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in which they had no interest. In the fair trade situation the manufacturer is concerned solely with his own products; he is given the power to fix the price of commodities in which he has an obvious original interest and in which he continues to have an interest by reason of the fact that the commodity carries his brand name. In substance, therefore, fair trade is not a delegation of any legislative power but is rather a legislative recognition of a continuing property right which may not have existed at common law.

CONCLUSION

While it seems beyond question that fair trade is secure from attack on the federal level, it seems equally beyond question that the views expressed by those state courts which have held fair trade statutes invalid under state constitutions will influence other state courts called upon to consider the question.²⁹

PART II: DEFINITIONS AND RELATED PROBLEMS

VALIDITY OF THE CONTRACT

Since the fair trade contract exists by grace of statute its validity depends upon its conformity to the terms of the applicable fair trade act. If the contract relates to goods which are in interstate commerce it must conform to the requirements of the applicable federal statute as well.¹ Generally, courts have taken the view that fair trade acts must be strictly construed.² However, the construction must be such as to give full effect to the statutes.³

Minimum resale prices must be formally stipulated in the contract. A

29. The highest court of Utah held fair trade a violation of art. XII, § 20 of the Utah Constitution. *General Elec. Co. v. Thrifty Sales, Inc.*, 5 Utah 2d 326, 301 P.2d 741 (1956). Article XII, § 20 provides: "Any combination by individuals, corporations, or associations, having for its object or effect the controlling of the price of any product of the soil, or of any article of manufacture or commerce, or of the cost of exchange or transportation, is prohibited, and hereby declared unlawful and against public policy." The constitutions of five other states contain similar sections, and it is therefore not inconceivable that these states will strike down their fair trade laws, if their constitutionality is tested. They are: *Ariz. Const. art. XIV, § 15*; *Idaho Const. art. XI, § 18*; *Mont. Const. art. XV, § 20*; *N.D. Const. art. VII, § 146*; *Wyo. Const. art. X, § 8*.

1. *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 95 A.2d 391 (1953).

2. *Rayess v. Lane Drug Co.*, 138 Ohio St. 401, 35 N.E.2d 447 (1941); *Bathasweet Corp. v. Weissbard*, 128 N.J. Eq. 135, 15 A.2d 337 (1940).

3. *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N.J. Eq. 105, 19 A.2d 454 (1941); *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N.Y.S.2d 320 (Sup. Ct. 1938); see also, *Ely Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939).

mere suggested price list sent by a manufacturer to his retail distributors is not sufficient to bind them.⁴ The buyer, however, need not be obliged to buy or the seller to sell any quantity of the goods which are the subject of the contract.⁵ A fair trade contract will be implied where a retailer accepts goods for resale with notice that they may not be sold below a fixed fair trade price;⁶ but in New Jersey it was decided that a retailer who accepted goods covered by a fair trade agreement, but who notified his vendor that he would not abide by the minimum price stipulation, was not bound by the fair trade price.⁷ The court reasoned that it would violate the spirit and intent of the Miller-Tydings Act⁸ to hold otherwise. However, since the McGuire amendment,⁹ it has been held that one fair trade contract is sufficient to bring a fair trade law into operation against nonsigners.¹⁰ The McGuire Act and the state statutes which include nonsigner clauses obviate, to a large degree, the question of whether a fair trade contract can be implied.

The contract to be binding upon nonsigners must be bona fide. It may not be made between a manufacturer and his wholly owned retailer¹¹ nor may it be made with a person who does not deal in or expect to resell the commodity which is the subject of the contract.¹² The contract must relate to the *resale* of a commodity. An attempt by motion picture distributors and exhibitors to set minimum admission prices was held not to be within the purview of a fair trade act because title to the films never passed to the exhibitor.¹³ Moreover, where goods are bought to be used in the manufacture or processing of other goods the transaction is not deemed to be a resale.¹⁴ Thus a manufacturer of soft drinks does not *resell* the bottle caps which he purchases for the purpose of sealing the bottled soda.¹⁵

4. Calvert Distillers Corp. v. Stockman, 26 F. Supp. 73 (E.D.N.Y. 1939); Magazine Repeating Razor Co. v. Weissbard, 125 N.J. Eq. 593, 7 A.2d 411 (1939); Allan B. DuMont Laboratories, Inc. v. R. H. Macy & Co., CCH Trade Reg. Rep. (1949 Trade Cas.) ¶ 62481 (N.Y. Sup. Ct. 1949).

5. General Elec. Co. v. S. Klein on the Square, Inc., CCH Trade Reg. Rep. (1953 Trade Cas.) ¶ 67443 (N.Y. Sup. Ct. 1953).

6. Downs v. Benatar's Cut Rate Drug Stores, 75 Cal. App. 2d 61, 170 P.2d 88 (1946).

7. Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 95 A.2d 391 (1953).

8. 15 U.S.C.A. § 1 (1953). See Part I: Constitutionality pp. 69, 70 supra.

9. 15 U.S.C.A. § 45 (Supp. 1957). See Part I: Constitutionality pp. 70-72 supra.

10. Revlon Nail Enamel Corp. v. Charmley Drug Shop, 123 N.J. Eq. 301, 197 Atl. 661 (1938).

11. See California Oil Co. v. Reingold, 5 N.J. Super. 525, 68 A.2d 572 (Ch. 1949).

12. Ibid.

13. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

14. Matter of H. D. Kampf, Inc., 38 F. Supp. 319 (S.D.N.Y. 1941); Poer v. Curry, 243 Ala. 76, 8 So. 2d 418 (1942).

15. Poer v. Curry, supra note 14.

COMMODITY DEFINED

A resale price agreement is valid only if it relates to the resale of a *commodity*. The word, as used in the fair trade acts, has been defined as "any article of commerce."¹⁶ In *Eastman Kodak Co. v. Home Util. Co.*,¹⁷ a question arose as to whether a producer, packaging fair traded and non-fair traded goods together and clearly marking the new container with his trade-mark, could set the resale price for the combined products. The plaintiff-producer contended that the new package was a commodity, separate and distinct from the commodities which it contained. The court upheld this contention and further noted that since the new units bore the plaintiff's trade-mark, he was entitled to protect his property interest in that trade-mark by fair trading the combination.¹⁸

A commodity, to be the proper subject of a fair trade contract, must bear on it the trade-mark of its producer or manufacturer.¹⁹ This raises the question as to whether a manufacturer may set the resale price on articles of his manufacture which, in the hands of subsequent distributors, are materially changed or modified. The Supreme Court of the United States gave a negative answer in *United States v. Univis Lens Co.*²⁰ There the defendant produced lens blanks which it sold only to those distributors who agree to resell at its stipulated price. The distributors ground and polished the blanks and then sold the finished lenses to prescription retailers or consumers. The Court held that the lens company could not control the resale price of the lens blanks for the reason that its was ". . . not the manufacturer of the 'commodity' . . ." which the subsequent distributors sold, and these distributors were ". . . not engaged in the 'resale' of the commodity . . ." ²¹ which they had bought. The opinion pointed out the harmful implications of a contrary decision by stating that in the case of ". . . products manufactured in successive stages by different

16. N.J. Stat. Ann. § 54:4-3 (1937); N.Y. Gen. Bus. Law § 369-d. The Virginia Fair Trade Act defines a commodity as "any subject of commerce" but specifically excluded certain foodstuffs and wearing apparel. Va. Code Ann. § 59-2(1) (1950). The question is discussed in 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3145 (1956).

17. 234 F.2d 766 (4th Cir. 1956).

18. *Id.* at 774. See, *Eastman Kodak v. Siegel*, 1 A.D.2d 1002, 151 N.Y.S.2d 859 (1st Dep't 1956).

19. Most state fair trade acts and the McGuire Act require that the trade-mark belong to the producer or owner of the commodity. Some states vary the requirement to include the mark of the "producer or distributor," "producer or wholesaler," "producer, distributor or owner," and "producer." 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3150 (1956). A possible conflict may exist between those state acts allowing resale price agreements on distributor or wholesaler marked commodities and the federal acts which stipulate that where goods are in interstate commerce, they can be fair traded only if they bear the trade-mark of their producer or owner.

20. 316 U.S. 241 (1942).

21. *Id.* at 253.

processors . . . the first [manufacturer] would be free to control the price of his successors." ²² A similar conclusion was reached in a case concerning a fabric manufacturer who attempted, by affixing his trade-mark to yard goods, to control the resale price of the dresses made from his goods.²³ The court refused to enjoin the defendant from selling the finished garments below the price set by the plaintiff-manufacturer. The plaintiff, reasoned the court, was not the producer of the *commodity* to be resold since "the composite or ensemble, not the fabric, is the article or commodity."²⁴ The opinion further suggested that neither could the dressmaker be deemed the producer of the commodity because the workmanship and trimmings which he added were not the sole elements in the completed dress.²⁵ However, there are no other cases which accept this theory and the indication is that courts will accept the manufacturer of the finished product as the manufacturer of the commodity.²⁶

State fair trade acts differ slightly in prescribing the manner in which a commodity must be trade-marked. In most states it is required that the trade-mark, brand or name appear on the "label or container" of the goods, although in a few the word "content" is used in place of "container."²⁷ This language has been liberally construed according to the nature of the product; for example, coal was held to be a trade-marked commodity, although no mark or brand appeared on the coal or its container, but the trade name was placed on the bill of lading or the consumer's bill.²⁸ Under the Hawaii Fair Trade Act, gasoline sold from a pump was deemed to be a properly trade-marked commodity if the pump or tank from which it was drawn clearly indicated a trade-mark, brand, or name.²⁹

FREE AND OPEN COMPETITION

Before a commodity may be fair traded, it must be in "free and open competition with articles of the same general class."³⁰ Because a manu-

22. *Id.* at 253-54.

23. *Mallinson Fabrics Corp. v. R. H. Macy & Co.*, 171 Misc. 875, 14 N.Y.S.2d 203 (Sup. Ct. 1939).

24. 171 Misc. at 877, 14 N.Y.S.2d at 205.

25. *Ibid.* (dictum).

26. See *United States v. Univis Lens Co.*, 316 U.S. 241 (1942).

27. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3150 (1956).

28. Opinion of Attorney General of Indiana, CCH Trade Reg. Rep. (1940-1943 Trade Cas.) ¶ 56049 (Ind. 1939).

29. *Auto Rental Co. v. Lee*, 35 Haw. 77 (1939); 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3150 (1956).

30. This provision is included in all fair trade acts. Sometimes the word "fair" is used in place of "free" but no distinction is made between them. The phrase "free and open competition" was held not to be fatally vague or uncertain. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

facturer knows that he risks his business by overpricing goods which may be readily substituted on the market, this requirement protects buyers against unreasonable and arbitrary resale price agreements. Nevertheless, the term has generally been given a liberal construction. A New York court held that phonograph records, featuring artists who were under contract to perform for a single recording company, were in "free and open competition" with other records.³¹ The court said, "[T]wo articles may be competing in the same general class although one or both have distinctive characteristics which cannot be exactly reproduced by a competitor. Where there are generally similar trade-marked articles of almost any description, . . . such products may be placed under fair trade contracts."³² This same reasoning formed the basis of the decision that books, although the exclusive property of a particular publisher, were freely competing in the same general class with all other books.³³ The fact that a commodity has been granted a patent or copyright in recognition of its unique nature does not mean that it cannot be in free and open competition with products of a like nature.³⁴

The courts have established no definite criterion with which to judge whether a commodity is in "free and open competition with articles of the same general class." Judicial opinions suggest that the distinction is largely a matter of degree. In *Eastman Kodak v. FTC*³⁵ it was held that color film and black and white film were not competing articles of the same general class. Logically, it is difficult to distinguish between the *Kodak* case and cases wherein publishing companies, having exclusive control over certain books, were privileged to set fair trade prices. Perhaps black and white film is not of the same general nature as color film but neither, to paraphrase one author, is "Ferdinand the Bull" a suitable substitute for "The Grapes of Wrath."³⁶

"Free and open competition" has been interpreted to mean "that there are on the market similar products made by competing manufacturers."³⁷ The question of what constitutes a "similar product" remains to be determined in any given case. Here again the tendency of the courts is toward a liberal interpretation.

31. *Columbia Records, Inc. v. Goody*, 278 App. Div. 401, 405, 105 N.Y.S.2d 659, 663-64 (1st Dep't 1951).

32. *Ibid.*

33. *Schill v. Remington Putnam Book Co.*, 179 Md. 83, 17 A.2d 175 (1941).

34. *United States v. Univis Lens Co.*, 316 U.S. 241 (1942); *Glen Raven Knitting Mills, Inc. v. Sanson Hosiery Mills, Inc.*, 189 F.2d 845 (4th Cir. 1951); *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, 1 CCH Trade Reg. Rep. ¶ 3180 (Cal. Super. Ct. 1940).

35. 158 F.2d 592 (2d Cir. 1946), cert. denied, 330 U.S. 828 (1947).

36. *Fulda, Resale Price Maintenance*, 21 U. Chi. L. Rev. 175, 198 (1954).

37. *Sunbeam Corp. v. Central Housekeeping Mart, Inc.*, CCH Trade Reg. Rep. (1952 Trade Cas.) ¶ 67379 at 67987 (Ill. Super. Ct. 1952).

WHO MAY SET THE RESALE PRICE

Twenty-two states have specifically adopted the provision that a fair trade price may be fixed only by the owner of the trade-mark or a distributor authorized by the owner of the trade-mark.³⁸ Other states have failed to specify who may set the resale price. Among the latter there has arisen a variety of rules.³⁹

A New Jersey court has held that since it is the primary purpose of the fair trade acts to protect the good will that attaches to a commodity through the use of a trade-mark, any merchant in the chain of distribution who has an interest in the trade-mark may set the resale price.⁴⁰ The law in that state extends the privilege to distributors and wholesalers where the owner or producer of a commodity fails to set the price himself.⁴¹ Of course, once a resale price has been established on a commodity, all subsequent dealers are bound by it.

Contrary to the liberal view taken by New Jersey is the interpretation given to the New York fair trade act. The two state statutes are similar in that neither stipulates who may set the resale price and both require that the trade-mark appearing on the commodity belong to the owner or producer of the commodity.⁴² The New York courts, however, understand the intention of the legislature to be that only those persons whose trade-mark or name appears on the goods may fix the resale price.⁴³ This view recognizes that the purpose of a fair trade act is to protect the good will embodied in a trade-mark⁴⁴ but it deems this good will to belong only to the owner of the mark or brand.

The position taken by the New York courts is motivated in large part by a fear of the general confusion that could result if many distributors were to set different resale prices.⁴⁵ It is feared that unless the right to set the resale price is strictly limited to the owner of the trade-mark, ". . . the owner of the trade-mark might find his prices fixed for him by the very cut-raters against whom the statute aims to protect such owner."⁴⁶ The answer given to this argument is that where confusion

38. This is discussed in *Norman M. Morris Corp. v. Hess Bros., Inc.*, 243 F.2d 274, 277 (3d Cir. 1957). See also, 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3003 (1956).

39. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3172 (1956).

40. *Schenley Products Co. v. Franklin Stores Co.*, 124 N.J. Eq. 100, 199 Atl. 402 (1938).

41. *Pazen v. Silver Rod Stores, Inc.*, 130 N.J. Eq. 407, 22 A.2d 237 (1941).

42. N.J. Stat. Ann. § 56:4-5 (1937); N.Y. Gen. Bus. Law § 369-a.

43. *Automotive Elec. Serv. Corp. v. Times Square Stores Corp.*, 175 Misc. 865, 24 N.Y.S.2d 733 (Sup. Ct. 1940).

44. *Id.* at 869, 24 N.Y.S.2d at 738.

45. *Id.* at 871, 24 N.Y.S.2d at 740.

46. *Id.* at 872, 24 N.Y.S.2d at 740.

results from a multiplicity of resale prices, the producer can quickly correct the situation by fixing his own price on the article.⁴⁷

An exception to the New York rule has been made in the case of an exclusive distributor who is authorized by the owner of the trade-mark to set the resale price.⁴⁸ Recently, a similar case arose under the Pennsylvania fair trade act and it was held that an exclusive distributor, with or without authorization from the producer, could fix the price at which goods were to be fair traded.⁴⁹ Considering the number of different state laws that now exist, a distributor and his vendee might well be uncertain when dealing in interstate commerce, of their right to enter into a fair trade agreement. The problem would be eliminated if the federal fair trade statute specified who may set the resale price.⁵⁰ The Federal Trade Commission, reporting on the Miller-Tydings Act, criticized the act for its failure to make such a provision⁵¹ but the subsequently enacted McGuire Act was equally silent on the subject.

WHEAT PRICE MAY BE SET

Ordinarily, courts will take no action on the retailer's charge that the established fair trade price is too high.⁵² The reason for this policy was well stated in an Illinois case,⁵³ where a manufacturer had set a minimum resale price which guaranteed him a two hundred per cent profit. The court, in holding that the manufacturer was entitled to enforce the resale price, said, "the Illinois Fair Trade Act provides no criteria by which courts can determine whether a price is too high or too low. The theory seems to be that if a price is set too high, the public will refrain from buying or buy competing products. . . . Certainly the court has no facility for determining whether a price is too high, or too low, or just right. . . ."⁵⁴ The question of whether a fair trade price has been set too low is less likely to arise since many of the acts permit only the establishment of a minimum resale price.⁵⁵ It could arise, however, in those juris-

47. This view was set forth in *Parrott and Co. v. Somerset House, Inc.*, 1 CCH Trade Reg. Rep. (10th ed. 1956) ¶ 3170.05 (Cal. Super. Ct. 1937).

48. *Continental Distilling Sales Co. v. Famous Wines and Liquors, Inc.*, 273 App. Div. 713, 80 N.Y.S.2d 62 (1st Dep't 1948).

49. *Norman M. Morris Corp. v. Hess Bros. Inc.*, 243 F.2d 274 (3d Cir. 1957).

50. Proposed federal legislation would establish that the resale price may be set by the proprietor (owner of the trade-mark) or by a distributor specifically authorized by the proprietor to set resale prices. See H.R. 10527, 85th Cong., 2d Sess. § 2(5) (1958).

51. FTC, Summary and Conclusion on Resale Price Maintenance, December 13, 1945.

52. *Lentheric, Inc. v. F. W. Woolworth Co.*, 338 Pa. 523, 13 A.2d 12 (1940).

53. *Sunbeam Corp. v. Central Housekeeping Mart, Inc.*, CCH Trade Reg. Rep. (1952 Trade Cas.) ¶ 67379 (Ill. Super. Ct. 1952).

54. *Id.* at 67985.

55. Some states provide for the establishment of an absolute resale price. The McGuire Act and other state acts permit the vendor to set either a minimum or an absolute fair trade price. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3180 (1956).

dictions which allow the establishment of an absolute or stipulated resale price.⁵⁶

While it is true that courts will generally not interfere with a fair trade price on the ground that it is excessive, there are some exceptions to the rule. An Oklahoma court concluded that a fair trade price was "arbitrary and unreasonable" where it was shown that the price was set to assure the producer a profit of close to 375 per cent.⁵⁷ The Wisconsin fair trade act is singular in its provision that the department of agriculture and markets may, at their discretion, hear the complaint of any person that an established fair trade price is unfair or unreasonable.⁵⁸

A manufacturer may set a minimum price for a specific quantity of his product and the law will protect him against retailers who, after repackaging or rebottling the goods in smaller quantities under the same trade-mark, attempt to sell these lesser quantities in violation of the established fair trade price.⁵⁹ This rule was embodied in the decision in *Guerlain, Inc. v. F. W. Woolworth Co.*⁶⁰ The plaintiff in this case was a perfume manufacturer who set a minimum price of \$1.60 for "one dram or less" of his product. The defendant sold fractions of a dram of the perfume in tiny ampules under the plaintiff's trade-mark, for ten cents. Although it would have taken seventy ampules of perfume to make one dram, thereby making the retail price \$7.00 per dram, the defendant was enjoined from selling the fractional quantity below the minimum price. The court pointed out that while a fair trade price ". . . must always be related to the quantity which the contract ties to that figure," there is nothing in the fair trade act ". . . about proportioning prices to quantity."⁶¹ The decision in the *Guerlain* case appears to be consistent with the spirit and intent of the fair trade laws. Although it seems unlikely, the courts could apply the *Guerlain* rule to other commodities and such an application might work severe injustice. If the fair trade price were set on "one ton or less" of coal, or "one yard or less" of silk, then there would be discrimination as against the purchaser who needed

56. Where a fair trade act provides for the establishment of an absolute fair trade price it has been interpreted to include the authorization of minimum resale prices as well. *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942).

57. *Julius Schmid, Inc. v. McKay*, 1 CCH Trade Reg. Rep. (10th ed. 1956) ¶ 62509 (D. Okla. 1949).

58. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3180 (1956).

59. *DeVoin v. W. T. Grant Co.*, 1 CCH Trade Reg. Rep. (10th ed. 1956) ¶ 3184.05 (Cal. Super. Ct. 1938); *Lentheric, Inc. v. W. T. Grant Co.*, 257 App. Div. 348, 13 N.Y.S.2d 169 (1st Dep't 1939); *Lentheric, Inc. v. F. W. Woolworth Co.*, 338 Pa. 523, 13 A.2d 12 (1940).

60. 297 N.Y. 11, 74 N.E.2d 217 (1947).

61. *Id.* at 17-18; 74 N.E.2d at 219.