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Jay W. Sorge
University of Michigan Law School

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UNFAIR COMPETITION — UNLAWFUL TRADE PRACTICES — MICHIGAN STATUTE — MISLEADING PRACTICES BY "WHOLESALE SELLERS"
—During recent years "phony" wholesalers have been defrauding the public by selling merchandise at "wholesale" prices which are actually higher than the retail prices of the same articles. These sales are made by three methods: (a) through the use of open showrooms, in which the articles are displayed as they would be at a wholesale house, although the actual business carried on is with individuals; (b) by distributing courtesy cards entitling the bearer to discounts at certain retail or
wholesale houses,\(^1\) and (c) by sending out to members of organizations or to individuals catalogs which advertise standard brands at low prices, and then after the order and money are sent in by a customer, delivering some other similar product to him with the excuse that the company is “just out of the product ordered but the article sent is just as good.”\(^2\) Such practices are detrimental to the public because they are misled into thinking that they are getting bargains when they are not, and for this reason they forego many of the retail services such as credit facilities, exchange privileges, and free deliveries. Recent studies have shown that in most instances the public is so far misled that they actually pay on an average of forty-eight per cent more for articles purchased in this manner.\(^3\) No guarantee is given with such sales, and since such practices are usually carried on by irresponsible persons a great deal of dissatisfaction results when the article does not work out as expected.\(^4\) Such practices are also detrimental to legitimate retailers from whom trade is diverted and to the state itself, since collection of the sales tax is made more difficult by the dealers' holding themselves out to be wholesalers and thus not subject to the tax on retail sales.

Since these practices continued to flourish in spite of the efforts of Better Business Bureaus and the Federal Trade Commission,\(^5\) the

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\(^1\) See Lees, “Only Saps Pay Retail Prices,” 39 AM. MERC. 426 (1936). Sometimes several “wholesale” merchants organize an association and sell memberships in it for a small fee which entitles members to obtain “discounts” at the showrooms of these merchants. This is all part of the scheme of making the person feel that he is being given a privilege which the general public does not have.


\(^3\) Hirschman, “Only Suckers Buy Wholesale,” 44 AM. MERC. 190 (1938). This investigation was made by the Chicago Better Business Bureau, and 54 items were investigated. See Tallman, “When Consumers Buy at Wholesale,” 17 HARV. BUS REV. 339 (1939).

\(^4\) Since the retail merchants depend on repeat sales for the continued success of their business, they are more likely to stand back of their products and make adjustments or repairs if necessary.

\(^5\) See L. & C. Mayers Co. v. Federal Trade Commission, (C. C. A. 2d, 1938) 97 F. (2d) 365, in which the circuit court of appeals upheld an F. T. C. order compelling a jeweler to cease describing himself to the public as a wholesaler, since the prices he charged for his merchandise were greater than the established retail price for the same articles. See also Federal Trade Commission v. Royal Milling Co., 288 U. S. 212, 53 S. Ct. 335 (1933); Brown Fence & Wire Co. v. Federal Trade Commission, (C. C. A. 6th, 1933) 64 F. (2d) 934. The Better Business Bureaus can aid in correcting the situation by warning the public of the dangers of such buying, but this has not proved to be a completely satisfactory solution to the problem. Although the Federal Trade Commission does have power to stop such practices, it is without power to interfere if the selling is done only locally.
Michigan legislature passed the Unlawful Trade Practice Act in June of 1941. This act makes it unlawful for any person to advertise or imply in any way that any sale of goods made by him is a sale at wholesale unless the sale is made for resale and not subject to the sales tax law of Michigan. It is also unlawful for any seller or transferor of merchandise to individual consumers to incorporate into his name the words "manufacturer," "miller," "wholesaler," "broker," or any derivative or synonym unless such person is actually engaged in such business. In addition the use of the word "employee" cannot be used in advertising or in signs which in any way refer to the sale of goods if such sales or transfers are made or offered to others than bona fide employees of such seller or transferor. The act provides that an injunction may be obtained by any person who has been damaged or is about to be damaged by such practices. Though this provision may not be as effective as a penalty provision providing for a fine or imprisonment for violation of the act, a contempt decree may be obtained if the injunction is violated and may provide an effective means of enforcement. The act further provides that any person buying goods sold in a manner prohibited by the act may rescind such sale within six months.

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6 Mich. Pub. Acts (1941), No. 271, Sec. 6 of the act makes it unlawful for employers to sell articles to their employees unless the employer manufactures or handles the article in his regular course of business. For a discussion of this section of the act and of statutes passed by other states to deal with the practice whereby employers obtain discounts for their employees, see 40 Mich. L. Rev. 883 (1942).

7 Mich. Pub. Acts (1941), No. 271, § 2: "When used in this act: (a) The term 'person' includes any individual, firm, co-partnership, joint adventure, association, municipal or private corporation whether organized for profit or not, company, estate, trust, or any other group or combination acting as a unit. . . ."


9 Mich. Pub. Acts (1941), No. 271, § 5. It seems unlikely that such phrases as "from factory to you" or "save the middleman's profit" would be prohibited under the act. The spirit of the act might indicate that such phrases would be forbidden if used by companies whose method of operation did not justify them.

10 Id., § 4. This section is designed to correct the practice especially prevalent in department stores whereby employees are given several employee discount cards which they may distribute to their friends.

11 Id., § 7. Injunctions may be issued by the circuit court in any county where the unlawful act is committed. Criminal penalties of fine or imprisonment could not be imposed by the act since such penalties are unconstitutional unless criminal "intent" is required. Coffeey v. Harlan County, 204 U. S. 659, 27 S. Ct. 305 (1907); Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506 (1927). Statutes may, however, provide for criminal punishment of some acts without requiring "intent" in the exercise of the police power of the state. Such acts are usually mala in se, and since the defrauding of the public would seem to be in this category the act might be constitutional even if criminal penalties had been provided. United States v. Balint, 258 U. S. 250, 42 S. Ct. 301 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 30 S. Ct. 663 (1909). See also 15 Tulane L. Rev. 277 (1941).
after the sale is made. This provision provides a satisfactory remedy for persons who are dissatisfied with the goods after buying them and should prove an effective means for discouraging the making of such sales.

In the light of *Nebbia v. New York* it is clear that this Michigan statute is not repugnant to the due process clause of the Federal Constitution. The Supreme Court of Michigan, however, in *S. S. Kresge Co. v. Mayor of Detroit* held that legislation which allowed one group of citizens to get rid of the competition of another group was repugnant to the due process clause of the state constitution unless the public was materially benefited. The court also indicated in *Carolene Products Co. v. Thompson* that the police power of the state could be used to interfere with private business only if the activities carried on were definitely shown to defraud the public. In these cases, however, the showing of danger to the public was not great, and in *Saigh v. Common Council of Petoskey* the court held valid a local ordinance regulating the auctioning of linens and lace since the danger of fraud upon the public was more pronounced. Inasmuch as the public is clearly being defrauded by the practices made unlawful by the act, it seems likely that the Michigan court will hold this statute valid under the Michigan Constitution. Further, since the act will aid in the collection of the sales tax it may be held valid as a legitimate exercise of the power to lay and collect taxes. It is likely that other states will follow the example of Michigan and enact similar statutes to protect the public from their own gullibility in "trying to get it wholesale."

*Jay W. Sorge*

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13 Though such relief might be obtained under an ordinary fraud action, the statutory provisions will facilitate such recovery.
16 276 Mich. 172 at 180-181, 267 N.W. 608 (1936). The statute involved in this case prohibited the sale of milk to which coconut oil had been added and from which the butter fat had been extracted, thus decreasing the vitamin A content of the milk. The court said: "Even if they actually deceive, a few casual and individual deceptive offers of a product would not constitute public fraud and, therefore, would not afford a reasonable relation between a public wrong and the remedy as to justify absolute prohibition of sale of the product. If it were otherwise, the police power over the constitutional right to do business would be without practical limit as the possibility of misrepresentation exists in the sale of any article." See also People v. Victor, 287 Mich. 506, 283 N. W. 666 (1939), in which the court refused to follow the reasoning of the Nebbia case and declared a statute prohibiting unfair trade practices in the bakery and petroleum business contrary to the due process clause of the state constitution. A vigorous dissent indicated accord with the reasoning in the Nebbia case.
17 251 Mich. 77, 231 N. W. 107 (1930).