

IX.

It is further ordered, That the provisions of this order shall not apply to any contract relating to the sale of petroleum coke produced at the refineries designated in the complaint when said coke is to be used as fuel substitute for coal, heating oil or natural gas.

X.

This order shall terminate and cease to be effective twenty years from the date of entry of this order.

Chairman Engman not participating.

IN THE MATTER OF

CORNING GLASS WORKS

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8874. Complaint, January 13, 1972—Decision, June 5, 1973.

Order and opinion requiring a Corning, New York manufacturer, advertiser, seller, and distributor of Pyrex, Corning Ware, and Corelle Livingware brands of glass household products for food preparation, serving, and storage, among other things in connection with any fair trade programs of those products, to cease illegal price-fixing and refusal-to-deal activities. The respondent is also required to abrogate Wholesaler Fair Trade Contracts where resale is in free trade jurisdictions, and to abrogate fair trade contracts with retailers in signer-only states which were obtained by wholesalers in free trade states subject to the illegal boycott provision.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Corning Glass Works, a corporation, hereinafter referred to as respondent, has been and is now in violation of Section 5(a) (1) of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

COUNT I

PARAGRAPH 1. Unless otherwise required by context, the follow-

ing definitions shall apply for purposes of this count and the accompanying order to cease and desist:

(a) "State" means any State or Territory of the United States and the District of Columbia.

(b) "Fair trade law (or statute)" and "resale price maintenance law (or statute)" mean any state statute or provision thereof providing in substance that contracts permitting intra-state vertical resale price fixing, as such statutes are described in Sections 5(a) (2) and 5(a) (3) of the Federal Trade Commission Act, are valid and enforceable against signers or non-signers of such contracts, or against both, any other state law to the contrary notwithstanding.

(c) "Fair trade contract (or agreement)" and "resale price maintenance contract (or agreement)" mean any contract or agreement entered into pursuant to a fair trade statute.

(d) "Non-signer clause" means any provision of a fair trade statute which makes, is intended to make, or has been construed to make, the minimum or stipulated resale prices prescribed in fair trade contracts binding upon any reseller other than an actual signatory thereto; or which makes, is intended to make, or has been construed to make, any advertising, offer to sell, or sale, at less than said prices by such reseller actionable at the suit of any person.

(e) "Fair trade state" means any state having a fair trade statute which is valid and enforceable as to signers and non-signers, or only as to signers.

(f) "Non-signer state" means a fair trade state wherein the non-signer clause of the state's fair trade statute is valid and enforceable.

(g) "Signer-only state" means a fair trade state wherein no non-signer clause is included in the fair trade statute, or wherein the non-signer clause has been repealed or held invalid and unenforceable.

(h) "Free trade state" means any state wherein no fair trade statute has been enacted, or in which the last enacted fair trade statute has been repealed or held wholly invalid and unenforceable.

(i) "Reseller" means any purchaser of any of respondent's commodities who, in his regular course of business, sells (resells) such commodities, including but not limited to wholesalers and retailers.

(j) "Retailer contract (or agreement)" means respondent's fair

trade contract forms for retail resellers of commodities which bear, or the labels or containers of which bear, respondent's Pyrex, Corning Ware, or Corelle trademark, brand, or name. Copies of said contracts are incorporated by reference into this complaint and are attached hereto as Appendix A.

(k) "Wholesaler contract (or agreement)" means respondent's fair trade contract forms for wholesale resellers of commodities referred to in subparagraph (j) of this paragraph. Copies of said contracts are incorporated by reference into this complaint and are attached hereto as Appendix B.

(l) The words "lines," "merchandise," and "goods," whether used alone or in conjunction with the term "fair trade(d)," refer to commodities which bear, or the labels or containers of which bear, respondent's Pyrex, Corning Ware, or Corelle trademark, brand, or name; the words "wholesaler" and "retailer" refer to resellers of said commodities.

PAR. 2. Respondent Corning Glass Works is a corporation organized and existing under the laws of the State of New York and whose principal office address is Houghton Park, Corning, New York.

PAR. 3. Respondent's consolidated net sales during its fiscal year ended December 27, 1970 were in excess of five hundred ninety million dollars (\$590,000,000.00), a substantial portion of which sales were of respondent's fair traded lines.

PAR. 4. (a) Respondent is now and for some time last past has been engaged in the manufacture, advertising, offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of numerous commodities which bear, or the labels or containers of which bear, trademarks, brands, and names owned by respondent.

(b) Among said commodities are glass and glass ceramic products for food preparation, serving, and storage under the names Pyrex and Corning Ware, and tableware under the name Corelle.

(c) Respondent sells these lines of merchandise to wholesalers in Puerto Rico, the District of Columbia, and every state except Alaska, Nevada, New Hampshire, North Dakota and South Dakota.

(d) Respondent's wholesalers purchase said merchandise and resell it to retailers located in every state, the Commonwealth of Puerto Rico, and the District of Columbia.

(e) Except as set forth in Paragraph Five below, respondent's

wholesalers and retailers are free to, and many in fact do or could resell respondent's lines to resellers in other states.

PAR. 5. (a) Through contracts with all of its wholesalers and with all retailer vendees of said wholesalers, respondent now maintains, and for some time last past has maintained, a fair trade or resale price maintenance (sometimes hereinafter "RPM") program for each of its lines purchased for resale by said wholesalers and retailers. As to each such line, the RPM provisions of said contracts are now, and for some time last past have been, substantially the same as those contained in the sixth and seventh numbered sections of each of respondent's RPM contracts in Appendices A and B hereof.

(b) By means of these RPM contracts respondent has for some time last past established and maintained, and still does maintain, a minimum retail fair trade price for each item in each of its lines. Said prices are set forth in price lists which may be and are changed by respondent from time to time, and which are referred to as "schedule A" in respondent's wholesaler and retailer contracts. Recent versions of respondent's retail fair trade price lists are incorporated by reference into this complaint and are attached hereto as Appendix C.

(c) By means of its wholesaler contracts respondent has for some time last past established and maintained, and still does maintain, minimum wholesale fair trade prices for each of its lines by establishing and maintaining maximum percentages of discount from "Schedule A" (App. C) prices which respondent's wholesalers can grant when reselling respondent's merchandise for resale. Respondent's schedule of such discounts is referred to in section 6(a) of respondent's wholesaler contracts as "Schedule B." Recent versions of respondent's fair trade wholesale discount schedules are incorporated by reference into this complaint and are attached hereto as Appendix D.

(d) Respondent's retailer contracts (see section 6(2), App. A) and wholesaler contracts (see section 6(b), App. B) provide that no wholesalers or retailers may sell or transfer any of respondent's goods to any reseller who has not agreed with respondent to maintain respondent's fair trade prices. Respondent's wholesalers and retailers in effect may sell only to other resellers who have signed a fair trade contract.

(e) By the terms of the second sentence of section 7 of both the wholesaler and retailer contracts, both the price and customer

restriction provisions of section 6 of said contracts become operative and apply either (i) when the wholesaler or retailer party to the contract makes or would make a resale within a fair trade state, or (ii) regardless of whether such (first) resale occurs in a fair trade state or in a free trade state, when the merchandise will be transported to any fair trade state in which another resale will occur. Whenever, by the terms of respondent's wholesaler and retailer contracts, the resale price maintenance provisions thereof do not apply to a resale, the third sentence of section 7 of the wholesaler contract and a notice on the first page of schedule A make respondent's fair trade resale prices its suggested resale prices. All of respondent's wholesalers are supplied with both Schedules A and B, and all of respondent's retailers are supplied with Schedule A.

(f) In order to obtain signed retailer contracts, to ensure that its wholesalers comply with Section 6(b) of the wholesaler contract, and to ensure that all retail resellers of its goods are signers of its retailer contracts, respondent relies primarily upon, and in effect requires its wholesalers to obtain retailer contracts. In the normal course of business, respondent does not itself seek or obtain such contracts. Respondent permits its wholesalers to determine whether and with whom respondent will have retailer contracts. Respondent supplies its wholesalers with quantities of pre-signed, but otherwise blank, retailer contract forms on which the wholesaler then obtains the retailer's signature to ensure that only signers in fair trade states are able to obtain respondent's merchandise and that section 6(b) of his wholesaler contract is not violated. Respondent's wholesalers are not required to, and in fact do not, seek respondent's approval prior to causing respondent and any particular retailer to become parties to a retailer contract. Nor is there any procedure directly involving respondent which wholesalers use to determine whether any prospective customer has already signed a retailer contract prior to having purchased from another wholesaler. Therefore, fair trade state retailers who purchase, or have purchased, respondent's goods from more than one wholesaler are usually required to sign, and have signed, retailer contracts at the instance of each wholesaler from whom they have purchased. By this method, respondent is relieved of the necessity of itself obtaining retailer contracts before its wholesalers can sell to customers wishing to purchase respondent's goods. Together with section 6(b) of the wholesaler contract, this method minimizes the possibility of respondent's merchandise

being obtained by any non-signer retailer in any fair trade state, especially those in signer-only states.

(g) Respondent maintains and periodically circulates to all of its salesmen and wholesalers, a list of fair trade state retailers, and particularly non-signers in signer-only states, who have been reported as price-cutters with respect to respondent's merchandise and who refuse to sign a retailer contract. Respondent insists, under threat of suit for breach of contract or termination, that none of its wholesalers deal with any signer-only state retailer appearing on said list (the "blacklist"). Any signer in a signer-only state who violates his retailer contract will have said contract terminated by respondent, and the retailer's name will also appear on respondent's blacklist. Respondent represents to its salesmen and its wholesalers that the latter "must refuse to sell" such blacklisted retailers under the terms of the wholesaler contract. Respondent's use of the blacklist, respondent's fair trade enforcement policies and procedures, and many of respondent's views of the law applicable in this matter, are contained in respondent's Fair Trade Procedures booklet, a copy of which is incorporated by reference into this complaint and is attached hereto as Appendix E.

PAR. 6. (a) Among the wholesalers and retailers under fair trade contract more fully described in Paragraph Five above, are wholesalers and retailers located in free trade states. Contracts with said wholesalers and retailers are now and for some time last past have been in effect. Names and addresses of respondent's free trade state wholesalers under such contracts are contained in respondent's January 1, 1971 wholesaler list, a copy of which is incorporated by reference into this complaint and is attached hereto as Appendix F. (The free trade state wholesalers are those with a year opposite their names; the year is that in which each became one of respondent's wholesalers.)

(b) As set forth in subparagraphs (a), (c) and (e) of Paragraph Five above, respondent has contracted to fix said free trade state wholesalers' and retailers' minimum resale (selling) prices whenever the sale is to a reseller in any fair trade state.

(c) Respondent's wholesaler and retailer fair trade contracts by their terms apply to resellers located within, and/or to resales made by said resellers within, jurisdictions having no statute, law, or public policy making contracts prescribing such minimum resale prices lawful with respect to intrastate sales, and into which

jurisdictions (free trade states) respondent has shipped or transported its merchandise for resale.

PAR. 7. Respondent's fair trade contracts with its free trade state wholesalers and retailers, insofar as said contracts purport to establish any fair trade minimum resale prices on respondent's lines, and any circumstances or conditions under which such prices shall apply to any resale, are now and since their inception have been—

(a) Outside the exemption from being declared unlawful under the Antitrust Acts and the Federal Trade Commission Act afforded certain fair trade contracts and agreements by Section 5(a)(2) of the Federal Trade Commission Act;

(b) An unlawful burden and restraint upon, and interference with, interstate commerce between free trade states and fair trade states within the meaning of Section 1 of the Sherman Act and Section 5(a)(4) of the Federal Trade Commission Act; and, therefore,

(c) Unlawful under, and in violation of, Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

PAR. 8. (a) The allegations of Paragraphs One through Five are incorporated herein by reference.

(b) Respondent's wholesaler and retailer contracts now contain, and for some time last past have contained, refusal-to-deal provisions substantially the same as those contained in Section 6(b) of respondent's wholesaler contract and Section 6(2) of respondent's retailer contract.

(c) As set forth in subparagraphs (a), (d), (e) and (f) of Paragraph Five above, respondent has used said provisions to force fair trade state resellers, primarily retailers, to become signers in order to obtain respondent's merchandise and has contractually required its free trade state resellers to deal only with signer retailers in fair trade states.

(d) Respondent thereby prevents its free trade state wholesalers and retailers from making sales of respondent's goods in interstate commerce to all non-signer retailers in all fair trade states, and more specifically, to such retailers in the signer-only states.

(e) Respondent's wholesaler and retailer contracts by their terms apply to resellers located, and/or to resales made, within jurisdictions having no statute, law, or public policy making con-

tracts so limiting a reseller's right to resell lawful with respect to intrastate sales, and into which jurisdictions (free trade states) respondent has shipped or transported its merchandise for resale.

(f) To the extent that section 6(b) of respondent's wholesaler contract and Section 6(2) of its retailer contract are intended to, or in fact do, restrict the right of non-signer retailers in signer-only states to purchase respondent's merchandise from free trade state resellers, or, alternatively, result in said retailers becoming signers, said provisions are also contrary to the statutes, laws, or public policies of said signer-only states, under which statutes, laws, or public policies non-signers may resell fair traded goods at less than their fair trade prices.

PAR. 9. Respondent's contracts with its free trade state wholesalers and retailers, insofar as said contracts in any way purport to restrict sales of respondent's goods by said free trade state resellers to fair trade state retailers, and particularly to non-signer retailers in signer-only states, are now and since their inception have been—

(a) Outside the exemption from being declared unlawful under the Antitrust Acts and the Federal Trade Commission Act afforded certain fair trade contracts and agreements by Section 5(a) (2) of the Federal Trade Commission Act;

(b) An unlawful burden and restraint upon, and interference with, interstate commerce between free trade states and fair trade states within the meaning of Section 1 of the Sherman Act and Section 5(a) (4) of the Federal Trade Commission Act; and, therefore,

(c) Unlawful under, and in violation of, Section 5(a) (1) of the Federal Trade Commission Act.

COUNT III

PAR. 10. (a) The allegations of Paragraphs One through Five are incorporated herein by reference.

(b) As appears on the face of respondent's wholesaler and retailer contracts, and as previously set forth in subparagraphs (a), (d), (e) and (f) of Paragraph Five above respondent's fair trade state resellers may not sell respondent's merchandise to any fair trade state retailer who has not entered into a retailer contract with respondent.

(c) If any such refusal-to-deal provision is either expressly or by implication granted immunity by Section 5(a) (2) of the Fed-

eral Trade Commission Act, such provision can be immune only in contracts with resellers located in non-signer states. The statutes, laws or public policies of the signer-only states not only permit non-signers to resell fair traded commodities at prices of their own choosing, they also prohibit or render unenforceable any agreements by which a reseller is bound to refuse to deal with any non-signer.

PAR. 11. To the extent that non-signer retailers in all fair trade states and particularly those in signer-only states are prevented by the refusal-to-deal provisions of respondent's wholesaler and retailer contracts from purchasing respondent's goods from resellers also located in signer-only states, said provisions are contrary to the statutes, laws or public policies of both the vendors' and their vendees' states.

PAR. 12. Respondent's contracts with all signer-only state resellers, insofar as said contracts require said resellers to refuse to deal with all fair trade state retailers and particularly with those in signer-only states who have not agreed with respondent to maintain fair trade prices, are now, and since their inception have been—

(a) Outside the exemption from being declared unlawful under the Antitrust Acts and the Federal Trade Commission Act afforded certain fair trade contracts and agreements by Section 5(a) (2) of the Federal Trade Commission Act;

(b) An unlawful burden and restraint upon, and interference with, interstate commerce between signer-only and non-signer states and among signer-only states within the meaning of Section 1 of the Sherman Act and Section 5(a) (4) of the Federal Trade Commission Act; and, therefore,

(c) Unlawful under, and in violation of, Section 5(a) (1) of the Federal Trade Commission Act.

COUNT IV

PAR. 13. (a) The allegations of Paragraphs One through Twelve above are incorporated herein by reference.

(b) By the terms of respondent's wholesaler and retailer contracts and price lists as described in subparagraph (e) of Paragraph Five above, respondent's minimum wholesaler and retailer fair trade prices may, and often do, become suggested resale prices for the reseller parties to said contracts.

(c) Whether respondent's scheduled prices are fair trade or

suggested prices depends upon the circumstances attending the particular resale. For example, under the terms of respondent's wholesaler contract a free trade state wholesaler is bound by the resale price provisions of his contract when he sells to any fair trade state retailer. However, if an identical sale is made to a retailer in the wholesaler's own state or in any other free trade state, respondent's wholesaler contract by its terms suggests that the resale be made at the fair trade price.

(d) Respondent's contracts and price lists do not clearly set forth the circumstances which make the fair trade provisions thereof inapplicable. Respondent's contracts do not set forth the circumstances under which or the states into which its wholesalers and retailers may resell without being bound by said contracts. Said contracts also contain provisions which, as previously alleged herein, make the fair trade provisions thereof applicable to transactions in which said fair trade provisions cannot lawfully be applied.

PAR. 14. By having so worded its contracts, by having unlawfully entered into all of its contracts with free trade state resellers, by having obtained most of its retailer contracts as set forth in subparagraph (f) of Paragraph Five above, and particularly those with signer-only state retailers, by having circulated lists of retailers to whom resales are not to be made as set forth in subparagraph (g) of Paragraph Five above, by having committed the violations alleged in Counts I, II, and III herein, and by having used its fair trade prices as suggested resale prices for resellers whose contracts were unlawfully entered into or obtained, respondent has implemented its fair trade programs in a manner which is designed to, and in fact tends to—

(a) Diminish the likelihood that its wholesalers and retailers will resell at prices of their own choosing in instances where it is, or in the absence of a signed retailer contract would have been, lawful for them to do so, and in instances in which their contracts with respondent do not or cannot apply; and which is also designed to, and in fact tends to, achieve resale price maintenance in states, with resellers, and as to transactions, with respect to which resale price maintenance is, or in the absence of a signed retailer agreement would have been, unlawful; and which—

(b) Make unavailable, or diminish the availability of, respondent's goods from respondent's wholesalers and retailers to other resellers or potential resellers who refuse to agree with respondent to fix resale prices set for said goods by respondent, regardless of

whether such agreement would be lawful if entered into or lawfully obtained.

PAR. 15. Respondent has, therefore, unlawfully contracted, combined and conspired, within the meaning of Section 1 of the Sherman Act and in violation of Section 5(a) (1) of the Federal Trade Commission Act—

(a) To fix prices; to eliminate, discourage, or lessen the likelihood of, competition in price in its goods; and

(b) To obtain executed fair trade contracts, and to boycott those who are unwilling to become signers of such contracts.

COUNT V

PAR. 16. (a) The allegations of Paragraphs One through Five above are incorporated herein by reference.

(b) As set forth in subparagraphs (a) and (c) of Paragraph Five above, the minimum resale prices of respondent's fair trade state wholesalers and the purchase prices of said wholesalers' fair trade state retailers are subject to the maximum discount established and maintained by respondent as shown in Appendix D.

(c) Respondent thereby allows its wholesalers to grant, and suggests that they do grant to said retailers, discounts which vary depending upon the quantity purchased by the retailer. Therefore, as to any particular item in any of respondent's lines, the minimum wholesale price thus allowed and suggested by respondent through its wholesaler contracts, is not necessarily uniform for all competing retailers whose purchase prices are thus contractually controlled by respondent.

(d) Whenever respondent's wholesalers resell at the maximum quantity discounts allowed by respondent's "Schedule B," said schedule becomes a means by which unlawful price discrimination between competing retailers may occur.

(e) Respondent's quantity discount schedule (Appendix D) is not now, and for some time last past has not been, based upon each of its wholesalers' individual differences in costs of sale and delivery. In fact, respondent continues to maintain said quantity discounts without actual knowledge of whether the price differentials thereby allowed and suggested are justifiable by each or any of its wholesalers.

(f) By virtue of respondent's retailer contracts, competing retail purchasers of respondent's lines are, in many instances, precluded from engaging in retail price competition with respect

thereto. Therefore, the result of such wholesale price discrimination which may, or which actually does, occur is solely the enrichment of the larger retailers who can afford to purchase respondent's merchandise in quantities carrying the higher discounts.

PAR. 17. (a) By distributing its goods through wholesalers and by having contractually controlled the wholesalers' maximum discounts as set forth in Paragraph Sixteen hereof, respondent has established and maintained minimum wholesaler resale prices which have resulted in price discrimination between competing retailers of said goods.

(b) Respondent has thereby violated Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Ronald A. Bloch and Mr. Steven B. Gold for the Commission.

Mr. Charles C. Parlin, Jr., Mr. Thomas A. Dieterich and Mr. R. Bruce MacWhorter of *Shearman & Sterling*, New York, N.Y. for respondent.

Mr. William C. Ughetta, Corning Glass Works, Corning, N.Y. of counsel.

INITIAL DECISION BY RAYMOND J. LYNCH, ADMINISTRATIVE
LAW JUDGE

DECEMBER 27, 1972

PRELIMINARY STATEMENT

The Federal Trade Commission on January 13, 1972, issued the complaint herein which contains five counts. Each of these counts alleges that a practice engaged in by the respondent in connection with its Fair Trade program violates Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)). Respondent filed its answer on February 22, 1972. This answer denies any violation by respondent of Section 5 of the Federal Trade Commission Act and asserts as an affirmative defense to Counts I to IV inclusive that respondent's acts therein challenged are authorized by the McGuire Amendment to Section 5 of the Act.

On March 29, 1972, a prehearing conference was held, at which time there was discussion of the possibility of resolving this dispute by summary decision on stipulated facts. Counsel for the parties proceeded to explore this possibility and subsequently entered into two stipulations to facilitate that objective.

A stipulation filed August 3, 1972, stipulated certain facts with respect to Count V of the complaint and with respect to the pleading in Paragraph 8(e) of the complaint. A stipulation filed October 17, 1972, provided, in effect, that relief relating to the allegations of Counts I and IV of the complaint could be granted against respondent only if Count II of the complaint is sustained. This latter stipulation means that on the issue of liability the administrative law judge need determine only Counts II, III and V.

On September 29, 1972, complaint counsel filed a motion for summary decision in their favor on Counts II, III and V of the complaint. The motion was made pursuant to Section 3.24 of the Commission's Rules of Practice and Procedure. On October 16, 1972, respondent filed a cross-motion pursuant to Section 3.24 of the Commission's rules for summary decision in its favor on Counts II, III and V.

Each side filed in support of its motion an extensive memorandum of law and oral argument was had on these cross-motions for summary decision on October 25, 1972. At this oral argument counsel for both sides agreed that there were no factual disputes between the parties; that Counts II, III and V raised purely legal questions which could properly be decided on a motion for summary decision; and that in line with the stipulation between the parties filed October 17, 1972, a decision on these cross-motions for summary decision would be dispositive of the entire proceeding.

On November 16, 1972, this proceeding was assigned to the undersigned administrative law judge inasmuch as Judge Johnson was unavailable. The undersigned has had an opportunity to review all of the motions, memorandums of law and the transcript of the oral argument that was held on October 25, 1972, and upon the basis of all the evidence that has been presented, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Fair Trade Legislation

1. A brief description at this point of fair trade legislation in this country will be useful. In very broad outline, fair trade legislation permits a manufacturer of trademarked goods, under certain specified conditions, to prescribe the price at which his trademarked merchandise may be resold by others. The 50 states (plus Puerto Rico and the District of Columbia) fall into three general categories with respect to fair trade legislation:

(1) Those states which do not have any fair trade legislation in effect—the “free trade states.” There are 14 states plus Puerto Rico and the District of Columbia in this category.

(2) Those states which have fair trade legislation which is binding upon any reseller within the state whether or not he has signed a fair trade agreement—the so-called “non-signer fair trade states.” There are 17 states in this category.

(3) Those states which have fair trade legislation which is binding only upon those resellers who have signed fair trade agreements—the so-called “signer only fair trade states.” There are 19 states in this category.

2. The United States Supreme Court in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911) held that the Sherman Act invalidated resale price maintenance agreements in interstate commerce. On the other hand, some 46 state legislatures have acted at some time to validate resale price maintenance agreements in intrastate commerce. Recognizing the unique competence of the states to resolve conflicting considerations (which far transcend the legal), Congress has twice passed legislation to immunize resale price maintenance agreements from antitrust objection to the extent that they are validated by state fair trade laws in intrastate commerce, namely, the Miller-Tydings Act in 1937 (50 Stat. 693) and the McGuire Act in 1952 (66 Stat. 631). By this legislation Congress has permitted the states to apply their respective fair trade legislation to interstate transactions, without interjection of the federal antitrust laws as enunciating controlling legal rules.

The Undisputed Facts

3. A party moving for summary decision under Section 3.24 of the Commission's Rules of Practice is required to assert “that there is no genuine issue as to any material fact” and both parties have so asserted on these cross-motions for summary decision. The parties are also in agreement that the undisputed facts are as asserted in respondent's answer and in the stipulations filed August 3, 1972 and October 17, 1972 (pages 55–56 of the transcript of proceedings held October 25, 1972). In the following recitation of undisputed facts, therefore, the references will be to paragraph numbers in respondent's answer.

4. Respondent is a New York corporation with its principal office in the same state (answer, ¶ 2). It is engaged in the manufacture, sale and distribution in substantial volume of various

products for food preparation, serving and storage (Answer, ¶¶ 3, 4a, 4b). These commodities bear (or the label or container bears) respondent's trademarks Pyrex, Corning Ware or Corelle and are in free and open competition with commodities of the same general class produced or distributed by others (answer, ¶¶ 4a, 4b, 18, 19).

5. Respondent sells this trademarked merchandise only to wholesalers. These wholesalers are located in Puerto Rico, the District of Columbia and 45 different states (answer, ¶ 4c). These wholesalers purchase the trademarked merchandise from respondent for resale to retailers located in Puerto Rico, the District of Columbia and all 50 states (answer, ¶ 4d). These retailers resell the trademarked merchandise to their customers. Both types of resales (*i.e.*, resales by the wholesaler and resales by the retailer) are made across state lines (answer, ¶ 4e).

6. Respondent has contracts with all of its wholesalers in the forms attached to the complaint as Appendix B-1 and Appendix B-2 (answer, ¶ 5a). For present purposes the significant parts of these wholesaler contracts are those parts of paragraphs 6 and 7 which read as follows:

6. FAIR TRADE AGREEMENT—As to each state and as to such sales where it is lawful so to agree (but not elsewhere or otherwise).

(a) Distributor agrees that it will not (except as specifically permitted by statute) directly or indirectly advertise, offer for sale or sell any PYREX ware or CORNING WARE products at prices less than the fair trade prices now or hereafter designated and set forth in schedule A less discounts listed in schedule B applicable to the products sold * * *.

(b) Distributor agrees that it will not sell or transfer PYREX ware or CORNING WARE products to any reseller unless such reseller has agreed with Corning to maintain Corning's fair trade prices.

7. APPLICABLE LAW—This agreement, entered between Corning and Distributor at Corning, New York, is governed by the laws of the State of New York. The agreements contained in the Fair Trade Agreement set out in paragraph 6 hereof shall apply solely to sales, offers or advertisements only when and where agreements of the character of those therein contained shall be lawful as applied to intrastate transactions under any statute, law or public policy, now or hereafter in effect, in the state in which such resale is to be made or to which products are to be transported for such resale. In other states the prices referred to in paragraph 6 hereof are merely suggested as possible resale prices which may or may not be adopted for resale in those states in the sole discretion of the Distributor.

7. In order to obtain signed retailer contracts in fair trade states, to ensure that its wholesalers comply with paragraph 6(b) of the wholesaler contract, and to ensure that all fair trade state

retailers of its trademarked merchandise are bound to observe respondent's fair trade prices upon their retail resales, respondent in effect requires its wholesalers to obtain retailer fair trade agreements from fair trade state retailers to which the wholesalers sell merchandise bearing respondent's trademarks (answer, ¶ 5f). These retailer contracts are in the forms attached to the complaint as Appendix A-1 and Appendix A-2 (answer, ¶ 5a). For present purposes the significant parts of these retailer contracts are those parts of paragraphs 6 and 7 which read:

6. FAIR TRADE AGREEMENT—As to each state and as to such sales where it is lawful so to agree (but not elsewhere or otherwise): (1) Dealer agrees that it will not (except as specifically permitted by statute) directly or indirectly advertise, offer for sale or sell any PYREX ware or CORNING WARE products at prices less than the fair trade prices now or hereafter designated and set forth in Schedule A as such Schedule may be constituted from time to time (2) Dealer agrees that it will not sell or transfer PYREX ware or CORNING WARE products to any reseller unless such reseller has agreed with Corning to maintain Corning's fair trade prices. * * *

7. APPLICABLE LAW—This agreement, entered between Corning and Dealer at Corning, New York, is governed by the laws of the State of New York. The agreements contained in the Fair Trade Agreement set out in paragraph 6 hereof shall apply solely to sales, offers or advertisements only when and where agreements of the character of those therein contained shall be lawful as applied to intrastate transactions under any statute, in the State in which such resale is to be made or to which products are to be transported for such resale.

8. Through wholesaler fair trade agreements with all of its wholesalers, and through retailer fair trade agreements with certain retailer vendees of such wholesalers, respondent thus maintains a resale price maintenance program. This program, as set forth in the fair trade agreements, has three distinct elements:

(1) The program includes the establishment of maximum discounts from retail fair trade prices which respondent's wholesalers may grant when reselling respondent's trademarked merchandise to customers who will themselves resell such merchandise. The maximum discounts are specified by the wholesaler fair trade agreements and apply only where the wholesaler's disposition of the trademarked merchandise in question occurs in a state where resale price maintenance agreements are lawful under local law in intrastate commerce. In respect of wholesaler sales occurring in other states, the wholesaler is completely free to resell to a retailer (or to any other person) at any price.

(2) The program also includes the establishment of minimum retail fair trade prices which are set forth in price lists issued by

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respondent from time to time. Said price lists, as well as the language of the retailer fair trade agreements hereinabove quoted, make it abundantly clear that minimum retail prices are established by respondent's program only where the retail sale in question occurs in a state where resale price maintenance agreements are lawful under local law in intrastate commerce. In respect of retail sales occurring in other states, respondent's fair trade prices are merely suggested prices.

(3) In order to effectuate its program at the retailer level, respondent has included provisions in its wholesaler fair trade agreements and its retailer fair trade agreements that no party thereto may sell or transfer any of respondent's trademarked goods to any dealer who, in turn, will resell such goods in a fair trade state unless such dealer has agreed with respondent to maintain respondent's fair trade prices upon its further resales of respondent's trademarked merchandise in fair trade states. In effect, parties to wholesaler fair trade agreements and retailer fair trade agreements may sell respondent's trademarked merchandise to fair trade state resellers only if the latter have signed a fair trade contract with respondent.

9. Respondent maintains and periodically circulates to its salesmen and wholesalers a list of fair trade state retailers who have refused to sign a retailer fair trade agreement or who, having signed such an agreement, have violated the resale price provisions thereof. Consistent with the terms of its wholesaler and retailer fair trade agreements, respondent insists that no party to such an agreement sell respondent's trademarked merchandise to any person whose name appears on this list—including non-signers in signer-only states (answer, ¶¶ 5g, 23).

10. The manner in which respondent in practice enforces its fair trade agreements is set forth in a booklet entitled "Fair Trade Procedures" which is Exhibit E to the complaint (answer, ¶ 23). The instructions given by respondent in this booklet include the following:

1. FULLY VALID FAIR TRADE STATES

The following states have Fair Trade Laws and maintain the constitutionality of the non-signer clause. We may sue any store which has had actual notice of our fair trade prices whether a contract has been signed or not.

Arizona	Maine	North Dakota
California	Massachusetts	Ohio
Connecticut	New Hampshire	Tennessee
Delaware	New Jersey	Virginia
Illinois	New York	Wisconsin
Maryland	North Carolina	

PROCEDURE:

When a report of price cutting is brought to your attention check the accuracy of the report and attempt to correct the situation with a personal call wherever possible. Report the violation to J. H. Miller, Corning, New York. A Fair Trade wire and registered letter will be sent to violator requesting that prices be restored or legal action will be taken.

If price cutting persists legal action is recommended. The actual shopping of the store for evidence will be handled by the Legal Department. (A shopping report or receipt for merchandise before notice to the store is of no value).

2. NON-SIGNER STATES

The following states have Fair Trade Laws but specify that the non-signers clause is unconstitutional. Unless a dealer actually signs a Fair Trade Agreement he is not bound to maintain Fair Trade prices.

Arkansas	Kentucky	Pennsylvania
Colorado	Louisiana	South Carolina
Florida	Michigan	South Dakota
Georgia	Minnesota	Washington
Idaho	New Mexico	West Virginia
Indiana	Oklahoma	
Iowa	Oregon	

PROCEDURE:

When a report of price cutting is brought to your attention, ask the violator to restore prices and sign a Fair Trade Agreement. If the dealer refuses to sign, report this to J. H. Miller, Corning, N. Y., and the dealer's name will be added to a special list that is mailed to our distributors. Distributors may not sell to dealers appearing on this list.

We may as part of the Wholesale Fair Trade Agreement ask the distributor to agree that he will not sell to any dealer who has refused to sign a Fair Trade Agreement.

If the distributor violates this agreement we may either (1) sue him for breach of his agreement or (2) cut him off.

If a dealer violates his contract we may terminate his contract and notify all distributors that we have done so. A distributor *must* refuse to sell him to avoid violation of the wholesale contract. It is valid to insist that our ware be distributed only through signing retailers.

3. STATES WITH NO FAIR TRADE

The following states have no Fair Trade Laws and our Fair Trade Schedule A prices are merely suggested prices for the guidance of our distributors and dealers.

Alabama	Montana	Rhode Island
Alaska	Mississippi	Texas
District of Columbia	Missouri	Utah
Hawaii	Nebraska	Vermont
Kansas	Nevada	Wyoming

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PROCEDURE:

In states *not having Fair Trade Laws* the selection of dealers is at the sole discretion of the wholesaler. To make absolutely certain there will be no misunderstanding you are instructed *not* to report to your distributors any retailer not using our suggested retail prices when retailer is located in non-fair trade states.

PLEASE REFER ALL QUESTIONS AS TO THE APPLICABILITY OF FAIR TRADE LAWS TO HENRY H. SAYLES, LEGAL DEPARTMENT, CORNING, N. Y.

The State Fair Trade Legislation

11. Each of the 36 states that presently have fair trade legislation in effect of course has used somewhat different legislative language. An example of this state fair trade legislation is the Illinois Fair Trade Act reading as follows:

AN ACT to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

Sec. 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, 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.

Sec. 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

The provision of this Act shall not apply to any contract or agreement

relating to any commodity which may be sold or offered for sale to the State of Illinois or to any of its administrative agencies or political subdivisions, or to any municipality, or to any free public library, endowed library, college, university or school library in this State.

Sec. 4. This Act may be known and cited as the "Fair Trade Act".

(Illinois Laws of 1935, Senate Bill 598, as amended in 1941)

The McGuire Act

12. Congress enacted the McGuire Act in 1952 (66 Stat. 631). The preamble of the McGuire Act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

The text of the McGuire Act amends Section 5 of the Federal Trade Commission Act by adding to Section 5 the following:

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, 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, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully 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, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right

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of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between persons, firms, or corporations in competition with each other.

Count II of the Complaint

13. From the foregoing it can be seen that a typical state fair trade act as well as the McGuire Act of Congress contains provisions permitting resale price maintenance and also provisions permitting the restriction of dealers. This proceeding is directed at the dealer restriction provisions of Corning's fair trade program.

14. Count II of the complaint is addressed to the situation where Corning sells its trademarked merchandise to a wholesaler in a free trade state who will resell that merchandise to a retailer who will in turn resell the merchandise in a fair trade state. The complaint alleges that respondent has forced fair trade state retailers to sign fair trade agreements in order to obtain respondent's merchandise (§ 8(c)); that respondent has contractually required its free trade state wholesalers to deal only with signer retailers in fair trade states (§ 8(c)); that respondent thereby prevents free trade state wholesalers from selling respondent's merchandise to non-signing retailers in fair trade states (§ 8(d)); that such a restriction preventing free trade state resellers from selling to non-signing retailers in signer-only states is outside the exemption of Section 5(a)(2) of the Federal Trade Commission Act and is therefore a violation of Sections 5(a)(1) and 5(a)(4) of the Act.

15. The facts as to Corning's conduct are not in dispute. It may be helpful to take as an example a sale by Corning to a wholesaler in Missouri (a free trade state) who will resell to a retailer in either neighboring Illinois (a non-signer fair trade state) or neighboring Arkansas (a signer-only fair trade state). Respondent requires all of its wholesalers, wherever located, to sign its wholesalers fair trade agreement. Therefore, a Missouri wholesaler as a condition of his appointment is required to sign the fair trade agreement even though Missouri is a free trade state.

16. The fair trade obligations of the Missouri wholesaler are limited by the provisions of paragraphs 6 and 7 of his agreement

quoted above. Therefore, he can sell to any Missouri retailer he wants to and at any price he chooses. (Similarly, the Missouri retailer may resell respondent's trademarked merchandise in Missouri at any price he chooses.)

17. However, if the Missouri wholesaler resells the merchandise to a retailer who, in turn, will resell the merchandise in a fair trade state (in our example, either Illinois or Arkansas) Corning's wholesaler fair trade agreement requires that the Missouri wholesaler sell only to an Illinois or Arkansas reseller who has signed one of respondent's fair trade agreements. If the Missouri wholesaler sells to an Illinois or Arkansas reseller who has not signed a fair trade agreement, the wholesaler will have breached his fair trade agreement with Corning. Complaint counsel claim these undisputed facts demonstrate a violation of Section 5(a)(1) of the Federal Trade Commission Act. Respondent claims these admitted practices fall squarely within the exemption of the McGuire Act.

18. Neither side has called our attention to any cases determinative of the issue. Complaint counsel cite *Revere Camera Co. v. Masters Mail Order Co.*, 128 F. Supp. 457 (D. Md. 1955); *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 140 F. Supp. 165 (D. Md. 1956), *aff'd*, 240 F.2d 684 (4th Cir. 1957); and *General Electric Co. v. Masters Mail Order Co.*, 244 F.2d 681 (2d Cir. 1957). These cases involved sales from a free trade jurisdiction retailer to an ultimate customer located in a fair trade jurisdiction. No resales in a fair trade state were involved.

19. Respondent cites *Sunbeam Corp. v. MacMillan*, 110 F. Supp. 836 (D. Md. 1953); *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31 (D. Cal. 1953); and *Vornado, Inc. v. Corning Glass Works*, 255 F. Supp. 216 (D. N.J. 1966), *aff'd* 388 F.2d 117 (3d Cir. 1968). These cases demonstrate that fair trade agreements identical with those involved in this proceeding have been upheld under the laws of various fair trade states. But they are not dispositive of the central issue under Count II, that is which state law should be looked to in determining whether the McGuire Act exemption applies.

20. Complaint counsel argue that the law of the free trade jurisdiction—the state of the first resale—must govern. They claim support for their position in the debates in the House of Representatives leading up to the enactment of the McGuire Act—particularly the fact that an amendment was proposed by Mr. Cole of Kansas and defeated (98 Cong. Rec. 5029–5031). This

Cole Amendment would have protected fair trade state merchants against sales in or even deliveries into their state by sellers located in free trade states. However, the House also considered and rejected the Keogh Bill (H.R. 6925, 82d Cong., 2d Sess.) as an alternative to the McGuire Act. The Keogh Bill would have exempted from fair trade enforcement any interstate sales either out of or into a free trade state. The same cases which complaint counsel cite in support of their position in Count II have concluded that the House debates were contradictory and inconclusive and I agree, See, for example, *Bissell Carpet Sweeper Co. v. Masters*, 140 F. Supp. at pp. 175-178.

21. Our analysis must begin with the language of the McGuire Act itself. The preamble of the McGuire Act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce. (66 Stat. 631-632)

22. The pertinent language of the McGuire Act for purposes of Count II is

(2) Nothing contained in this Act * * * shall render unlawful any contracts or agreements * * * requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity * * * 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 * * * in which such resale is to be made, or to which the commodity is to be transported for such resale.

There are two points which may be noted from this Congressional mandate:

(1) The McGuire Act specifically recognizes the dealer restriction provisions of the state fair trade laws and covers these dealer restriction provisions in its exemption from the applicability of the Federal Trade Commission Act; and

(2) The McGuire Act itself specifies the state whose law must be referred to in determining the lawfulness of the fair trade restrictions.

23. It will be noted that in the last two lines quoted from subsection (2) of the McGuire Act, the phrase "such resale" twice appears. This obviously refers to the resale "at minimum or stipulated prices" mentioned earlier in the subsection.

24. In the factual setting of Count II there is no resale at a minimum or stipulated price in Missouri because Missouri is a free trade state. The "such resale" therefore does not apply to the first resale in the distribution process—the Missouri resale by the wholesaler.

25. In the Count II situation, however, there is also a second resale—the resale by a retailer located in a fair trade state—either Illinois or Arkansas. This resale in a fair trade state is clearly the "such resale" referred to in subsection (2) of the McGuire Act—that is, it is the resale at a minimum or stipulated price.

26. It follows, therefore, that to determine the legality of the dealer restriction provision, we must look to the law of Illinois or Arkansas—the state (in the language of the McGuire Act)

to which the commodity is to be transported for such resale.

27. Every one of the 36 states which have fair trade laws has a provision making lawful the dealer restriction provisions of the kind here attacked. To continue with our example, Title 70 of the Arkansas Statutes Section 70-202 permits fair trade contract provisions:

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

28. Since the dealer restrictions are lawful in the state where the resale at a maintained price will take place, the McGuire Act says in so many words that they are not unlawful under the Federal Trade Commission Act.

29. This result is the logical result of the legislative scheme. The only purpose of the dealer restriction provision in Corning's wholesaler fair trade agreement is to assist in effectively maintaining the resale price in those states whose legislatures have opted for fair trade as a matter of state policy. It follows that the law of the fair trade state should be looked to in determining the legality of the dealer restriction provisions of Corning's contracts.

30. Since those provisions are legal under the laws of all 36 fair trade states the claim of complaint counsel under Count II of the complaint must be rejected and summary decision granted in favor of respondent on Count II.

Count III of the Complaint

31. Count III of the complaint alleges that under Corning's wholesaler and retailer fair trade agreements, Corning's fair trade state resellers may not sell Corning's trademarked merchandise to any fair trade state reseller who has not signed one of Corning's fair trade agreements. It is further alleged that

The statutes, laws or public policies of the signer-only states * * * prohibit or render unenforceable any agreements by which a reseller is bound to refuse to deal with any non-signer. (§ 10(c))

The conclusion pleaded in Count III of the complaint is that to the extent Corning's fair trade agreements require signer-only state resellers to refuse to sell to non-signing resellers in fair trade states, the agreements are outside the exemption of Section 5(a)(2) and in violation of Sections 5(a)(4) and 5(a)(1) of the Federal Trade Commission Act.

32. Again, there is no dispute as to the facts. The situation may be analyzed in terms of a Corning wholesaler in a signer-only fair trade state such as Indiana who might consider selling the trademarked merchandise to a non-signing retailing reseller also located in a signer-only fair trade state (for example, Indiana again or its neighboring state, Kentucky). To analyze this situation:

(1) Respondent requires each of its wholesalers, wherever located, to sign its wholesalers fair trade agreement as a condition of his appointment.

(2) Under paragraph 6 of the wholesaler's fair trade agreement he agrees not to sell the trademarked merchandise to any Indiana reseller unless that reseller has agreed to maintain respondent's fair trade prices.

33. There are 19 states which have (like Indiana) enacted Fair Trade Acts which can be enforced only as to persons who have signed fair trade agreements—that is, they are signer-only states. Each of the 19 Fair Trade Acts, however, specifically authorizes a dealer restriction provision such as is contained in respondent's contract. Title 24, Article 3, Chapter 1 of the Indiana Code provides in Section 2 that no contract relating to the resale of a trademarked commodity shall be deemed in violation of any law of the State of Indiana by virtue of a provision:

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell.

The other 18 signer-only states, all have similar statutes.

34. At the oral argument on October 25, 1972, complaint counsel conceded that they were asking for a determination that the quoted statute of Indiana, and the comparable statutes of the 18 other signer-only fair trade states, were "not in effect" within the meaning of the McGuire Act (transcript p. 89, line 17; p. 92, line 15). This argument is devoid of merit since in each case the statute has been duly enacted, it has never been repealed or superseded, and the dealer restriction portion of the statute has never been declared unconstitutional by any court.

35. Decisions in Florida and Michigan cited by complaint counsel in support of their position on this Count III of the complaint clearly do not support said position. Those decisions hold only that dealer restriction provisions cannot be used to enforce fair trade prices against persons not signing fair trade agreements in signer-only states, on a tortious interference with contract theory. *E.g.*, *Sunbeam Corp. v. Gilbert Simmons Associates, Inc.*, 91 So. 2d 335 (Fla. 1956), *Argus Cameras Inc. v. Hall of Distributors, Inc.*, 343 Mich. 54, 72 N.W. 2d 152 (1955). Irrespective of the correctness of those holdings, which are contrary to authority in other states, *Cat's Paw Rubber Co. v. Barlo Leather & Findings Co.*, 12 F.R.D. 119 (S.D.N.Y. 1951); *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31 (N.D.Cal. 1953); *Bissell Carpet Sweeper Co. v. Shane*

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Co., 237 Ind. 188, 143 N.E. 2d 415, 421 (1957), said decisions do not deal with—and certainly do not resolve—the validity and enforceability of dealer restriction provisions as between the parties to fair trade contracts in signer-only states. Subsequent decisions in Florida and Michigan themselves make this clear. *Sunbeam Corporation v. Chase & Sherman, Inc.*, 1953 CCH Trade Cases ¶67,524, cert. denied, 72 So.2d 714 (Fla. 1955), *Miami Parts & Spring, Inc. v. Champion Spark Plug, Inc.*, 364 F.2d 957, 967 (5th Cir. 1966), *Sunbeam Corp. v. Schiros*, 151 F.Supp. 166 (S.D. Mich. 1957).

36. Indeed, complaint counsel cannot point to a single decision holding invalid the dealer restriction provision of a fair trade agreement, as between the parties thereto, which is expressly validated by every one of the 36 states having some form of fair trade legislation. If such provisions are to be found invalid on public policy grounds, that decision must be left to the states, in conformity with Congressional intent evidenced by Miller-Tydings and McGuire. I shall not presume the invalidity of state legislation, and accordingly, I dismiss Count III of the complaint.

Count V of the Complaint

37. Count V of the complaint deals with the quantity discount provisions of Corning's fair trade agreements. The allegation is that Corning has "required" its wholesalers to give quantity discounts which have resulted in price discrimination between competing retailers.

38. Once again, the facts are not in dispute. And the following facts which have been stipulated by the parties contradict the claim of complaint counsel:

(1) Respondent's wholesaler contracts (complaint, Appendix B) and discount schedules (complaint, Appendix D) do not by their terms require that the maximum discounts be given to any retailer. However, when applicable to any resale, said contracts and schedules do require that retailers purchasing in lesser quantities be sold at lesser discounts.

(2) In at least some instances, respondent's fair trade state wholesalers grant the maximum quantity discounts allowed by respondent's wholesaler discount schedules (complaint, Appendix D) to retail customers qualifying therefor. Retail customers of said wholesalers purchasing in lesser quantities are sold at the lesser discounts required by said schedules.

(3) To the extent that respondent's wholesaler resale prices are merely suggested prices, many of respondent's wholesalers adopt and follow said suggested prices.

39. Under these agreements it is the responsibility of the wholesaler to decide whether or not he wishes to give a quantity discount and whether any such quantity discount will comply with the Robinson-Patman Act.

40. Quantity discounts are widely used. And they are not *per se* illegal. See *Bruce's Juices, Inc., v. American Can Co.*, 330 U.S. 743 at 745-46 (1947).

41. Quantity discounts are not illegal if they are cost justified; or if they are given simply to meet competition; or if they have no adverse effect on competition. This means, of course, that each case must be examined on its own particular facts.

42. Count V must therefore be dismissed because:

(1) Respondent does not require its wholesalers to grant quantity discounts; and

(2) It is impossible to state categorically that any quantity discount that respondent's wholesalers might choose to grant would be illegal.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of and over respondent and the subject matter of this proceeding.

2. For the reasons set forth above, I have determined that Counts II, III and V of the complaint must be dismissed. This means that in accordance with the stipulation of the parties filed October 17, 1972, Counts I and IV of the complaint need not be litigated.

ORDER

It is ordered, That the complaint herein be, and the same hereby is dismissed in its entirety.

PYREX® WARE AND CORNING WARE® PRODUCTS AUTHORIZED DEALER APPOINTMENT AND FAIR TRADE AGREEMENT

As of the _____ day of _____, 19____ at Corning, New York, CORNING GLASS WORKS, a New York Corporation, hereinafter called "Corning", hereby appoints

Name _____

(Print Clearly)

TYPE OF STORE: HARDWARE APPLIANCE
 VARIETY DEPARTMENT
 OTHER (Please Specify) _____

