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## FAIR TRADE—VARIABLE PRICE CONTRACTS AND THE NON-SIGNER CLAUSE

In 1931, during this country's severest depression, California became the first state to enact a Fair Trade Law.<sup>1</sup> This was the result of pressure brought upon the legislature by independent retailers seeking resale price maintenance to protect against loss of business resulting from an increasing number of successful chain stores.<sup>2</sup> The California law,<sup>3</sup> as originally written, was found to be almost totally ineffective, however, since few retailers were willing to bind themselves to fair trade prices without assurances that competing firms were also bound.<sup>4</sup> Thus, in 1933 a "non-signer" clause was added to the California statute to enable the contracting parties to enforce the fixed price against others who were not signatories to the agreement.<sup>5</sup> Other states followed the lead of California and in 1936 the United States Supreme Court,<sup>6</sup> in a suit against a non-signer, held that the Illinois Fair Trade Law<sup>7</sup> was not violative of due process.<sup>8</sup> The following year Congress passed the Miller-Tydings Act<sup>9</sup> expressly

<sup>1</sup>CAL. BUS. & PROF. CODE §§ 16900-05 (West 1964). For background and historical material concerning fair trade laws generally, see Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967 (1955); Weston, *Resale Price Maintenance*, 33 A.B.A. ANTITRUST SECTION 76 (1967); Comment, *Fair Trade: The Ideal and Reality*, 27 OHIO ST. L.J. 144 (1966); Comment, *Resale Price Maintenance: The Nature and Validity of Fair Trade Laws*, 1967 U. ILL. L.F. 307. A good capsule history is given by the court in *General Elec. Co. v. S. Klein-on-the-Square, Inc.*, 121 N.Y.S.2d 37 (Sup. Ct. 1953).

<sup>2</sup>See Comment, *Fair Trade: The Ideal and Reality*, 27 OHIO ST. L.J. 144, 147 (1966); Comment, *Resale Price Maintenance: The Nature and Validity of Fair Trade Laws*, 1967 U. ILL. L.F. 307, 308.

<sup>3</sup>CAL. BUS. & PROF. CODE §§ 16900-05 (West 1964).

<sup>4</sup>Comment, *Resale Price Maintenance: The Nature and Validity of Fair Trade Laws*, 1967 U. ILL. L.F. 307.

<sup>5</sup>CAL. BUS. & PROF. CODE § 16904 (West 1964). The California statute is typical of the clause still in existence today and reads:

Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

*Id.*

<sup>6</sup>*Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

<sup>7</sup>ILL. ANN. STAT. ch. 121 ½, §§ 188-91 (Smith-Hurd 1960).

<sup>8</sup>In addition to the due process question, the court stated that the Illinois law was not violative of equal protection, was not an unlawful delegation of power to private persons and that the terms "fair and open competition" and "any commodity" were not vague and uncertain. *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936).

<sup>9</sup>15 U.S.C. § 1 (1970). Following the Sherman Act statement that "[e]very contract . . . in restraint of trade . . . is declared to be illegal," the Miller-Tydings Act adds:

exempting vertical price fixing agreements<sup>10</sup> entered into under state fair trade laws from Sherman Act prohibitions.<sup>11</sup>

In 1951, however, the Supreme Court in *Schwegmann Brothers v. Calvert Distillers Corp.*<sup>12</sup> held that under Miller-Tydings state fair trade laws would not apply to non-signers as to goods sold in interstate commerce. Congressional reaction to this decision was immediate, and in 1952 Congress passed the McGuire Act<sup>13</sup> to validate state laws as they applied to non-signers and interstate sales.<sup>14</sup> Federal court approval quickly followed.<sup>15</sup> Although forty-six states eventually enacted fair trade laws,<sup>16</sup> and forty still have such legislation, only twenty-eight now consider the law valid under their state constitutions.<sup>17</sup> At present, only fifteen of these twenty-eight states permit enforcement of fair trade contracts against non-signers.<sup>18</sup>

Notwithstanding the apparent legality of the non-signer clause in these fifteen states, non-signers continue to question the validity of fair trade contracts when enforcement is sought against them. In the recent case of *Black & Decker Manufacturing Co. v. Ann & Hope, Inc.*,<sup>19</sup> the Massachusetts Supreme Judicial Court upheld the trial court in deciding that Black & Decker's contract was unenforceable against the defendant, a non-signer, since it did not provide for a fixed price below which the

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Provided, [t]hat nothing contained in section 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears . . . the trademark, brand, or name of the producer . . . and which is in free and open competition . . . when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute . . . in effect in any State . . . .

*Id.*

<sup>10</sup>Vertical price-fixing agreements are those between a manufacturer or producer on one hand, and a wholesaler or retailer on the other. This type of agreement is permitted by the fair trade laws. Horizontal agreements, which are still not allowed, are those between producers, between wholesalers, or between retailers.

<sup>11</sup>15 U.S.C. § 1 (1970).

<sup>12</sup>341 U.S. 384 (1951).

<sup>13</sup>15 U.S.C. §§ 45(a)(2)-(5) (1970).

<sup>14</sup>*Id.* at §§ 45(a)(2)-(3).

<sup>15</sup>*Schwegmann Bros. v. Eli Lilly Co.*, 205 F.2d 788 (5th Cir.), *cert. denied*, 346 U.S. 856 (1953). The Supreme Court later upheld the Act in *Hudson Distrib., Inc. v. Eli Lilly Co.*, 377 U.S. 386 (1964).

<sup>16</sup>2 TRADE REG. REP. ¶ 6041. Alaska, Missouri, Texas and Vermont have never enacted fair trade laws. *Id.* at ¶ 6017.

<sup>17</sup>For a complete breakdown of the state laws *see* 2 TRADE REG. REP. ¶ 6041.

<sup>18</sup>2 TRADE REG. REP. ¶ 6041. The fifteen states considering the non-signer clause constitutional are Arizona, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Tennessee, Virginia and Wisconsin. *Id.*

<sup>19</sup>5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,806 at 91,413 (Mass. Jan. 14, 1972).

goods could not be sold. Although the Massachusetts court had ruled earlier that fair trade agreements were constitutional and enforceable against non-signers,<sup>20</sup> this case was distinguished because of an additional provision in the contract allowing a cash discount, not exceeding three percent of the minimum retail selling price, to be given under certain conditions.<sup>21</sup> The Massachusetts law<sup>22</sup> provides that a contract will not be in restraint of trade when it contains a provision "[t]hat the buyer will not resell such commodity except at the price stipulated by the vendor."<sup>23</sup> The plaintiff's contract, the court reasoned, did not comply with the law because it authorized each retailer, at his sole option, to vary the price of any article by as much as three percent.<sup>24</sup> With this decision the Massachusetts court becomes the first to identify the "variable price" contract. In examining whether this type of pricing will be incorporated into the fair trade laws, the initial question becomes whether the federal enabling legislation<sup>25</sup> precludes variable price contracts.

The Miller-Tydings Act,<sup>26</sup> as the first piece of enabling legislation, provides for contracts or agreements prescribing "minimum" prices for resale. In *Schwegmann*<sup>27</sup> the Supreme Court held that the Louisiana Fair Trade Law<sup>28</sup> was not authorized by Miller-Tydings since Louisiana law sanctioned the fixing of maximum as well as minimum prices.<sup>29</sup> The court went on to point out that the exemption granted by the Miller-Tydings Act is a limited immunity and that when the bill was being considered by Congress, the idea of allowing conditions other than a minimum price was rejected, the provision being restricted to agreements prescribing

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<sup>20</sup>*Shulton, Inc. v. Consumer Value Stores, Inc.*, 352 Mass. 605, 227 N.E.2d 482 (1967); *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 337 Mass. 665, 148 N.E.2d 861 (1958); *General Elec. Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956).

<sup>21</sup>The conditions contained in the contract were:

- (1) The discount must be in the form of cash, trading stamps, coupons, cash register receipts or analogous form.
- (2) The discounts must be given as a matter of the Retailer's general policy and not on Black and Decker products alone.
- (3) Black and Decker products must continue to be advertised and offered for sale at the minimum retail price as set out in this Schedule . . . .
- (4) The discount should not be given solely for the purpose of selling trade marked Black and Decker products below the established minimum retail price.

5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,806, at 91,414.

<sup>22</sup>MASS. GEN. LAWS ch. 93, §§ 14 A-D (1967).

<sup>23</sup>*Id.* at § 14A(1).

<sup>24</sup>5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,806, at 91,414-15.

<sup>25</sup>15 U.S.C. §§ 1,45(a)(2)-(5) (1970).

<sup>26</sup>15 U.S.C. § 1 (1970).

<sup>27</sup>341 U.S. 384 (1951); text accompanying note 12 *supra*.

<sup>28</sup>LA. REV. STAT. §§ 51:391-95 (1950).

<sup>29</sup>341 U.S. at 388. See History and Source of Law annotation accompanying LA. REV. STAT. § 51:392 (1950).

minimum prices only.<sup>30</sup> Thus, after *Schwegmann*, it is evident that Miller-Tydings, without more, would not permit variable price contracts to be enforced.

The McGuire Act,<sup>31</sup> as the second enabling provision, added an authorization for the "stipulated price" in addition to providing for enforcement against non-signers and thus allows a contract or agreement to prescribe minimum or stipulated prices for the resale of a commodity. The variable price contract was not discussed in the committee hearings for the McGuire Act, and after hearing arguments concerning the proposed legislation in general,<sup>32</sup> the Senate Committee on Interstate and Foreign Commerce reported the bill without recommendation.<sup>33</sup> If the Supreme Court should consider the validity of variable price agreements, there seems to be no reason supplied by the legislative history of the McGuire Act to hold them invalid. However, with the *Schwegmann* decision as precedent for a strict construction of the enabling acts and similar reasoning in *United States v. McKesson & Robbins, Inc.*,<sup>34</sup> variable pricing could be rejected.

The Sixth Circuit, on the other hand, applying Tennessee law, allowed a contract permitting a discount to be enforced against a non-signer,<sup>35</sup>

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<sup>30</sup>341 U.S. at 388, 393.

<sup>31</sup>15 U.S.C. § 45(a)(2)-(5) (1970).

<sup>32</sup>The arguments before the Senate Committee tended to strike a balance between opponents and proponents, e.g., the contention that it "hogties" competition at the retail level was met with the proposition that price cutting is one of the strongest forces that can be used to develop a monopoly and fair trade would stimulate competition among manufacturers making possible lower prices on quality merchandise.

The reference to the method of pricing was limited to concern of opponents that the addition of stipulated prices would give producers too much control, while proponents were interested in being sure only minimum prices could be fixed with no limit being placed on the maximum that could be charged. S. REP. NO. 1741, 82d Cong., 2d Sess. (1951), 2 U.S. CODE CONG. & AD. NEWS 2181 (1952).

<sup>33</sup>S. Rep. No. 1741, 82d Cong., 2d Sess. (1951), 2 U.S. CODE CONG. & AD. NEWS 2181 (1952).

<sup>34</sup>351 U.S. 305 (1956). While this case involved a question of whether the contracts were vertical or horizontal, rather than the way goods were priced, the Supreme Court reviewed both the Miller-Tydings and McGuire Acts and in rejecting a request for liberal interpretation of the Acts said:

Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy.

*Id.* at 316.

<sup>35</sup>*Shulton, Inc. v. Hogue & Knott, Inc.*, 364 F.2d 765 (6th Cir. 1966). The contract allowed discounts up to three percent of the retail price as a concession in the form of a cash discount, trading stamps, cash register receipts or other devices. *Shulton, Inc.* has had the 3% variable contract in force since 1964. 364 F.2d at 766.

despite the provision in the Tennessee Code that the price be "stipulated by the vendor."<sup>36</sup> The court reasoned that since the McGuire Act permitted "minimum or stipulated" prices to be fixed by the vendor,<sup>37</sup> the contract could be enforced against a non-signer. However, since at no point in the decision does the court refer to the discount provision as a variable price agreement, it seems that the rationale must have been that the provision in the contract was just another form of setting a minimum price. Regardless of this semantic discrepancy, it appears the Sixth Circuit deems variable pricing to be within the intended scope of the McGuire Act.

Assuming the Supreme Court would hold that the enabling legislation does not preclude variable pricing, either by equating this technique with setting a minimum price or otherwise, the question arises whether the practice would be permitted in an interpretation of the applicable state law.<sup>38</sup> Of the fifteen states whose nonsigner clauses have been held constitutional,<sup>39</sup> the fair trade laws in six<sup>40</sup> provide an exemption for price fixing at "the price stipulated by the vendor." The remaining nine,<sup>41</sup> on the other hand, permit price controls at "the minimum price stipulated by the vendor." Of the six absolute price states, a question similar to that of variable pricing has been considered only in Tennessee by the Sixth Circuit as discussed above.<sup>42</sup> Although Tennessee law was being interpreted, the court apparently did not consider that the state legislature had chosen absolute wording. Thus, it is not clear that variable pricing would be recognized as valid if tested in the Tennessee state courts. With the recent restrictive interpretation of the Massachusetts absolute language in *Black & Decker*, it seems reasonable to assume that the remaining absolute states might very well follow the strict interpretation approach of the court and refuse to enforce a variable price contract against a non-

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<sup>36</sup>TENN. CODE ANN. § 69-201 (1955).

<sup>37</sup>15 U.S.C. § 45(a)(4) (1970).

<sup>38</sup>The Miller-Tydings and McGuire Acts allow vertical price fixing agreements only if they are permitted by the legislature of the individual states. See 15 U.S.C. §§ 1,45(a)(2)-(5) (1970).

<sup>39</sup>Note 18 *supra*.

<sup>40</sup>*Id.* These six are Illinois, Massachusetts, New Jersey, New York, Tennessee and Wisconsin.

<sup>41</sup>*Id.* These nine states are Arizona, California, Connecticut, Delaware, Maryland, New Hampshire, North Carolina, Ohio and Virginia. The reporter includes Arizona in the list with those states having a "minimum" price statute although the wording of the section is the same as in the "absolute" price states and it apparently should be considered with them. See ARIZ. REV. STAT. ANN. § 44-1422(A) (1967). Maine's statute provides for a minimum price; however, the statute has not been tested as to the constitutionality of the non-signer clause. See ME. REV. STAT. ANN. ch. 10, § 1152 (1964).

<sup>42</sup>Notes 35-36 *supra*.

signer.<sup>43</sup>

The question has been considered in the minimum price states only by the Rhode Island Supreme Court,<sup>44</sup> which held that by allowing a three percent reduction from the fair trade price, a manufacturer did not waive his right to enforce fair trade contracts against nonsigners.<sup>45</sup> While this decision provides no assurance that variable pricing would fare better in other minimum states, it seems the variable concept is likely to be accepted in these jurisdictions since variable pricing may, in fact, be just another form of setting minimum prices.

While the variable price contract may be disallowed in absolute states and accepted in minimum states, a further consideration is whether either group of states should allow this type contract to be enforced against a non-contracting party. To arrive at an answer to this question, a comparison of the need for variable price contracts with additional burdens placed on non-signers is required. The need for this type of agreement has unquestionably been the result of demands by those retailers<sup>46</sup> who were willing to enter into fair trade contracts. The desire of these merchants to create shopping incentives in the form of trading stamps and similar devices is evidenced by the popularity of these modern forms of business competition, which have been permitted under the fair trade laws of twenty-two states.<sup>47</sup> These merchandising methods were mentioned in a finding by the Rhode Island court in *Shulton, Inc. v. Apex, Inc.*,<sup>48</sup> where it was recognized that the three percent provision in Shulton's contract was made to accommodate the use of trading stamps, discounts and other similar devices.<sup>49</sup> In addition, the Sixth Circuit in *Shulton, Inc. v. Hogue & Knott, Inc.*<sup>50</sup> recognized that the variable price provision was adopted

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<sup>43</sup>This is especially true in Wisconsin where price concessions are not permitted by a separate statute. See WIS. STAT. ANN. § 100.15(a) (1957). The Wisconsin Supreme Court, however, has approved an agreement allowing a special price for quarts or fifths of brandy sold in three bottle lots, holding that this gave reasonable notice of contract prices to non-signer retailers of brandy. *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 146 N.W.2d 447 (1966).

<sup>44</sup>*Shulton, Inc. v. Apex, Inc.*, 103 R.I. 131, 235 A.2d 88 (1967). Rhode Island has since repealed its Fair Trade Law. R.I. GEN. LAWS ANN. § 6-12-1 (Supp. 1971). See text accompanying note 74 *infra*.

<sup>45</sup>235 A.2d at 90.

<sup>46</sup>Comment, *Resale Price Maintenance: The Nature and Validity of Fair Trade Laws*, 1967 U. ILL. L.F. 307.

<sup>47</sup>2 TRADE REG. REP. ¶ 6047.

<sup>48</sup>Note 44 *supra*.

<sup>49</sup>Ohio has provided by statute for concessions in the form of "trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three percent of such stipulated minimum resale price." OHIO REV. CODE ANN. § 1333.32 (Baldwin 1971).

<sup>50</sup>364 F.2d 765 (6th Cir. 1966).

to make allowance for the fact that trading stamps had become a way of life in supermarket merchandising. Indeed, in 1968 the number of outlets licensed to use the green stamps of Sperry & Hutchinson Co. alone was 70,000, with more than 35 million American households saving those stamps.<sup>51</sup> It is apparent, then, that the benefits of variable pricing, if not outweighed by the burdens placed on non-signers, suggest the conclusion that the variable concept should be an integral part of the fair trade laws.

Generally, before a non-signer can be held to have violated the unfair competition provisions of fair trade laws, it must be shown that he had knowledge of a fair trade contract and of the price established by that contract for the commodity he sells.<sup>52</sup> The significant wording in the typical statutory provision is that the violation be "willfully and knowingly" committed.<sup>53</sup> The courts, however, have been inconsistent in their interpretation of the term "knowledge."<sup>54</sup> In New York, for example, a court has said that "it is well established law that the act requires no particular form of notice" and indicated that the only necessity was that the retailer know the goods were fair traded and the particular price to be charged.<sup>55</sup> In Rhode Island,<sup>56</sup> on the other hand, the court reasoned that the non-signer should be sent an actual copy of the contract or price list. In addition, some jurisdictions require that the knowledge be present only before the resale of the commodity,<sup>57</sup> while in others the party seeking to enforce the contract is usually compelled to demonstrate that the non-signer had knowledge of the fair trade prices before he acquired the goods.<sup>58</sup> In the latter jurisdictions the claim of lack of knowledge before the goods were purchased has been held an affirmative defense, with the burden placed on the non-signer to prove this fact.<sup>59</sup> While there seem to be inherent burdens on non-signers as shown in the above discussion,

<sup>51</sup>Sperry & Hutchinson Co. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,449 at 20,774 (FTC 1968).

<sup>52</sup>TRADE REG. REP. ¶ 6280.

<sup>53</sup>*Id.* at ¶ 6264. Virginia and Ohio are two exceptions since both by statute require that actual notice be given to the non-signer if he is to be bound to the contract. *See* VA. CODE ANN. § 59.1-2 (Repl. Vol. 1968); OHIO REV. CODE ANN. § 1333.30 (Baldwin 1971).

<sup>54</sup>TRADE REG. REP. ¶ 6250.

<sup>55</sup>Reylon, Inc. v. Janel Sales Corp., 198 N.Y.S.2d 359 at 360-61 (Sup. Ct. 1960).

<sup>56</sup>Milady Brassiere & Corset Co., Inc. v. Zwetchkenbaum, 1962 Trade Cas. ¶ 70,434 at 76,739-40 (R.I. Super. Ct. June 28, 1962).

<sup>57</sup>Calvert Distillers Corp. v. Goldman, 255 Wis. 69, 37 N.W.2d 859 at 862 (1949); Barron Motor, Inc. v. May's Drug Stores, Inc., 227 Iowa 1344, 291 N.W. 152 at 154 (1940).

<sup>58</sup>*See, e.g.*, James Heddon's Sons v. Callender, 29 F. Supp. 579, 580 (D. Minn. 1939); Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc., 15 Ill. 2d 182, 154 N.E.2d 290, 295 (1958); Lionel Corp. v. Grayson-Robinson Stores, Inc., 15 N.J. 191, 104 A.2d 304, 308 (1954); Cluett, Peabody & Co. v. J. W. Mays, Inc., 6 N.Y.2d 952, 161 N.E.2d 223, 224, 190 N.Y.S.2d 1013, 1014 (1959). *See generally* 2 TRADE REG. REP. ¶ 6252.

<sup>59</sup>Seagram Distillers Co. v. Armanetti, 19 Ill. App. 2d 575, 154 N.E.2d 866 (1958).



albeit in varying degrees, the courts have apparently not thought them to be of great weight since they have consistently enforced absolute and minimum prices on these non-contracting parties.

With the addition of the variable price contract, different problems with the knowledge requirement may arise since these contracts contain other conditions, such as the discount itself, the fact that the discount given must be on all the retailers goods, not just fair trade items, and that the commodity fair traded must be advertised without the discount being shown.<sup>60</sup> In New York the manufacturer apparently would not be able to rely on mere knowledge of the existence of the contract and the prices established, but would be required to show that the non-signer also knew of all the conditions in the agreement<sup>61</sup> before he acquired the goods.<sup>62</sup> In Rhode Island this problem probably would not arise since knowledge is established only when the non-signer is furnished a copy of the contract.<sup>63</sup> Thus, with a variable price contract, at least in states accepting the New York view, demonstrating knowledge may involve a more detailed notice procedure. It would seem, however, that this would increase the burden on the producer instead of the non-signer.<sup>64</sup> In addition, it would seem the non-signer would have a greater possibility of showing lack of knowledge of all the pertinent provisions of a variable contract when he claimed this fact as an affirmative defense.<sup>65</sup> In any event, it is clear that once the non-contracting party has adequate knowledge of the requirements of the variable contract, there is no greater burden on him than upon the contracting retailer.

Assuming the need for variable pricing to complement modern merchandising methods, it seems the courts should liberally construe the applicable statutes to provide enforcement of variable price contracts where it can be shown that the non-signer had adequate knowledge of all the provisions of the agreement. In addition, state legislatures should amend the applicable law to permit variable pricing with an established minimum<sup>66</sup> and include new and more rigorous notice requirements to

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<sup>60</sup>See, e.g., note 21 *supra*.

<sup>61</sup>See text accompanying note 55 *supra*.

<sup>62</sup>*Cluett, Peabody & Co. v. J. W. Mays, Inc.*, 6 N.Y.2d 952, 161 N.E.2d 223, 190 N.Y.S.2d 1013 (1959).

<sup>63</sup>See text accompanying note 56 *supra*.

<sup>64</sup>For example, some fair traders have adopted the practice of affixing to quotations, invoices, or the commodity itself, a notice that the commodity is the subject of an established fair trade price. With the variable contract the need to disclose all the conditions might make these methods impracticable. 2 TRADE REG. REP. ¶ 6250.

<sup>65</sup>See text accompanying note 59 *supra*.

<sup>66</sup>*Jantzen, Inc. v. E.J. Korvette, Inc.*, 219 F. Supp. 604 (S.D.N.Y. 1963). Here the court refused to enforce a contract permitting use of trading stamps which did not specify the number which might be given with the sale of the fair-traded item. In this contract, the court

insure that the non-signer has adequate knowledge before he can be bound.<sup>67</sup>

Although fair trade laws are still viable in twenty-eight states<sup>68</sup> and enforceable against non-signers in fifteen of those states,<sup>69</sup> there is support for the theory that the trend is toward doing away with the practice altogether.<sup>70</sup> The idea finds a basis in the conjecture that since the reasons for the law that grew out of the depression years no longer exist, the law should be retired.<sup>71</sup> In addition, it is claimed that manufacturers have other means at their disposal to achieve brand name protection, a goal which is most frequently cited as the reason for their willingness to participate in fair trade contracts.<sup>72</sup> Such means include franchise operations, selective refusals to sell to habitual price cutters, direct selling to the customer, consignment selling, and vertical integration with retail outlets.<sup>73</sup> Evidence of the trend is that Mississippi and Rhode Island repealed their acts in 1970, following the example of Nevada in 1965, Hawaii and Kansas in 1963, and Nebraska in 1959.<sup>74</sup> In other states, the statute is strictly construed so as to limit its effectiveness, as is demonstrated by the Massachusetts court in *Black & Decker*.<sup>75</sup>

Since variable price contracts should give recognition to changing times and merchandising methods, seemingly without placing a burden on non-signers, adjustments in the law are needed. Also, in the interim period before state legislatures act, it would seem desirable for state courts to liberally construe present statutory provisions so that they com-

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said, there was no price stipulated within the requirements of the New York Fair Trade Law.

<sup>67</sup>See note 53 *supra*, stating that the Ohio and Virginia legislatures have already taken steps to provide specific notice requirements.

<sup>68</sup>TRADE REG. REP. ¶ 6041. Where contracts are not enforceable against non-signers, their effectiveness is severely limited.

<sup>69</sup>Note 18 *supra*.

<sup>70</sup>For an article on the impending demise of the entire concept of resale price maintenance, see Note, *The Impending Demise of Resale Price Maintenance*, 1970 WASH. U.L.Q. 68. See also Weston, *Resale Price Maintenance*, 33 A.B.A. ANTITRUST L.J. 76 (1967); Comment, *Resale Price Maintenance: The Nature and Validity of Fair Trade Laws*, 1967 U. ILL. L.F. 307; Comment, *The Nonsigner Provision Past and Present*, 47 ORE. L. REV. 80 (1967).

<sup>71</sup>Note, *The Impending Demise of Resale Price Maintenance*, 1970 WASH. U.L.Q. 68, 78.

<sup>72</sup>See Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 835 (1958); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. LAW & ECON. 86, 104-05 (1960).

<sup>73</sup>Comment, *Resale Price Maintenance: The Nature and Validity of Fair Trade Laws*, 1967 U. ILL. L.F. 307, 317 n. 79.

<sup>74</sup>TRADE REG. REP. ¶ 6041.

<sup>75</sup>TRADE REG. REP. (1972 Trade Cas.) ¶ 73,806 at 91,414-15.