A Symposium on the Fair Trade Laws: Part IV: Indirect Methods of Evading the Fair Trade Laws

other violators within a specified time[89] or on the continuation of an effective enforcement program.[90] The retailer discriminated against might also be able to secure affirmative relief on the theory that non-discrimination is a "service" within the meaning of section 2(e) of the Robinson-Patman Act.[91] Under this theory the retailer might obtain injunctive relief or treble damages.[92] Similarly, there is no reason why the courts might not give the contracting retailer discriminated against specific relief against a discriminating manufacturer by means of a constructive condition, since it would undoubtedly appear that adequate enforcement is implicit in the fair trade contract.[93]

PART IV: INDIRECT METHODS OF EVADING THE FAIR TRADE LAWS

COMBINATION SALES

Where a combination is composed entirely of fair traded items and is itself fair traded at a price equal to or in excess of the sum of the fair trade prices of the components there is no violation of the fair trade laws.[1] However, in combinations consisting of both fair trade items and non-fair trade items the price at which the combination is itself fair traded is of primary concern. In *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*,[2] one of the combinations put out by plaintiff, which the defendant alleged constituted an abandonment of price structure, included a fair trade product plus a non-fair trade product at a price of one cent in excess of the price of the fair trade product. The New Jersey court, in striking

89. Fishman v. Kaye, CCH Trade Reg. Rep. (1950 Trade Cas.) ¶ 62718 (N.J. Super. Ct. 1950).

90. General Elec. Co. v. R. H. Macy & Co., 199 Misc. 87, 103 N.Y.S.2d 440 (Sup. Ct.), rev'd and judgment vacated on plaintiff-respondent's motion, 278 App. Div. 939, 105 N.Y.S.2d (1st Dep't 1951).

91. Note, 65 Yale L.J. 235, 243-44 (1955).

92. 15 U.S.C.A. §§ 15, 26 (1951).

93. See 3 Corbin, Contracts §§ 632, 653 (1951); 3 Williston, Contracts §§ 668, 675A (rev. ed. 1936).

1. It has been held that the combination may itself be a commodity fair traded by the producer. Eastman Kodak Co. v. Siegel, 1 A.D.2d 1002, 151 N.Y.S.2d 859 (1st Dep't 1956). Accord, Eastman Kodak Co. v. Home Util. Co., 234 F.2d 766 (4th Cir. 1956), cert. granted, 352 U.S. 821, appeal dismissed, 352 U.S. 956 (1957).

Generally it is the manufacturer who puts out the combination, the question of its validity being raised as a matter of defense to the effect that the producer has abandoned his price structure as to the fair trade items in the combination. When the retailer or wholesaler is the party putting out the combination, the question is whether he is selling the fair trade items in the combination below their fair trade prices.

2. 129 N.J. Eq. 105, 19 A.2d 454 (Ch. 1941).

down the combination sale, said, ". . . in every case [including the combination now being considered] the price of the combination package *reduces the value of the individual unit* for which a minimum resale price had previously been established. The manufacturer is attempting to enforce at the same time its two price schedules for the combination and the individual article . . . . This court held that the act of the manufacturer resulted in an abandonment of the minimum resale price which had been fixed for the articles which were a part of the combination." [3]

However, in *Eastman Kodak Co. v. Siegel,*[4] the producer of the combination was granted relief. The New York Supreme Court rejected defendant's contention that the combination constituted an abandonment by plaintiff of its price structure and denied the injunction solely upon the ground that the combination as it stood could not be properly fair traded. The appellate division, in a memorandum opinion, reversed this holding and granted the injunction on the ground that the combination was in itself a commodity and could be fair traded. [5] The combination in the *Eastman* case consisted of fair trade items made by plaintiff and non-fair trade items, some of which were made by other producers. The sum of the price of the fair trade items was $7.85, the fair trade price of the combination was $13.65, with the difference of $5.80 presumably representing the price of the non-fair trade items. Perhaps significantly, neither New York court discussed the question of abandonment in terms of the relation of the combination price to the price of the fair trade items included, as did the New Jersey court in the *Fischer* case.[6]

The factual distinction between the *Fischer* case and the *Eastman* case lends support to the proposition that the respective courts were in reality applying the same rule and that the difference in result arose because of the difference in facts. There is little doubt that the one cent price of the non-fair trade item in the *Fischer* case was used as a makeweight to disguise what, in its practical effect, was a reduction in the price of the fair trade item. But this inference could not be so easily drawn with respect to the $5.80 price of the non-fair trade items in the *Eastman* combination. Thus, on the surface at least, it is possible to argue that New Jersey and New York apply the same rule of thumb to combination sales based upon the peculiar facts of each case. In opposition to such a conclusion, however, stands the dictum of the court in the *Eastman* case, ". . . combination sales of identical or different fair traded products of the same man-

3. Id. at 112, 19 A.2d at 459. (Emphasis added.)

4. 2 Misc. 2d 966, 150 N.Y.S.2d 99 (Sup. Ct.), rev'd, 1 A.D.2d 1002, 151 N.Y.S.2d 859 (1st Dep't 1956).

5. 1 A.D.2d 1002, 151 N.Y.S.2d 859 (1st Dep't 1956). Accord, Eastman Kodak Co. v. Home Util. Co., 234 F.2d 766 (4th Cir. 1956).

6. See note 3 supra.

ufacturer at *less* than the sum of the fair trade prices fixed for each individual item should be protectable under the Fair Trade Law . . . ."[7] This, it should be noted, is an even more extreme situation than that presented in the *Fischer* case. There is strong probability, therefore, that the respective rationales of the *Fischer* and *Eastman* cases are, in fact, opposed to one another. If such is the fact, the more equitable view is that taken by New Jersey since it places the burden of the confusion, if any, which a combination may cause on the retail market upon the party causing it.[8]

Combinations consisting of two or more fair trade items where the combination price is less than the sum of the fair trade prices of the components have also been held to be an abandonment by the producer of its price structure. In *Bathasweet Corp. v. Weissbard*[9] two of the combinations in question involved fair trade items sold in combination at a price less than the sum of their prices when sold separately. The New Jersey court said: "when the complainant placed upon the market a combination package for resale at a price which was less than the aggregate price of the combined items when sold independent of the combination, it abandoned its fair trade contract and the prices fixed thereunder on the individual items."[10] Tennessee has rejected this position[11] and the dictum in the *Eastman* case indicates that New York may also adopt a contrary view.[12] Again it appears that the New Jersey position is the sounder from an equitable point of view. The fair trade laws, at least ostensibly, were passed to enable the producer, or other parties who may suffer damage, to protect his interest in the good will attached to the trade name or brand by stipulating minimum resale prices for such commodities and enforcing them against sellers by injunctive proceedings.[13] In permit-

7. 2 Misc. 2d at 979, 150 N.Y.S.2d at 113 (dictum). (Emphasis added.)

8. Bathasweet Corp. v. Weissbard, 128 N.J. Eq. 135, 15 A.2d 337 (Ch. 1940). The difficulties of the retailer stocked with the individual fair trade item who must sell it at its fair trade price in competition with the combination was noted by a New York court but did not enter its decision. Pinaud, Inc. v. Beaux Arts Chemists Corp., 170 Misc. 583, 10 N.Y.S.2d 893 (Sup. Ct. 1939).

9. 128 N.J. Eq. 135, 15 A.2d 337 (Ch. 1940).

10. Id. at 138, 15 A.2d at 339. Utah may have adopted this position in regard to such combinations. Opinion of the Attorney General of Utah, CCH Trade Reg. Rep. (1941 Trade Cas.) ¶ 56162 (Utah 1941).

11. Colgate-Palmolive Co. v. Hogue & Knott Super Market, CCH Trade Reg. Rep. (1955 Trade Cas.) ¶ 67989 (W.D. Tenn. 1955). Plaintiff producer fair traded 3¼ oz. of toothpaste at $.47 then put out a combination of two tubes of the same toothpaste equalling 3½ oz. for a combination price of $.39. The court held that there was no abandonment, such short term offers being a legitimate and common practice among producers such as plaintiff.

12. See note 7 supra.

13. Bristol-Myers Co. v. L. Bamberger & Co., 122 N.J. Eq. 559, 195 Atl. 625 (Ch.

ting equitable enforcement by the producer the courts should take care to see that the producer satisfies the equitable maxim that "he who seeks the aid of equity should himself do equity." To permit a producer to set up a low priced combination of fair trade items in competition with retailers who bought the items individually relying upon the producer to aid in their sale, not obstruct it, is inconsistent with the equitable nature of the action.[14]

EMPLOYEE DISCOUNTS[15]

Certain classes of purchasers, generally charitable or municipal organizations, are specifically exempted from fair trade price provisions by the statutes.[16] The producer, however, may expressly exempt certain purchasers by the terms of his fair trade contract. Generally, such exclusions run only in favor of the producer's own employees and/or the employees

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1937); Guerlain, Inc. v. F. W. Woolworth Co., 297 N.Y. 11, 74 N.E.2d 217, cert. denied, 332 U.S. 837 (1947). This is generally held to be the basic purpose of all of the fair trade laws.

14. There are other types of combinations which raise problems somewhat beyond the scope of the discussion in this section. Combinations consisting of a fair trade item and a free gift fall more properly within the discussion of gifts in conjunction with the sale of fair trade items, p. 100 infra. Combinations consisting of fair trade items made by the combining producer and fair trade items made by another producer raise an anti-trust problem. In Magazine Repeating Razor Co. v. Weissbard, 125 N.J. Eq. 593, 7 A.2d 411 (Ch. 1939), the New Jersey court held that the plaintiff, by permitting a fellow producer to sell its fair traded razor in combination with his own shaving cream for a combination price less than the fair trade price of the razor, abandoned its price structure as to the razor. The court noted that resale price fixing agreements between the producers would be illegal. Possible solutions for plaintiff in such a case might be a refusal to sell to the combining producer, or the courts might possibly consider the combining producer in such a case as a seller and permit plaintiff to enforce its fair trade prices against him under the fair trade law.

15. Discounts directly effecting a reduction in the minimum resale price of a fair trade item, would, in the absence of exemptions either statutory or contractual, constitute a violation of the fair trade law. Discounts such as those involved in the giving of trading stamps, cash register receipts and similar devices will be discussed pp. 100-03 infra. Discounts such as the familiar quantity purchase discounts between wholesalers or between wholesalers and retailers may or may not be violations of the fair trade laws depending upon whether the producer by his fair trade contract has established minimum resale prices at all levels of the merchandising chain or has only fixed the minimum resale price at the retail level. Of course, even where there is a stipulated minimum, the discount may be given by varying the margin in excess of the minimum price. Since the primary concern is the price at which the ultimate consumer can get the item, it is the general practice of producers to fix only the retail price leaving the middlemen free to grant such discounts among themselves as are deemed useful to their business.

16. See, e.g., N.Y. Gen. Bus. Law § 369a (3). Obviously sales to employees of such exempted charitable or municipal organizations would not fall within the words or intent of the statutory exemptions unless the employees were purchasing as agents of the corporation for the use and benefit of the corporation.

of the producer's distributors although they may sometimes include the employees of retailers handling the producer's products. The right of the producer to make such express exemptions if they are reasonable and no discrimination is made among sellers who may make sales to such exempted persons, has generally been upheld.[17] The reasonableness of the exception, of course, would depend upon its extent and the circumstances involved. A seller who sells fair trade products to his own employees at discounts where such employees are not expressly exempted in the fair trade contract, violates the fair trade law.[18] It follows, therefore, that the common practice of small retailers in industrial communities of granting discounts below minimum resale price to employees of the larger firms in the area may in many cases constitute a violation of the fair trade law.

Gifts, Trading Stamps, Cash Register Receipts and Customer Services

The giving of a free gift in conjunction with the sale of a fair trade commodity, except to the extent authorized by the fair trade contract, is specifically prohibited by the statutes of nineteen states.[19] Decisions in New York and New Jersey, the statutes of which do not contain such specific prohibitions, have reached substantially the same result.[20]

The question of whether the familiar trading stamps, cash register receipts and similar devices given with the purchase of commodities and redeemable in cash or merchandise, constitute a violation of the fair trade laws has occasioned a split among the jurisdictions. The statutes of twenty of the states specifically prohibit the offering or making of any concession of any kind in conjunction with the sale of fair trade commodities except to the extent authorized by the fair trade contracts.[21] In

17. General Elec. Co. v. Federal Employees' Distributing Co., 45 Cal. 2d 914, 291 P.2d 942 (1956); Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A.2d 841 (1942); Schill v. Remington Putnam Book Co., 179 Md. 83, 17 A.2d 175 (1941); General Elec. Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652 (1956); Burroughs Wellcome & Co. v. Weissbard, 129 N.J. Eq. 563, 20 A.2d 445 (Ch. 1941); General Elec. Co. v. Klein on the Square, Inc., 121 N.Y.S.2d 37 (Sup. Ct. 1953); see also, General Elec. Co. v. Monarch-Saphin Co., 80 N.Y.S.2d 419 (Sup. Ct. 1948).

18. Bristol-Myers Co. v. L. Bamberger & Co., 122 N.J. Eq. 559, 195 Atl. 625 (Ch. 1937).

19. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3008 (1956).

20. E. R. Squibb & Sons v. Charline's Cut Rate, Inc., 9 N.J. Super. 328, 74 A.2d 354 (Ch. 1950); Bernhard v. Savall Drug Store, Inc., 82 N.Y.S.2d 122 (Sup. Ct. 1948). The latter case made an interesting distinction. Defendant therein was enjoined from offering a free gift with every purchase of $2.00 or more. Defendant amended the offer to a free gift for every person entering the store regardless of whether a purchase was made or not. An injunction was denied on the ground that the offer now was merely a device to attract customers and was not directly related to the sale of the commodities in the store.

21. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3008 (1956). Wisconsin has a separate statute prohibiting the giving of stamps when the result would be a sale below the fair trade price. 1 CCH Trade Reg. Rep. supra.

these states there are few problems in regard to stamps and similar devices.[22]

The decisions in those states in which there are no express statutory prohibitions, fall into two general classes.

First, those jurisdictions which hold that such devices are merely discounts given in consideration for the payment of cash and do not effect a direct reduction in the price of the commodities involved.[23]

Second, those jurisdictions which hold that such devices do directly effect a reduction in price of the commodities involved and, when offered in conjunction with the sale of fair trade commodities, constitute a viola-

22. There is a possible state constitutional problem involved. There are cases in some of the states which involved statutes prohibiting the giving of premiums in conjunction with the sale of certain commodities. Many of these statutes were held to be unconstitutional as violative of the due process clause of the state constitution. Stamps were the premiums involved in some of them, e.g., Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 30 N.E.2d 269 (1940). Generally the objection was made that the trading stamp business was a legitimate business practice which was protected under due process and the prohibition of such practice in the particular cases had no reasonable relation to the police power of the states. New York had such a case, People v. Gillson, 109 N.Y. 389, 17 N.E. 343 (1888), and it was cited on the constitutional problem in Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950). The court of appeals distinguished People v. Gillson on the ground that whereas the direct prohibition of the trading stamp business as such might be a violation of due process, the regulation of that business to give effect to fair trade legislation which had been held to be within the police power would not be unconstitutional. This position might be taken regardless of whether the particular fair trade statute involved expressly prohibits trading stamps in conjunction with the sale of fair trade commodities or whether such a prohibition is implied by the courts. The Supreme Judical Court of Massachusetts in the recent case of Colgate-Palmolive Co. v. Elm Farm Foods Co., —— Mass. ——, 148 N.E.2d 861 (1958), cited Bristol-Myers Co. v. Picker, supra, with approval saying that while ". . . this court has stated in several cases that the issuance of trading stamps is a legitimate practice which could not be made unlawful by legislative enactment. . . . [L]ike all rights, this right cannot be exercised in such a way as to injure the rights of others [the producer's right to protect his good will]." —— Mass. at ——, 148 N.E.2d at 866.

It should be noted that the United States Supreme Court in Rast v. Van Deman & Lewis Co., 240 U.S. 343 (1916), held that a state in the exercise of its police power could prohibit the giving of premiums with the purchase of certain merchandise without violating the federal due process clause.

23. Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1952); Safeway Stores v. Oklahoma Retail Grocers Ass'n, —— Okla. ——, 322 P.2d 179 (1958); Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956). There is a New Jersey decision, Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954), decided not under the state fair trade act but under the Motor Fuels Sales Act. The court specifically stated that it was not concerned with the conventional price fixing act but it held that stamps were merely a cash discount; a term of payment and not a price reduction. In the light of such reasoning it is difficult to see how a different result could be reached in regard to stamps and the sale of fair trade commodities.

tion of the fair trade law.[24] The New York Court of Appeals in *Bristol-Myers Co. v. Picker*[25] considered the question in the following terms: "considered as a method of advertising, the challenged scheme [cash register receipts] must be differentiated from types of service such as free parking, self-service, care of infants, entertainment, free delivery and the like . . . . These other types of service have no direct relation to the article purchased or the price paid . . . . Here the benefit to the customer is directly, proportionately, inseparably and specifically *related to the article purchased and its price.*"[26] It is submitted that this is a fairly good test whereby all types of "devices" on the retail level presently in use or which may be used in the future may be judged in relation to violation of the fair trade law.

It is urged by those jurisdictions which consider such devices to be mere cash discounts that the giving of stamps had been a legitimate merchandising device long before the passage of the fair trade acts and that it was not the intent of the legislature in those acts to prohibit this practice. This argument finds support only in those jurisdictions the statutes of which do not expressly prohibit concessions such as stamps and similar devices.[27]

The stamps which the purchaser of a fair trade item at the stipulated fair trade price receives are not valueless; they represent a value in connection with the exchange which cannot logically be ignored when de-

24. Colgate-Palmolive Co. v. Elm Farm Foods Co., —— Mass. ——, 148 N.E.2d 861 (1958) (stamps and cash register receipts); Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950) (cash register receipts); Ed. Schuster & Co. v. Steffes, 237 Wis. 41, 295 N.W. 737 (1941) (stamps). The Wisconsin fair trade laws specifically prohibit stamps where the result is a sale below fair trade price and that was the ground of the decision. See note 21 supra. The court stated, however, that it does not necessarily follow that because a device is a cash discount it does not effect a reduction in price as well. The Massachusetts court in Colgate-Palmolive Co. v. Elm Farm Foods Co. supra said, "there is no magic in the words 'cash discount.' When subjected to analysis they are merely a euphemism for what is in reality a price cut." —— Mass. at ——, 148 N.E.2d at 865.

25. 302 N.Y. 61, 96 N.E.2d 177 (1950). It is interesting to note in connection with the constitutional problem outlined, note 22 supra, that both the Colgate-Palmolive Co. v. Elm Farm Foods Co. and the Ed Schuster & Co. v. Steffes cases, note 24 supra, lend support to the New York position that while prohibition of stamps may be unconstitutional, regulation to give effect to the fair trade laws would not.

26. Id. at 68, 96 N.E.2d at 180. The courts appear to be in general accord that customer services such as those mentioned by the New York court do not constitute violations of the fair trade laws but are legitimate competitive methods to attract customers. Accord, Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1943); Gever v. American Co., 387 Pa. 206, 127 A.2d 694 (1956).

27. This was one of the arguments put forth by the courts in Weco Products Co. v. Mid-City Cut Rate Drug Stores, and Gever v. American Stores Co., note 23 supra. Neither the California nor the Pennsylvania fair trade statutes expressely refer to the giving of stamps or other concessions. See note 21 supra.

termining the actual price paid for the item. The price of an article necessarily includes the entire exchange of value between buyer and seller in relation to the article.

The weakness of the cash discount theory is further demonstrated by the holding of the California court in *Food and Grocery Bureau, Inc. v. Garfield*.[28] It was held in that case that the fact that a seller did an all cash business did not prevent him from giving stamps in consideration of the payment of cash for his goods. It is a somewhat strained position to say that such a retailer is giving a cash discount. At best, the discount is being given in consideration for the willingness of customers to patronize a store where they cannot get credit.

If, as seems clear, stamps and similar devices effect a reduction in price of the commodity below fair trade price, which need not be the case where the products are being sold for a price in excess of the stipulated minimum, they constitute a violation of the fair trade laws regardless of the reason for which they are given.

REPACKAGING

There is no question that where a seller removes the label or other indicia of the producer's good will in the fair trade commodity and resells it wholly without the use in any way of that good will, he may resell it at his own price.[29]

Where, however, the seller sells the producer's product in a new package but one which bears indicia of the producer's good will, if the result is a sale below the fair trade price, there is a violation of the fair trade law. An interesting question as to what constitutes a sale below fair trade price in such a case was presented in *Guerlain, Inc. v. F. W. Woolworth Co.*[30] There the court said of defendants' attempt to sell perfume in smaller quantities in its own bottles but still under a plaintiff's name, "in employing [plaintiff's brand] . . . , in placing [it] on the label, defendants are using plaintiff's good will . . . to facilitate sales. They are . . . in

28. 20 Cal. 2d 228, 125 P.2d 3 (1942).

29. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Schwegmann Bros. Giant Super Markets v. Hoffmann-LaRoche, Inc., 221 F.2d 326 (5th Cir.), cert. denied, 350 U.S. 839 (1955); Guerlain, Inc. v. F. W. Woolworth Co., 297 N.Y. 11, 74 N.E.2d 217, cert. denied, 332 U.S. 837 (1947); Johnson & Johnson v. Weissbard, 121 N.J. Eq. 585, 191 Atl. 873 (Ch. 1937); Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523, 13 A.2d 12 (1940). The statutes of Ala., Ark., Colo., Conn., Del., Ga., Idaho, Ind., Kan., Mont., Neb., N.C., S.D., Utah, W. Va., and Wyo. specifically exempt sales where the label has been removed or obliterated and the sale is made without the use of the producer's good will. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3006 (1956).

30. 297 N.Y. 11, 74 N.E.2d 217 (1947). For a fuller discussion of the facts of this case and the holding in regard to what constitutes a sale below fair trade price see Part II: Definitions and Related Problems, p. 80 supra.

practical effect, *identifying* the product as plaintiff's, and to that extent they are violating the plain mandate of the Feld-Crawford Act."[31]

Pinesbridge Farm, Inc. v. Bloomingdale Bros., Inc.[32] raised a somewhat different problem. The producer fair traded the product under one name but put out the same product (smoked turkey pate) under a different brand name without regard to price restrictions. The court rejected defendant's contention that this constituted an abandonment by plaintiff of its price schedule, substantially on the ground that the producer, like the vendor, may separate the physical property from the indicia of good will and sell the product under other brands without regard to fair trade prices.

DAMAGE AND CLOSE-OUT SALES

While damage and close-out sales are specifically exempted by the fair trade statutes of all jurisdictions, the requirements vary.[33] The problems involved mainly concern questions of fact as to good faith, actual damage and the like.

Concerning damage sales, in New York at least, the goods must actually be damaged and notice must be given to the public that the reduction in price is due to the fact that the goods are damaged and the allowance made must be reasonably proportionate to the extent of the damage.[34] In order for a seller to sell damaged goods below list price, it is not necessary that the goods be damaged while owned by him.[35]

The statutes of some of the states exempt sales of second hand as well as damaged articles,[36] while those of New York and some other jurisdictions do not. The enactments of the latter group do not expressly state whether in speaking of fair trade commodities they refer only to *new* commodities. If second hand fair trade commodities also come within

31. Id. at 18-19, 74 N.E.2d at 219. The Feld-Crawford Act referred to is the New York fair trade act.

32. 176 Misc. 179, 26 N.Y.S.2d 1005 (Sup. Ct. 1941).

33. 1 CCH Trade Reg. Rep. (10th ed.) ¶¶ 3005-06 (1956).

34. Empire State Camera Exchange, Inc. v. Reynolds, 194 Misc. 301, 88 N.Y.S.2d 107 (Sup. Ct. 1949). The provisions of the New York act in regard to damage sales are as follows: (Sales are Exempted) "When the goods are damaged or deteriorated in quality, and notice is given to the public thereof." N.Y. Gen. Bus. Law § 369a(2)(b). The court interpreted this as follows, "if and when a particular article becomes actually damaged . . . it may . . . be sold at less than list price, provided the fact of damage . . . and the fact that it is being sold below list price because of such damage . . . are made known to the customer, and provided the discount below list price is fairly proportioned to the nature and extent of the damage . . . ." Empire State Camera Exchange, Inc. v. Reynolds, supra at 303-04, 88 N.Y.S.2d at 109-10.

35. Remington Arms, Inc. v. Fox & Murphy, Inc., 206 Misc. 1030, 136 N.Y.S.2d 272 (Sup. Ct. 1954). That this is not so in the case of close-out sales, see notes 40 and 42 infra.

36. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 3006 (1956).

the prohibitions of the statute, then a problem is clearly presented for, very often, such articles may not qualify as damaged goods. Thus, if the statute requires second hand dealers to sell fair trade commodities at fair trade price, such dealers would be faced with the reluctance of purchasers to pay the same price for a used article as they would for a new article. It would seem, therefore, that statutes not containing an express exemption for the sale of second hand fair trade commodities, would be construed as containing an implied exemption to that effect or as relating only to new articles. There do not appear to be any cases on this point.

With regard to close-out sales the sale must be made by the owner of the goods for the purpose of discontinuing delivery of that type of merchandise.[37] In *Remington Arms, Inc. v. Harris Berger, Inc.*[38] defendant purchased plaintiff's shells from a dealer who was closing out the item and resold them below fair trade price. The court granted the injunction on the ground that the sales by defendant were not sales by the "owner" within the meaning of the fair trade act and were not made for the purpose of discontinuing delivery of the item by defendant. In the California case of *Sterling Drug, Inc. v. Benatar*[39] the defendant purchased war surplus toothpowder from the federal government, the brand being clearly stated on the packages. He put this toothpowder on sale below the fair trade price of the same brand toothpowder which he regularly carried. The court took the same position as the New York court saying, "it seems very doubtful whether a merchant who . . . bought large quantities of a war surplus commodity for the express purpose of selling them below fair trade price, can be said to be 'closing out the owner's stock' even if he does not intend to further carry the same commodity."[40]

In *Bulova Watch Co. v. Sattler's, Inc.*[41] an attempt was made to avoid this problem. Here defendant made an agreement to purchase all the stock of a dealer who was going out of business which stock included plaintiff's fair trade products. The agreement provided that the "close-out" sale would take place in a department set aside in defendant's store and defendant was to have complete control of the sale and advertising, although the dealer was to retain title to the stock during the sale. The court in granting the injunction said, ". . . such practice . . . should not

37. The New York statute, which is typical, provides in part: (Sales are Exempted) "In closing out the owner's stock for the purpose of discontinuing delivering of such commodity." N.Y. Gen. Bus. Law § 369a 2(a).

38. 208 Misc. 561, 144 N.Y.S.2d 751 (Sup. Ct. 1955).

39. 99 Cal. App. 2d 393, 221 P.2d 965 (1950). Accord, National Distillers Products Corp. v. Greenwald Liquors, Inc., 1 CCH Trade Reg. Rep. (10th ed. 1956) ¶ 3222.05 (D.C. Colo. 1939); Federal Cartridge Corp. v. Helstrom, CCH Trade Reg. Rep. (1952 Trade Cas.) ¶ 67366 (Ore. Cir. Ct. 1952).

40. 99 Cal. App. 2d at 398, 221 P.2d at 969.

41. 208 Misc. 257, 143 N.Y.S.2d 742 (Sup. Ct. 1955).

be permitted to be used as a device to allow the store management to evade responsibility for compliance with the [fair trade laws] . . . ."[42] The court further held that defendant, having full control, had full responsibility to any persons who might be injured by the trade practices used.

TRADE-INS

There is a paucity of authority on the question of trade-ins. Apparently, an allowance on the list price of a fair trade commodity where that allowance represents a reasonable price for the trade-in of an old commodity which the seller has at least seen, and of which he makes a reasonable effort to secure possession, is not a violation of the fair trade law.[43] In *General Elec. Co. v. Wite Elec. Appliances Co.*,[44] an allowance of $1.00 for an old electric iron made to a stranger without seeing the iron and without attempting to acquire possession of it was stated to be incredible as a matter of law.

If used in good faith, a trade-in is merely a method of simplifying the exchange between the parties. Basically it is the good faith of the seller with regard to the trade-in item which should determine whether a particular trade-in allowance is or is not utilized as a device to evade the fair trade law.

CONSUMER CO-OPERATIVES

The problem involved here is whether or not the so-called "patronage dividend" is a discount on the price of commodities purchased by the members from the co-operative or is a distribution of the net profits of the joint venture in proportion to the patronage of the members. In *Sunbeam Corp. v. Civil Serv., Employees' Co-operative Ass'n*[45] the point was not directly in issue although the court indicated throughout that it would not consider the patronage dividend a violation of the fair trade law. In that case, unlike the usual consumer co-operative, defendant allowed a discount directly upon purchase of the commodities by the purchaser. The court said, "we do not have before us the question whether a year-end distribution of profits to members can constitute a violation of the Fair Trade Acts. We do have the question of whether a discount at the time of sale is a violation. We conclude that it is. . . ."[46]

There is a definite distinction between the "patronage dividend" and

42. Id. at 260, 143 N.Y.S.2d at 745.

43. Sunbeam Corp. v. Baumgarten, 93 F. Supp. 532 (E.D.N.Y. 1950).

44. CCH Trade Reg. Rep. (1950 Trade Cas.) ¶ 62637 (N.Y. Sup. Ct. 1950).

45. 187 F.2d 768 (3d Cir.), rev'd on other grounds, 192 F.2d 572 (3d Cir. 1951), cert. denied, 342 U.S. 909 (1952). The reversal was on another ground, namely that defendant was a nonsigner and plaintiff could not enforce the contracts. This ground is no longer applicable since the passage of the McGuire Act.

46. Id. at 772.

the direct price discount.[47] It is suggested that the "patronage dividend," if it is to be considered as related to the sale and price of commodities at all, falls within the category of those devices which are not directly related to the article purchased and its price.[48]

MAIL ORDER SALES

Mail order sales constitute by far the most urgent problem in fair trade litigation. It is not an unwarranted generalization to say that the future of fair trade legislation as it exists today is inextricably entwined with the legal implications of mail order sales.

There is no doubt that resales or advertising and offering incidental to contemplated resales within a fair trade jurisdiction below the fair trade price constitute actionable wrongs under the statutes of that jurisdiction.[49] The difficulty arises where there is no resale or contemplated resale within a fair trade jurisdiction but there is open and systematic advertising and offering done within that jurisdiction in relation to sales to be technically made within a free trade jurisdiction where sales below list price would be legal.[50] Since there is no federal fair trade law[51] a plaintiff seeking to enjoin the activities of a particular seller must prove a cause of action under the fair trade statute of some particular state or territory.

The issue in such cases is, whether in and of itself such advertising and offering below fair trade price done in a fair trade jurisdiction constitutes an actionable wrong under the fair trade statute of the jurisdiction. Many of the fair trade statutes provide in part that wilfully and knowingly advertising, offering for sale *or* selling any commodity at less than the price stipulated is unfair competition which may be enjoined by injured parties.[52] Many of these provisions are taken in *haec verba* from the

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47. Bunn, Consumers' Co-operatives and Price Fixing Laws, 40 Mich. L. Rev. 165, 173 (1941).

48. See the "test" used by the court in Bristol-Myers Co. v. Picker, note 26 supra.

49. General Elec. Co. v. Masters Mail Order Co., 244 F.2d 681 (2d Cir.), cert. denied, 355 U.S. 824 (1957); Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 240 F.2d 684 (4th Cir. 1957).

50. There are at present a total of nine jurisdictions which have either never passed a fair trade statute or have declared their statutes unconstitutional. 1 CCH Trade Reg. Rep. (10th ed.) ¶ 10000 (1956). These are the so-called "free trade" jurisdictions in which resale price fixing agreements would be illegal as violative of the antitrust laws.

51. The Miller Tydings Act, 15 U.S.C.A. § 1 (1953), and the McGuire Act, 15 U.S.C.A. § 45 (Supp. 1957), are merely enabling or permissive legislation which exempt resale price fixing agreements from the federal antitrust and interstate commerce laws where such agreements were entered into in jurisdictions wherein they are legal in intrastate commerce. Thus fair trade violations are strictly a cause of action under state law and, when brought in federal courts on grounds of diversity, those courts must apply applicable state law.

52. See, e.g., N.Y. Gen. Bus. Law § 369b. In Eastman Kodak Co. v. Masters, Inc., 7 Misc. 2d 185, 153 N.Y.S.2d 433 (Sup. Ct. 1956), the New York Supreme Court clearly and

McGuire Act itself.[53] These provisions are framed in the disjunctive indicating an intent that each of these acts, in and of itself, is a sufficient basis for a cause of action established under state law and permitted by the McGuire Act. Why, then, have two circuit courts of appeal refused injunctions where there was clearly advertising and offering below fair trade price being done within a fair trade jurisdiction?[54] It was reasoned that the price fixing agreement would be illegal and, therefore, unenforceable in any respect were it not for the Miller-Tydings and McGuire Acts; that those acts, however, did not exempt the enforcement of all price fixing agreements in all respects and in all situations but only those agreements which are lawful ". . . in any State, Territory, or the District of Columbia *in which such resale is to be made, or to which the commodity is to be transported for such resale.*"[55] The term "resale" has a technical meaning in the law of sales, referring to the passage of title from seller to buyer. The place of resale, therefore, would be the geographical situs at which title passes from seller to buyer. If the provisions of any price fixing agreement are to be enforced against such resale the McGuire Act states that it must be an agreement lawful under a "statute, law, or public policy" of that place, i.e., the "place where such resale is to be made." When the McGuire Act sets forth advertising, offering to sell or selling below stipulated price as actionable unfair competition, it must be interpreted in the light of that section of the act which makes the place of resale the determining factor as to any enforcement under a price fixing agreement.[56] Thus in order to have a basis for a cause of action for advertising or offering or selling there must be an agreement enforceable at the place where the sales are made or the place where the sales contemplated by the advertising and offering are to be made.

In both *General Elec. Co. v. Masters Mail Order Co.*,[57] and *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*,[58] the defendant was the same mail order house located in Washington, D. C., a free trade jurisdic-

unmistakably construed this section in the disjunctive holding that advertising and offers below price in and of themselves violate the fair trade law regardless of the place of resale.

53. The McGuire Act provides in part: "(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale or selling . . . is unfair competition and is actionable at the suit of any person damaged thereby." 15 U.S.C.A. § 45(a)(3) (Supp. 1957).

54. General Elec. Co. v. Masters Mail Order Co., 244 F.2d 681 (2d Cir.), cert. denied, 355 U.S. 824 (1957); Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 240 F.2d 684 (4th Cir. 1957).

55. 15 U.S.C.A. § 45(a)(2) (Supp. 1957). (Emphasis added.)

56. See notes 53-55 supra.

57. 244 F.2d 681 (2d Cir.), cert. denied, 355 U.S. 824 (1957).

58. 240 F.2d 684 (4th Cir. 1957).

tion. By the technical law of sales, title in all of the defendant's mail order sales passed to the customer within Washington, D. C. The defendant advertised and made offers in relation to these sales in fair trade jurisdictions. These advertising operations of defendant were particularly pronounced in the *General Elec. Co.* case. In both cases the plaintiffs substantially prayed for an injunction restraining the advertising and offering being done by the defendant including in the *General Elec. Co.* complaint the sales themselves. In respect to the sales themselves it was urged that while technically the sales were consummated in the District of Columbia, the economic impact was found in New York where the bulk of the customers resided and, therefore, for all practical purposes, they constituted sales in New York in violation of the New York fair trade law. This contention was the basis upon which the district court granted the injunction but it was rejected by the circuit court in reversing that decision.[59] In respect to the advertising and offering done within the fair trade jurisdiction in relation to the sales to be made in the District of Columbia, the court in the *Bissell* case said, "we agree . . . that advertising the sale of a commodity at less than the stipulated fair price is of itself unfair competition ... whether or not a sale takes place; but we are satisfied that the advertisement must relate to a sale of goods within the State in order to fall within the condemnation of the statute." [60] Chief Justice Clark in the *General Elec. Co.* case set forth substantially the same rule.[61]

59. 145 F. Supp. 57 (S.D.N.Y. 1956), rev'd, 244 F.2d 681 (2d Cir.), cert. denied, 355 U.S. 824 (1957).

60. 240 F.2d at 687. Accord, Revere Camera Co. v. Masters Mail Order Co., 128 F. Supp. 457 (D. Md. 1955).

61. 244 F.2d at 684. In a separate concurring opinion Circuit Judge Waterman put forth the theory that the situs of the seller was determinative of the issues. Since the seller in this case had a situs in Washington, D.C., the injunction was properly denied. The basis of this position is that the "place of resale" as used in the McGuire Act should be construed as meaning the place where the seller of the goods is located. While this position finds some doubtful support in the legislative history of the McGuire Act and in some state decisions, it would seem that if Congress had intended to make the law of the place where the seller is located the applicable law it would have been a simple matter to have said so in precise language and the term "place of resale" would hardly have been used as a substitute for the term "place where the seller is located." Nevertheless, the New York Court of Appeals in Raxor Corp. v. Goody, 307 N.Y. 229, 120 N.E.2d 802, cert. denied, 348 U.S. 863 (1954), enjoined a seller located in New York from making sales outside the state below the New York fair trade prices. Certainly the decision would be sound under Judge Waterman's theory. The difficulty is that the precise rationale of the decision is not very thoroughly discussed. With the briefest of discussion the court states that the McGuire Act makes no distinction between goods directly in interstate commerce and those indirectly in interstate commerce. This is hardly strong authority where the primary issue is the construction of the McGuire Act in its entirety. It is indicative, however, of the fact that New York does not consider the place of resale as controlling. It is, however, the intention

These cases lead to the inescapable conclusion that advertising done or offers made in fair trade jurisdictions in relation to sales to be made in a free trade jurisdiction cannot be enjoined simply because such an injunction is not permitted by the McGuire Act. Thus the McGuire Act requires as the basis of *any* enforcement action a pricing agreement which is enforceable by the law of the place of actual or contemplated resale. Since no such agreement would be enforceable in the District of Columbia the advertising and offering in relation to sales to be made in that jurisdiction cannot be enjoined regardless of where such advertising or offering is done.

Finding that the entire issue hinged upon an interpretation of the McGuire Act, although basically they were construing state statutes, both courts delved quite deeply into the legislative history of that act.[62] Particular stress was laid by the courts upon the rejection of the Keogh Bill[63] which would have created a federal cause of action for fair trade violations and the debates which led to the rejection of the Cole Amendment to the McGuire Act[64] which would have made it an act of unfair competition to deliver pursuant to a sale, or otherwise deliver in a fair trade jurisdiction any fair trade commodity at less than stipulated price.[65]

The practical significance of the *General Elec. Co.* and *Bissell* cases has been marked.[66] Representative Harris has been prompted to introduce a fair trade bill in the House of Representatives.[67] The bill creates a federal cause of action for violation of fair trade agreements with the exception that the provisions of the act in respect to fair trade agreements, ". . . shall not apply to the merchandise of proprietors no substantial part of whose merchandise crosses state lines at any stage of distribution."[68] This leaves the states free to elect whether they will have fair trade as a state policy in regard to commerce which is primarily intrastate in nature.

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of Congress, not the interpretation of New York which is of primary concern when construing a federal statute such as the McGuire Act.

62. The legislative history of the McGuire Act was most thoroughly examined by the district court in the Bissell case and was heavily relied upon by the circuit court in affirming the decision of the district court. Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 140 F. Supp. 165 (D. Md. 1956), aff'd, 240 F.2d 684 (4th Cir. 1957). See also Note, 43 Geo. L.J. 258 (1955).

63. H.R. Rep. No. 6925, 82d Cong., 2d Sess. (1952).

64. 98 Cong. Rec. 4921 (1952).

65. Id. at 4952.

66. General Elec. Co. and Sunbeam Corp. abandoned fair trade in respect to a great many of their smaller appliances. New York Times, Feb. 27, 1958, p. 1, cols. 7-8. Many other manufacturers are expected to follow suit.

67. H.R. 10527, 85th Cong., 2d Sess. (1958). Some insight into the background and intent of this bill may be had by reference to MacLachlan, A New Approach to Resale Price Maintenance, 11 Vand. L. Rev. 145 (1957).

68. H.R. 10527, 85th Cong., 2d Sess. § 2(7) (1958).

It is doubtful whether this bill will receive a more congenial welcome than that extended to the Keogh Bill and the Cole Amendment.[69] The bill attempts to clarify a number of problems which have arisen in fair trade litigation, such as, for example, adequate notice to nonsigners and the problem of the proprietor who distributes both through subsidiaries and through independent distributors.

With regard to the particular problem involved in the *General Elec. Co.* and *Bissell* cases, the bill, while it retains the language of the McGuire Act, contains significant additions to that language. If a substantial portion of the merchandise crosses state lines *at any stage of distribution* the provisions of the bill shall apply,[70] thus allowing a plaintiff to proceed directly under the federal statute. If the plaintiffs in the *General Elec. Co.* and *Bissell* cases had been able to proceed under the Harris Bill instead of the New York and Maryland statutes would the result in those cases have been different? Section 2(5) of the bill states that the word "commerce" means all commerce that may be lawfully regulated by Congress and further declares that it shall be unlawful for any person with actual notice of stipulated or minimum resale prices to sell, offer to sell, or advertise merchandise in "commerce" at a lower price.[71] The "commerce" involved in the *General Elec. Co.* and *Bissell* cases was clearly commerce which Congress could regulate. Thus it appears that under the Harris Bill the advertising and offering in those cases would be unlawful and could be enjoined.

The future of fair trade as it exists today may well depend in great measure upon passage of the Harris Bill or similar legislation. The pending struggle over such legislation in Congress promises to be an interesting one with far reaching results in the economic system of the nation.

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69. See notes 63-64 supra.
70. H.R. 10527, 85th Cong., 2d Sess. § 2(7) (1958). (Emphasis added.)
71. Id. at § 2(5).