholesaler in the absence of any express statutory restriction (as is the case under the New Jersey Act) where no price restriction has been set by the producer.⁵³ In *Automotive Electric Service Corporation v. Times Square Stores Corp.*⁵⁴ arising under the New York Act,

contention, holding that the brushes were in competition with other brushes, and since they bore the brand of the producer, they came within the purview of the fair trade act.

51. 17 A. (2d) 175 (Md. Court of Appeals, 1941). (Motion reargument denied—C. C. H. Trade Regulation Service, 9th Ed., Par. 52,575).

52. See, for example, Virginia statute.

53. It is to be observed that in both *Old Dearborn v. Seagram*, and *Triner v. McNeil*, *supra* note 17, neither of the plaintiffs were producers.

54. 24 N. Y. S. (2d) 733 (Sup. Ct., 1940).

plaintiff, a distributor under a "franchise" from the manufacturer, entered into fair trade contracts with its customers. The New York Fair Trade Act, like the one in New Jersey, does not by its terms limit to a producer the right to set the price. The manufacturer did not make any agreements fixing resale prices, though it did supply the plaintiff, as well as other "franchise" holders, with forms of fair trade contracts to be used by them. In denying an injunction the trial court took the view that only the party whose name, mark or brand appears on the commodity may set the price pursuant to a fair trade agreement. It felt that to allow any one other than the owner of the name, brand or mark to set the price would cause confusion "for if a person other than such owner can do it then a hundred others may do it and each may fix different prices."⁵⁵ However, a California court, in considering the same argument, has suggested that there is no reason for anticipating a possible condition not actually presented to the court.⁵⁶ When the question as to the wholesaler's right to set the price was presented to the New Jersey Court of Errors and Appeals in *Schenley Products Co. v. Franklin Stores Co.*,⁵⁷ it was held that under the New Jersey

55. *Id.* at page 740.

56. "The court does not join with counsel for defendants in the fear of general disruption and confusion of the retail trade and of retail prices in the event that several wholesalers of the same product should set different prices by their contracts with their vendee retailers. Such a possibility exists if the producer should fail to exercise the power given by the statute to fix prices when he makes the sale in the first instance, but preservation of the trade in any given commodity would dictate a different course. No doubt the producer would find means of preventing such a condition or of terminating it once it had commenced. This question will likewise be considered if it should become concrete." *Parrott & Co. v. Somerset House, Inc.*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,026, page 25,098 (Superior Court, Los Angeles County, January 27, 1937).

57. 124 N.J.Eq. 100, 199 A. 402 (1937) reversing 122 N.J.Eq. 69, 192 A. 375 (Chancery, 1937); followed in *Pazan v. Silver Rod Stores, Inc.*, 129 N.J.Eq. 128, 18 A. (2d) 576 (Chancery, 1941); *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N.J.Eq. 105 (Chancery, 1941). Cf. also *Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co.*, 287 Ill. App. 187 (1936).

Act there was no requirement that the contract be made by the owner of the brand, mark or name; all that was required under the statute was that the commodity in question bear the brand, name or mark of the producer or owner. It has also been held that a wholesaler, under the New Jersey Act, has the right to set the price where the manufacturer having had a commodity under fair trade, subsequently discontinued its price structure and fair trade contracts.⁵⁸ Where a party has the right of exclusive distribution within a given area, the interest of that party in preserving the good will identified with the brand of the commodity is only in degree different from that of the owner of the mark himself, and in the absence of a specific limitation in the act, there would appear to be ample reason supporting the right of such distributor to make a resale price contract.⁵⁹

The fair trade acts provide against the making of horizontal agreements, that is to say, between producers or between wholesalers or between retailers.⁶⁰ However, where a wholesaler has

58. See *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, *supra* note 57. Here the manufacturer had at one time established a fair trade price for the commodity in question. Thereafter the manufacturer voluntarily discontinued its price structure with respect to the item. Subsequently plaintiff, a wholesaler, without the consent or approval of the manufacturer, entered into a fair trade contract with certain retailers. While the court denied the application for an injunction on other grounds, it specifically held, upon the authority of *Schenley v. Franklin Stores* (*supra* note 57) that the wholesaler could set the retail price in a contract made with a retailer rejecting the defense that the complainant, not being the producer or exclusive distributor, could not set the price.

59. *Hiram Walker, Incorporated v. Goldman*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,137 (Wisconsin Circuit Court, Milwaukee County, April 1, 1938); *Parrott Co. v. Somerset House, Inc.*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,026 (California Superior Court, Los Angeles County, January 27, 1937). Cf. also *Broff v. Silver Liquor Stores, Inc.*, 25 Conn. L. J. 288, 5 Conn. Sup. 288 (1937). As to the applicability of the resale price restriction set by a producer for wholesalers, to sales by such producer to retailers, see *Gillette Safety Razor Co. v. Green*, 167 Misc. 251, 3 N. Y. S. (2d) 822 (Sup. Ct., 1938), *aff'd* 258 A. D. 723, 15 N. Y. S. (2d) 142 (First Dept., 1939).

60. See sec. 56:4-4 New Jersey Act, *supra* note 1.

agreed not to sell to retailers except with a stipulation that the retailer is not to sell below the producer's retail minimum, in a sale by the wholesaler to another wholesaler, there would, of course, be no prohibition against including the provision relating to sales to or by the retailer. Such a situation may be covered by the producer in his contracts with wholesalers.⁶¹ While in one case it has been held that two producers cannot agree on a minimum price for a combination deal involving a product of each,⁶² this would seem to be a rather strained view when the items involved in the combination are not competitive with each other; since it would not appear to be the purpose of the act to withdraw its sanction from a mere joint venture combining in one package two dissimilar items, which are in fair and open competition with articles of like class produced by others.

All of the fair trade acts make certain exceptions when the minimum price restriction as to price shall not be deemed applicable. For example, under the New Jersey statute it is provided that it is implied in each fair trade contract that the restriction as to prices does not obtain in closing-out the owner's stock of the commodity or when the goods are damaged or deteriorated, and notice thereof is given to the public, or when the sale is

61. See sec. 56:4-5, subdivision 1(b) N. J. Act; *cf.* also Virginia statute where this situation is specially covered by the Act.

62. *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N.J.Eq. 105, 110-111 (Chancery, 1941); to like effect *cf.* *Magazine Repeating Razor Company v. Weissbard*, 125 N.J.Eq. 593, 596, 7 A. (2d) 411, 413 (Chancery, 1939). See also *Rayess v. The Lane Drug Co.*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,602 (Ohio Court of Appeals, December 23, 1940). Of course, there would be no objection to parties joining together for the purpose of bringing suit. Compare, for example, *Pekarne v. J. Rothstein Sons, Inc.*, 99 N. Y. L. J. 2978, Col. 3, June 19, 1938 (Sup. Ct.) holding it proper for several retailers to join in one suit; in fact, the defendant urged that plaintiffs were not members of an association which the court regarded as immaterial. Also, note *Iowa Pharmaceutical Association v. May's Drug Stores, Inc.*, 229 Iowa 554, 294 N. W. 756 (1940) where the suit was by the association individually and as agent for a group of retailers.

made by any officer acting under orders of any court.⁶³ These three exceptions appear in all the acts in one form or another. Whether goods are damaged within the meaning of this exception probably presents a simpler question of fact than does that presented by a determination of what is a close-out. In a closing-out certainly the least that should be demanded of one who relies on this exception is good faith. Thus, a dealer cannot be regarded as closing-out if he buys the goods simultaneously with the advertisement announcing the close-out or if he has not carried the goods on the shelves.⁶⁴

In addition to the above exceptions, the New Jersey statute does not apply to books sold to libraries located in the State.⁶⁵ In similar fashion, the New York Act makes an exception not only in favor of libraries, but also in favor of governmental agencies.⁶⁶ This situation should be compared with that presented in the Wisconsin case of *Weco Products v. Reed Drug Co.*⁶⁷ The court, in considering the constitutionality of the Wisconsin Fair Trade Act, declared that an exemption in favor of cooperatives was invalid. The statute provided that it did not apply to any cooperative society or association not organized for profit. It was pointed out that the exemption was not confined to transactions between an association and its members, but that it was applicable as well to sales made by members of the association, in competition with other retail dealers, to the public at large. The exception, therefore, is inconsistent with the general purpose of the fair trade act. However, it has been held that

63. See sec. 56:4-5, subdivision 2 of N. J. Act, *supra* note 1.

64. *National Distillers Corporation v. Louis Greenwald Liquors*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,352 (U. S. D. C. Colorado, 1939).

65. Sec. 56:4-4 of N. J. Act, *supra* note 1; the exception as to libraries was introduced by an amendment in 1940.

66. Sec. 369-a General Business Law; added by Laws of 1941, Chapter 39, effective March 3, 1941.

67. 225 Wisc. 474, 274 N. W. 426 (1937).

sales below the minimum wholesale price, made by a cooperative to its own members consisting of retail grocers, none other but members being permitted to buy from the cooperative, did not constitute a violation of the wholesale price restriction, the defendant's members, all being retailers, observing the resale prices stipulated by the producer. The transactions of the defendant are distinguished by the court from that of an ordinary wholesaler or jobber, in that the purchases of the latter are made for resale, whereas in the cooperative the purchases are really made by a group of retailers acting in concert through their association, for resale to ultimate consumers.⁶⁸

May a contract make exceptions, other than those stipulated in the act itself, where the fair trade price is not to apply? This question was answered in the affirmative in a case involving the Maryland Act, the court holding that the fair trade act did not preclude reasonable exceptions being agreed upon by the parties to the contract.⁶⁹ There would seem to be no reason for regarding an agreement as enforceable because of a reasonable stipulation as to exceptions not affecting competition; as for example, where a statute does not cover libraries, governmental agencies, etc., there should be no objection to permitting the party establishing the price to make exceptions if he so desires in favor of sales to such classes of consumers.⁷⁰ However, where the con-

68. *Welch Grapejuice Co. v. Frankford Grocery Co.*, 36 Pa. D. & C. 653.

69. *Schill v. The Remington Putnam Book Company*, 17 A. (2d) 175, 180-1 (Md. Ct. of Appeals, 1941).

70. Cf. the contrary dicta in *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N.J.Eq. 105, 109 (Chancery, 1941). "Except as the legislature itself may constitutionally provide, the fixed price must apply to all consumers alike and this can be accomplished only by binding all retailers to maintain the same minimum price schedule. A manufacturer may not require or permit one group of retailers to sell at a fixed price leaving another group selling the same product free to pursue its own price policy. *Similarly the manufacturer may not, except as permitted by statute (see 1940 amendment exempting libraries) set a different price for classes of consumers.* The very description of the statute as a fair trade act carries with it the fundamental equitable concept that 'equality is equity.' Exemptions from price restriction cannot be left to the sole uncontrolled, arbitrary act of the manufacturer." (Italics ours.)

tract attempts to make exceptions in favor of classes of dealers, then the exception would be invalid for the reasons mentioned in the *Weco* case.⁷¹

It is incumbent upon one who seeks to enforce a price restriction against one who is not a party to a contract, to show that the party proceeded against had notice of the price restriction. This is necessary because to charge that party with liability it must be shown that the violation of price restriction was done wilfully and knowingly.⁷² The notice need not follow any particular form. Thus, the receipt of a letter advising of the existence of fair trade contracts and enclosing an undated and unsigned form of contract is sufficient notice of the existence of price restrictions.⁷³ The restriction, however, must be knowingly violated. For example, in *Weco Products Co. v. Sam's Out Rate, Inc.*,⁷⁴ the defendant, a retailer, had been advised of the price restriction, but was under a misapprehension as to the effective date of one of the fair trade act due to information which he had received from the Clerk of one of the Houses of legislature. The court held that there was no wilful and knowing violation of the price restriction in that the defendant was evidently

71. *Supra* note 67. Insofar as the court in the Frank Fischer case (*supra* note 70) asserts that a manufacturer may not be permitted to exempt a group of retailers, that is to say, make a dealer exception, the view of the court is sound.

72. See sec. 56:4-6, N. J. Act, *supra* note 1. *Trilling v. Sugarman*, 39 Pa. D. & C. 129 (1940); *Shryock v. Association of United Fraternal Buyers, Inc.*, 135 Pa. Superior Court 428, 5 A. (2d) 581 (1939). As to averments of notice "on information and belief" where a preliminary injunction is sought, see *Citarella v. Bryant Wine & Liquor Shop, Inc.*, 103 N. Y. L. J. 2868, Col. 2, June 25, 1940 (Sup. Ct.) and *Miller v. Coliseum Wine & Liquor Stores, Inc.*, 103 N. Y. L. J. 2721, Col. 1, June 15, 1940 (Sup. Ct.).

73. *Seagram Distillers Corporation v. Seyopp Corporation*, 2 N. Y. S. (2d) 550 (Sup. Ct., 1938). Notice may be given by price charts—*Hiram Walker, Incorporated v. Goldman, C. C. H. Trade Regulation Service*, 8th Ed., Vol. 3, Par. 25,137 (Wisconsin Circuit Court, Milwaukee County, April 1, 1938). *Calvert Distillers Corporation v. Nack*, 101 N. Y. L. J. 2015, Col. 2, May 2, 1939 (Sup. Ct.).

74. 295 N. W. 611 (Mich., Sup. Ct., 1941).

under a belief that the act was not yet in effect as a result of the advice received by him. This calls to mind the practical necessity of avoiding any confusion as to when price changes are to go into effect, for the doubts resulting from lack of clarity will be resolved in favor of the defendant.⁷⁵

The question presents itself as to the number of parties who must be advised of a price restriction. This was considered in a case recently arising in New Jersey. The plaintiff, a wholesaler, gave notice of the price restriction to 1200 retailers. The product in question was handled by both drug stores and grocery stores. It was conceded that in the State there were approximately 1800 drug stores and upwards of 4000 grocery stores. The defendant asserted that the complainant had failed to comply with the statute because it did not notify all retailers of the product in question, including the immediate competitors of the defendant. This defense was sustained by the court. While holding, in answer to a contention of the complainant that the duty to notify defendant's competitors of the price restriction rests upon the complainant and not upon the defendant, the court went further and took the view that the competitive area is the entire state, saying: "... The statute is state-wide in its application and the court cannot draw the line where competition begins in one section of the state and ends in another. The execution of one contract with a retailer in the state, no matter where he is located, is sufficient to bind all other retailers throughout the state, and this being so it cannot be said that the statute calls for a distinction as to competitive areas where the manufacturer or distributor has failed to bind all retailers to maintain the minimum price fixed by him."⁷⁶ It does not follow because a

75. *National Distillers Corporation v. Brandie-Wine Stores, Inc.*, 99 N. Y. L. J. 601, Col. 1, February 4, 1938 (Sup. Ct.); cf. also *Trilling v. Sugarman*, *supra* note 72.

76. *Frank Fischer Merchandising Corporation v. Ritz Drug Co.*, 129 N.J.Eq. 105, 109-110 (Chancery, 1941).

defendant is allowed to raise the defense that others in the competitive area have not been bound by the price restriction, that the competitive area is coterminous with the state boundaries or that failure to notify dealers, no matter where situated, is a proper defense. In viewing the competitive area as coterminous with the state, a court may not be following a factual pattern which actually exists. The court should look at the situation realistically. It could hardly be supposed, for example, that a producer's failure to notify someone in an entirely distinct competitive area, located in a far distant part of the state, should be a justification for a dealer to depreciate the producer's trademarked items or to injure the business of merchants dealing therein in the city or vicinity of the defendant.⁷⁷ Further, regardless of the competitive area, it would not appear that a defense of failure to give notice to other dealers should be available unless the defendant shows that he was adversely affected.

The necessity that a dealer, to be charged with observance of the price restriction, have notice, raises the question as to whether the price restriction can operate retroactively so as to cover merchandise acquired before notice. It has been held that the restriction as to pricing applies only prospectively to merchandise acquired after notice.⁷⁸ While goods acquired before

77. An interesting situation in connection with the problem of competitive areas is afforded by the cases of *Weinstein v. Peter Corbyon Liquor Store, Inc.*, 104 N. Y. L. J. 83, Col. 5, July 11, 1940 (Sup. Ct.) and *Steinberg v. Wall Street Liquor Corporation*, 101 N. Y. L. J. 669, Col. 7, February 10, 1939 (Sup. Ct.) where on application for preliminary injunctions there was involved the question of injury.

78. *Oneida Ltd. v. Macher Watch Co., Inc.*, 99 N. Y. L. J. 1706, Col. 3, April 8, 1938 (Sup. Ct.); *Lentheric, Inc. v. Weissbard*, 122 N.J.Eq. 573, 195 A. 818 (Chancery, 1937); *cf.*, however, *Barron Motors, Inc. v. May's Drug Stores, Inc.*, 227 Iowa 1344, 291 N. W. 152 (1940)—Here the retailer argued that it bought its stock of merchandise before notice to desist from price-cutting was received. The court expressed itself as follows: "Appellant argues that it bought its stock of 'Zerone' before notice to desist was received. It cites a New Jersey case under a statute which makes a similar law applicable only to such products as

notice are not governed by the price restriction, this does not mean that it is incumbent upon the complainant to aver and prove that the goods were acquired after notice; rather, it is a part of the defendant's case to establish lack of notice at the time of the acquisition of the goods in question.⁷⁹

The New Jersey statute provides that a wilful and knowing violation of the price restriction "is actionable at the suit of the producer or distributor of such commodity or at the suit of any retailer selling such commodity at not less than the price stipulated in any contract entered into pursuant to the provisions of" the act.⁸⁰ The express wording of this statute permits a suit by one retailer against another. In New York, the statute provides that the violation of the resale agreement "is actionable at the suit of any person damaged thereby." The New York Court of Appeals in *Port Chester Wine & Liquor Shop, Inc. v. Miller Brothers*,⁸¹ had before it the question of a retailer's right of ac-

were acquired after notice of the price fixed. Our statute contains no such provision." (Page 1346 Iowa; page 154, N. W.). The statute involved in this case appears to be substantially the same as that involved in *Lentheric, Inc. v. Weissbard*—the case to which the court presumably has reference. Possibly the *Barron* case may be distinguished on the ground that the defendant had knowledge of the price restriction before notice to desist was received. If a party is informed of the price restriction, he would be under a duty of observance and would not be privileged to disregard the restriction on the claim that he had no further notice to cease and desist.

79. *Goldsmith v. Mead Johnson*, 176 Md. 682-689, 7 A. (2d) 176-178 (1939); *Seagram Distillers Corporation v. Seyopp*, 2 N. Y. S. (2d) 550 (Sup. Ct. 1938) (Here the court first ruled that plaintiff must aver that goods were acquired after notice, but on reargument court changed its view and issued injunction *pendente lite*); *Hiram Walker, Incorporated v. Goldman*, C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,137 (Wisconsin Circuit Court, Milwaukee County, April 1, 1938); *James Heddons' Sons v. Callendar*, 29 Fed. Supp. 579 (D. Minn., 1939).

80. See sec. 56:4-6, N. J. Act, *supra* note 1; the specific reference to retailers was introduced by amendment in 1938.

81. 281 N. Y. 101, 22 N. E. (2d) 253 (1939) *aff'g.* memorandum opinion 254 A. D. 780, 6 N. Y. S. (2d) 147 (Second Dept., 1938) following same case 253

tion against another retailer. In this case the suit was brought by two retailers who had signed fair trade contracts. The court held that the statute conferred a right of action upon a retailer to restrain a violation by another retailer of the resale price agreement. The lower court, at Special term, had denied an injunction in part on the theory that to permit the action to be maintained would amount to a sanction of horizontal price fixing.⁸² The Appellate Division, in taking the contrary view, aptly pointed out that a retailer was likely to suffer more than the producer as a result of price cutting.⁸³

In the Port Chester case the parties plaintiff were both signatories to a contract. However, the opinion of the Court of Appeals goes on to say that the phrase "actionable at the suit of any person damaged thereby" must "be taken to include a retail reseller who is bound to abide by the resale price restrictions of a fair trade agreement."⁸⁴ A non-signatory being equally so bound, it follows that he likewise has a cause of action. This issue was presented in the New Jersey case of *Burstein v. Charline's Out Rate*.⁸⁵ The fact that the plaintiff was not a signatory to a fair trade contract was held by the court to be immaterial. "The statute . . . affords protection to retailers who are damaged, whether signatory or not."⁸⁶ It should be remembered that a

A. D. 188, 1 N. Y. S. (2d) 802 (Second Dept., 1938) which reversed 1 N. Y. S. (2d) 336 (Sup. Ct., 1937).

82. 1 N. Y. S. (2d) 336 (Sup. Ct., 1937).

83. 253 A. D. 188, 1 N. Y. S. (2d) 802. See also *LePage v. Automobile Club of New York, Inc.*, 258 A. D. 981, 981-2, 17 N. Y. S. (2d) 568, 569 (Second Dept., 1940). "This action is maintainable because the plaintiff has an interest in the good will of the trade-name of the gasoline which he sells, which is a property right"—citing *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros.*, *id.* 253 A. D.

84. *Supra* note 81 at page 106 N. Y., page 254 N. E.

85. 126 N.J.Eq. 560, 10 A. (2d) 646 (Chancery, 1940).

86. *Id.* at page 561 N.J.Eq., 647 A. (2d). Note also *Schenley Products Co. v. Franklin Stores Co.*, 124 N.J.Eq. 100, 199 A. 402 (Errors & Appeals, 1938) reversing 122 N.J.Eq. 69, 192 A. 375 (Chancery, 1937)—Here one of the plain-

retailer is bound by the price restriction after notice even though only one contract has been signed.⁸⁷ The price restriction set by a single contract becomes operative as to all who are notified of its existence. A retailer may not undersell in order to meet the competition of another retailer who is violating the price restriction, since, as is shown later in the text, violation by others does not constitute a defense. Further, as indicated by the Appellate Division in the Port Chester case, the retailer would probably be injured more seriously than the producer as a result of the unfair price-cutting competition in a particular place. To deny a right of action to a retailer not a party to a contract, but who is observing the price restriction in obedience to notice thereof, would subject him to a liability without affording him corresponding relief and remedy against others. The observing retailer, though not a party to a contract, is bound by its terms, and is as much a person damaged by the violation of the price restriction as is the party who has signed the contract, and accordingly there should be no question as to his right to maintain an action against another retailer. Any other conclusion would be violative of elementary principles and standards of equity.

Since it must be regarded that the right of action is conferred directly by the statute upon the retailer,⁸⁸ it should follow that a retailer bound under the contract, as a signatory or by notice, is not barred from relief merely because by reason of peculiar circumstances a producer had disqualified himself from enforcing the price restriction. Thus, where a manufacturer has

tiffs was a producer who was not a party to a contract, but was permitted to maintain an action on a contract made by a wholesaler. In accord with the view expressed in *Burstein v. Charline's Cut Rate, Inc.*, is *Weisstein v. Peter Corbyon Liquor Store, Inc.*, 174 Misc. 1075, 22 N. Y. S. (2d) 510 (Sup. Ct., 1940) under the New York Act, holding good a complaint by a non-signatory retailer. See also *Broxmeyer v. Polikoff*, 33 Pa. D. & C. 224 (1940).

87. *Revlon Nail Enamel Corporation v. Charmley Drug Shop*, *supra* note 20.

88. *Port Chester Wine & Liquor Shop, Inc. v. Miller Brothers*, *supra* note 81.

been denied an injunction because of alleged unjustified refusal to sell, the same defense was held not available in a retailer suit involving the product of that manufacturer.⁸⁹ The point is very interestingly brought out in the New York case of *Stockman v. Wilson Distributing Co.*⁹⁰ Here the plaintiff, a retailer, brought an action against a distributor for a declaratory judgment that certain fair trade agreements had been abandoned and asking further that the defendant be restrained from enforcing the prices established by such contracts. The complaint in effect alleged that due to lax and discriminatory enforcement the defendant had abandoned the price restriction. The complaint seeking a declaratory judgment was dismissed. It was held that even assuming that the non-diligence of the defendant-producer amounted to an abandonment of his right to enforce the contract, yet price-cutting in violation of the contract would still remain actionable at the suit of any person damaged thereby, including competing retailers, and that in the declaratory action it was not possible to determine the jural relations and rights of all retailers.⁹¹

The effective way to enforce the price restriction so that it operates equitably as to all obligated parties is by way of injunctive relief against an offender.⁹² But the party seeking the forum

89. *Burstein v. Charline's Cut Rate*, 126 N.J.Eq. 560, 562-3, 10 A. (2d) 646, 647-8 (Chancery, 1940).

90. 104 N. Y. L. J. 1221, Col. 4, October 23, 1940 (Sup. Ct.) *aff'd*. memorandum 105 N. Y. L. J. 985, Col. 7, March 4, 1941 (A. D. Second Dept.).

91. See also *Ferran v. Woodside Wine & Liquor Store, Inc.*, 256 A. D. 1103 (Second Dept., 1939) reversing 101 N. Y. L. J. 408, Col. 6, January 26, 1939 (Sup. Ct.)—In the lower court an application for a temporary injunction was denied, the affidavit in opposition asserting that the defendant would interpose an answer showing that it called upon distributors to take action to stop price-cutting, there being a price-war, but that no action was taken and defendant was obliged to meet competition; reversed on appeal.

92. *Calvert Distillers Corporation v. Nussbaum Liquor Stores, Inc.*, *supra* note 37; see also *Eastman Kodak Co. v. E. M. F. Electric Co.*, 36 Fed. Supp. 111 (D. Mass., 1940) where the court expressed itself as follows: " * * * the acts

of equity must of course meet the challenge of an equitable defense asserted by the defendant. "In construing and enforcing the statute, therefore, equitable principles must be applied suitable to the nature and purpose of the law involved."⁹³

A defense very commonly raised in enforcement suits is that others are similarly cutting prices. A retailer will sometimes attempt to claim such a defense on the ground that there is a so-called "price-war."⁹⁴ However, price-cutting by others is no justification for like conduct by the defendant against whom suit is brought.⁹⁵ Obviously the injustices of a disorganized price situation were among the reasons for the remedies afforded by the fair trade law, and recourse should be had to those remedies.

Since a complainant should exercise reasonable diligence in upholding his rights⁹⁶ the extent to which effort is directed

of the defendant constitute unfair competition and will cause irreparable injury to the plaintiff's name, trademarks, brands, and labels, unless the defendant is enjoined from continuing its violations. Further, I conclude the plaintiff has no other adequate remedy at law." (Page 111 Fed.)

93. Calvert Distillers Corporation v. Nussbaum Liquor Stores, Inc., *supra* note 37 at page 345 Misc.; page 324 N. Y. S.

94. See Weisstein v. D. Sokolin & Co., Inc., 100 N. Y. L. J. 1564, Col. 1, November 10, 1938 (Sup. Ct.) and *cf.* Wilson Distilling Co., Inc. v. Friedland, 11 N. Y. S. (2d) 154 (Sup. Ct., 1939).

95. Calvert Distilling Co. v. Gold's Drug Stores, 123 N.J.Eq. 458, 198 A. 536 (Chancery, 1938); National Distillers Products Corporation v. Columbus Circle Liquor Stores, Inc., 166 Misc. 719, 2 N. Y. S. (2d) 319 (Sup. Ct., 1938); National Distillers Products Corporation v. Martell's Wine & Liquor Co., Inc., 100 N. Y. L. J. 979, Col. 7, October 5, 1938 (Sup. Ct.); Dougherty v. Goldstein, 104 N. Y. L. J. 143, Col. 6, July 18, 1940 (Sup. Ct.); Wilson Distilling Company v. Gelb, 101 N. Y. L. J. 1790, Col. 1, April 19, 1939 (Sup. Ct.); Calvert Distillers Corp. v. Stockman, 26 Fed. Supp. 73 (E. D. N. Y., 1939); Goldstein v. Mishkin Brothers Pharmacy, Inc., 104 N. Y. L. J. 184, Col. 5, July 24, 1940 (Sup. Ct.); see also Ray Kline, Inc. v. Davega-City Radio, Inc., *infra* note 101.

96. See Fein v. Wohl's Drug Store, Inc., 104 N. Y. L. J. 1434, Col. 5, November 6, 1940 (Sup. Ct.) and Bristol-Myers Company v. J. Rothstein Sons, Inc., 103 N. Y. L. J. 557, Col. 5, February 3, 1940 (Sup. Ct.) on application for temporary injunction where price cutting had been engaged in by the defendant for a considerable time (approximately two years) before suit was brought.

towards procuring adherence to established prices will have a bearing on the issue of whether there has been acquiescence in the price-cutting.⁹⁷ This does not mean that simultaneous suits must necessarily be started against every violator.⁹⁸ "There must be a sincere and diligent effort to prevent price-cutting of branded products through legal process if necessary."⁹⁹ One suit may be sufficient to bring about the desired result in a particular area—the possibility of likewise being subject to action being enough to induce others to discontinue their violation.¹⁰⁰ Where the plaintiff-producer induces, or the plaintiff-retailer pursues a course of price-cutting, equitable principles would bar relief.¹⁰¹

A producer runs the risks of denial of relief if the court thinks he has dealt unfairly with the defendant.¹⁰² Has the producer acted inequitably when he has refused to sell the defendant? In the New Jersey case of *Lentheric, Inc. v. Weissbard*¹⁰³ in resist-

97. *Gordon J. Weil, Inc. v. Gimbel Brothers, Inc.*, 101 N. Y. L. J. 1621, April 7, 1939 (Sup. Ct.); *Automotive Electric Service Corp. v. Times Square Stores Co.*, 24 N. Y. S. (2d) 733, 741 (Sup. Ct., 1940); *Schimpf v. R. H. Macy & Co.*, 166 Misc. 654, 2 N. Y. S. (2d) 152 (Sup. Ct., 1937) reversed on other grounds 254 A. D. 835, 6 N. Y. S. (2d) 328 (First Dept., 1938); see also *Bathasweet Corporation v. Weissbard*, *infra* note 114.

98. See *Calvert Distilling Co. v. Gold's Drug Stores, National Distillers Products Corporation v. Columbus Circle Liquor Stores, Inc., National Distillers Products Corporation v. Martell's Wine & Liquor Co., Inc.*, *supra* note 95.

99. *Calvert Distillers Corporation v. Nussbaum Liquor Store, Inc.*, *supra* note 37 at page 346 Misc.; page 325 N. Y. S.

100. *Calvert Distilling Co. v. Gold's Drug Stores*, *supra* note 95.

101. *Calvert Distillers Corporation v. Harry Fox, Inc.*, 105 N. Y. L. J. 211, Col. 4, January 14, 1941 (Sup. Ct.); *Wilson Distilling Company, Inc. v. Stockman*, 11 N. Y. S. (2d) 51 (Sup. Ct., 1939); *Ray Kline, Inc. v. Davega City Radio, Inc.*, 168 Misc. 185, 4 N. Y. S. (2d) 541 (Sup. Ct., 1938); *Weinstein v. Peter Corbyon Liquor Store, Inc.*, 174 Misc. 1075, 22 N. Y. S. (2d) 510 (Sup. Ct., 1940).

102. *Schenley Distributors, Inc. v. Nussbaum Liquor Stores, Inc. and Calvert Distillers Corporation v. Nussbaum Liquor Stores, Inc.*, 98 N. Y. L. J. 2183, Col. 7, December 15, 1937 (Sup. Ct.).

103. 122 N.J.Eq. 573, 195 A. 818 (Chancery, 1937).

ing an application for a preliminary injunction, the defendant asserted that notwithstanding its offer to purchase the complainant's products on the same terms as accorded to other chain stores, the defendant being an operator of a chain, the plaintiff had refused to sell the defendant. The complaint alleged that complainant's products were obtained by the defendant from third parties without complainant's knowledge or consent. The Chancellor denied the injunction. While affirming the right of the manufacturer to refuse to sell the defendant, the court felt it is inequitable to compel the defendant to maintain established prices where the plaintiff "refuses to make it possible for defendants to deal in its products and thus to maintain prices."¹⁰⁴ Here seems to be a peculiar confusion of equitable principles. Since the court recognizes the right of the plaintiff to refuse to sell the defendant, what the court did in this case was to try to say that a manufacturer had a choice of remedies—either refusal to sell or enforcement of fair trade prices. But the refusal to sell was no remedy at all if plaintiff nevertheless secured the merchandise from sources unknown to plaintiff. The refusal to sell would not protect plaintiff against damage to his good will from price-cutting on merchandise acquired by defendant from whatever sources. Even before the fair trade laws, a manufacturer could legally refuse to sell a party who refused to follow the price announced in advance by the manufacturer.¹⁰⁵ One of the accomplishments of the fair trade statutes is to equalize the position of the retailer buying directly from the manufacturer or from a known wholesaler with that of a dealer securing his supplies from sources not known to the producer, and to do away with the unfair competitive advantage that the latter merchant had over the former in the matter of cutting prices. There-

104. *Id.* page 575 N.J.Eq., page 819 A.; followed in *Charmley Drug Shop v. Guerlain, Inc.*, 113 Fed. (2d) 247 (C.C.A. 3rd, 1940) reversing 31 Fed. Supp. 410 (D. N. J., 1940).

105. *U. S. v. Colgate*, 250 U. S. 300, 62 L. Ed. 992 (1918).

fore, what the court did in effect in the case referred to was to disregard the remedy afforded by the fair trade law and put the parties back to the partial and ineffective remedy of refusal to sell, to the continuing injury of the trademark and to the detriment and damage of merchants, purchasing from the manufacturer or known jobbers, who were obliged to maintain prices. Other courts have rejected the point of view expressed in *Lentheric* against *Weissbard*, holding that the refusal to sell does not constitute a defense.¹⁰⁶ It was said in one of the cases, involving the Connecticut Act: "Certainly it is no part of the unwritten law of Connecticut that a manufacturer who sells his product to A, B and C is under legal obligation to sell also to X, Y and Z merely because the latter also may wish to buy of him. Nothing in the Connecticut Fair Trade Act suggests the existence of such an obligation as a limitation upon the manufacturer's right to the relief afforded by the statute. And from the numerous cases cited under the Fair Trade Acts in other states, except for the *Weissbard* case in New Jersey commented on above, not a single case is cited to me which even suggests that the plaintiff's willingness to sell to all-comers is a condition precedent to its right to relief, or even a relevant factor bearing upon that right."^{106a}

It has been stated that while there is no requirement to invoke legal process against every violator, "at least where he (the producer or owner) does not resort to legal action, the producer

106. *Eastman Kodak Company v. Johnson Wholesale Perfume Co., Inc.*, digest C. C. H. Trade Regulation Service, 9th Ed., Par. 52,539 (U. S. D. C. Com., February 11, 1941); *Elizabeth Arden Sales Corporation v. Johnson Wholesale Perfume Co., Inc.*, digest C. C. H. Trade Regulation Service, 9th Ed., Par. 52,573 (Mass. Superior Ct. in Equity, April 14, 1941); *Barron Motors, Inc. v. May's Drug Stores, Inc.*, 227 Iowa 1344, 291 N. W. 152 (1940); see also *Eli Lilly & Company v. Saunders*, *infra* note 108.

106a. *Eastman Kodak Company v. Johnson Wholesale Perfume Co., Inc.*, *supra* note 106. (Advance copy of opinion obtained from C. C. H.; no report available at the time of preparation of this article.)

is required to use reasonable diligence to see to it that none of his products continue to be sold to a retailer who cuts prices after the producer has notice of such violation."¹⁰⁷ This suggests that if the Chancellor is correct in the Lentheric case, then the producer would be on the horns of a dilemma. If he engaged in a permissible practice in refusing to sell a price-cutter he would be confronted with the prospect of having his diligence rewarded by the denial of injunctive relief should the price-cutter obtain merchandise from sources other than the producer. Since the producer runs the risk of abandoning his rights under fair trade if he does not exercise diligence to secure adherence to prices, the refusal to sell to the offending price-cutter could hardly be regarded as conduct warranting a denial of equitable relief. Nor would the refusal to sell cure the situation for the producer or non-offending retailers if the price-cutting retailer continued to secure the merchandise and slash the price. The point of view expressed in *Lentheric v. Weissbard*, therefore, does not appear to be correct in principle.¹⁰⁸

In *Revlon Nail Enamel Corporation v. Charmley Drug*

107. *Calvert Distillers Corporation v. Nussbaum Liquor Stores, Inc.*, *supra* note 37, at page 346 Misc., page 325 N. Y. S. This language was quoted approvingly in *Magazine Repeating Razor v. Weissbard*, *infra* note 114 at page 595 N.J.Eq., page 412 A. (2d). To similar effect see *Calvert Distilling Corporation v. Gold's Drug Stores*, *supra* note 95, at page 461 N.J.Eq., page 538 A.

108. In *Eli Lilly & Company v. Saunder*, 216 N. C. 163, 4 S. E. (2d) 528 (1939) the sale to the defendant rather than the refusal to sell was asserted by the defendant as estopping the plaintiff from relief. The court rejected this argument. "It was optional with the plaintiff whether it obtained the contract or relied upon the statute, and the simple act of sale to defendant, without stipulating a resale price, did not carry with it any assumption that the defendant might violate the law or confer upon him the right to do so. If the law itself is valid, and we hold it to be so, it is a public statute which the defendant was bound to have in contemplation when he made the purchase."

"In *Lentheric, Inc. v. Weissbard*, 122 N.J.Eq. 573, 195 A. 818, the argument was successfully made that where the plaintiff refused to sell to the defendant, he was estopped in equity to assert his claim when defendant had obtained goods elsewhere. Here we are confronted with the direct opposite of that argument.

*Shop*¹⁰⁹ likewise arising under the New Jersey act, the defense of refusal to sell was raised, but rejected. Here the manufacturer had refused to sell not only the defendant, a drug store, but to all other drug stores. The court distinguishes this situation from the one presented in *Lentheric v. Weissbard* on the ground that the denial extended not only to the defendant but to an entire class, that is to say, all drug stores, the plaintiff wishing to restrict its products to beauty and department stores.

Following the pattern in cases of unfair competition where misrepresentation affecting the public in connection with the subject of the action will bar relief, it has been held the defendant may set up a similar defense in a suit under the fair trade act. In *Dr. Miles California Co. v. Mid-City Out Rate Drug Stores*,¹¹⁰ a defense was interposed that the plaintiff's good will or demand for the product, as alleged in the complaint, had been built up on misleading advertising. Upon the hearing of the application for a temporary restraining order, defendant offered as evidence in support of its defense a stipulation entered into between the plaintiff's assignor and the Federal Trade Commission covering certain advertising in connection with the product in question. While recognizing that it ill-befitted the defendant to assert such defense when it was selling and manifesting a desire to sell the plaintiff's products, the court nevertheless denied the plaintiff's application and dismissed its demurrer to the defense. On the second hearing of the application for a preliminary injunction it appeared that the plaintiff had discontinued the alleged advertising covered by the Federal Trade Commission stipulation about eight months prior to the com-

In our opinion, neither has merit." Page 181 of N. C., page 540 S. E. In *Seagram Distillers Corporation v. Seyopp Corporation*, *supra* note 73, it was held no defense that plaintiff had sold to defendant in violation of plaintiff's contract with others not to sell to any but those who signed contracts.

109. 123 N.J.Eq. 301, 197 A. 661 (Chancery, 1938).

110. C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,478; 25,589 (Calif. Superior Court, Los Angeles County, June 21, 1940, January 11, 1941).

mencement of the action. Notwithstanding this, the court again saw fit to deny the plaintiff's application.¹¹¹

Since it is the good will associated with the brand or name appearing on a product that a producer desires to protect, it has been held that it is no defense to a suit to enforce the price restriction on a branded item, that the producer sells the same commodity not bearing his brand or name without a price restriction.¹¹² Another possible situation is where two branded items are put out by a manufacturer, one having and the other not having a price restriction, the brands being similar in appearance and name. Here there is a great possibility of confusion and to enforce the price restriction might give an advantage to the party dealing in the open price items. The problem is suggested by the case of *Hunter's Baltimore Rye Distillery, Inc. v. Bloomingdale Brothers*,¹¹³ although not involving precisely the same question. The plaintiff had sold the defendant Hunter's Straight Rye Whiskey, which the plaintiff alleged was sold on the condition that it be resold at \$2.39 and which price the plaintiff sought to have maintained in this action. The plaintiff also sold a whiskey called Hunter's Blended Rye Whiskey on which there was a price restriction. The defendant contended that there was no price restriction on the Straight Rye Whiskey sold to it; evidently there was some misunderstanding as to whether the whiskey sold to the defendant was to be an exclusive brand. The defendant sold the Straight Whiskey below the fair trade price for the Blended Whiskey and due to the great simi-

111. While generally misrepresentation discontinued before suit commenced cannot be relied upon as a defense, the authorities are not all in accord. See Nims "Unfair Competition and Trade-Marks," Third Edition 1936, Sec. 393. See also cases collected note 4 A. L. R. 44-92 and *Munn & Co. v. The Americana Co.*, 83 N.J.Eq. 309, 91 A. 87 (Errors & Appeals, 1914) modifying 82 N.J.Eq. 63, 88 A. 330 (N. J. Chancery, 1913).

112. *Pinesbridge Farm, Inc. v. Bloomingdale Bros., Inc.*, 105 N. Y. L. J. 1333, Col. 3, March 25, 1941 (Sup. Ct.).

113. *Supra* note 19.

larity in brand names there was a resulting confusion, and other retailers who were handling the Blended Rye Whiskey began to complain. The application for a temporary injunction was denied in view of the controversy as to whether there was any understanding that there was a price restriction on the whiskey sold the defendant.

Suppose a manufacturer places upon the market two items, each of which is covered by fair trade. Later, in order to promote the sale of the items in question, he decides upon a special combination which is lower than the sum total of the individual minimum prices for the items separately. It has been held that placing the combination package upon the market constitutes an abandonment of the fair trade prices established for the individual items.¹¹⁴ Another possible situation is suggested in which a manufacturer puts out a package consisting of several items and sets a price for the combined package. The package is new and the individual items were not sold separately before. The manufacturer does not desire that the package be broken down and the items sold separately. In order to avoid this, he sets a price of \$1.00 for the combined package and 50c each for the three items constituting the combination. Here the rule in *Lentheric v. Grant*¹¹⁵ should be applicable; the manufacturer is maintaining the good will of his combination package by not having it broken down and the items sold separately. His price is for the combination and not its components sold separately. It should be observed further that where a price is set for multiple units of the same item which price is lower than the total price of the items were they to be sold separately (for example, the familiar case of an item sold 10c straight or 3 for 25c) the

114. *Bathasweet Corporation v. Harry Weissbard*, 128 N.J.Eq. 135, 15 A. (2d) 337 (Chancery, 1940); *Magazine Repeating Razor Company v. Harry Weissbard*, 125 N.J.Eq. 593, 7 A. (2d) 411 (Chancery, 1939). Cf. also *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N.J.Eq. 105, 111-113 (Chancery, 1941).

115. *Supra* note 30.

rule of the Grant case, that there need be no correspondence between quantity and price, would again be applicable. Here every dealer can comply with the price restriction, both for the single item as well as for the combination, without any cause to complain that enforcing the single price creates hardship.¹¹⁶

Very important to the party seeking relief is the scope of the injunction that will be granted. Where a defendant is a persistent price-cutter, granting relief only with respect to the commodities named in the complaint as having been sold below the minimum, would mean a multiplicity of suits on the part of the plaintiff in order to follow the defendant in his course of price-cutting. On the other hand, granting an injunction as to all price-cutting, whether or not covered by contracts mentioned in the complaint, might prejudice a defendant and put him in jeopardy of being subject to the penalties of a contempt order without having a prior opportunity to defend with reference to contracts not part of the complaint;¹¹⁷ such an injunction has been held too sweeping.¹¹⁸ While, of course, the circumstances

116. The contrary view on quantity item combinations in *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, *supra* note 114, appears to be incorrect in principle.

117. *Cf. Costa v. Katz*, 105 N. Y. L. J. 38, Col. 6, January 3, 1941 (Sup. Ct.)—If there is any hardship on defendant he should move to modify decree; he is not privileged to violate any of its provisions.

118. *Iowa Pharmaceutical Association v. May's Drug Stores*, 229 Iowa 554, 294 N. W. 756 (1940). Compare, however, decree in *James Heddons' Sons v. Callendar*, 29 Fed. Supp. 579 (D. C. Minn., 1939) as reported in C. C. H. Trade Regulation Service, 8th Ed., Vol. 3, Par. 25,349, page 25,995—The injunction extended to prices established in "fair trade contracts heretofore or hereafter entered into . . ." See also *LePage v. Automobile Club of New York, Inc.*, 258 A. D. 981, 17 N. Y. S. (2d) 568 (Second Dept., 1940). Here it was held that the action was maintainable insofar as the complaint alleged an agreement to cut prices on gasoline with respect to which plaintiff was bound under a fair trade agreement, but bad insofar as it alleged agreements with reference to gasoline not carried by the plaintiff; however, that portion of the complaint which was bad was so inextricably interwoven with that part which was good that the whole complaint was dismissed with leave given to the plaintiff, however,

as well as the stage of the suit may possibly impel a court to limit its injunction to the items on which the minimum price restriction has been violated,¹¹⁹ the relief should be adequate to secure protection of the right invaded; accordingly, it has been held that the injunction need not be limited to the specific items mentioned in the complaint, when the contract covered other items as well.¹²⁰

The foregoing review is based upon an examination of more than one hundred cases, as to which reports are available, dealing with various phases of the fair trade statutes and contracts.

to serve an amended complaint. In *Broxmeyer v. Polikoff*, 39 Pa. D. & C. 224 (1940), the fact that the relief demanded was too broad was held not to be a ground for dismissing the bill; the chancellor may mould his decree in accordance with the cause of action proved. In connection with the problem of blanket injunctions, the case of *National Labor Relations Board v. Express Publishing Co.*, 85 L. Ed. Adv. Op. 614 (U. S. Sup. Ct., 1941) affords an interesting comparison, where it was held that a blanket injunction against any violation of the National Labor Relations Act was too broad and sweeping.

119. *Schenley Distributors v. John C. Karath*, 99 N. Y. L. J. 2810, Col. 5, June 10, 1938 (Sup. Ct.)—On application for temporary injunction, injunction limited, under circumstances presented to court (not disclosed in opinion) to specific items undersold with a warning that repeated violations might result in a more sweeping injunction. In *Canada Dry Ginger Ale, Inc. v. Varon*, 102 N. Y. L. J. 733, Col. 6, September 21, 1939 (Sup. Ct.) a temporary injunction was denied where the only showing was that there had been a violation of the price in a single sale, but in *Eastman Kodak Co. v. Fotoshop, Inc.*, 100 N. Y. L. J. 1058, Col. 4, October 10, 1938 (Sup. Ct.) on the final hearing a permanent injunction was issued where only two transactions were involved. See also *Talge & Co. v. Rival Drug Co., Inc.*, 104 N. Y. L. J. 91, Col. 5, July 12, 1940 (Sup. Ct.) where a temporary injunction was issued though no sales were involved, the unfair competition consisting in the advertising below the fair trade price.

120. *Weisstein v. Freeman's Wines & Liquor, Inc.*, 169 Misc. 391, 7 N. Y. S. (2d) 234 (Sup. Ct., 1938); *Goldstein v. Mishkin Brothers Pharmacy, Inc.*, 104 N. Y. L. J. 184, Col. 5, July 24, 1940 (Sup. Ct.). Cf. also *Iowa Pharmaceutical Association v. May's Drug Stores*, *supra* note 118—The relief may extend to all contracts set forth in the petition, even though violations are established as to some but not all of such contracts. It would appear that the right to be free from the defendant's persistent course of unfair competition would include all contracts set forth in the petition covering items sold in competition with defendant.

No doubt the reported cases involve the more complicated situations; and it will be noted that many of the decisions are in the trial forum, and have not reached the courts of last resort. It may be seen, however, that the subject is being fitted into the framework of the law of unfair competition, and that general equitable principles are being applied to the solution of the questions coming before the courts. As the issues are brought into relief, and receive the attention of the courts, the fair trade laws will be given their intended scope and effect and will operate toward the elimination of the kind of unfair competition for which these statutes have provided causes of action and remedies.

ROY M. STERNE.

BERNARD H. GOLDSTEIN.

MAY 1, 1941.