A Symposium on the Fair Trade Laws: Part III: Enforcement and Procedure

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less than a ton or a yard. Such resales could be in conflict with the Robinson-Patman Act and state laws forbidding price discrimination.

The numerous ambiguities that have arisen out of conflicting interpretations of the language in the fair trade acts call for clarification. There is now pending before Congress a bill that would define more certainly some of these controversial terms, at least as they apply in interstate commerce. This desirable feature of the bill, notwithstanding, other of its provisions render its enactment doubtful.

PART III: ENFORCEMENT AND PROCEDURE

Enforcement Policy

In the enforcement of fair trade prices, many fair traders operate on the principle that prevention is better than cure. A vigorous enforcement policy generally will force the majority of price cutters to adhere to the fair trade price without resorting to legal action. Knowledge that an alleged violation has occurred is generally obtained by the producer through complaints received from his own salesmen, from wholesalers and from competitors of the alleged violator. Many associations in large cities have fair trade committees which aid in obtaining information about price violations. The procedure followed by the enforcer upon receipt of the complaint is usually one which attempts to preclude possible defenses if legal action should become necessary. A registered or certified letter is sent to the alleged violator telling him that a complaint has been received, advising him of the fair trade retail price and requesting that the price cutting stop immediately. The violater is then "shopped" by an agent of the manufacturer who attempts to buy the product at a discount in order to substantiate the truth of the allegation. If the price cutting has continued, either a stern letter warning of legal action is sent or the price cutter is contacted personally. If all warnings go unheeded, then the strong enforcer will resort to litigation or take other measures to prevent the price cutting.

One method of indirect enforcement is the refusal to sell. Inasmuch as the provisions of the fair trade acts are permissive in that it is theoretically optional with the manufacturer to originate fair trade contracts

63. See Part IV: Indirect Methods of Evading the Fair Trade Laws pp. 110, 111.

2. See Note, 69 Harv. L. Rev. 316, 335 (1955), for a description of enforcement procedures frequently used.
4. See Weigel, The Fair Trade Laws 30 (1938); Comment, 58 Yale L.J. 1121 (1949).
5. See note 49 infra; see also Note, 36 Cornell L.Q. 781, 793-94 (1951) briefly pointing
and he is under no obligation to sell to a retailer not of his own choosing, the courts will generally not deny relief to the manufacturer where the defense of refusal to sell has been interposed by the defendant retailer. However, the courts are circumspect when dealing with this problem since its ramifications may encompass the antitrust laws. In addition, a lone producer would benefit little from such a refusal as it might result in loss of markets and would be practically futile against the large retail outlets which go to great lengths to obtain goods.

In order to enforce the fair trade price against violators who continue to price cut, resort may be had to legal action. A few states authorize government officials to enforce the contracts. While the Federal Trade Commission has consistently taken the position that it would not act to enforce fair trade prices, legislation has recently been introduced to


In a recent case the court placed an affirmative duty on the manufacturer to refuse to sell, holding that the manufacturer who did not show that it had minimized its alleged losses by refusing to sell to price cutting noncontracting retailers was not entitled to injunctive relief. Calvert Distillers Co. v. Wish, CCH Trade Reg. Rep. (1957 Trade Cas.) # 68921 (NJ). Ill. Nov. 14, 1957). See also Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc., 166 Misc. 342, 2 N.Y.S.2d 320 (Sup. Ct. 1938) (dictum).

A refusal to sell to a certain class of retailers will not afford a defense where the manufacturer considered it sound business policy. For example, in Revlon Nail Enamel Corp. v. Charmley Drug Shop, 123 N.J. Eq. 301, 197 Atl. 661 (Ch. 1938), the enforcing party's principal outlets were beauty parlors which would not push the plaintiff's product if it were also sold by drug stores.

7. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951) the Court stated that a concerted refusal to sell by two manufacturers was a violation of the Sherman Act. Refusal to deal is generally allowed where the manufacturer has acted individually. Id. at 214 (dictum).


10. Where an association of retail jewelers notified the Federal Trade Commission that fair trade was being discriminated enforced in their industry, the Commission refused to investigate, pointing out "... it [the McGuire Act] does not in terms prohibit any practices nor require the Commission to take corrective action towards proscribed activities. ... The Commission has consistently taken the position that it is not within the province of the Federal Trade Commission to exercise control over resale price agreements nor to enforce such agreements."

make that group responsible for enforcement. Passage of such legislation would remove the burden of enforcement from private litigants where it has rested for the most part since the inception of the fair trade laws. At the present time, in addition to the cause of action which the manufacturer has against the contracting retailers who have violated the fair trade contract, actions may also be based upon the unfair competition provision of the state and local fair trade acts by any person damaged thereby. Not only may individual retailers bring suit against nonsigners, but the action may be brought even where the suing retailer is himself a nonsigner. The suit may be brought by "... the owner or holder of the brands or marks or by one having the exclusive right to use such marks in a given territory." This may be the manufacturer, producer, distributor, wholesaler or retailer. An association of retailers is a proper party and has been permitted to sue as the representative of injured retailers.

**Requirements for a Cause of Action**

In order to set forth a cause of action, the plaintiff in a fair trade suit must prove the existence of a fair trade contract. He must show the parties to the contract and that the trade-marked commodity is in free and open competition. The price must be a fixed or stipulated price binding on the retailer and cannot be one merely suggested or recommended. The plaintiff must also show that the defendant was notified of the existence of the contract and of the stipulated prices.

11. See Part IV: Indirect Methods of Evading the Fair Trade Laws pp. 110, 111.
12. See, e.g., N.Y. Gen. Bus. Law § 369-b. In order to establish that he has been damaged, a retailer suing a nonsigning retailer must show that the offending party is a competitor. The cases define no rule to determine the extent of competition necessary. See also notes 28-30 infra. In Friedman v. Peller, CCH Trade Reg. Rep. (1951 Trade Cas.) ¶ 62776 (N.Y. Sup. Ct. 1951), it was declared to be sufficient that the damaged party be in the same general vicinity as the offender and need not be in the immediate vicinity.
14. Burstein v. Charline's Cut Rate, 126 N.J. Eq. 560, 10 A.2d 646 (Ch. 1940).
21. An injunction may not be issued in the absence of a finding that the defendant had
By merely reciting the inverse of the fair trade nonsigner clause, it may be assumed that a retailer may advertise, offer for sale or sell a fair trade item at less than the stipulated price where he does not do so knowingly and if so, does not willfully violate a known fair trade agreement. Thus, it is apparent that a retailer, in order to be bound by a fair trade agreement, must have actual knowledge of the agreement and of the prices stipulated therein and mere constructive notice is not sufficient.

Normally, the burden is upon the enforcing party to adequately allege and prove that a defendant-retailer has actual knowledge of the prices stipulated in the fair trade agreement before he will be granted injunctive relief for alleged price violations. Thus, where a noncontracting retailer was sought to be enjoined, allegations "upon information and belief" that the defendant-retailer had notice of the prices of the fair traded items were insufficient. Where a retailer has seen any instrument sufficient to impart notice to him of an existing fair trade agreement and of the prices fixed for the items covered thereby, such as a profit and loss chart issued by the manufacturer or a copy of a fair trade contract, the defense of lack of knowledge will fail.


22. "Noncontractors are bound by the contract '... only to the extent that the statute makes the contract binding upon them'—specifically, as to that provision in the contract which relates to the price of the commodity." Note, 36 Cornell L.Q. 781, 785 (1951).

23. Mailing of notice is presumptive evidence of the receipt of knowledge of the fair trade agreement and the stipulated prices contained therein, which may be rebutted by a specific denial. Magazine Repeating Razor Co. v. Weissbard, 125 N.J. Eq. 593, 7 A.2d 411 (Ch. 1939). Cf. Bulova Watch Co. v. Anderson, 270 Wls. 21, 70 N.W.2d 243 (1955) where registered mail was used.

In the recent English case of County Laboratories Ltd. v. J. Mindel Ltd., [1957] 2 Weekly L.R. 541, Justice Harman, construing the Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 25 which is similar to the McGuire Act, referred to the general rule that the equitable doctrines of constructive notice were not to be extended to purely commercial transactions and stated, "taking with notice . . . means taking with express knowledge, and not being put on inquiry and being therefore fixed with what would have been ascertained if the inquiry had been pushed to its reasonable limit." For an excellent discussion of the general status of resale price maintenance in England, see Morrison, Commercial Restrictions in English Law, 11 Vand. L. Rev. 1 (1957).


Under a literal interpretation of the nonsigner clause, one fair trade contract is sufficient to bind every retailer in the state who has knowledge of such an agreement.27 However, where the retailer has cut prices the courts will generally limit the granting of an injunction against both contracting and noncontracting retailers, to cases where notice has been uniform within the area of the retailers competitive trading.28 Where the defendant noncontracting retailer has himself adequately received notice, he may not rely on the fact that all his competitors have not been notified of the manufacturer's fair trade contract to substantiate a defense of lack of knowledge.29 It should follow that in a suit by a manufacturer, his lack of diligence in notifying other noncontracting retailers would give rise to a successful defense of discriminatory or inadequate enforcement.30 Also the defendant-retailer might show that price cutting was prevalent among his competitors and that it was necessary for him to cut prices to meet competition.31 On the other hand, where the retailer

27. In Revlon Nail Enamel Corp. v. Charmley Drug Shop, 123 N.J. Eq. 301, 197 Atl. 661 (Ch. 1938), plaintiff had made one fair trade contract with a retailer who sold less than twelve bottles of nail polish in three months. The court held that the contract was sufficient to bind all other retailers who had knowledge of it. Cf. California Oil Co. v. Reingold, 5 N.J. Super. 525, 68 A.2d 572 (Ch. 1949).


29. Contra, Frank Fischer Merchandising Corp. v. Ritz Drug Co., 129 N.J. Eq. 105, 19 A.2d 454 (Ch. 1941), where the defendant retailer successfully interposed the defense that all the other retailers competing in the same state had not been informed of the fair trade agreement of which he had knowledge.

30. The defendant noncontracting retailer will, however, face considerable difficulty in this respect if he is being sued by other retailers. See notes 55-56 infra.

31. Schimpf v. R. H. Macy & Co., 166 Misc. 654, 2 N.Y.S.2d 152 (Sup Ct.), order rev'd, 6 N.Y.S.2d 328 (1st Dep't 1938). The courts, however, have allowed the defense of meeting competition only under the most compelling circumstances. In such a situation the retailer would seem to be on a more solid legal footing where he has notified his competitors of the fair trade agreement if necessary and brought injunctive proceedings against competing violators where he has been damaged by their price cutting. See 1 CCH Trade Reg. Rep.
has upheld the fair trade contract, he may take the initiative against competing retailers. Under the terms of the act there is nothing to prevent such a retailer who is bound by a fair trade agreement from imparting sufficient notice of the agreement to his competitors and even bringing suit against them himself where he has been damaged by their violations after they have received sufficient knowledge of the fair trade agreement.

As a practical matter where a defendant-retailer is shown to have "knowingly" violated a fair trade agreement injunctive relief will be granted. However, where the defendant-retailer is able to show absence of an intent to violate the agreement, this will constitute a complete defense. Thus, where a retailer had posted established prices but had sold the goods at lower prices suggested by agents of the distributor or where the enforcing party's contradictory instructions contributed to the alleged violation, injunctive relief will be denied. Where a retailer is able to raise a reasonable doubt as to an alleged willful violation a temporary injunction should not be granted; but where the retailer pleads that his employees or servants have undersold fair traded items either through inexperience or inadvertence such will apparently constitute no defense.

Where the retailer has previously been enjoined, the introduction of the previous enjoining decrees to show the deliberate character of the defendant-retailer's breach of the fair trade agreement has been held proper. Similarly in Donner v. Calvert Distillers Corp., a criminal (10th ed. 1956) § 3448 for listing of cases where the defense of meeting competition was successful; see also notes 32-33 infra.


33. See notes 12-14 supra.

34. Johnson & Johnson v. Webster Cut Rate Drug Stores, Inc., 98 N.Y.L.J. 2184, col. 2 (N.Y. Sup. Ct. 1937). The courts are not in general agreement as to willful violations where the retailer cuts his prices because of economic necessity. See note 31 supra. In Ray Kline, Inc. v. Davega-City Radio, Inc., 168 Misc. 185, 4 N.Y.S.2d 541 (Sup. Ct. 1938), the court held that the defendant-retailer was not a willful violator where it was forced to cut prices because of the chaotic condition of business. But cf. Calvert Distillers Corp. v. Stockman, 26 F. Supp. 73 (E.D.N.Y. 1939).


action for the violation of a previous injunction, the court stated that because the defendant-retailer knew of the previous one year trade agreement which they had formerly violated, there was a "... presumption of fact that something which has been proved to exist continues to exist for a reasonable time. ... This is known as the presumption of continuance, and it is held to be not a legal presumption but a matter of the burden of proof." In the *Donner* case the second violation occurred over a year and a half after the issuing of the first injunction. During that time the manufacturer had notified the retailer of its fair trade policy and a price list was sent to the retailer about four months before the violation. While the retailer was never explicitly informed that the previous one year fair trade contract had been renewed, the court reasoned that there should have been an inference or presumption of continuance in this particular case and that it was incumbent upon the defendant to disprove the existence of such an inference or presumption.

The evidentiary point enumerated by the *Donner* decision is particularly appropriate where indeterminable or short term fair trade contracts are in question. Once a noncontracting retailer has known of the existence of a fair trade contract there should be a presumption in favor of the manufacturer that the retailer's knowledge of the contract has continued to exist contemporaneously with the existence of the contract itself. The ramifications of this point would also extend to situations where price changes have occurred in the fair trade contract. Once the contracting or noncontracting retailer has known of an established fair trade price, there should be a presumption in the retailer's favor that the price which the retailer was originally informed of continues to be the price at which he was bound. It has been suggested that the burden of proving lack of knowledge should be uniformly placed upon the retailer as a matter of convenience to facilitate the enforcement of price maintenance. It is unlikely that this principle will be adopted by a majority of the courts inasmuch as the party seeking to enforce the

40. Id. at 480, 77 A.2d at 311.
42. That both the contracting and noncontracting retailer must have knowledge of the prices contained in the fair trade contract and of the changes therein, see Ampex Corp. v. Goody Audio Center, Inc., 5 Misc. 2d 1072, 163 N.Y.S.2d 191 (Sup. Ct. 1957); Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc., 166 Misc. 342, 2 N.Y.S.2d 320 (Sup. Ct. 1938).
fair trade contract is seeking an extraordinary remedy, one existing by virtue of statute alone. It would seem logical both in precedent and principle that it should be incumbent upon the enforcing party to bear the burden of proving notice if it wishes to qualify for the benefits of the act.44

Very often the time of notice is of decisive importance. Generally, where a noncontracting retailer purchases fair traded goods prior to knowing that they were fair traded commodities, the stipulated prices need not be observed even though the retailer subsequently learned that the items were fair traded prior to his reselling the goods.45 Where there is a dispute as to the time when notice was acquired, a temporary injunction will not be granted.46 However, pleading that notice of the fair trade agreement was acquired after purchase of the fair traded items is properly a matter of defense and it is not necessary for the enforcing party to plead the time of notice.47

DEFENSES TO THE ENFORCEMENT POLICY

Defenses are often raised which question the enforcement policy of the manufacturer. Very often a fair trading manufacturer will be tempted to pursue discriminatory enforcement procedures which may be profitable to him.48 Because of massive distribution techniques through various and diverse outlets, it may be economically feasible for the manufacturer to pursue a diligent enforcement policy against smaller retailers in deference to larger distributors while retaining the benefits of the fair

48. This discussion will encompass both lack of enforcement and favoritism in enforcement policies. Both may be considered as discriminatory practices. While the problem of discrimination revolves primarily around the procedures employed by the manufacturer to insure that his fair trade contracts are upheld, under the Robinson-Patman Act, 15 U.S.C.A. § 13(a) (1953), the practice of selling the same commodity to favored or disfavored distributors or retailers at different price levels is also considered as a mode of discrimination. Section 13(e) of the act also forbids secretive discrimination which is not directly reflected in the price such as services to some customers and none to others. See, e.g., Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 135 (2d Cir. 1946); 80 Cong. Rec. 9415-19 (1936).
Such practices may be especially lucrative in view of the unprecedented expansion of the discount houses and the absence of specific affirmative remedies available to the small retailer.

49. Very often the retailer will continue to sell a well known trade-marked item in spite of a reduction in customers induced by the price cutting of larger competitors. FTC, Report on Resale Price Maintenance 7 (1945). However, the greatest overall proponent and exploiter of adequate and vigorous enforcement is undoubtedly the retailer. For an interesting discussion of the possible repercussions the manufacturer may find in trying to terminate fair trade contracts, see The Not-So-Fair Trade Laws, Fortune, Jan. 1940, pp. 70-71; The Fair Trade Controversy, Fortune, April 1949, p. 75.

While in theory horizontal price fixing, or price constraints between sellers on a given level are illegal under the antitrust laws, in actual economic practice it can readily be seen that incidentally, uniform and effective enforcement is often an affirmative instrumentality in inducing or aiding price fixing of a horizontal nature. Through pressure on manufacturers, retailer associations are often able to obtain a desired markup and are instrumental in establishing the resale prices of commodities especially in the less competitive fields. See Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Resale Price Maintenance, 82d Cong., 2d Sess. 273 n.4 (1952); FTC, Report on Resale Price Maintenance LX, 520, 546 (1945).

50. This statement is of course contingent on the nature of the commodity which is fair traded and the character of the business engaged in, i.e., whether highly competitive or not. No doubt in the absence of the "discount house" factor a retail boycott would be extremely effective against any favoritism or discrimination practiced by the manufacturer. Another factor to be considered is whether the profits garnered from discrimination would offset the effects on the manufacturer's fair traded item and the price identification therewith. See Hearings, supra note 49, at 174, 344-45. But where the manufacturer is able to discriminate in favor of the large discount house his profits will be greater per unit sale, since distribution costs may be significantly lowered. See Weiss, Mass Marketing to "400" Mass Retailers 3, 356 (1950).

Trade-marked goods are particularly susceptible to "loss leader" selling (selling one product at a loss to attract more customers, in the hope that they will in turn buy other items to make up the loss and increase the overall profits) because of their widespread reputation. However such a practice may also result in a shrinkage of the manufacturer's market since some retailers may be unable to compete in the face of such competition. There is also considerable opinion that loss leader-selling is not unethical but a legitimate merchandising technique. See Hearings Before the Subcommittee on the Judiciary on H.R. No. 1611, 75th Cong., 1st Sess. (1937); also Haring, Retail Price Cutting and Its Control (1935).

In the face of discriminatory enforcement practices on the part of the manufacturer, the retailer is often unable to get an injunction against the manufacturer to prevent him from inadequate or discriminatory enforcement. For example, § 369-b of the N.Y. Gen. Bus. Law like most of the statutes, makes selling at less than the stipulated fair trade price by the retailer illegal, but the statute makes no express prohibition against allowing such underselling. Even where the court may find that the retailer has a cause of action against the manufacturer for allowing such underselling, still it is doubtful that the courts will grant affirmative relief in the form of a positive decree to compel the manufacturer to effectively enforce his fair trade agreements. Cf. Walsh, Equity § 66 (1930).

As a matter of practice the courts will not grant a declaratory judgment in favor of the retailer where he has not joined all the necessary parties to the action, which oftentimes is practically impossible or economically unfeasible. Weissbard v. Potter Drug & Chemical
While fair trade legislation has ostensibly been enacted to protect the manufacturer's reputation and the "good will" which he has established in his trade-marked products, the protection of the small retailer from ruinous competition with his larger counterparts and from undue concentration of the avenues of distribution in the hands of few retailers is also equally within the purview of the act. Because of inadequacies within the acts themselves, the retailer may often be left in a precarious position. If, faced with price cutting competitors, he undersells the stipulated fair trade price in an effort to compete with other price cutting retailers he is subject to suit and if he maintains the fair traded price while waiting for relief from the courts, he may expose his business to economic ruination. Even though the manufacturer may have been discriminatory in his enforcement program, if the suit is brought by competing retailers the defense that the manufacturer was not diligent in enforcing his fair trade contracts will be insufficient unless it is shown that the manufacturer has in fact abandoned the fair trade contract.

51. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 193 (1936), where the Supreme Court sustained the constitutionality of state fair trade legislation in that it protects the manufacturer's property interest in his brand name. See Miller, Unfair Competition 231-32 (1941); see also Bowman, The Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825, 832-35 (1955) for an excellent short discussion of the advantages of fair trade to the manufacturer.


53. See notes 31-33 supra.

54. See note 50 supra. Small retailers or retailers with undiversified products may not be able to cut their prices sufficiently to meet the competition of larger distributors. See Miller, Unfair Competition 249-57 (1941).


There is nothing to prevent a manufacturer from inducing some friendly retailer to bring suit against a retailer who price cuts since the retailer's cause of action is not derivative from that of the manufacturer. See Burstein v. Charline's Cut Rate, 126 N.J. Eq. 560, 10 A.2d 646 (Ch. 1940).

Whether the various states are prone to approve or disapprove the rationale of the fair trade acts is reflected in the defenses which are allowed to the retailer where he places the enforcement policy of the manufacturer in issue. See Fogel v. Bolet, 194 Misc. 1019, 91 N.Y.S.2d 642 (Sup. Ct. 1949).
Where the manufacturer has formed fair trade agreements he must use reasonable diligence to enforce the stipulated prices. However, as pointed out in *General Elec. Co. v. R. H. Macy & Co.*, the precise elements of an adequate enforcement program are not prescribed by law. Enforcement activities may take such form as is called for by the nature of the product, the industry, and the violations by the retailers, providing they add up to a reasonable and diligent effort in the light of all the facts. That court, while not attempting to set forth in detail the requirements of a satisfactory enforcement program, outlined certain basic essentials. The manufacturer or producer should: (1) keep informed as to price cutting activities and other trends generally known; (2) keep prior violators under close scrutiny and take necessary action; (3) investigate and vigorously follow up complaints; (4) if necessary, enforce fair trade prices by repeated legal action; (5) pursue a continuing and sustained enforcement program. Thus, where the manufacturer has completely failed to enforce his contract, injunctive relief against price violators will not be granted. But where he has permitted one or two violations, such will not constitute a defense to an enforcement action. Where the line of demarcation is drawn as to the use of reasonable diligence in an enforcement policy is uncertain and the courts have generally refrained from setting forth definitive requirements for injunctive relief. Thus a resort to general standards and the particular facts of each case must be had in intermediate cases and often irreconcilable results will ensue.

The fair trade acts do not bind a manufacturer to institute legal action when he has knowledge of price violations. He may resort to a warning

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58. Id. at 95, 103 N.Y.S.2d at 449.

59. Id. at 98-99, 103 N.Y.S.2d at 452.


62. See Calvert Distilling Co. v. Gold’s Drug Stores, 123 N.J. Eq. 458, 198 Atl. 536 (Ch. 1938).
against future violations\textsuperscript{63} or if he does resort to legal action he need not sue all violators at the same time.\textsuperscript{64}

Where the petitioner himself has violated the fair trade agreement\textsuperscript{65} or where he has encouraged violations\textsuperscript{66} such may constitute an abandonment of his contract and will be a complete defense to an injunction action against a retailer. Since the fair trade acts were partially promulgated to protect the "good will" of the manufacturer's fair traded product, where he has established such by false claims or misleading advertisement it would be consistent to deny him injunctive relief against price violators.

**Remedies of Persons Damaged**

The remedy sought by the person damaged by the price cutting may be in the form of a suit for damages, brought either against a party to the fair trade contract for breach of the contract or by nonsigners under the unfair competition provisions. However, such actions for damages are unusual because of the difficulty of proving that financial losses are causally related to the violation.\textsuperscript{67} Even if a drop in volume of sales could be shown following a price cutting, it would be difficult to show a legal chain of causation between the price cutting and drop in volume. Since a suit for damages, even if recoverable, provides compensation only for past injuries, it is generally coupled with a request for injunctive relief to protect against future violations. In fact, obtaining an injunction restraining sales below the fair trade price has been deemed the only practical method of enforcement.\textsuperscript{68}

Specific money damage need not be alleged to obtain injunctive relief. The Court of Appeals of New York pointed out this lack of need of money damages in *Bristol-Myers Co. v. Picker*.\textsuperscript{69} The court stated, "the 'assault upon the good will' is the injury or damage resulting from the unfair competition, and is actionable under the statute even though proof of specific money damages is not supplied."\textsuperscript{70}

The ordinary principles followed by a court of equity in granting injunctive relief are of course adhered to in suits brought to enforce fair


\textsuperscript{64} Revere Copper & Brass, Inc. v. The Economy Sales Co., 127 F. Supp. 739 (D. Conn. 1954).

\textsuperscript{65} Frank Fischer Merchandising Corp. v. Ritz Drug Co., 129 N.J. Eq. 105, 19 A.2d 454 (Ch. 1941).


\textsuperscript{67} Weigel, The Fair Trade Laws 78 (1938).

\textsuperscript{68} Calvert Distillers Corp. v. Stockman, 26 F. Supp. 73 (E.D.N.Y. 1939).

\textsuperscript{69} 302 N.Y. 61, 96 N.E.2d 177 (1950).

\textsuperscript{70} Id. at 70, 96 N.E.2d at 181.
trade contracts. The Supreme Court in *Yakus v. United States*\(^7\) pointed out that the award of an injunction is a matter of sound judicial discretion in the exercise of which the court balances the conveniences of the parties and possible injuries to them as they may be affected by the granting or withholding of the injunction.

A preliminary injunction is frequently sought in order to stop the price cutting quickly. The failure to obtain a preliminary injunction may mean, in effect, the loss of the case for the plaintiff, particularly if the delay until trial allows the defendant to cut prices during a peak selling season.\(^7\) Preliminary injunctions are denied when the defendant shows the probable existence of a substantial issue of fact or law.\(^7\) The need for the drastic remedy must be established.\(^7\) In *General Elec. Co. v. Masters Mail Order Co.*\(^7\) a temporary injunction was denied because it was not a certain or probable cause for assuming that the plaintiff would prevail at the trial and it was not shown that the plaintiff would suffer irreparable harm. The court took into consideration that the plaintiff was a large national organization with distributors throughout the United States and would not be irreparably harmed by the comparatively inconsequential transactions of the defendant. Other courts have not been as strict in determining the amount of harm necessary to constitute the "irreparable injury." In *Revere Copper and Brass, Inc. v. The Economy Sales Co.*\(^7\) the court stated, "generally today, if a plaintiff comes within the purview of the Fair Trade Act, then violations and the threat of continued violations entitle him to injunctive relief."\(^7\) A temporary injunction was granted in that case where it was shown that the injunction would not cause great injury to the defendant. Other courts have granted the temporary injunction, reasoning that no harm could come to the defendant by prohibiting him from violating the fair trade law.\(^7\)

**Scope of Injunction**

Since a court exercising equity powers can enter a decree which will safeguard the rights of the parties, the scope of the injunctions issued has

\(^{71}\) 321 U.S. 414, 440 (1944).
\(^{76}\) 127 F. Supp. 739 (D. Conn. 1954).
\(^{77}\) Id. at 741.
\(^{78}\) Calvert Distillers Corp. v. Stockman, 26 F. Supp. 73 (E.D.N.Y. 1939).
varied widely. In Iowa Pharmaceutical Ass'n v. May's Drug Store Inc., the court stated the case against the granting of a blanket injunction. That court held that the injunction should be limited to the contracts referred to in the petition and the violations established at the trial. In New York it has been held that an injunction covering violations of fair trade contracts not alleged in the complaint or established at the trial and including within its terms products not even dealt with by the defendant was in effect an injunction at the instance of one retailer restraining the defendant from violating the fair trade act generally. However, in a recent decision a lower New York court, in Ampex Corp. v. Goody Audio Center, Inc., held that the plaintiff, having established that the defendant violated the pertinent statute, was entitled to injunctive relief not only with respect to the specific items involved, but as to all other of the plaintiff's products similarly price fixed so as to protect him from any future violations of the same kind. The court felt that only by such a broad injunction could the intent of the legislature in passing the fair trade act be carried out. In Weissstein v. Freeman's Wines & Liquors', Inc. it was reasoned that such a broad decree in no manner increased the burden put on the defendant by law.

The injunction may also be made conditional or contingent. The conditioning of an injunction on future behavior of the plaintiff is employed by the courts in order to afford the plaintiff relief while at the same time protecting the defendant against any future lapses in conduct. Where the defendant showed that numerous other violations of the fair trade contract had occurred, a New Jersey court issued a preliminary injunction on the condition that the plaintiff take action within thirty days against other violators. Where the defendant in General Elec. Co. v. R. H. Macy & Co. showed that during an early period the enforcement policy of the plaintiff was a limited one, the court granted an injunction conditioned on the continuation by the plaintiff of a vigorous enforcement policy.

An injunction may include prohibitions beyond the terms of the fair trade statute. Where the injunction prohibits generally any sale below the price fixed in a schedule, closing out sales at less than that price are

79. 229 Iowa 554, 294 N.W. 756 (1940).
81. 5 Misc. 2d 1072, 163 N.Y.S.2d 191 (Sup. Ct. 1957).
82. 169 Misc. 391, 7 N.Y.S.2d 234 (Sup. Ct. 1938).
also prohibited, although they would be legal if only the fair trade law were concerned.\textsuperscript{86}

Where the retailer is able to successfully defend against an injunction action because of the manufacturer's lack of diligent enforcement or because of his discriminatory practices, the retailer may have unwittingly left himself in a quandary. Because the manufacturer is prevented from enjoining violations, the courts may have opened the door to unmitigated violations by contracting and noncontracting retailers who had been bound under the contract. No doubt, the benefits of the fair trade act will be lost to the manufacturer by the imposition of the successful defense but the substantial victim of the manufacturer's suit may ironically be the retailer himself.\textsuperscript{87}

\textbf{Conclusion}

It is suggested that where the manufacturer has been defeated in his action to enjoin, the courts should be primarily concerned with a rejuvenation of an effective enforcement policy. If such can be accomplished the manufacturer will continue to gather the benefits of fair trade and the retailer will be relieved of future debilitory discrimination. In the past a temporary injunction has generally been denied where the defendant retailer has adequately and sufficiently alleged discrimination.\textsuperscript{88} Nevertheless, the courts should take a flexible position which would best inure to the benefit of both parties. Such could be accomplished by conditioning the granting of an injunction on the instigation of positive action against

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\item Just as the courts vary in the scope of the injunction, they differ as to the enforcement of the injunction in contempt proceedings which may be brought for violations of the injunction. Compare Sunbeam Corp. v. Ross-Simons, Inc., CCH Trade Reg. Rep. (1957 Trade Cas.) ¶ 68784 (R.I. Sup. Ct. July 24, 1957) where a retailer who had been enjoined from price cutting at "its place of business" was not held in contempt where subsequent sales were made at a customer's home and in the street outside the entrance to the retailer's store, with Eastman Kodak Co. v. Masters, Inc., 7 Misc. 2d 185, 153 N.Y.S.2d 433 (Sup. Ct. 1956) where the court held that the injunction had been violated when the retailer advised its customers that the product could be purchased by mail order from a Washington, D.C. affiliate at less than the New York fair trade price.
\item Defenses to a fair trade enforcement action cannot be asserted or held valid in a contempt action. In such a situation the proper remedy would be to apply to the court for a modification of the injunction or a vacation of the order. General Elec. Co. v. Bernfield, CCH Trade Reg. Rep. (1951 Trade Cas.) ¶ 62794 (N.Y. Sup. Ct. 1951).
\item See note 30 supra.
\item Usually the defendant-retailer will allege discrimination by means of affidavits. Thus some courts have denied a motion for a temporary injunction on the grounds that the issues raised by the affidavits require a full trial. The Parker Pen Co. v. E. J. Korvette Co., CCH Trade Reg. Rep. (1955 Trade Cas.) ¶ 68025 (S.D.N.Y. 1955).
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