

### Unfair Competition—Fair Trade Acts

The pendulum of competition swings—to the slight tug of that which society deems to be for its best interests; to the hardy shove and selfish pull of pressure groups.

Legislation validating resale price maintenance contracts belongs in the latter category, enacted at the behest of manufacturers and producers of goods or, more probably, by command of groups of retailers.<sup>1</sup> Benefit to the general public or none is still moot.

Prior to legislative approval, contracts between manufacturers or producers, on the one hand, and retailers, on the other, fixing the resale price of a commodity which contained the trade-mark, brand, or name of the manufacturer or producer, were held to be unenforceable.<sup>2</sup> The objections to these contracts were twofold: The agreements constituted an unreasonable restraint of trade; they were in the nature of restrictive covenants on chattels, upon which the courts have always looked with disfavor.<sup>3</sup>

The main contention advanced for upholding the validity of the agreements was the protection of the trade-mark, trade-name, or brand of the manufacturer and producer—that is, the proprietary interest in the trade-mark, trade-name, or brand. However, this proprietary interest was held to be inferior to the benefit to be gained by the public in permitting unrestrained competition between retailers in the products of the same manufacturer or producer

From this judicial frown, those persons and groups most interested in the maintenance of uniform prices took an appeal direct to the state legislative bodies. Success resulted from their efforts early (and, presumably, only) in New Jersey. In 1913, the New Jersey legislature

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1. Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607 (1940); 49 YALE L. J. 145 (1939).

2. *John D. Park & Sons Co. v. Hartman*, 153 F. 24 (C.C.A. 6th 1907), cert. den. 212 U. S. 588, 29 S. Ct. 689, 53 L. Ed. 662 (1908); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1910); *Ingersoll v. Goldstein*, 84 N.J.Eq. 445, 93 A. 193, 7 A.L.R. 449 (Ch. 1915).

3. See excellent discussion of this aspect, Chafee, *Equitable Servitudes on Chattels*, 41 HARVARD L. R. 945 (1928).

enacted its first Fair Trade Act.<sup>4</sup> Slightly amended in 1915<sup>5</sup> and in 1916,<sup>6</sup> it has remained on the books down to the present time.<sup>7</sup> This statute did not affirmatively validate resale price-fixing contracts. It prohibited appropriation of or discrimination against a trade-name, trade-mark, or goodwill of a "maker" of goods by depreciating the value of the goods in the public mind by misrepresentations as to value or by price inducement, provided a notice to this effect was placed on the goods by the maker.

It is to be noted that the act was based solely upon the protection of the "maker's" goodwill and was operative only at his behest through the medium of something closely analogous to an equitable servitude on the articles themselves. The act was held to be constitutional in *Ingersoll v. Hahne & Co.* (Ch. 1918),<sup>8</sup> the court stating that a restraint to prevent the cut-price retailing knaves from using a producer's trade-name to defraud the public and to damage the manufacturer was a reasonable restraint. Nothing much in particular came of the legislation, and it is doubted whether very many manufacturers or producers took advantage of it.<sup>9</sup>

Subsequent to the débâcle of 1929, the "cut-rate" era began on a large scale. Each retailer cut prices to attract the trade to his place of business—in many cases, prices were cut to such an extent that financial failure resulted. To save themselves from their suicidal tendencies, appeal was again made to the legislative bodies in the early part of the preceding decade, this time by the retailers. As a result, forty-four of the states have now passed Fair Trade Acts. Most of the statutes passed are identical in terms.

New Jersey joined the parade in 1935 with the passage of this "uniform" Fair Trade Act.<sup>10</sup> In effect, it validates contracts between a

4. Chap. 210, P. L. 1913.

5. Chap. 376, P. L. 1915.

6. Chap. 108, P. L. 1916.

7. R. S. 56:4-1, 56:4-2; N. J. S. A. 56:4-1, 56:4-2.

8. 89 N.J.Eq. 332, 108 A. 128.

9. Litigation under the statute was limited to two cases: *Ingersoll v. Goldstein*, 84 N.J.Eq. 445, 93 A. 193 (Ch. 1915); *Ingersoll v. Hahne & Co.*, 88 N.J.Eq. 222, 101 A. 1030 (Ch. 1917); *Ingersoll v. Hahne & Co.*, *supra* note 8.

10. R. S. 56:4-3 to 56:4-6 inclusive; N. J. S. A. 56:4-3 to 56:4-6 inclusive.

manufacturer or producer and a wholesaler, between a manufacturer or producer and a retailer, or between a wholesaler and a retailer which fix the resale price of any commodity which bears a trade-mark, trade-name, or the name of the producer or owner "which is in fair and open competition" with other commodities of the same class. "Willfully and knowingly advertising, offering for sale, or selling any commodity" below the price stipulated in any contract, by any person, whether a party to the contract or not, is "unfair competition."<sup>11</sup>

The statute operates affirmatively as a curative measure on two broad common law doctrines which, in the problem under consideration, are interrelated. It removes any possible "restraint of trade" stigma attaching to price-fixing agreements; and it validates, if validation be necessary, equitable servitudes as between business organizations concerning the resale price of commodities containing a trade-mark, trade-name, or the name of the producer or owner.

The common law objection to these agreements on the basis of an unreasonable restraint of trade (*i.e.*, competition) was solely a question of policy. With the enactment of the statute there is an express legislative declaration that a policy exists in favor of protecting the goodwill of persons and businesses in the classes set forth stronger than that policy which is opposed to limitations on free and unhampered competition—at least insofar as price competition in identical commodities made by the same manufacturer or producer is concerned.<sup>12</sup>

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11. The statute was held to be unconstitutional in *Johnson & Johnson v. Weissbard*, 120 N.J.Eq. 314, 184 A. 783 (Ch. 1936); but this decision was reversed by the Court of Errors and Appeals, 121 N.J.Eq. 585, 191 A. 873, solely on the basis of *Old Dearborn Co. v. Seagram Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 130, 106 A.L.R. 1476 (U. S. Sup. Ct. 1936) holding the Illinois statute constitutional.

12. At this point the question might well be raised as to whether resale price maintenance contracts relating to *identical commodities and marketed by the same manufacturer or producer* do, in fact, unreasonably restrain competition. That is, can there be a valid basis for a determination that such an agreement is an unreasonable restraint. See *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, Harry Shulman, *supra* note 1; but *cf.* *John D. Park & Sons Co. v. Hartman*, and *Dr. Miles Medical Co. v. John D. Park & Sons*, *supra* note 2.

By the same token, any policy objection to price-fixing agreements as restraining alienation is cured.

The foregoing material is founded upon a strictly legalistic view of the act rather than upon its true philosophy. Although representing but a small portion of spirits in the decanter of social legislation, these Fair Trade Acts are, nevertheless, social legislation for the benefit of a certain class in the community—the retailers. Within the space of a few years, the philosophy behind price-fixing has sprung from a protection of the goodwill inherent in the trade-name of a commodity to protection of the small retailer from demoralizing price-cutting, and this though the statute proclaims its policy to be protection of the goodwill of the producer. A reading of the cases gives the impression that the courts, at least in New Jersey, are attempting to carry out this philosophy so far as is possible under attendant circumstances. But the results are not entirely satisfactory.

It would appear that the resale price maintenance contracts under the statute operate in such a manner as to give rise to an equitable servitude attaching immediately to the *business* of the retailer entering into the contract and to all other *business organizations* which sell the commodities which are the subject of the contract thereafter receiving notice of the existence of the contract and of the prices set forth therein.<sup>13</sup>

Mechanically, the first step in acquiring the benefits of the statute is the consummation of at least one contract setting forth the resale price of the commodity. Although the "contract" is merely one of many possible price-fixing devices which could have been used for the same purpose, the existence of a valid contract is a condition precedent.<sup>14</sup>

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13. The problem of whether the servitude attaches to the business organization or simply to the commodities themselves is more or less academic. The only indication to support the view that the servitude attaches to the business is the often repeated statement that the fixed price can be disregarded and the commodity sold for whatever price the retailer sees fit to sell it *so long as the trade-mark, trade-name, or name of the producer or manufacturer is removed*. See *Old Dearborn Co. v. Seagram Corp.*, *supra* note 11; *Schenley Products Co. v. Franklin Stores Co.*, 124 N.J.Eq. 100, 199 A. 402 (E. & A. 1938).

14. This requirement has received liberal interpretation; *Houbigant Sales Corp. v. Woods Cut-Rate Store*, 123 N.J.Eq. 40, 196 A. 683 (Ch. 1937); *Revlon*

Notice of the contract and of the prices set forth therein binds all other retailers as to commodities acquired after notice.<sup>15</sup> The act does not stipulate what type of notice is to be deemed "notice" and no cases have as yet arisen in New Jersey concerning this question. Presumably a registered letter would best serve the purpose. The prevailing practice, it would appear, is for the manufacturer or producer to have a separate agreement with each retailer, each agreement necessarily containing the same price schedules.

Enforcement of price schedules contained in resale price maintenance agreements is by injunction. As originally enacted, violation of the price schedules of a resale price maintenance contract was "actionable at the suit of any person damaged thereby." After a notably unrealistic decision which followed the letter but not the spirit of the statute in *Schenley Products Co. v. Franklin Stores Co.* (Ch. 1937),<sup>16</sup> an amendment was passed making violation "actionable at the suit of the producer, distributor . . . or retailer."<sup>17</sup> By thus expressly awarding retailers a cause of action against the violating retailer, that class of persons for whose benefit the statute was enacted received something which it should not have been necessary for the legislature to give. Regardless of the wording of the statute, it was inherent therein

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*Nail Enamel Corp. v. Charmley Drug Shop*, 123 N.J.Eq. 301, 197 A. 661 (Ch. 1938).

15. *Burstein v. Charline's Cut-Rate*, 126 N.J.Eq. 560, 10 A. 2d 646 (Ch. 1940); see also, *Revlon Nail Enamel Corp. v. Charmley Drug Shop*, *supra* note 14; *Lentheric, Inc. v. Weissbard*, 122 N.J.Eq. 573, 195 A. 818 (Ch. 1937); *Charmley Drug Shop v. Guerlain*, 113 F. 2d 247 (C.C.A. 3d 1940); *Joseph Pazen v. Silver Rod Stores, Inc.*, 129 N.J.Eq. 128, 18 A. 2d 576 (Ch. 1941). A problem might very well be raised where the manufacturer entered into one contract with a retailer and gave proper notice thereof to all other retailers; assume then that the contracting retailer breaches and does not maintain the prices fixed. The contract being the foundation, would the breach cause the entire scheme to fail and permit the noticee retailers to disregard the price schedules with impunity? With an eye toward the act's basic philosophy, it is submitted that the noticee retailers should be enjoined though the contracting retailer is not first enjoined.

16. 122 N.J.Eq. 69, 192 A. 375, *rev'd*, 124 N.J.Eq. 100, 199 A. 402 (E. & A. 1938). See also *Frank Fischer Corp. v. Ritz Drug Co.*, 129 N.J.Eq. 105, 19 A. 2d 454 (Ch. 1941).

17. Chap. 165, P. L. 1938.

that they, above all others, should have the right of action. At the very most, the amendment is, to an extent, a legislative confession of the underlying purpose of the act.

Though they have been expressly given this right of action and though they were the foremost instrumentality in having the statute adopted, the retailers have, on the whole, refrained from taking advantage of the statute. In only two reported cases have retailers sued to enjoin violation.<sup>18</sup> Mainly because of this lethargy and apparent lack of interest, a number of decisions have been rendered which are inimical to the purpose of the act. Most litigation has arisen between the producer or his representatives and retailers who have violated the resale price agreements. Consequently, any collateral defenses the violator had as against the producer could be pleaded as a bar to the issuance of an injunction. In most instances, such defenses would not have been available against a complainant-retailer. It has been held that injunctive relief will not be granted against a retailer who has indicated his willingness to abide by the resale price fixed but to whom the producer has refused to sell his products,<sup>19</sup> or where the producer has failed to use reasonable diligence to prevent price-cutting in his commodities by retailers other than the defendant either by taking steps to see that the violators obtain no more of the producer's goods or by suit to enjoin,<sup>20</sup> or where there has been a similar "abandonment of the price structure" by the producer by his combining two or more articles together in a special package the price of which is less than

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18. *Burstein v. Charline's Cut-Rate*, *supra* note 15; *Joseph Pazen v. Silver Rod Stores, Inc.*, *supra* note 15.

19. *Lentheric, Inc. v. Weissbard*, *supra* note 15; but *cf.* *Revlon Nail Enamel Corp. v. Charmley Drug Shop*, *supra* note 14, where the violator is a member of a certain class of retailers with whom the producer believes it poor policy to deal.

20. *Calvert Distilling Co. v. Gold's Drug Stores*, 123 N.J.Eq. 458, 198 A. 536 (Ch. 1938); *Magazine Repeating Razor Co. v. Weissbard*, 125 N.J.Eq. 593, 7 A. 2d 411 (Ch. 1939); *Burroughs Wellcome & Co. v. Weissbard*, 129 N.J.Eq. 563, 20 A. 2d 445 (Ch. 1941). Query, in order to be able to enforce observance of the resale prices by retailers who have been given notice, must the producer give notice to all retailers who deal in these commodities in the state, or only in the county, or the municipality, or the local competitive district? See *Frank Fischer Corp. v. Ritz Drug Co.*, *supra* note 16.

the total price of the two articles when sold separately.<sup>21</sup> It is submitted that all of the preceding rules are sound determinations in suits in which the producer is the complaining party, but they do not carry out the philosophy of the act, and the defenses should not and, presumably, will not have any weight in a suit by a retailer under the same circumstances.<sup>22</sup> That the courts are not unwilling to enforce the resale price schedules stringently is quite apparent in the case of *Bristol-Myers v. L. Bamberger & Co.*,<sup>23</sup> where the defendant was enjoined from selling complainant's products to its employees at a usual ten per cent employee discount.<sup>24</sup>

Since our policy is now to protect this retailing class of society from each other and from themselves, without regard to any possible benefit or detriment to the general public, it is quite pertinent to inquire whether the statute and supplemental decisions are giving this class the benefit of this policy. It would appear that they are not receiving the full benefit. The judiciary is willing to give it to them, but they, individually, seem unwilling to pursue the advantages and permit the producer to shoulder the burden of compelling observance of price schedules. As a practical matter, this apparent uninterested attitude may very well be caused by the nature of the remedy to compel observance. Remedy by injunction is very effective, but it is expensive, and, seemingly, there is always more than one violator thus requiring an indeterminate number of separate suits, the cost of which would leave the average retailer impoverished.<sup>25</sup> But this is not the primary difficulty.

With all due respect to the ancient and honorable injunctive order,

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21. *Magazine Repeating Razor Co. v. Weissbard*, *supra* note 20; *Bathasweet Corp. v. Weissbard*, 128 N.J.Eq. 135, 15 A. 2d 337 (Ch. 1940); *Frank Fischer Corp. v. Ritz Drug Co.*, *supra* note 20.

22. *Burstein v. Charline's Cut-Rate*, *supra* note 15.

23. 122 N.J.Eq. 559, 195 A. 625 (Ch. 1937), *aff'd*, 124 N.J.Eq. 235, 1 A. 2d 332 (E. & A. 1938).

24. See also *Johnson & Johnson v. Weissbard*, 121 N.J.Eq. 585, 191 A. 873 (E. & A. 1937); *Schenley Products Co. v. Franklin Stores*, *supra* note 13; *Houbigant Sales Corp. v. Woods Cut-Rate Stores*, *supra* note 14; *Revlon Nail Enamel Corp. v. Charmley Drug Shop*, *supra* note 14.

25. There is no reason why retailers' associations could not do the policing and furnish the funds whenever necessary.

it does not fit the needs; it is insufficient in and of itself. Herein seems to lie the greatest stumbling block in the path of effective enforcement of the statute and the furtherance of its true policy. When a retailer, having notice of a resale price maintenance contract, contemplates selling below the prices fixed, he will naturally consider the possible adverse consequences. What must he consider? First, he *can be* enjoined. But will he be enjoined? This, in turn, depends upon whether the producer, wholesaler, or another retailer feels sufficiently aggrieved to file a bill and to expend the necessary funds. Assume that he is enjoined, what will this mean to him? He will be ordered to refrain from selling these commodities below the prices fixed in the resale price maintenance contract. This is the extent of his threatened "punishment" if he determines to ignore the price schedules. Secondly, he is liable at law for any damages resulting from his disregard of the price schedules. These words roll forth with majestic overtones, but they fail to frighten. Who will be able to prove that damages have been suffered or the extent thereof? Simply, there is no real deterrent.

It is believed that a would-be violator would tend to refrain from cutting prices were he faced with a strong penalty in the form of a fine perhaps. Any penalty harsh enough to act as a true deterrent would, in all probability, give better effect to our avowed policy of protecting the retailers, as a class of society, from demoralizing price-cutting. The legislature has declared the policy and installed the machinery. Let them now provide the power to work enforcement.