Michigan Law Review

Volume 47 | Issue 6

1949

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Recommended Citation
Earl R. Boonstra, *TRADE REGULATION-STATE FAIR TRADE ACTS AND SUPPLEMENTARY FEDERAL LEGISLATION*, 47 MICH. L. REV. 821 ().
Available at: https://repository.law.umich.edu/mlr/vol47/iss6/9

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TRADE REGULATION—STATE FAIR TRADE ACTS AND SUPPLEMENTARY FEDERAL LEGISLATION—The state Fair Trade Acts and the federal Miller-Tydings Act were enacted for the avowed purpose of exempting vertical price fixing contracts from the federal and state anti-trust laws.[1] This legislation followed several court decisions which had declared resale price maintenance agreements unlawful trade restraints.[2] The first Fair Trade Act was enacted by California in 1931, and by 1941 all but four jurisdictions had passed similar legislation.[3] In 1936, the United States Supreme Court upheld the constitutionality of the California and

[1] The provisions of the Sherman Anti-trust Act, 26 Stat. L. 209 (1890) c. 647, § 1, are typical of these latter federal and state laws. "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." See note 2, infra.

[2] Dr. Miles Medical Co. v. J. D. Park and Sons Co., 220 U.S. 373, 31 S.Ct. 376 (1911); F.T.C. v. Beech-Nut Packing Co., 257 U.S. 441, 42 S.Ct. 150 (1922); Moir v. F.T.C., (C.C.A. 1st, 1926) 12 F. (2d) 22.

[3] Cal. Business and Professions Code (Deering, 1943) §§ 16900-16905. Resale price maintenance contracts are illegal in Texas, Missouri and District of Columbia, but may be legal in Vermont under its common law.

Illinois acts on the broadest of grounds,[4] and while the Miller-Tydings Act has not been passed upon, its constitutionality appears certain. With a few individual state exceptions,[5] no recent constitutional questions have been posed. The purpose of this comment is to discuss generally the application, enforcement, defenses and remedies of the various acts. The economic validity of the statutes, while certainly debatable, is not within the scope of the present discussion.[6]

A. Statutes

1. *State Fair Trade Acts.* Although variations occur in individual instances, all the statutes contain two basic provisions: (1) resale price maintenance contracts on branded commodities in free and open competition with goods of the same general class are declared lawful; and (2) wilfully and knowingly advertising, offering to sell or selling below the stipulated price by any person, whether a contracting party or not, is unfair competition and actionable by any person damaged. In addition, provision is usually made for certain excepted sales, safeguards against evasion, and exclusion of horizontal price fixing from the act's protection.[7] The contractual arrangements contemplated are of two types: (1) agreement by the vendee to sell at a stipulated price, or not to sell below a minimum price, and to impose the same type of contract condition upon his subsequent vendees; and (2) agreement by the vendor not to sell

[4] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139 (1936), 106 A.L.R. 1486 (1937); The Pep Boys, Inc., v. Pyroil Sales, Inc., 299 U.S. 198, 57 S.Ct. 147 (1936). The acts were held not to be legislative price fixing; not to violate due process of law; not arbitrary, unfair or unreasonable; and not to deny equal protection under the Fourteenth Amendment.

[5] See Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N.W. 426 (1937), in which an exemption of non-profit co-operative associations was declared unconstitutional; Bristol-Meyers Company v. Webb's Cut Rate Drug Co., Inc., 137 Fla. 508, 188 S. 91 (1939), where a defect in the title of the act was found. The Florida act was subsequently amended, but the acts of other states have similar titles and may conflict with constitutional provisions; among them are: Alabama, Delaware, Georgia, Idaho, Indiana, Kansas, Minnesota, Montana, Nebraska, Nevada, Oklahoma, Oregon, Utah, West Virginia and Wyoming. Maryland and Michigan, faced with similar attacks, held their acts constitutional in Goldsmith v. Mead Johnson and Co., 176 Md. 682, 7 A. (2d) 176 (1939); and Weco Products Co. v. Sam's Cut Rate, Inc., 296 Mich. 190, 295 N.W. 611 (1941). Several acts have been declared not to conflict with state constitutional provisions prohibiting monopolies. See Goldsmith v. Mead Johnson and Co., 176 Md. 682, 7 A. (2d) 176 (1939); Eli Lilly and Co. v. L. S. Saunders, 216 N.C. 163, 4 S.E. (2d) 528 (1939); Miles Laboratories, Inc. v. Seignious, (D.C. S.C. 1939) 30 F. Supp. 549.

[6] For an analysis of the economic background of the acts, see SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932).

[7] Cal. Business and Professions Code (Deering, 1943) §§ 16900-16905; Mich. Comp. Laws (1948) c. 445; Ill. Rev. Stat. (1947) c. 121½ § 188-190; 19 N.Y. Consol. Laws (McKinney, 1941) art. 24-A; N.C. Gen. Stat. (1943) §§ 66 (50-57); Fla. Stat. (1941) c. 541; Ore. Comp. Laws Anno. (1940) § 43-401; R.I. Acts and Resolves (1936) c. 2427.

to another purchaser unless that purchaser agrees to the established prices. The later enactments have an additional section which permits the vendor to agree that he will not sell to any wholesaler or retailer unless the wholesaler or retailer will agree to make the same price arrangement with other wholesalers and retailers to whom he may resell.

The underlying philosophy of the courts in construing the statutes may well be derived from Justice Holmes' dissent in the *Dr. Miles Medical Co.* case,[8] in which he stated, "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."[9] The principal avowed object of proponents of the statutes was to eliminate cutthroat price cutting with subsequent destruction of goodwill,[10] and whether the courts agree in economic principle or not, the Fair Trade Acts are being construed as broadly as is necessary to eliminate the evil which it is their purpose to combat.

2. *The Miller-Tydings Act.*[11] This is the federal picket in the resale price maintenance fence. It amends the Sherman Anti-Trust Act, the provisions of which were seriously hampering the effectiveness of the state price enactments. The amendment exempts contracts made pursuant to the state Fair Trade Acts from the operation of the federal trade restraint law. One provision carefully excludes protection for horizontal price fixing agreements or combinations.[12] The Miller-Tydings Act merely authorizes contracts or agreements prescribing minimum prices for the resale of a commodity; therefore, all the secondary and reciprocal contracts of the series evidently contemplated by the state provisions may not receive federal sanction. However, there are as yet no decisions on this point.

B. Contracts Protected by the Acts

The acts provide that only a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or owner can be the subject of a price maintenance contract. The courts have had little occasion to define the term "commodity." However, where

[8] Dr. Miles Medical Co. v. J. D. Park and Sons Co., 220 U.S. 373, 31 S.Ct. 376 (1911).

[9] Id. at 412.

[10] 2 NIMS, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS, § 300 (1947); Max Factor & Co. v. Kunsman, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936).

[11] 50 Stat. L. 693 (1937), 15 U.S.C. (1946) § 1.

[12] Id., § 1, "Provided further . . . shall not make lawful any contract or agreement, providing for . . . the maintenance of minimum resale prices . . . between manufacturers, or between wholesalers . . . or between persons . . . in competition with each other."

a blank-lens maker attempted to set prices for finished lens, the finishing of which was done by another, the contract was held not to be protected by the Fair Trade Act.[13] The same conclusion was reached where a fabric manufacturer attempted to establish prices of finished dresses made by another.[14] Although the limitation is not yet clearly defined, the courts appear to be working toward a "finished product" test. Thus, the one who would contract must do so as the owner, producer or distributor of the finished product.[15]

The commodity must be in free and open competition with goods of the same general class produced by others. This requirement has produced a conflict for patentees who wish to market an exclusive product. The patent monopoly, in itself, grants no immunity from the Sherman Anti-Trust Act,[16] and when the patentee attempts to "fair trade" he may be unable to show his product is in free competition. Although Kodachrome, a patented color film, was held not to be in free and open competition and was denied the privilege of the acts,[17] a patented nylon toothbrush qualified for fair trading.[18] The court found general competition in the toothbrush field, while Kodachrome could be used in but one type of camera. These cases indicate the courts feel compelled to look further than the exclusiveness of the patent; however, their exact position is not clear because the decisions are too few to be conclusive. The Wisconsin statute includes a provision enabling a state commission to determine whether the established price is unreasonable and, if so found, to declare the contract in restraint of trade.[19] But unless the superior skill of the administrative agency to determine reasonable prices justifies it, such a

[13] United States v. Univis Lens Co., Inc., 316 U.S. 241, 62 S.Ct. 1088 (1942).

[14] Mallison Fabrics Corp. v. R. H. Macy Co., Inc., 171 Misc. 875, 14 N.Y.S. (2d) 203 (1939); the court said at p. 877, "To permit the pursuit of this fabric to the finished or ultimate product, and thereby subject such finished or ultimate product to a price fixing contract covering the fabric would, as I view it, enable a producer or owner of a trade-marked or branded commodity to dictate the price of the finished product of which the commodity formed but a part." The practice of licensing rather than selling has rendered the Fair Trade Acts inapplicable to the motion picture industry. United States v. Paramount Pictures, Inc., (D.C. N.Y. 1946) 66 F. Supp. 323.

[15] But see Schimpf v. Macy and Co., Inc., 166 Misc. 654, 2 N.Y.S. (2d) 152 (1938), in which a fair trade contract providing a standard for determining trade-in allowances on old radios was upheld.

[16] Cummer-Graham v. Straight Side Basket Corp., (C.C.A. 5th, 1944) 142 F. (2d) 646; Ethel Gasoline Corp. v. United States, 309 U.S. 436, 60 S.Ct. 618 (1940).

[17] Eastman Kodak Co. v. F.T.C., (C.C.A. 2d, 1946) 158 F. (2d) 592.

[18] Weco Products Co. v. Mid-City Cut Rate Drug Stores, (Cal. Sup. Ct., Los Angeles Co. 1940), 3 C.C.H. TRADE REG. REP., 8th ed., ¶ 25,523 (1941).

[19] Wis. Stat. (1935) § 133.25. The constitutionality of this provision was upheld in Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N.W. 426 (1937).

provision seems unnecessary, since unreasonably high prices indicate there is no "free and open competition," in which case the Fair Trade Acts are not applicable to protect the contracts.[20]

Although horizontal price fixing agreements do not meet the requirements of statutory protection, almost all state enactments and the Miller-Tydings Act specifically exclude them. The illegal horizontal combination can be present either in establishing or enforcing the resale price maintenance contract. In *United States v. Frankfort Distilleries, Inc.*,[21] a conspiracy of producers, wholesalers and retailers to fix and maintain retail prices of alcoholic beverages shipped into Colorado, by adoption of a single course in making contracts of sale and boycotting others who would not conform, was held to be a violation of the Sherman Anti-Trust Act. The Court said,

> "Both the federal and state 'Fair Trade' Acts expressly provide that they shall not apply to price maintenance contracts among producers, wholesalers and competitors. It follows that whatever may be the right of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act."[22]

Where, however, the combination has sought merely to enforce the trade agreements, its action has been upheld on the theory that, if one injured dealer can sue, others can join in the action.[23] It appears that an association which remains completely aloof from the price fixing phase of the contract will receive court sanction in its enforcement actions, but where its activity includes price fixing, policing and indications of collusive practices, it will be denied "fair trade" protection.

The key provision in the contracts is reservation of the right to establish the resale prices. The acts specify either that minimum prices or that stipulated prices may be set. The majority of the statutes contain no limitation as to the person legally entitled to establish the prices; however, with the principal purpose being to protect goodwill, the provisions

[20] Rayess v. Lane Drug Co., 138 Ohio St. 401, 35 N.E. (2d) 447 (1941).

[21] 324 U.S. 293, 65 S.Ct. 661 (1945).

[22] Id. at 296. See also Pazen v. Silver Rod Stores, Inc., 130 N.J. Eq. 407, 22 A. (2d) 237 (1941); United States v. Bausch and Lomb Optical Co., 321 U.S. 707, 64 S.Ct. 805 (1944).

[23] Port Chester Wine & Liquor Shop v. Miller Bros. Fruiterers, Inc., 281 N.Y. 101, 22 N.E. (2d) 253 (1939); Iowa Pharmaceutical Assn. v. May's Drug Stores, Inc., 229 Iowa 554, 294 N.W. 756 (1940) (association of 23 retail dealers successfully joined in action).

indicate the price setter must, at some time, have been the owner or distributor of the goods. Here again, the sole limitation appears to be the "finished product" test.

The minority of states, those with later enactments, provide that only the owner of the trademark, brand or name, or a distributor specifically authorized may set the resale price.[24] It is submitted that this is the better provision inasmuch as the statutes were enacted to protect the goodwill of the trademark owner. The Federal Trade Commission has noted the failure to place such a limitation in the Miller-Tydings Act as an important defect.[25]

C. The Non-Signer Provision

The success of the Fair Trade Acts is fundamentally dependent upon the "non-signer" provision. This section declares that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the contract price established pursuant to the acts is unfair competition and actionable by any person damaged, whether the person so selling is a party to the contract or not. The significance of this section can be readily appreciated when it is noted that one resale price maintenance contract within a state is sufficient to establish prices for that state.[26]

The Miller-Tydings Act merely echoes the first provision of the state acts and does not mention the non-signer section. This raises the issue of whether those sections are an attempted state regulation of interstate commerce. Clearly, where the state forces non-contractors to observe prices established for "fair traded" goods in interstate commerce, it is regulating that commerce. Although Congress may permit state regulation, without such permission the states cannot act.[27] Passage of the federal statute with full knowledge of the state non-signer provisions may indicate a legislative policy to grant such permission.[28] It may be doubted,

[24] Automotive Electric Service Corp. v. Times Square Stores Corp., 175 Misc. 865, 24 N.Y.S. (2d) 733 (1940); and see Continental Distilling Sales Co., Inc. v. Famous Wines & Liquors, Inc., 274 App. Div. 713, 80 N.Y.S. (2d) 62 (1948), holding that the authorized agent must be the exclusive sales agent.

[25] Federal Trade Commission commentary on resale price maintenance, 2 C.C.H. TRADE REG. REP., 9th ed., ¶ 7180 (1948).

[26] Frank Fischer Mdse. Corp. v. Ritz Drug Co., 129 N.J. Eq. 105, 19 A. (2d) 454 (1941); and see Revlon Nail Enamel Corp. v. Charmley Drug Shop, 123 N.J. Eq. 301, 197 A. 661 (1938), where one contract with a dealer who made only twelve sales in three months was held sufficient to invoke the non-signer provision of Fair Trade Act.

[27] Real Silk Hosiery Mills v. Portland, 268 U.S. 325, 45 S.Ct. 525 (1925).

[28] Pepsodent Co. v. Krauss Co., (D.C. La. 1944) 56 F. Supp. 922 at 927, where the court said, "The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings Amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

however, that the state acts will finally be held applicable to interstate sales. Under the doctrine of the "goods having come to rest," the great majority of resales within any given state are local;[29] therefore, the interstate problem does not loom too large.

The non-signer provision may not be invoked unless the seller "knowingly" offers to sell or sells below the established price. The burden of notice is upon the one who sets the prices. Almost any type of notice is sufficient, such as stamping on the product, attaching labels or price lists or distributing catalogs. How the notice is given seems unimportant, but it is essential that the dealer have notice at the time of resale.[30] There is one important point on which the cases may be developing a conflict—to which goods do the notice and established price apply? The majority of decisions clearly hold the established price applicable only to the goods purchased by the retailer subsequent to the price fixing and notice.[31] On the other hand, the Iowa court applied the non-signer provision to all goods sold by the non-contracting retailer subsequent to receiving notice.[32] The former appears to be the better rule. Inasmuch as the statutory regulation is, in effect, imposing others' contract prices upon a third party, the latter should have the opportunity to refuse to handle fair trade products, if he so wishes, after learning the established prices.

In addition to "knowingly" selling below established prices, the sale must be made "wilfully."[33] The earlier statutes left the determination of wilful evasions entirely to the courts; however, most of the later acts contain a specific section devoted to a definition of evasive practices.[34] Gifts and secret concessions are the ordinary methods utilized, with issuance of trade coupons[35] and employee discounts[36] also under court attack. Several states have permitted the use of trading stamps where that is a recognized trade practice.[37]

[29] Atl. Coastline R.R. Co. v. Std. Oil of Ky., 275 U.S. 257, 48 S.Ct. 107 (1927); Whitfield v. Ohio, 297 U.S. 431, 56 S.Ct. 532 (1936).

[30] Downs v. Benetar's Cut Rate Drug Stores, 75 Cal. App. (2d) 61, 170 P. (2d) 88 (1946).

[31] Lentheric, Inc. v. Weissbard, 122 N.J. Eq. 573, 195 A. 818 (1937); Charmley Drug Shop v. Guerlain, Inc., (C.C.A. 3d, 1940) 113 F. (2d) 247; Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc., 166 Misc. 342, 2 N.Y.S. (2d) 320 (1938).

[32] Barron's Motors, Inc. v. May's Drug Stores, Inc., 227 Iowa 1344, 291 N.W. 152 (1940).

[33] Weco Products Co. v. Sam's Cut Rate, Inc., 296 Mich. 190, 295 N.W. 611 (1941).

[34] N.C. Gen. Stat. (1943) § § 66 (50-57); Ore. Comp. Laws Ann. (1940) § 43-401; Fla. Stat. (1941) c. 541.

[35] Minn. Report of the Atty. Gen., No. 252, p. 388 (1938).

[36] Bristol-Meyers Co. v. Bamburger & Co., 122 N.J. Eq. 559, 195 A. 625 (1937).

[37] Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. (2d) 684, 131 P. (2d) 856 (1942); Bristol-Meyers Co. v. Lit Bros., Inc., 336 Pa. 81, 6 A. (2d) 843 (1939).

D. Enforcement—Defenses—Remedies

Suits involving the contracting parties have presented little difficulty, but the non-signer provision has brought many problems to the courts.

1. Enforcement. Violation of the non-signer section is declared to be "unfair competition" and "actionable by any person damaged." The broad language permits a wide range of possible parties plaintiff. The title of the New York act, "To protect the trademark owners, distributors and the public,"[38] indicates the diversity of the interested parties. Following the *Dearborn* case,[39] all states with decisions on the point have upheld the right of a party to the price maintenance contract to enforce the statutory non-signer provision.[40] Will the court follow further the broad statutory language and literally permit "any person damaged" to sue? Several decisions have answered this in the affirmative and have granted recovery in actions by non-signatory plaintiffs against non-signer defendants.[41] The significance of this holding to price maintenance enforcement is hard to exaggerate when it is again noted that but one contract per state will invoke "fair trade" protection. Thus, where owner *A* makes one contract with dealer *B*, and subsequently notifies some 5000 other dealers in the state of the contract and the prices established, a cause of action will accrue to any dealer who can show damage, if price cutting develops.

If "any person damaged" by a violation of the non-signer provision is entitled to an action, what damages must he show? He must be a dealer in the goods which are being "fair-traded."[42] This should effectively exclude recovery to one for loss of competing product sales. Procedurally, proof of damage has been facilitated for the trademark owner or distributor. Provided he shows the existence of goodwill and illegal price cutting, he need not show actual damages; injury to him will be presumed.[43] Damages are difficult to prove and, as the great majority of cases request injunctive relief, it is vitally important to enforcement that the courts readily presume some damages.

[38] 19 N.Y. Consol. Laws (McKinney, 1941) art. 24-A.

[39] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139 (1936).

[40] Weco Products Co. v. Sam's Cut Rate, Inc., 296 Mich. 190, 295 N.W. 611 (1941); Calvert Distilling Co. v. Gold's Drug Stores, 123 N.J. Eq. 458, 198 A. 536 (1938); Barron's Motors, Inc. v. May's Drug Stores, Inc., 227 Iowa 1344, 291 N.W. 152 (1940).

[41] Burstein v. Charline's Cut Rate, 126 N.J. Eq. 560, 10 A. (2d) 646 (1940); Weisstein v. Peter Corbyon Liquor Store, Inc., 174 Misc. 1075, 22 N.Y.S. (2d) 510 (1940).

[42] Le Page v. Automobile Club of N.Y., Inc., 258 App. Div. 981, 17 N.Y.S. (2d) 568 (1940).

[43] Calverts Distillers Corp. v. Nussbaum Liquor Store, 166 Misc. 342, 2 N.Y.S. (2d) 320 (1938).

The acts do not permit periodic price reductions in order to stimulate sales unless new prices are properly established, but all the acts exempt certain sales. Generally four classes of sales are privileged: closing out sales, damaged goods sales, sales under court order and sales of products with the brand name removed. Just what the producer can do about making piecemeal price reductions in areas where his product is moving slowly is uncertain. If he discriminates in a given area, he may be held to have abandoned his contracts and lose all right to have them enforced.[44] Prediction is particularly difficult in view of one decision in which the court refused to delimit a regional market as a competitive block and used the entire state as one "fair trade" area.[45] An alternative for the court faced with this problem would be a refusal to find that dealers outside the area of competition are damaged by the price differentials.

2. *Defenses.* The major defense is "lack of equity in the plaintiff." The attitude of the courts can best be exemplified by the following statement in *Calverts Distillers Corp. v. Nussbaum*:[46] "If the power confered by the statute upon producers and owners to fix and enforce retail selling prices is not subject to equitable restrictions and safeguards imposed by the courts, then every retailer must hold his business life at the sufferance of producers and owners who may act arbitrarily and who may be actuated by favor or caprice."[47] In attempting to invoke equitable defenses it has been contended that the owner or distributor who refused to sell to the non-contractor could not equitably enforce the statutory provision against such non-contractor. This contention has not been allowed, however, on the ground that the owner can sell to whom he pleases.[48] Another controversial issue arises when the defendant pleads that other dealers are also cutting prices and no action is being taken against them. Must the plaintiff bring actions against all known violators? Noting the impossibility of enforcement if legal action were required against all the violators, the courts have been satisfied where

[44] Ibid.; Magazine Repeating Razor Co. v. Weissbard, 125 N.J. Eq. 593, 7 A. (2d) 411 (1939); but cf. Burt v. Wollsulate, 106 Utah 156, 146 P. (2d) 203 (1944), where a contract with a sales representative for a lower price than given to other contractors was permitted.

[45] Frank Fischer Mdse. Corp. v. Ritz Drug Co., 129 N.J. Eq. 105, 19 A. (2d) 454 (1941).

[46] 166 Misc. 342 at 345, 2 N.Y.S. (2d) 320 (1938).

[47] Ibid. The equitable defense was also allowed where a manufacturer tried to undersell to a few special chain customers: Gillette Safety Razor Co. v. Green, 167 Misc. 251, 3 N.Y.S. (2d) 822 (1938).

[48] Barron's Motors, Inc. v. May's Drug Stores, Inc., 227 Iowa 1344, 291 N.W. 152 (1940); Revlon Nail Enamel Corp. v. Charmley Drug Shop, 123 N.J. Eq. 301, 197 A. 661 (1938); however, see Lentheric, Inc. v. Weissbard, 122 N.J. Eq. 573, 195 A. 818 (1937), where injunction was denied for refusing to sell to the dealer.

the plaintiff acts with reasonable diligence to stop evasions. Reasonable action includes halting supplies to evaders, although suits against all are not demanded.[49]

The courts have hedged somewhat in defining the right being enforced. Is it protection of the trademark owner's goodwill, or prevention of injury to retailers by cutthroat competition? The liberal use of equitable defenses emphasizes this problem when the person bringing suit is not the owner or distributor of the trademarked commodity. If his right of action is held to be derivative, the courts should have little trouble charging the plaintiff with any defaults of the trademark owner. However, the statutes state that they are designed to protect the owners, distributors and public. Thus, it would seem that the courts are faced with a dilemma. If recovery is permitted where the owner could not have sued successfully, the courts open the door to collusive actions and may themselves be used as instruments of discrimination against certain retailers. On the other hand, if all actions are held to be derivative, the courts must read a restriction into the statutes clearly not present in the language.[50] Faced with this problem, a court may well draw an analogy from a decision involving members of the radio industry, where the retailer-plaintiff was denied relief partially on the ground that conditions in the radio industry were so chaotic, relief against one retailer would not stabilize the market.[51]

Defendants have a second valuable defense available—illegality of the fair trade agreement. This can be used when the price has been fixed by the wrong party,[52] when an illegal combination has fixed the prices[53] or when the contracts are shown to be in violation of the Sherman Antitrust Act or state antitrust acts.[54]

3. *Remedies.* The majority of Fair Trade Acts provide that actions for damages are available for enforcement. Although many statutes do not specifically provide for injunctive relief, it has, nevertheless, been

[49] Calvert Distillers Corp. v. Stockman, (D.C. N.Y. 1939) 26 F. Supp. 73; James Heddon's Sons v. Callender, (D.C. Minn. 1939) 29 F. Supp. 579; Automotive Electric Service Corp. v. Times Square Stores Corp., 175 Misc. 865, 24 N.Y.S. (2d) 733 (1940).

[50] See Burstein v. Charline's Cut Rate, 126 N.J. Eq. 560, 10 A. (2d) 646 (1940), where the court granted an injunction although the manufacturer refused to sell to defendant, but specifically refused to rule on the status of the retailer-plaintiff when relief to the manufacturer would be barred as a matter of law.

[51] Ray Kline, Inc. v. Davega-City Radio, 168 Misc. 185, 4 N.Y.S. (2d) 541 (1938).

[52] Automotive Electric Service Corp. v. Times Square Stores Corp., 175 Misc. 865, 24 N.Y.S. (2d) 733 (1940).

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

[54] Schill v. Remington-Putnam Book Co., (Ct. of App. Md. 1943) 31 A. (2d) 467.

available.[55] This construction is fortunate because practice has indicated injunctions are the only useful remedy. Injunctions can effectually discourage violations, and the plaintiff is not burdened with the difficult task of proving exact damages, which, in many cases, the small retailer would find impossible.

E. Conclusions

The broad grounds on which the *Dearborn* case upheld the Illinois statute have seemingly ended major constitutional attacks. Therefore, the successful enforcement of, or defense against, the acts is almost exclusively determined by the nature of the contract and the equitable position of the plaintiff.

The lack of decisions in many states indicates that several of the problems discussed are still open. However, the general uniformity of the statutes and the apparent tendency of the courts to follow decisions from other states has established a surprisingly uniform national fair trade pattern.[56]

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[55] Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A. (2d) 841 (1942); Seagram-Distillers Corp. v. Ackerman, 263 App. Div. 1016, 33 N.Y.S. (2d) 937 (1942).

[56] It must be noted that there are two additional statutes in the "fair trade" structure which have been widely enacted: unfair trade practice acts, enacted in 30 states, which prevent below cost selling; and price discrimination statutes, in force in 26 states, which curtail selected area price cutting by chain dealers.