THE McGUIRE ACT AND THE MAIL ORDER VENDOR—COMMERCE CLAUSE LIMITATIONS ON ANTI-FAIR TRADE STATE POLICIES

The persistent turmoil stirred up by legislatively recognized fair trade contract systems[1] has once again returned to the litigious limelight.[2] The current question concerning the extent of state legislative jurisdiction specifically involves enforcement of the cause of action under state fair trade laws against non-resident, non-signer, mail order houses. More significant, however, is recognition of a federal policy on fair trade which overshadows the specific controversy.[3]

Recently questioned is the extent to which Congress, in the exercise of its plenary power over commerce between the states, can regulate by

---

1. Resale price maintenance contracts have, over a long period of years, gone from a status of absolute unconstitutionality to total validity in the eyes of the courts. I CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 359 (1945); Schachtman, *Resale Price Maintenance and the Fair Trade Laws,* 11 U. OF PITT. L. REV. 562 (1950).

For the typical statute see IND. ANN. STAT. §§ 66-301 to 66-309 (Burns 1951). See charts analyzing and comparing the fair trade laws of the states at 1 CCH TRADE REG. REP. (10th Ed.) 3003-08 (1954). These statutes make lawful contracts of vendors with buyers requiring that certain products, which bear the trademark, trade name, brand, or name of the producer or distributor and which products are in free and open competition with other products of the same general class produced by others, be sold by the buyer only at or above a minimum (stipulated) price. The statutes provide a cause of action for anyone injured by the advertising, offering for sale, or selling of the products below the minimum (stipulated) price, whether the party so selling the product has or has not signed a contract with the producer or distributor.

2. In two recent cases preliminary injunctions against non-signing mail order vendors have been denied, as well as motions to dismiss entered by the defendant mail order firm. Revere Camera Co. v. Masters Mail Order Company of Washington, D. C., Inc., 128 F. Supp. 457 (D.C. Md. 1955); General Electric Co. v. Masters Mail Order Company of Washington, D.C., Inc., 122 F. Supp. 797 (S.D.N.Y. 1954). In another case involving a non-signer, mail-order vendor, the plaintiff dismissed the action for an injunction because the defendant had discontinued the injurious practice. In this case the Justice Department filed an amicus curiae brief after the defendant had agreed to a consent decree for a permanent injunction but prior to the time that the judge signed the order. Sunbeam Corporation v. Missouri Petroleum Products Company, Civil No. 9778, E.D.Mo., 1954.

The General Electric case has been continued with prayer for permanent injunction argued on March 22, 1955. General Electric Company v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 93-260, S.D.N.Y., pending. No decision has as yet been reached in other cases. Sunbeam Corporation v. Masters Mail Order Company of Washington, D. C., Inc., Civil No. 7419, D. Md., pending; Bissel v. Masters Mail Order Company of Washington, D. C., Inc., as indicated in Note, 43 GEO. L.J. 258, 262 (1955). See Note, 16 U. OF PITT. L. REV. 50 (1954) for discussion of other recent fair trade cases.

3. See consideration of the non-resident, non-signer, mail order vendor problem in Cook, *The Continuing Fair Trade Battle,* 29 ST. JOHN'S L. REV. 66, 82-83 (1954); Notes, 43 GEO. L.J. 258 (1955); 22 U. OF CHI. L. REV. 25 (1955).

excepting from the federal anti-trust legislation the application of state fair trade laws to the mail order transaction.[4] Without Congressional authorization, the states may not regulate commerce solely to protect their own internal economies.[5] It has been advanced that though Congress has permitted states to make regulations affecting commerce through liquor and insurance regulations,[6] it does not follow that Congress has power to permit this regulation for the protection of state economies.[7] This contention would appear to be without basis, however, in light of the decisions upholding the Hawes-Cooper and Amhurst-Sumners Acts, permitting states to prohibit the importation of certain prison-made goods.[8]

---

4. "Old Dearborn [Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936)], of course, did not consider the challenges which are addressed to the McGuire Act [66 STAT. 632, 15 U.S.C. § 45 (a) (1952)]. The argument is that Article 1, Sec. 1, of the Constitution vests in Congress legislative power which can not be delegated, and that Article 1, Sec. 8, grants to Congress powers over interstate commerce which cannot be surrendered." Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 205 F.2d 788, 792 (5th Cir. 1953).

For other recent challenges to this exercise of the commerce power see Sunbeam v. Wentling, 185 F.2d 903, 906 (1950); Brief Amicus Curiae for the United States, pp. 31-34, Sunbeam Corporation v. Missouri Petroleum Products Company, Civil No. 9778, E.D. Mo., filed Oct. 12, 1954; Harper, *Impact of Schwegmann Decision on State Fair Trade Laws,* ANTITRUST LAW SYMPOSIUM 1952, at 122, 130-31 (1952), Legislation, 27 ST. JOHN'S L. REV. 379, 391, 396 (1953).

5. H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 (1935).

6. Liquor: Clark Distilling Co. v. Western Md. Ry., same v. American Express Co., 242 U.S. 311 (1917) sustaining the Webb-Kenyon Act, 37 STAT. 699 (1913), 27 U.S.C. § 122 (1952), which permits the states to regulate the importation of alcoholic beverages and creates a federal offense for the importation of such beverages in violation of state laws; *in re* Rahrer, 140 U.S. 545 (1891) sustaining the Wilson Act, 26 STAT. 313 (1890), 27 U.S.C. § 121 (1952), which permits states to subject to its laws alcoholic beverages entering the states even though the products are still in interstate commerce; *accord,* Leisy v. Hardin, 135 U.S. 100 (1890). Insurance: Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) sustaining the McCarran-Ferguson Act, 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-15 (1952), which provided that state regulation or taxation of interstate insurance companies is not to be considered restricted because of congressional silence.

7. See Brief Amicus Curiae for the United States, *supra* note 4 at 34.

8. The Hawes-Cooper Act, 45 STAT. 1084 (1929), 49 U.S.C. § 60 (1952), was upheld in Whitfield v. Ohio, 297 U.S. 431 (1936). The Ashurst-Sumners Act provided a federal offense for the shipment of prison-made goods into a state in violation of that state's laws. 49 STAT. 494 (1935), *repealed* 62 STAT. 862 (1948), and *now covered by* 18 U.S.C. §§ 1761, 1762 (1952). The Ashurst-Sumners Act was upheld in Kentucky Whip & Collar Co. v. Illinois Central R. R., 299 U.S. 334 (1937).

The state laws prohibiting prison-made goods appear to protect an economic interest of the state in that they attempt to exclude the products of prison labor, preferring thereby the products of the free labor within the state. *See* Whitfield v. Ohio, *supra* at 436.

Recent statements by the Court indicate that Congress has free discretion in allowing states to make regulations affecting commerce. *See* United States v. Public Utilities Comm'n, 345 U.S. 295, 304 (1952); California v. Zook, 336 U.S. 725, 728 (1949); Southern Pacific R.R. v. Arizona, 325 U.S. 761, 769 (1945); Cloverleaf Co. v. Patter-

In the McGuire Act of 1952, Congress attempted once again to establish effective fair trade for those states desiring it, while at the same time preserving for other states freedom to choose free trade. In stipulating that neither the making of fair trade contracts nor the enforcement of rights of action under fair trade laws is an "unlawful burden or restraint upon, or interference with, commerce," the legislative body did not, however, specifically mention that the sales of non-signing, mail-order vendors located in the non-fair trade jurisdictions could be enjoined.[9] This attempted application of the McGuire Act is, therefore, widely questioned. Some see the statute as ambiguous,[10] and though an ambiguity apparently may arise through construction of Section 2 of the Act as a limitation on the two subsequent sections,[11] it does not seem that enforce-

---

son, 315 U.S. 148, 155 (1942); Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 205 F.2d 788, 793 (5th Cir.) *cert. denied,* 346 U.S. 856, *rehearing denied,* 346 U.S. 905 (1953).

State courts have recently indicated that this principle applies to any redistribution of the commerce power in the McGuire Act. See Masters Inc. v. General Electric Co., 307 N.Y. 229, 120 N.E.2d 802, *appeal dismissed,* 348 U.S. 892 (1954); Goody Corp. v. Raxor Corp., 307 N.Y. 229, 120 N.E.2d 802, *cert. denied,* 348 U.S. 863 (1954); S. Klein-On-The-Square, Inc. v. Lionel Corp., 307 N.Y. 229, 120 N.E.2d 802, *appeal dismissed* and *cert. denied,* 349 U.S. 860, 863 (1954); Grayson-Robinson Stores, Inc. v. Lionel Corp., 15 N.J. 191, 104 A.2d 304, *appeal dismissed,* 348 U.S. 859 (1954).

9. Section 4 of the McGuire Act provides that "neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce." 66 STAT. 632, 15 U.S.C. § 45 (a) (4) (1952).

10. See Harper, *supra* note 4, at 129-31; Note, 43 GEO. L.J. 258, 263 (1955); Brief Amicus Curiae for the United States, *supra* note 4, at 15-16. This brief for the United States goes further than challenging the McGuire Act as ambiguous by maintaining that the Act on its face precludes enforcement against the non-resident, non-signer, mail order vendor.

11. Those advocating a restrictive interpretation of the McGuire Act place emphasis on what may appear to be words of limitation in Section 2. By that section resale price maintenance contracts or agreements are excepted from the antitrust acts and from the Federal Trade Commission Act *"when contracts or agreements* of that description are *lawful as applied to intrastate transactions* under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia *in which such resale is to be made. . . ."* 66 STAT. 622, 15 U.S.C. § 45 (a) (2) (1952). (Emphasis added.) See Note, 43 GEO. L.J. 258, 263 (1955); Brief Amicus Curiae for the United States, *supra* note 4. From this language it is argued that since there could not be a valid contract in the state where a resale is to be made, there can be no enforcement of a right of action under the statute of a fair trade state in which the mail order vendor may be advertising, because the sale takes place at the place of business of the vendor and not within the fair trade state. If the reference to Section 3 is so limited, then Section 4 would only apply as to transactions between two fair trade states. The validity of this contention seems to rest solely on an assumption that the Section 2 reference to the place "in which such resale is made" as applied to the mail order transaction across state lines contemplates only the sale in the limited sense. See Brief for the Defendant, pp. 22-25, General Electric Company v. Masters Mail Order Company of Washington, D. C., Inc. Civil No. 93-260, S.D.N.Y., pending. It is submitted that, in light of the nature of the mail order transaction, of the location of the effect of the mail order vendor's sale in a fair trade state, and of the traditional

ment was intended to be limited to actions against violators located in fair trade states.[12]

The committee reports, like the Act itself, do not refer in specific terms to the non-signer in a free trade state selling by mail into a fair trade state. The terms of one report, however, are more explicit than those of the Act and its preamble, and may possibly indicate legislative intent to provide the states with the requisite legislative jurisdiction.[13] This resort to legislative history in aid of interpretation requires caution and should probably be limited to the committee reports. If the statute's history is pursued to the floor debates, however, language favoring a

---

concepts of the extent of legislative jurisdiction as determined by geographical boundaries, it must be concluded that the term "resale" in Section 2 refers to the place where the purchaser is given an opportunity to buy rather than to the place of the sale as such. See discussion at pp. 508-09 *infra*.

12. Section 3 is said to be limited by Section 2 in that Section 3 refers to the ". . . exercise or enforcement of any right or right of action created by any statute . . ." against a person ". . . willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in *such contracts or agreements* whether the person so advertising, offering for sale, or selling is or is not a party to *such a contract* or *agreement*. . . ." 66 STAT. 632, 15 U.S.C. § 45 (a)(3) (1952). (Emphasis added.) It is true that there must exist a valid fair trade contract. This contract must, also, exist in the state where the resale is to be made according to Section 2. The resale contemplated by Section 2 is limited, it is submitted, by the very grammatical construction of that section, to resales to be made by the parties to the contracts. Therefore, even if the Section 2 places of "resale" contemplates a sale in the limited sense, that does not apply to the sale of the non-signer in the sense that the non-signer sale must occur within the fair trade jurisdiction. Furthermore, Section 2 is essentially a reiteration of the Miller-Tydings Amendment to the Sherman Act, 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952), as limited to the validity of fair trade contracts in interstate commerce by the decision in Schwegmaun Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The substance of Section 3 is directed toward overcoming the limitation of the first *Schwegmann* case in providing that the enforcement of rights of action under the fair trade laws against either signers or *non-signers* who advertise, offer for sale, or sell below the price established in a valid contract is not unlawful under the anti-trust acts. The Section 3 reference to Section 2, "such contracts," then, merely says that there must be a valid contract in the fair trade state, and that any person who advertises, offers for sale, or sells below a price or prices established in that valid contract has committed a wrong actionable at the suit of any person damaged thereby.

13. "The bill further provides that the application of these State laws to interstate transactions shall not constitute a burden upon interstate commerce. The purpose of this provision is to remove any obstacle, as far as Federal law is concerned, which might stand in the way of a broader interpretation of State fair-trade laws so as to make them applicable to retail transactions and retail *advertising* which *cross* State lines." H.R. REP. No. 1437, 82d Cong., 2d Sess. 2 (1952). (Emphasis added.) It is noteworthy that this report refers to retail transactions and advertising, which not only affect interstate commerce but which actually cross state lines. Thus, the mail order transaction was certainly meant to be covered, though again the report, as the Act, does not specifically say that a free to fair trade state transaction is included.

restricted interpretation of the McGuire Act may be found.[14] Primary reliance by those favoring such an interpretation is placed upon a statement of Representative Patman in opposition to the subsequently rejected Cole Amendment.[15] Though a portion of this particular statement supports this position, a reading of the entire comment together with Representative Patman's subsequent statements before the vote on the Cole Amendment, seem to at least leave a question as to his real objection. Furthermore, the concluding statement of the committee sponsoring the McGuire Act indicating that the real objections to the Cole proposal went to its creation of a federal cause of action should clearly be given greater weight.[16] It is

14. See Revere Camera Co. v. Masters Mail Order Co. of Washington, D. C., Inc., 128 F. Supp. 457, 463 (D.Md. 1955); Brief Amicus Curiae for the United States, *supra* note 4, at 17-31; Brief for the Defendant, pp. 29-40, General Electric Company v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 93-260, S.D.N.Y., pending; Reply Brief of Defendant, p. 13, Sunbeam Corporation v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 7419, D.Md., pending; Reply Brief of Defendant, pp. 21-25, Revere Camera Company v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 7710, D.Md., Feb. 23, 1955; Note, 43 GEO. L.J. 258, 264-72 (1955).

Study of the floor debates in two different cases has resulted in somewhat differing views of the conclusions to be drawn. *Compare* General Electric Co. v. Masters Mail Order Co. of Washington, D.C., Inc., 122 F. Supp. 797, 802 (S.D.N.Y. 1954), *with* Revere Camera Co. v. Masters Mail Order Co. of Washington, D.C., Inc., 128 F. Supp. 457, 463-64 (D.Md. 1955).

15. *Id.* at 463; Brief Amicus Curiae for the United States, *supra* note 4, at 25-28; Brief for the Defendant, pp. 33-36, General Electric Company v. Masters Mail Order Company of Washington, D.C., Inc., *supra* note 14; Note, 43 GEO. L.J. 258, 267 (1955). The Cole Amendment offered a paragraph in substitution for the present Section 3 of the McGuire Act, purporting to overcome the mail order problem by providing that it would be an act of unfair competition to ". . . (1) sell or (2) have transported for sale or resale or (3) deliver pursuant to a sale, or otherwise deliver, such commodity in any such State, Territory, or the District of Columbia, where such a contract or agreement is lawful, at less than the price or prices so established in such contract or agreements." 98 CONG. REC. 4952 (1952).

Representative Patman indicated in objection that the Cole Amendment would prevent merchants in a free trade state community such as Texarkana, Texas (his home town) from advertising in the adjacent fair trade state community of Texarkana, Arkansas, thereby affecting the Texas policy providing free trade for its retailers. 98 CONG. REC. 4953 (1952).

It is submitted that the Cole Amendment, if it had been enacted, would have contained the same infirmity urged against the present Section 3 of the McGuire Act. See discussion in notes 11, 12 *supra*.

16. 98 CONG. REC. 4954 (1952). Though Representative Patman was an expert on fair trade generally, he was not an expert on the McGuire and Keogh Bills being considered by the House, having made a pronounced error in a statement on the floor as to the contents of the latter. He had not been a member of any of the committees considering these bills. His statements, therefore, as to the intended effect of the McGuire Act and the Cole Amendment, should be considered with caution. See Plaintiff's Memorandum, Appendix A, pp. X-XIV, General Electric Company v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 93-260, S.D.N.Y., pending.

In the Senate, in answer to a question as to the applicability of the McGuire Bill to the mail order houses, Senator Humphrey, the proponent of the Bill in the Senate, replied that "the bill will have this effect. It will require that where there are trade or branded names on which fair-trade prices have been established the mail order house

advanced that, under a sound interpretation of the Act, legislative jurisdiction is granted over the activities of non-resident mail order vendors occurring within a fair trade state. In this way effect is given to the announced purpose of the Act to provide effective fair trade for those jurisdictions which desire it while preserving a freedom of choice for jurisdictions opposed.

Whether the courts in a fair trade state have personal jurisdiction over a mail order vendor operating in another state is another basic question. The tendency has been, under *International Shoe,* to accept a fewer number of contacts with the state as sufficient for state jurisdictional purposes.[17] The formation of a single contract or the commission of a single act has sufficed to give jurisdiction.[18] The mail order insurance cases might indicate that jurisdiction could similarly be obtained over a mail order vendor of consumer merchandise.[19] This extension of jurisdiction by analogy to mail order sales of insurance should be qualified, however, by the unusual state interests involved in insurance. Though in two recent cases jurisdiction was found in the fair trade state courts over foreign, non-signing, mail order vendors, a greater number of contacts with

---

will sell them at those prices in any State, just as the local retail man is required to do." 98 CONG. REC. 8887 (1952). It is suggested that this statement, if resort to legislative history is in order, should carry persuasive weight. See Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, and in Support of Plaintiff's Motion for Preliminary Injunction, p. 25, Sunbeam Corporation v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 7419, D.Md., pending.

17. See the discussion and citations in CHEATHAM, GOODRICH, GRISWOLD, AND REESE, CONFLICT OF LAWS, 128-29 (3d. ed. 1951); Note, 30 IND. L.J. 324, 328 (1955).

18. CHEATHAM, *op. cit. supra* note 17, at 144, 145. Note, 30 IND. L.J. 324, 328 n.23 (1955) and cases cited.

19. The Supreme Court has at least partially opened the door for jurisdiction over non-resident mail order vendors in Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950). There a state was allowed to maintain an action against a non-resident insurance company which contacted its existing policy holders in Virginia and from them requested names of prospective purchasers of insurance. These prospects were then contacted and insurance contracts were negotiated by mail. *Compare* Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518 (5th Cir.), *cert. denied,* 346 U.S. 877 (1953), where the plaintiff, beneficiary, recovered on an insurance policy against the non-resident defendant not authorized to do business in Florida. The insurance company only solicited insurance contracts by mail, the contract in question having been made as a result of the defendant's mail solicitations in Florida, *with* Parmalee v. Commercial Travelers Mutual Accident Ass'n, 206 F.2d 523 (5th Cir. 1953), where no jurisdiction was found over the insurance company. In this case, the decedent had made the insurance contract in Kentucky, transacted business with and paid premiums to the defendant in New York, and then subsequently moved to Florida where he died. See 67 HARV. L. REV. 527 (1954).

Though it has been suggested that Travelers Health Ass'n v. Virginia, *supra,* indicates there may be other types of mail order sales by foreign corporations which would subject the vendor to service of process valid under the Due Process clause, it must be recognized that in that case, the party in interest was the state in its effort to protect citizens under a regulatory insurance statute.

the jurisdiction were there present than are found in the usual mail order sale.[20]

Should jurisdiction be found and an injunction issue,[21] the enforcement of that decree in the free trade state would present difficult problems. Though enforcement of decrees ordering payment of money requires the same full faith and credit afforded judgments,[22] where the decree is not for payment, the courts are divided, most states favoring recognition and enforcement.[23] If an opposing public policy exists in the jurisdiction asked to recognize the decree, it is questionable whether recognition should be compelled under the Full Faith and Credit clause. It seems that the answer should be governed by a consideration of the results rather than by resort to *a priori* reasoning based on the historical nature of equitable decrees.[24]

It would seem that a vendor located in a free trade state approaching consumers within a fair trade state by mail is engaged in unfair competition under the latter's fair trade act. The distribution of the mail circulars to the consumers within the fair trade state certainly constitutes "advertising" within that state. Commercial circles generally agree that an advertisement in a handbill is not ordinarily intended as an offer which,

---

20. Jurisdiction was found in one case where the vendor's principal place of business was in Washington, D.C., and the fair trade forum was New York. The defendant vendor was an affiliate of a New York corporation with the stock of both corporations owned by the same parties and with the same individuals serving as officers of both corporations. The offices of both were in New York, and the mail order circulars of the Washington, D.C., subsidiary were distributed over the counter of the New York store. General Electric Co. v. Masters Mail Order Company of Washington, D.C., Inc., 122 F. Supp. 797 (S.D.N.Y. 1954).

In another case, jurisdiction of this same defendant was found in the fair trade forum, Maryland, even though the defendant had no place of business except that in the District of Columbia, since the defendant was incorporated under the laws of that state. Revere Camera Co. v. Masters Mail Order Company of Washington, D.C., Inc., 128 F. Supp. 457 (D.Md. 1955).

21. Here it is assumed that the fair trade state court, having once found jurisdiction of the mail order vendor, would grant an injunction. The anti-trust statutes of a free trade forum, which might contain the public policy capable of barring an action in the free trade state, might be construed by the fair trade forum as limited to a free trade state interest in the preservation of free competition. See discussion at pp. 516-17 *infra*. The anti-trust statutes might also be construed to raise a procedural bar only for the convenience of the free trade state courts. Either construction would permit the fair trade forum to ignore the free trade state public policy and grant an injunction. See JACKSON, FULL FAITH AND CREDIT 29 (1945).

22. The public policy of the forum is not a valid reason for refusal to enforce the judgment of a court in a foreign jurisdiction. GOODRICH, CONFLICT OF LAWS 620-21 (3d ed. 1949); Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 546-47 (1926).

23. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 124-25 (2d ed. 1951).

24. Traditionally, since an injunction is a decree of the court and since the parties are responsible to that court which has no jurisdiction beyond the borders of the state which created it, the question has been raised by some that a state should not be required to enforce a foreign state equitable decree. *Id.* at 124, 130.

upon acceptance, can be turned into a binding contract, and that distribution of the circulars does not technically constitute "offering for sale."[25] The sale technically takes place, according to the general rule, where the title to goods passes. In the absence of contrary intent, this is upon delivery to the carrier, even where the shipment is C.O.D.[26] All sales by the mail order vendor would thus seemingly occur at his place of business in the non-fair trade state. Certain facts of a mail order transaction may indicate the intention that title should not pass before delivery. If the seller has undertaken to get the goods to the buyer, for example, his performance is not complete until this is done.[27] It might be contended that the transaction is a "sale on approval" rather than a "sale or return," in which case property would not pass until receipt by the purchaser.[28] Although the language in enforcement clauses of the fair trade acts refers to selling and offering for sale below established minimum prices as the actionable conduct, it must be considered that it is not the sale or offer, in the technical sense, which is the object of regulation. It is rather the effect—the opportunity presented consumers to obtain fair traded products below the established price—at which the statutes are directed.[29]

25. VOLD, SALES 19 (1931). If the statutory language anticipates a customary, technical "offer," the offer would then consist of the consumers' orders addressed to the vendor, acceptance taking place and the contract for sale being consummated within the free trade state. See Note, 22 U. OF CHI. L. REV. 525, 526-27 (1955). It is noteworthy, however, that the statutory language, "offering for sale," probably could not be applied to the communication from consumer to vendor because that communication constitutes offering to buy. If "offering for sale" is used in the Act in a technical sense, then the distribution of the mail order circulars in the fair trade state is probably not covered by those words. The mail order vendor presumably does not intend to be bound through an acceptance by the consumer of an offer made in the circular. If, on the other hand, the words "offering for sale" are used in a broad generic sense, nearly synonymous with "advertising," the distribution of the circulars would be covered by both terms. Rather than to assume this apposition of terms, it is better to conclude that the mail order circulars do not, absent contrary evidence of intent in the nature of the circular and the transaction, constitute "offering for sale."

26. VOLD, SALES 209 (1931).

27. UNIFORM SALES ACT, § 19, Rule 5. Absent contrary intent, if the mail order vendor prepays postage or transportation charges as part of the understanding of the parties before the consumer places his order, it would appear that title passes in the fair trade state. VOLD, SALES 210 (1931). See Plaintiff's Memorandum, pp. 23-30, General Electric Company v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 93-260, S.D.N.Y., pending. Where a sales tax law exists in the free trade forum, and the mail order vendor resident of that state does not collect a tax on sales by mail to residents of fair trade states, the inference would appear to be that title passes in the fair trade state. *Id.* at 27-28.

28. *Id.* at 26-27. In the absence of a contrary intent, in a "sale on approval" title does not pass on delivery to the buyer, whereas in a "sale or return" title passes on delivery. UNIFORM SALES ACT, § 19, Rule 3 (1) and (2) respectively.

29. See Note, 22 U. OF CHI. L. REV. 525, 527 (1955); Plaintiff's Memorandum, *supra* note 27, at 30. There can, of course, be no fair trade contract system in the free trade state, and consequently no established resale price under fair trade can exist. In the fair trade state an established resale price would exist. Without the presence

Other factors have demanded consideration where the action under a fair trade statute is brought in a free trade forum. A party seeking an injunction would, if there was diversity, probably resort to the federal courts where opposition from differing policies of the forum might not be as strong as in the state courts. The federal courts in such cases must follow the law, including the conflicts rules of the state in which that court is sitting.[30] The general conflicts rule for torts is that the law of the place where the act first takes injurious effect controls the result.[31] If Section 4 of the McGuire Act could be viewed as a federal choice of law rule, it would be necessary to apply that section to the activities of a non-signer, mail order vendor located in a free trade state but selling into a fair trade state. This Section was, however, supposedly inserted to correct the decision in *Sunbeam v. Wentling*[32] that enforcement of fair trade contracts as to non-signers constituted a burden on commerce.[33] Section 4 should thus not be construed as a controlling federal choice of law rule.

A difficult question to resolve concerns the public policy of the non-fair trade forum.[34] Under the present approach such policy is permitted to bar foreign actions only when it is specifically expressed in a statute.[35]

---

of an established resale price, probably little harm would result from price-cutting activities of a retailer. Even more significantly, without an established resale price, far less motivation would exist for use of fair traded products in price-leading advertisement. Consequently, the place of the sale in itself is not significant but rather the fact of whether or not there exists an established price at the place where the consumer is given the opportunity to buy.

30. Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941); *accord,* Sampson v. Channell, 110 F.2d 754 (1st Cir.), *cert. denied,* 310 U.S. 650 (1940). See 22 U. OF CHI. L. REV. 525, 528 (1955).

31. STUMBERG, CONFLICT OF LAWS 182 (2d ed. 1951); Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?,* 15 MINN. L. REV. 161 (1931).

32. 185 F.2d 903 (3d Cir. 1950), *vacated and remanded,* 341 U.S. 944 (1951). The Third Circuit decided this case before the Supreme Court decided that the Miller-Tydings Act did not apply to non-signers in interstate commerce in the first *Schwegmann* case. This case was then remanded by the Supreme Court for decision in conformity with the *Schwegmann* case.

33. The *Wentling* case involved mail order sales from Pennsylvania, a fair trade state, to other states. A sale by mail through interstate commerce to consumers in other states, however, would work no harm on the fair trade structures in the state of Pennsylvania, but only on fair trade structures in other states. See discussion in note 29 *supra.*

The Third Circuit made an erroneous choice of law in attempting to apply the Pennsylvania fair trade law to this case. Had the correct choice of law been made, the decision would have been the same, but without the necessity of using a burden on commerce rationale.

34. See KUHN, COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW 306 (1937). A comprehensive collection of cases involving the forum public policy has been made. See Note, 33 COLUM. L. REV. 508 (1933).

35. *Cf.,* Hughes v. Fetter, 341 U.S. 609 (1951); First National Bank v. United Air Lines, 542 U.S. 396 (1952). See STUMBERG, CONFLICT OF LAWS 67, 171 (2d ed. 1951); Note, 22 U. OF CHI. L. REV. 525, 533 (1955). Few cases are found involving torts where the public policy of the form has been used as a bar to an action. STUMBERG, CONFLICT OF LAWS 198 (2d ed. 1951).

Of the states which currently have no fair trade laws, two have statutes making contracts to maintain resale prices unlawful,[36] and these statutes could operate to close the courts of the forum to an action charging a violation of foreign fair trade laws in order to save the forum courts from the unconscionable burden of having to issue decrees pursuant to those laws. The courts would not seem to be greatly inconvenienced, however, by requests for enforcement of foreign fair trade laws, which are almost completely uniform.[37] The denial of relief in the free trade forum may arise out of broader policy considerations than that of convenience of the courts. The more serious objections to the action may be found where the free trade forum state has an anti-trust statute, which, though by its terms is limited to intrastate transactions,[38] does represent broad policies of the free trade state opposing attempted maintenance of resale prices and protecting domestic businesses.[39]

The existence of a statutory public policy in the forum directly opposed to the foreign law does not permit that court to refuse recognition without further consideration.[40] The constitutional requirement of full faith and credit places a limit on the extent to which a state may use the forum policy.[41] The absence of Supreme Court precedent on the question

36. Mo. ANN. STAT. § 416.020 (Vernon 1952); TEX. STAT., REV. CIV. art. 7426 (2) (1948).

37. See Note, 22 U. OF CHI. L. REV. 525, 527-30 (1955). See also 4 CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS § 93.2 (2d ed. 1950), discussing application of the continental "place of acting" rule to the common law torts of disparagement and unfair competition.

Though some of the state statutes speak of stipulated and others of minimum prices, it has been held that since the legislature only made unlawful sales below, not above the stipulated price, a minimum price was contemplated. Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So.2d 303 (1942). See I CCH TRADE REG. REP. (10th ed.) ¶ 3180 (1954).

38. It appears that the state anti-trust statutes might easily be construed by the free trade forum to include a mail order sale to a foreign consumer since the place of the technical sale most likely would be found within the forum. See discussion p. 509 *supra*.

The Texas anti-trust statute cannot, however, apply to interstate commerce. Albertype Co. v. Gust Feis Co., 102 Tex. 219, 114 S.W. 791 (1909). Nor can the Missouri anti-trust statute. Weber v. Anheuser-Busch, Inc., 23 U.S.L. WEEK 4150 (U.S. Mar. 28, 1955); Hadley-Dean Plate Glass Co. v. Highland Glass Co., 143 Fed. 242 (8th Cir. 1906). These states are the only free trade states with anti-trust laws.

39. See discussion in Note, 22 U. OF CHI. L. REV. 525, 534 (1955).

40. Alaska Packers Ass'n v. Industrial Accident Comm'n of California, 294 U.S. 532 (1935), where Mr. Justice Stone said that "a rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Id.* at 547.

41. "Unless by force of that clause [the Full Faith and Credit Clause] a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another." *Ibid.*

of full faith and credit for the fair trade statutes requires resort to other court opinions to discover the factors generally considered in determining whether recognition of a foreign state statute is required under the Constitution.[42] Although there seems to be no one standard of review by which it can be determined what choice of law is required, some of the recent decisions of the Supreme Court indicate that the result should turn on the weight given the various governmental interests of the jurisdictions concerned.[43] The validity of these state interests is undoubtedly limited by the differing nature of problems involved and the very existence of state boundaries.[44]

A consideration of the legislative purpose behind the fair trade acts may help to determine the particular governmental interests of the states, even though it has often been suggested, that the hasty enactment of the state fair trade laws and the Miller-Tydings Act resulted from a forceful, well-organized, and self-interested lobby, precluding the presence of a sound, considered legislative purpose.[45] A search for governmental

---

For general discussions of the operation of the Full Faith and Credit clause, see LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 17 (1947); Note, *Developments—Conflict of Laws—1935-36,* in SELECTED ESSAYS ON THE CONFLICT OF LAWS 1119, 1140-42 (1940); Beale, *Two Cases on Jurisdiction,* 48 HARV. L. REV. 620 (1935); Dodd, *supra,* note 22; Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause,* 12 MINN. L. REV. 439 (1928); Freund, *Chief Justice Stone and the Conflict of Laws,* 59 HARV. L. REV. 1210 (1946); Langmaid, *The Full Faith and Credit Required for Public Acts,* 24 ILL. L. REV. 383, 404-05 (1929).

42. ". . . I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." JACKSON, FULL FAITH AND CREDIT 28 (1945).

43. Probably the best statement of what the Court attempts to do is that often-quoted one of Mr. Justice Stone: "The necessity [for the Supreme Court to determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another] is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. In either case, the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to the weight." Alaska Packers Ass'n v. Industrial Accident Comm'n of California, 294 U.S. 532, 547 (1935).

44. The Court, at least in its language, seems to follow the viewpoint that, absent federal authorization, a state may not extend its regulatory arm beyond its territorial limits. *See* New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914); Scott v. Sanford, 60 U.S. (19 How.) 393, 460 (1857). See Langmaid, *supra* note 41, at 386, 420; Freund, *supra* note 41, at 1225.

45. Forty of the forty-five states having fair trade statutes enacted these laws during the period extending from 1935 to 1937. REPORT OF THE FEDERAL TRADE COMMISSION ON RESALE PRICE MAINTENANCE XXVII (1945). See Rose, *Resale Price Maintenance,* 3 VAND. L. REV. 24 (1949).

The fact that none of the fair trade acts have been repealed, and the enactment of

interests inevitably leads to contact with the highly controversial economic and social arguments advanced by proponents and opponents of fair trade legislation.[46] Many contend that the purpose of fair trade legislation is protection of the small retailer, shielding him from the effects of loss-leader practices and insuring him a mark-up equalling that granted his large competitors.[47] Further, it is believed that the elimination of retail level price competition on certain products may provide employment for many who might be left without work should the absence of fair trade cause failure of marginal small outlets.

A further argument is that the state's interest extends to manufacturers. Fair trade is said to promote mass distribution necessary to dispose of the output from mass production.[48] Mass production in turn,

---

the McGuire Act less than thirteen months after the decision in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), may indicate that the federal and state statutes now represent well considered legislative purposes.

In two states, continuing battles between the courts and legislatures have been staged on the economic policy of fair trade. See Cox v. General Electric Co., 85 S.E.2d 514 (Ga. 1955); Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So.2d 235 (Fla. 1951); Fink, *Fair Trade and Resale Price Maintenance in Florida*, 5 MIAMI L.Q. 553 (1951).

46. The economic and social arguments in support of and in refutation of fair trade have been presented often. See SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE 32 (1932); 2 U.S. CODE CONG. & ADM. NEWS 2185-94 (1952); Fink, *supra* note 45; Legis., 27 ST. JOHN'S L. REV. 379 (1953). Much of the literature carries an emotional tone. Compare the following quotes, "For this band of little men [the National Association of Retail Druggists] the Miller-Tydings Amendment to the Sherman Act was the end of a thirty years war." Rose, *supra* note 45, at 24. "The stigmatization of resale price maintenance as anti-competitive conduct violating the anti-trust laws is the result of a sort of hypnosis induced by uncritical acceptance of such frozen phrases as 'lessening competition' and 'co-operative efforts.'" 1 CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 413 (1945).

47. ". . . [T]he committee is ever mindful of the effects on our economic and political institutions that would result from the wholesale destruction of small concerns." *Report of Committee on Interstate and Foreign Commerce, No. 1437 to accompany H.R. 5767* [McGuire Bill], H.R. REP. No. 1437, 82d Cong., 2d Sess. 4 (1952). See Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F. Supp. 269, 271-72 (E.D. La. 1953); Fink, *supra* note 45, at 553; Fulda, *Resale Price Maintenance*, 21 U. OF CHI. L. REV. 175, 191-92 (1954); Fortune Magazine, *The Fair Trade Controversy*, in READINGS ON MARKETING 281-83 (Westing 1953); Comment, 48 NW. U.L. REV. 777, 780 (1954); Legis., 27 ST. JOHN'S L. REV. 379, 381 (1953).

48. The legal argument of Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936), that the manufacturer has a property interest in the trade-mark or trade name of a product which is not passed completely to a vendor on sale has often been challenged. See Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F. Supp. 269, 271-72 (E.D.La. 1953). See recent discussions in Fulda, *supra*, note 47 at 193-94, 209; Comment, 1953 U. OF ILL. L. FORUM 671, 676-77 (1953); Note, 16 U. OF PITT. L. REV. 50, 59 (1954); 102 U. OF PA. L. REV. 409, 412 (1954). Though these words of the Supreme Court are not accurately descriptive of the true manufacturer interest, the divided property interest concept does recognize that the presence of a brand name often requires stable resale prices for effective distribution. See Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, *supra;* Humphrey, *The Case for Fair Trade*, in READINGS IN MARKETING 284, 285 (Westing 1953).

is needed to reduce marginal costs which may permit higher prime costs and better products, and permit lower retail prices, both of which factors would operate to increase total sales.[49] The consumer is benefited indirectly because his welfare is dependent on that of the manufacturer.[50] The statutes also reflect an interest in the consumer by protecting him from the off-setting higher prices which are said to accompany loss-leader selling.[51]

There is still another possible unspoken legislative purpose behind fair trade statutes. Manufacturing has for several decades experienced a concentration of capital, which, more recently, has been followed by a similar and somewhat counter-balancing trend in the distribution system.[52]

---

49. That this benefit to the manufacturer may result from fair trade pricing seems to follow from sales statistics recently released by one manufacturer using a fair trade contract system to achieve resale price maintenance. During 1953 in non-fair trade District of Columbia, the sales of Sunbeam Corporation products dropped 11% from the previous year, while during the same period, Sunbeam experienced a nation-wide increase of 15%. During 1953, twenty discount houses in the District of Columbia took over 80% of Sunbeam's sales for the District, while during that same period 600 small distributors discontinued selling Sunbeam products. Time, Feb. 21, 1955, p. 72. During 1954, the Sunbeam Corporation experienced a further decrease in its District of Columbia sales of 5.1% below the 1953 figure, while the national total during 1954 increased 15.8% over 1953. During 1954, 80% of Sunbeam sales in the District were still concentrated in twenty discount houses, with four of those twenty now doing 75% of the total discount house business. Letter from General Counsel for Sunbeam Corporation to the *Indiana Law Journal,* Mar. 18, 1955.

Letters from other manufacturers of small appliances distributed under brand names, though not presenting statistical demonstration of the concentration and loss of sales experienced by Sunbeam in Washington, D. C., expressed strong feelings that effective fair trade laws are needed to protect mass distribution of their products.

50. SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE 94 (1932). Mr. Justice Holmes dissenting in the Dr. Miles case said that "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purposes 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." Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 412 (1911). See note 49 *supra.*

51. Note 46 *supra.* See Adams, *The Schwegmann Case: An Economic Comment,* 15 U. OF DETROIT L.J. 13, 16 (1951). An accepted practice in the retail field is that of raising prices on several products while sharply cutting prices on a few leading items at the same time to attract customers.

52. "It is simply inaccurate to present the American corporate system of 1954 as a system in which competition of great units (which does exist) produces the same results as those which used to flow from competition among thousands of small producers (which in great areas of American economics in the main does not exist)." BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 11 (1954). In the United States, 135 of the largest corporations own 45% of industrial assets. These same corporations own 25% of the world total of industrial assets. A little over 50% of U.S. industrial assets are owned by 200 of the largest corporations. *Id.* at 25-27.

Marketing has also been revolutionized during the last forty years and has experienced a tendency to yield to combination. 1 CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 127 (1945); GALBRAITH, AMERICAN CAPITALISM, THE THEORY OF COUNTERVAILING POWER 118-21 (1952). See *What Retailers and Their Trade Associations Can Do About Fair Trade and Discount Houses,* address by Albert A. Carretta, member of the Federal Trade Commission, before the American National Retail Jewelers Association, Waldorf-Astoria, New York, N.Y., Aug. 11, 1954, p. 5.

The automobile empires are exemplary of both industrial and marketing concentrations of power.[53] Much of the concentration in the field of distribution has taken the form of vertical integration which, in itself, has been saved from the wrath of Congress and the courts.[54] In addition there have developed franchise structures, agency systems, retailer-owned wholesale establishments, consignment-sale plans, manufacturer-employed consumer sales forces, private-brand goods, and fair trade contract systems. These devices enable the interested parties—manufacturers, wholesalers, and retailers—not only to gain power through the combination of capital but also to achieve resale price maintenance.[55] Should states not recognize the desirability of fair trade contracts, it might well be advanced

53. The sphere of influence of large manufacturers is certainly not limited to the dollar value of industrial assets they control. The automobile manufacturers, through their extensive and thoroughly regulatory dealer franchise systems, not only determine when, where, how, and by whom their products are to be marketed, but can, through the threat of revocation of the franchise, control the reputation of a firm's or individual's business ability in a community. The automobile industry, however, has recognized that this extensive control may be oppressive, and one producer has established an administrative board of appeal to review franchise revocations. One state, by establishing an administrative board for the same purpose, indicates a possible trend toward public expression of dissatisfaction of this power to deal with other men's income expectations. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 77-83 (1954). See Boro-Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir.), *cert. denied*, 317 U.S. 695 (1942). A similar degree of control exists in the gasoline and oil product distribution channels. BERLE, *op. cit. supra* at 27-28.

The influx of combination and aggregation of power through the concentration of assets in chain stores and mail-order houses brought Congressional action in the Robinson-Patman Act. 49 STAT. 1526 (1936), 15 U.S.C. § 13 *et seq.* (1952). See Rose, *supra*, note 45; Legis., 27 ST. JOHN'S L. REV. 379, 383 (1953); Note, 22 GEO. WASH. L. REV. 592, n.4, 593 n. 9 (1954). The recent Federal Trade Commission rule 203-1 on quantity discounts illustrates how abuses of vertical integration and private brand merchandising by chain organizations can be limited. 16 C.F.R. § 310.1 (Cum. Supp. 1954), discussed in Note, 22 GEO. WASH. L. REV. 592 (1954). Use of an entire store as a loss leader has been held violative of the Robinson-Patman Act. United States v. N.Y. Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd.*, 173 F.2d 79 (7th Cir. 1949), discussed in Fulda, *supra*, note 47.

54. See I CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 127 (1945); Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. OF CHI. L. REV. 157 (1954); 54 COLUM. L. REV. 282, 285-86 (1954). A manufacturer who owns retail stores is not precluded by the antitrust and FTC laws from establishing and enforcing a fair trade contract system with other retailers. In re Eastman Kodak, 3 CCH TRADE REG. REP. (10th Ed.) ¶ 25,291 (1955); Eastman Kodak Co. v. Schwartz, 133 N.Y.S.2d 908 (Sup. Ct. 1954).

55. Committee hearings, committee reports, and floor debates on the McGuire Act recognized that there were other methods of resale price maintenance. *Minimum Resale Prices, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, on H.R. 5767*, H.R., 82d Cong., 2d Sess., p. 13-14 (1952); H.R. No. 1437, 82d Cong., 2d Sess. 10 (1952); Sen. Humphrey at 98 CONG. REC. 8887 (1952).

Other resale price maintenance methods have been mentioned and discussed in relation to fair trade. SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE 280 (1932); Weston, *Resale Price Maintenance and Market Integration: Fair Trade or Foul Play*, 22 GEO. WASH. L. REV. 658 (1954); Williams, *Resale Price Maintenance and Freedom of Choice, Brief in Support of H.R. 6925*, at 31-35 (1952).

that the responsive market place would adopt or devise one of these more rigid and generally less desirable methods of providing resale price maintenance.[56]

These suggested social and economic purposes are probably too indefinite to be considered by a court as the affected governmental interests,[57] but the court must acknowledge the governmental interest in recognition and protection of fair trade systems within a state.[58] An attempt, then, is to be made to resolve the conflict in governmental interests by looking solely to the results which would flow from recognition or refusal to recognize the fair trade statutes. It has been indicated that the harm from violation of the acts occurs within the fair trade state. The fact that mail order vendors in the forum will be affected by recognition of the foreign law may not in itself result in frustration of the forum's policy. If the forum is interested in maintaining unrestrained competition between its retailers, that competition is not directly reduced by the limitation of the scope of activity of some retailers selling by mail in interstate commerce. The limitation could only arise as those selling in interstate commerce are required by the operation of the foreign fair trade laws to distinguish between their domestic and foreign customers in stating prices, the resulting higher costs of doing the mail order business possibly reducing the ability of those mail order houses to compete in the domestic, free trade markets. Restraining the activities of the mail order vendor in fair trade states should not, excluding other factors, cause higher prices in the free trade forum. It could be argued, however, that the prices in the

56. It appears that certain types of goods are generally distributed through only one or very similar types of vertical combinations. 1 CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 358 (1945). The experience of one manufacturer seems to show that a selective franchise method of distribution is better adaptable to the sale of major appliances than is a fair trade contract system. Not only were list prices followed after the adoption of the franchise system, but the total sales of the manufacturer increased. Business Week, *Fair Trade's Legacy,* in READINGS IN MARKETING 291, 293 (Westing 1953). A product-type listing of those items which are and are not commonly fair traded indicates that fair trade systems are being used less to maintain resale prices on major appliances, while those contract systems are in active use on small appliances and other "shopping" goods. Seib, *Fair Trade Faces Showdown,* Nation's Business, March, 1955, p. 34. For general treatment of the products subject to effective resale price maintenance through fair trade systems, see Meloan, THE FAIR TRADE CONTROVERSY 21, 82-83, 126-127 (MBA dissertation, Washington University, School of Business and Public Administration, 1950). The state court decisions outlawing non-signer clauses may well have been the factor causing some manufacturers recently to adopt fair trade contracts at the wholesale level. Hardware and Housewares, February, 1955, p. 1.

57. See Freund, *supra* note 41, at 1225.

58. *See* Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc., 166 Misc. 342, 344-45, 2 N.Y.S. 2d 320, 324 (N.Y.Sup.Ct. 1938). The failure to recognize this state interest in the statute without questioning the social and economic judgment of the legislatures has probably contributed to some invalidation of state statutes.

forum would be indirectly increased. If the recognition by the forum court of the foreign fair trade law causes such a reduction in the sales volume of the mail order firms so that they could no longer sell in the free trade forum at the low prices formerly offered, the overall effect might be to increase domestic prices.[59]

On the other hand, the failure to recognize the foreign fair trade statute would have extensive effects on enforcement of the acts in the fair trade states.[60] It has been long recognized by decisions that enforcement of the fair trade prices must be uniform.[61] Though the petitioner will not necessarily be denied relief where the violator can show a failure to enjoin each and every violation,[62] he will be denied an injunction where there is not evident a vigorous, continuous, and effective enforcement program.[63] The recent position of the courts has been to scrutinize closely requests for injunctions or for contempt adjudications, only granting relief in clear cases. In one case where inquiry into the motives of the offending party was required to establish contempt, the petition for

59. Another material limitation on the enforcement of the foreign fair trade law in the free trade forum might arise where the validity of the fair trade statute under the constitution of that state has not been decided. Should that constitutional question be raised in the free trade forum, it appears to be at least doubtful whether a determination of the constitutionality of a sister state statute under the sister state's constitution would be required. Recently a federal court declined to decide on the constitutionality of the Tennessee Fair Trade Law, remitting the parties to the state court for decision of that issue. Sterling Drug, Inc. v. Anderson, 127 F. Supp. 511 (E.D. Tenn. 1954).

60. *See* Sunbeam Corp. v. MacMillan, 110 F. Supp. 836, 843 (D.Md. 1953); see Notes, 43 GEO. L.J. 258, 261 (1955); 22 U. OF CHI. L. REV. 525, 537 (1955).

61. The uniform enforcement requirement does not preclude establishment of different minimum prices for different competitive areas. The established price need not be uniform throughout a state, nor must the prices in different states be uniform. General Electric Co. v. Halem., 1950 Trade Cas. ¶ 62,613 (Sup.Ct. N.Y. Co. 1950); see Editorial Comment, 1 CCH TRADE REG. REP. (10th ed. ¶ 3190 (1954).

62. Sunbeam Corp. v. Masters, Inc., 97 F. Supp. 318 (S.D.N.Y. 1951); see Note, 22 U. OF CHI. L. REV. 525, 537 n.60 (1955).

63. An injunction will be denied where it appears that the party attempting to enforce the contract has condoned earlier violations with no evidence of efforts to establish a fair trade enforcement program; the courts may not be used to establish the price. Victoria Silk Press, Inc. v. E. J. Korvette Co., Inc., CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,948 (N.Y.Sup.Ct., N.Y.Co., Dec. 23, 1954); Automotive Electric Service Corp. v. Times Square Stores Corp., 175 Misc. 865, 24 N.Y.S.2d 733 (Sup.Ct. N.Y.Co., 1940); *accord,* Lionel Corp. v. R. H. Macy & Co., Inc., CCH TRADE REG. REP. (1955 Trade as.) ¶ 67,949 (N.Y.Sup.Ct., N.Y.Co., Jan. 4, 1955). Though the state laws do not require a uniform price throughout a state, and do permit vendors or authorized distributors to establish the prices, the producers or owners of the trade marks or brand names, would themselves set the price in order to circumvent the possible problem that would arise if two different prices on the same product would be established where competitive areas might overlap. See Parrott & Company v. Somerset House, Inc., discussed in I CCH TRADE REG. REP. (10th Ed.) ¶ 3170 (Cal. Superior Ct. for Los Angeles, 1937). For general discussion of enforcement problems, see Fulda, *supra,* note 47, at 202-03.

issue of the decree on the pleadings was denied.[64] A temporary injunction was also refused where there was a conflicting issue on the claim of notice.[65] A rather extreme case refused a contempt decree where the injunction did not include the actual price below which the defendant could not sell.[66] These recent trends lead to a near certain conclusion that, should the non-signing vendor in the free trade state be permitted to continue his mail order activities in the fair trade states, the vendors within the fair trade states would be immune to injunction.[67] The result would be the collapse of fair trade structures in all states invaded by the mail order circulars.

If the anti-trust statute of the forum has as its purpose the prohibition of resale price maintenance contracts, the interstate nature of the mail order transaction would require a conclusion that the public policy of the forum cannot stand as a bar to the recognition of the foreign fair trade statute. Even if the announced purpose of the anti-trust statute of the forum be more generally to preserve free competition in the forum, since the conduct in question and the resulting harm occur within the fair trade state and since the direct effect of the requested relief will be limited to competition within that fair trade state, it at least appears that a balancing of the interests should fall in favor of recognition of the foreign fair trade statute.

If the purpose of the forum anti-trust statute is considered still broader so as to include protection of the forum retailers, a close question is presented. As the fair trade state interest in the welfare of its retailers is affected by the interstate aspects of commerce, so is the free trade state interest in the welfare of its retailers. Application of the fair trade state law to the operations of the non-resident, non-signer, mail order vendor protects the fair trade state retailers while it injures the free trade vendors; refusal to so apply the fair trade law, of course, works the opposite result.

64. Sunbeam Corp. v. Masters, Inc., 124 F. Supp. 155 (S.D.N.Y. 1954).

65. Revere Camera v. Members Purchasing Corporation, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,947 (N.Y.Sup.Ct., N.Y.Co., Dec. 23, 1954). The New York rule holds that the non-signer must have notice of the fair trade price at the time that he purchases the merchandise. Revere Copper & Brass, Inc. v. Nelson, 1950 Trade Cas. ¶ 62,663 (N.Y.Sup.Ct., N.Y.Co., 1950). See 1 CCH TRADE REG. REP. (10th Ed.) ¶ 3268 (1954).

66. Hoffman-La Roche, Inc. v. Schwegmann Bros. Giant Super Markets, 122 F. Supp. 281 (E.D.La. 1954). See 1 CCH TRADE REG. REP. (10th Ed.) ¶ 3380 (1954).

67. On request for a preliminary injunction, however, one court has held that a manufacturer who sells to a retailer owning a subsidiary mail order house in another jurisdcition which resells into the forum at less than the fair trade price has not abandoned his fair trade enforcement system without proof that such sales to a mail order house will so weaken his enforcement policy as to evince willingness to abandon the fair trade system. The question of abandonment was said to require a full trial for proper determination. Eastman Kodak Co. v. Siegel, 23 U.S.L. WEEK 2496 (Sup. Ct., N.Y. Co., Mar. 25, 1955).

The balance of interests, therefore, might be determined by the number and extent of the interests adversely affected in the respective jurisdictions either by recognition or non-recognition of the foreign state fair trade law. The absence of more compelling reason, however, may well lead to the conclusion that the forum would not be required by the Full Faith and Credit clause to subjugate its policy to that of the fair trade state.

It is submitted, however, that this recognition of a foreign fair trade statute by a free trade forum as applied to the mail order vendor in the free trade state does not merely present a conflict of laws problem. Limitations on the policy of the forum may be found in the Commerce clause of the Constitution as well as in the Full Faith and Credit clause. The McGuire Act, though it may so appear, is actually not analogous to the McCarran, Hawes-Cooper, Ashurst-Sumners, Webb-Kenyon, and Wilson Acts.[68] Those statutes affirmatively declared a congressional intent to permit states to make regulations affecting the flow of commerce in the direct, prior regulation by Congress. The McGuire Act, on the contrary, does not withdraw the congressional exercise of the commerce power.[69] Congress has already affirmatively preempted this field by enacting anti-trust legislation prohibiting price-fixing arrangements.[70] The McGuire Act is merely a modification of this federal anti-trust plan and, as such, the statute represents a federal policy favorable to fair trade pricing structures. The non-fair trade state anti-trust laws cannot be applied to mail order transactions, either as a bar to the foreign action, or as affirmative regulation of the interstate activities of a resident vendor.[71] Though a free trade state could regulate where the policies of the federal and state regulations are in harmony, where there is a policy conflict either on the face of the statutes or in their administration federal supremacy demands that the state policy give way.[72]

---

68. See note 8 *supra.*

69. *But see* Sunbeam Corp. v. Wentling, 185 F.2d 903, 906-07 (3d Cir. 1950); Brief for the Defendant, p. 30, General Electric Company v. Masters Mail Order Company of Washington, D.C., Inc., Civil No. 93-260, S.D.N.Y., pending.

70. See cases collected in Notes, 63 YALE L.J. 538 n.1 (1954); 63 YALE L.J. 399 n.4 (1954). Though Congress may well have said that it intended to withdraw the exercise of the commerce power as to fair trade laws, what the Congress actually did with the words employed, it is submitted, should be controlling. For discussion of the controlling effect of words, see Curtis, *A Better Theory of Legal Interpretation,* 3 VAND. L. REV. 407 (1950).

71. See note 33 *supra.*

72. "Where the statutes are in patent conflict, i.e., where compliance with one necessarily constitutes violation of the other, the answer is provided in the supremacy clause of Art. VI." SHOLLEY, CASES ON CONSTITUTIONAL LAW 946 (1951). Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Interstate Natural Gas. Co. v. Federal Power Comm'n, 331 U.S. 682 (1947); *cf.* Schwabacker v. United States, 334 U.S. 182 (1948); Cloverleaf Co. v. Patterson, 315 U.S. 148 (1942). The absence of a policy conflict between the state and federal statutes permits the state statute to stand. Cali-

The limits of interstate commerce have been expanded in order to give proper effect to congressional intent and to secure national uniformity.[73] As the concern of distributors of products for state borders has decreased, so the federal anti-trust legislation has fought to keep apace through expanded commerce concepts, carrying along the fair trade exceptions.[74] Not only would the state fair trade laws become empty verbalisms through either restrictive interpretation of the McGuire Act or the failure to give full faith and credit in the free trade forum to the foreign fair trade statutes, but the recent McGuire Act would also become meaningless. It would appear almost ridiculous to take non-signer enforcement of resale price maintenance laws out of the purview of anti-trust legislation, and yet in the same breath to declare, in effect, that enforcement against the non-signing, mail order vendor constitutes a burden on commerce.[75] Congress certainly does not enact legislation in support of a particular marketing device in order to destroy that which it apparently intends to protect.

A scintilla of doubt may be raised by the fact that the McGuire Act, its preamble, the committee reports, and the congressional debates all are set in terms providing for state freedom of choice in resale price maintenance policy. It cannot be ignored, however, that the McGuire Act permits the making and enforcement of fair trade contracts in interstate commerce, while the Act does not provide for the similar operation of state anti-trust laws. The McGuire Act shows at least some recognition of the fact that, like interstate commerce, competitive areas do not respect state boundaries. The Act falls short of reconciling the conflicting state laws and the border-crossing competitive areas, but the implicit recognition of the problem is certainly significant and supports the contention that the McGuire Act is an affirmative declaration of a pro-fair trade federal

---

fornia v. Zook, 336 U.S. 725 (1949); *accord,* Panhandle Eastern Pipe Line Co. v. Public Service Com. of Indiana, 332 U.S. 507 (1947).

73. Perhaps the most extreme demonstration of how far the commerce power of the federal government may reach is found in Wickard v. Filburn, 317 U.S. 111 (1942). See also United States v. Darby, 312 U.S. 100 (1941). A discussion and collection of cases showing in particular areas how far the commerce power has extended is found in CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 170, 82d Cong., 2d Sess. 144-60, (Corwin 1953). The reason that only minor aspects of our economy now remain free from the regulatory power of Congress is not legal but economic. Stern, *The Problems of Yesteryear—Commerce and Due Process,* 4 VAND. L. REV. 446, 468 (1951).

74. See S. Doc. No. 170, 82d Cong., 2d Sess. 144-48 (Corwin 1953) for a discussion of the commerce clause in relation to anti-trust legislation.

75. An interesting presentation of the potential burden on commerce viewpoint is found in 43 GEO. L.J. 258, 272-73 (1955).

policy.[76]

Any doubts, then, that constitutional full faith and credit must be given a foreign fair trade statute in a cause of action brought under that law in the courts of a free trade forum are actually not significant since the McGuire Act, due to its interstate commerce setting, has already done that which is needed to require limitation on the activities of the mail order vendors selling from free trade to fair trade states.

AMORTIZATION AND PERFORMANCE STANDARDS IN ZONING REGULATIONS: STUDY OF EXISTING NON-CONFORMING USES IN AN INDIANA COMMUNITY

Legislative and judicial protection of existing land uses which do not conform to prescribed zoning restrictions have been a fundamental impediment to urban and rural planning.[1] Early legislation reflects a failure to consider the neighborhood grocery or auto repair shop in a residential district a significant problem for zoning regnlation.[2] It was assumed that nonconforming uses would live their natural lives and then disappear.[3] The eagerness of planning commissions to have zoning controls popularly accepted made them apprehensive of creating public[4] and

76. That the McGuire Act represents a federal policy favoring fair trade does not, however, require a conclusion that therefore the Cole proposal as a creation of a federal cause of action, would have been preferable to the present Section 3 of the Act. Enforcement of the policy of the Act need not precipitate an increased burden on the federal courts; review of the state courts by the Supreme Court should adequately provide the guidance necessary to prevent judicial abandonment of the Congressional policy.

1. Writers regard nonconforming structures and uses as the primary problem of zoning regulation. Oppermann, *Non-Conforming Uses & the City Plan,* 15 J. LAND & P.U. ECON. 94 (1939); O'Reilly, *The Non-Conforming Use & Due Process of Law,* 23 GEO. L.J. 218 (1934); Notes, 1 BUFF. L. REV. 286 (1952); 1951 WIS. L. REV. 685.

2. Since zoning legislation was aimed at the regulation of prospective development, existing land uses were not considered a barrier to present control. Therefore, planning commissions were urged not to be deterred by the existence of nonconforming structures and uses in the zoning districts. 1 YOKLEY, ZONING LAW & PRACTICE § 50 (2d ed. 1953).

3. The classic statement on this point follows: "Within a period of another twenty years, a large number of such 'non-conforming' uses will have disappeared, either through the necessity of enlargement and expansion which invariably is forbidden or limited by ordinance, or by the owners realizing that it is unwise and uneconomic to be located in a district which probably is not suited for the non-conforming purpose, or by obsolesence, destruction by fire, or by the elements or similar inability to be used; so that many of these non-conforming uses will fade out." METZENBAUM, THE LAW OF ZONING 288 (1930).

4. "During the preparatory work for the zoning of Greater New York fears were constantly expressed by property owners that existing non-conforming buildings would be ousted. The demand was general that this should not be done. . . . Consideration for investments made in accordance with the earlier laws has been one of the strong supports for zoning in that city." BASSETT, ZONING 113 (1936).