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Regulation of Business - Sales - Below-Cost Statutes - The Elements of Violations and the Defense of Meeting Competition

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REGULATION OF BUSINESS—SALES-BELOW-COST STATUTES—THE ELEMENTS OF VIOLATION AND THE DEFENSE OF MEETING COMPETITION—Recent years have seen a decline in the effectiveness of resale price maintenance through state fair trade statutes. Invalidation of non-signer clauses on constitutional grounds has been frequent, resulting in loss of the manufacturer's means of enforcement against those distributors who chose not to contract with him.[1] And, even in a state whose fair trade act has been upheld, the act's efficacy may be undercut by decisions exempting from its operation a mail-order house in a non-fair trade jurisdiction.[2] Thus, in search of greater protection, manufacturers and distributors may devote additional attention to state statutes prohibiting sales below cost, variously labeled as unfair practices acts or unfair sales acts, and often found in conjunction with anti-discrimination provisions.

In general, these sales-below-cost statutes, found in thirty-one states,[3] prohibit sales, offers of sales, or advertisements of sales below the seller's cost, and provide both criminal and civil sanctions. Cost, as applicable to the distributive trades,[4] is defined as the lower of invoice or replacement cost, less trade discounts,[5] plus

[1] E.g., Remington Arms Co. v. Skaggs, (Wash. 1959) CCH Trade Reg. Rep. ¶69,520. See 60 A.L.R. (2d) 420 (1958).

[2] General Electric Co. v. Masters Mail Order Co., (2d Cir. 1957) 244 F. (2d) 681, cert. den. 355 U.S. 824 (1957).

[3] Ariz. Rev. Stat. (1956) §§44-1461 to 44-1466; Ark. Stat. (1947) §§70-301 to 70-314; Cal. Bus. and Prof. Code (Deering, 1951) §§17000-17101; Colo. Rev. Stat. Ann. (1953) §§55-2-1 to 55-2-17; Conn. Gen. Stat. (1958 Rev.) §§42-111 to 42-115; Hawaii Rev. Laws (1955) §§205-1 to 205-13; Idaho Code (1948) §§48-401 to 48-412; Kan. Gen. Stat. (Corrick, 1949) §§50-401 to 50-408; Ky. Rev. Stat. (1959) §§365.030, 365.040, 365.060; La. Rev. Stat. (1950) §§51:421-51:427; Me. Rev. Stat. (1954) c. 184, §§1-7; Md. Code Ann. (1957) art. 83, §§111-115; Mass. Laws Ann. (1954) c. 93, §§14E-14K; Minn. Stat. (1957) §§325.01-325.07; Mont. Rev. Code Ann. (1947) §§51-101 to 51-118; Neb. Rev. Stat. (1943; reissue of 1952) §§59-1201 to 59-1206; N. H. Rev. Stat. Ann. (1955) §§358:1-358:5; N. J. Stat. Ann. (1940) §§56:4-7 to 56:4-14; N.D. Rev. Code (1943) §§51-1001 to 51-1008; Okla. Stat. (1951) tit. 15, §§598.1-598.11; Ore. Rev. Stat. (1953) §§646.100-646.180, 646.990; Pa. Stat. Ann. (Purdon, 1953) tit. 73, §§211-217; R.I. Gen. Laws (1956) §§6-13-1 to 6-13-8; S.C. Code (1952) §66-65; Tenn. Code Ann. (1955) §§69-301 to 69.306; Utah Code Ann. (1953) §§13-5-7 to 13-5-18; Va. Code (1950) §§59-9 to 59-19-1; Wash. Rev. Code §§19.90.010-19.90.920; W.Va. Code (1955) §§4678 (8a)-4678 (8n); Wis. Stat. (1957) §100.30; Wyo. Stat. (1957) §§40-24 to 40-33. In most cases, references to statutes in this comment will be by states only.

[4] Many of the statutes cited in note 3 supra also prohibit below-cost sales by manufacturers, for whom a separate definition of cost is applicable. Although outside the scope of this discussion, many of the same considerations discussed herein are applicable to manufacturers' sales.

[5] Several states except "customary discounts for cash" from this deduction, e.g., Mass. Laws Ann. (1954) c. 93, §14E (a). Thus, savings actually realized by a merchant cannot be passed on to the purchaser, but must revert to the merchant as increased profit. The only apparent purpose for the exception is to remove a competitive advantage which the affluent merchant possesses over one who must buy on credit. Failure of the statute to allow for cash discounts rendered that portion unconstitutional in Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A. (2d) 267 (1951).

freight and miscellaneous charges, plus the "cost of doing business."[6] A number provide that in the absence of proof of a lesser cost, the markup for the cost of doing business shall be a fixed percentage (ranging from 2% to 12%) of other costs.[7] Cost surveys conducted by trade associations are given evidentiary status in some statutes.[8] Injunctive relief is commonly available to "any person,"[9] and it has been held that the only interest plaintiff need show thereunder is that of a citizen of the community.[10] Usually, the statute is made inapplicable in certain circumstances, such as sales made under judicial order, sales in conjunction with termination of business, or sales at prices set to meet those of competitors.[11]

On the whole, these statutes have gained judicial acceptance.[12] While their provisions have been most frequently invoked in retail sales of cigarettes and groceries,[13] they are not so limited in their application.[14] Hence, they appear to furnish an effective means whereby minimum resale prices may be lawfully controlled.

The purpose of this comment is to discuss two controversial aspects of the sales-below-cost statutes: (1) the intent or effect required for a finding of violation and (2) the defense of meeting competition.

I. SALES BELOW COST AT COMMON LAW

The early *Schoolmaster Case*[15] denied a remedy to an entrepreneur who lost business because a new competitor's prices were

6 E.g., Minn. Stat. (1957) §325.01, subdiv. 5.

7 E.g., Conn. Gen. Stat. (1958 Rev.) §42-111 (a) (3).

8 E.g., Ky. Rev. Stat. (1959) §365.030 (4).

9 E.g., Colo. Rev. Stat. Ann. (1953) §55-2-9 (1).

10 Heffelfinger v. Safeway Stores, Inc., (Colo. Dist. Ct. 1940) CCH Trade Reg. Rep. ¶7241.07.

11 E.g., Minn. Stat. (1957) §325.06. South Carolina has no express exceptions. Connecticut and Rhode Island make no exception for meeting competitive prices.

12 The sales-below-cost statutes have been declared unconstitutional as a whole or in important particulars in four states; *Colorado*, Standard Store v. Safeway Stores, Inc., (Colo. Dist. Ct. 1955) 1955 CCH Trade Cas. ¶68,153; *Kansas*, State v. Consumers Warehouse Market, Inc., 183 Kan. 502, 329 P. (2d) 638 (1958); *Maryland*, Cohen v. Frey & Son., Inc., 197 Md. 586, 80 A. (2d) 267 (1951); *New Jersey*, Lief v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A. (2d) 291 (1939). A more critical approach may be indicated by the Kansas decision, which invalidated the entire statute upon a finding that a provision exempting grain and feed dealers from its operation was not separable.

13 For reasons why these markets are not amenable to fair trade, see Grether, "Experience in California with Fair Trade Legislation Restricting Price Cutting," 24 CALIF. L. REV. 640 at 652 (1936).

14 Other statutes prohibiting below-cost sales of specific merchandise, most frequently tobacco and dairy products, are widespread. Except where they are particularly relevant they are outside the scope of this discussion.

15 Court of Common Pleas, Hilary Term, 1410, Y.B. Hen. J. V., f. 47, pl. 21.

less than a third as high as the plaintiff's. Although there was no allegation that the new price was not profitable, the judges' comments give no indication that this would have changed the result.

This virtually complete freedom of price competition was not clearly limited until some five centuries later, when, in the landmark case of *Tuttle v. Buck*,[16] it was held that allegations that defendant had established a competing enterprise with the sole and malicious purpose of injuring and destroying plaintiff's business stated a cause of action.[17] One judge would have required the additional allegation that defendant's business was being run at a loss. This case and others[18] indicate that sales below cost were not actionable at common law unless they were utilized as part of a plan whose purposes were solely malicious, and thus not designed to effectuate a legitimate business end.

II. STATUTORY REQUIREMENTS FOR VIOLATION

The elements of violation in the various states can best be compared by viewing the statutes in their historical perspective. The earliest statute, enacted by South Carolina in 1902 as part of its antitrust legislation,[19] prohibited sales below cost when made with the intent to drive out or financially injure competitors. It has found little, if any, application within the state and has not been imitated elsewhere.

The antitrust era found many states enacting anti-discrimination statutes. Typical of these was the South Dakota act[20] which prohibited discrimination in price between different market areas when for the purpose of destroying competition. Its constitutionality was upheld in *Central Lumber Company v. South Dakota*.[21] But a statute which prohibited discrimination without requiring a sinister purpose or intent was not so fortunate. In

16 107 Minn. 145, 119 N.W. 946 (1909). *Contra*, Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q.B.D. 598 (1889), affd. [1892] A.C. 25.

17 The case recognized a general principle of tort liability first discernible in Keeble v. Hickeringill, 11 East 574, 103 Eng. Rep. 1127 (1706). Justice Holmes stated in Aikens v. Wisconsin, 195 U.S. 194 at 204 (1904): "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Variously labeled as the "prima facie tort" or "justification" rationale of liability, it is to be contrasted with the "nominate tort" approach. See OPPENHEIM, UNFAIR TRADE PRACTICES—CASES, COMMENTS AND MATERIALS, c. 1 (1950).

18 Cf. Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923).

19 S.C. Acts, 1902, p. 1057, now S.C. Code (1952) §66-65. Under it, the seller is guilty of conspiracy to form a monopoly and of unfair competition.

20 S.D. Code (1939) §13.1803 carries the substance of the 1907 act.

21 226 U.S. 157 (1912).

Fairmount Creamery Co. v. Minnesota[22] the Supreme Court declared Minnesota's statute unconstitutional in words which had a profound effect on subsequent legislation regulating business conduct.[23]

The modern development of sales-below-cost statutes was initiated by a 1933 California amendment to its Unfair Practices Act.[24] The influence of the *Fairmont Creamery* case was apparent in the statute's prohibition of sales below cost only when made with a purpose of injuring and destroying competition. The following year in *Nebbia v. New York*[25] the Supreme Court upheld state power to fix prices in fields other than public utilities, using language which was as broad as that in the *Fairmont Creamery* case was restrictive.[26] Regardless of the seemingly permissive *Nebbia* decision, a 1935 amendment[27] to the California statute narrowed instead of broadened that state's prohibition by adding the defense of meeting competition. Another important feature of the 1935 amendment was the authorization of cost surveys as evidence of cost of doing business.

Two succeeding events played an important role in the further development of the statutes. In 1935 the decision in *Schechter*

[22] 274 U.S. 1 (1927).

[23] "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

"The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil. . . ." 274 U.S. 1 at 8-9 (1927)

[24] Cal. Stat. (1933) 1280.

[25] 291 U.S. 502 (1934).

[26] "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . ." 291 U.S. 502 at 537 (1934).

[27] Cal. Stat. (1935) 1546.

Poultry Corp. v. United States[28] struck down the NRA legislation, and with it the various codes of fair competition, many of which had contained prohibitions of sales below cost which, of course, had nationwide application.[29] Then, in 1936, the Clayton Act[30] was amended by the Robinson-Patman Act,[31] section 2 (a) of which prohibited discrimination in price where specified anti-competitive effects might result.[32] And section 3 made it unlawful to sell at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[33]

With the removal of the NRA sanctions providing a need, and congressional approval of similar legislation furnishing the encouragement, the period from 1936 to 1941 saw the adoption of sales-below-cost statutes by more states and territories. These statutes may be categorized as either (1) intent or (2) intent or effect types.

During 1936 and 1937, six states[34] adopted legislation almost identical to the 1935 California statute, requiring an intent to injure competitors *and* destroy competition.[35] Variations upon this theme first appeared in the New England states, in provisions requiring an intent to injure competitors *or* destroy competition.[36] The remaining five states[37] in which intent is the sole basis for violation have differing requirements, but an intent to induce

[28] 295 U.S. 495 (1935).

[29] For the codes which contained such prohibitions, see LYON, THE NATIONAL RECOVERY ADMINISTRATION 580-586 (1935).

[30] 38 Stat. 730 (1914).

[31] 49 Stat. 1526 (1936), 15 U.S.C. (1958) §§13, 13a, 13b.

[32] ". . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." 49 Stat. 1526 (1936), 15 U.S.C. (1958) §13 (a).

[33] 49 Stat. 1528 (1936), 15 U.S.C. (1958) §13a. See Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958), rehearing den. 355 U.S. 967 (1958), holding that §3 does not give a private cause of action.

[34] Arkansas, Colorado, Hawaii, Kentucky, Montana, Wyoming. Four of these states were sufficiently impressed with the California example to incorporate an identical typographical error into their legislation. See Wholesale Tobacco Dealers Bureau, Inc. v. National Candy and Tobacco Co., 11 Cal. (2d) 634 at 660, 82 P. (2d) 3 at 18 (1938). Compare Ark. Stat. (1947) §70-313; Colo. Rev. Stat. (1953) §55-2-16; Mont. Rev. Code Ann. (1947) §51-117; Wyo. Stat. (1957) §40-33 (". . . this act shall be literally [*sic*] construed that its beneficial purposes may be subserved").

[35] California in 1937 amended its provision to require a purpose to injure competitors or to injure competition. Cal. Bus. and Prof. Code (Deering, 1951) §17043.

[36] Found in seven states; California (see note 35 supra), Connecticut, Maine, Maryland, Massachusetts, Rhode Island, and Washington.

[37] Kansas, Oklahoma, Virginia, West Virginia, Wisconsin. Several explicitly use the term "loss leader" in reference to the prohibited practices. This shift of emphasis to injury to the purchaser seems characteristic of the later enactments, particularly those in 1939 and 1941.

purchase of other merchandise, unfairly to divert trade from a competitor or otherwise to injure a competitor would be a fair summary of their content.

The "intent or effect" type of statute had a parallel development, beginning with Tennessee's 1937 enactment. Under it, below-cost sales are prohibited when made with the intent or effect of inducing purchase of other merchandise, unfairly diverting trade from or otherwise injuring a competitor, where the result is a tendency to deceive purchasers, to lessen competition, to restrain trade, or to tend to monoply. Variations of this statute were enacted in six other states.[38] In addition, two states prohibit such sales when made with the intent or effect of injuring competitors or destroying competition,[39] and one[40] prohibits sales when made with the intent of unfairly diverting trade from or otherwise injuring a competitor, or which have the result of deceiving customers, substantially lessening competition, unreasonably restraining trade, or tending to monopoly.[41]

A. *The Requirement of Intent*

One of the more perplexing problems under either type of statute is whether a general or a specific intent is required. It is axiomatic that a seller's efforts are normally directed toward increasing his volume of business; if he is successful in doing so in a competitive market, his gain is almost invariably accompanied by a competitor's loss. Thus, it can be said that an intent to attract additional trade necessarily includes an intent to injure competitors, and that thus the former intent meets the intent requirement of the statutes. This reasoning and conclusion is reinforced by the frequent statutory presumption of violation upon a showing of a below-cost sale and its injurious effect.[42]

38 Arizona, Idaho, Louisiana, Nebraska, North Dakota, Utah.

39 Minnesota, New Hampshire. The original Minnesota statute, derived in part from California's, read "injuring competitors and destroying competition." It was amended to its present form in 1957 after the decision of State v. Wolkoff, 250 Minn. 504, 85 N.W. (2d) 401 (1957), which refused to find violation if only "injury" was proved.

40 Pennsylvania. That state's original act, requiring neither intent nor effect for violation, was declared unconstitutional in Commonwealth v. Zasloff, 338 Pa. 457, 13 A. (2d) 67 (1940).

41 Oregon, requiring only that the effect of a sale below cost substantially lessen competition, injure competitors, destroy competition, unreasonably restrain trade, or tend to monopoly, fits neither of the categories discussed in the text. The New Jersey statute, requiring neither intent nor effect, was declared unconstitutional and has never been reenacted in different form. See Lief v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A. (2d) 291 (1939).

42 Arizona, Arkansas, Kentucky, Montana, Nebraska, New Jersey, Oregon, South Carolina, Utah and Wyoming are the states which do not have the presumption or its

On the other hand, the statutory requirement of intent could as well be construed as being limited to the case where the seller's motive is malicious.[43] However, predatory price-cutting is recognized as unlawful under the antitrust acts;[44] it could be argued, therefore, that sales-below-cost statutes would serve no purpose if they were designed merely to cumulate the illegality of that practice.

Despite occasional vacillations, the courts have generally favored the requirement of a specific intent. In an early California case[45] it was held that proof that the sole purpose of defendant's below-cost sales was to meet competition and to advertise and stimulate his own business constituted a full defense, and would be sufficient to rebut the statutory presumption of violation. Similarly, where an alleged violator testified that he had no intent to injure his competitors but that he did intend his advertising to attract as many customers as possible, from any source whatsoever, it was held that the requisite intent was not present.[46] Colorado courts, after first holding that the seller's intending the natural and

equivalent. The presumption was declared unconstitutional in Minnesota, Great Atlantic & Pacific Tea Co. v. Ervin, (D.C. Minn. 1938) 23 F. Supp. 70, and Maine, Wiley v. Sampson-Ripley Co., 151 Me. 400, 120 A. (2d) 289 (1956). The Minnesota statute was amended to cure the defect.

The prohibition of a statute containing the presumption may be analogized to the prima facie tort theory of liability discussed in note 17 supra: a sale below cost is, prima facie, unlawful, and upon the seller falls the burden of justifying his act.

43 It has been said that the effect of the sales-below-cost statute was to change the common law so that solely malicious motives are no longer necessary, that sales made with mixed motives of gain and maliciousness were thereby rendered unlawful. State v. Langley, 53 Wyo. 332, 84 P. (2d) 767 (1938). Such an analysis seems correct and useful.

44 E.g., under Federal Trade Commission Act §5, E. B. Muller & Co. v. FTC, (6th Cir. 1944) 142 F. (2d) 511; under Sherman Act §1 and Robinson-Patman Act §3, United States v. National Dairy Products Corp., (indictment returned Sept. 16, 1959, Dept. of Justice case 147B) CCH Trade Reg. Rep. ¶45,059.

45 Balzer v. Caler, 11 Cal. (2d) 663, 82 P. (2d) 19 (1938).

46 Sandler v. Gordon, 94 Cal. App. (2d) 254, 210 P. (2d) 314 (1949) (the issue was raised on defendant's cross-complaint). But plaintiff's testimony was such that it could have been held to evince a reckless disregard for the consequences of his acts. General tort principles would allow a court to infer a specific intent in that event. Cf. Mercer v. Corbin, 117 Ind. 450, 20 N.E. (2d) 132 (1889).

The Sandler case may be explained in part by its factual setting. Plaintiff was a newcomer in the area, and attempted to increase his relatively small patronage by undercutting his competitors' prices. Defendant, an established businessman, protested to no avail, and thereafter stole plaintiff's customer list. He then offered free service to those customers and was successful in capturing a majority of them. His defense to plaintiff's suit under the Unfair Practices Act was that of meeting plaintiff's competition.

Contra, Los Angeles Laundry-Owners Assn. v. Cascade Laundry, (Cal. Super. 1950) 1950-1951 CCH Trade Cas. ¶62,667 at p. 63,920. "The activity of the defendant in soliciting the customers of its competitors and in actually taking them away from its competitors, coupled with its admission of the knowledge that this would injure competitors, constrains me to hold, in spite of evidence to the contrary, that the purpose of the defendant was actually to injure its competitors."

probable consequences of his act sufficed,[47] later held that a specific intent was necessary and that evidence of intent other than to injure competitors constituted a defense.[48]

These decisions requiring a specific intent would seem justified by the history of the unfair practices acts. As is often true when pressure groups sponsor bills,[49] legislative history of sales-below-cost statutes is sparse. However, two reasons can be suggested for the inclusion of an intent requirement. The first is the traditional reluctance of the courts to impose criminal penalties for acts done without criminal intent.[50] The second can be deduced from the unequivocal language contained in the *Fairmont Creamery* opinion.[51] While practically all of the present statutes were enacted after the decision of *Nebbia v. New York*,[52] now generally regarded as giving the states extremely broad power to regulate prices, there was considerable doubt at the time of that decision whether it had completely overruled *Fairmont Creamery*.[53] Of equal significance is the fact that the pioneer California statute, which furnished a pattern for other states, was enacted a year before the *Nebbia* decision.[54] If it is accepted as a premise that the statutes were designed to meet the objections to unfair trade acts voiced in *Fairmont Creamery*, reference to that decision indicates clearly that the Court would not have been satisfied with an intent requirement that went merely to the merchant's normal desire to succeed in the marketplace.[55] It follows, then, that a specific intent should be required under the statutes.

47 Dikeou v. Food Distributors Assn., 107 Colo. 38, 108 P. (2d) 529 (1940).

48 Perkins v. King Soopers, 122 Colo. 263, 221 P. (2d) 343 (1950). See, generally, People v. Pay Less Drug Store, 25 Cal. (2d) 108, 153 P. (2d) 9 (1944); State v. Wolkoff, 250 Minn. 504, 85 N.W. (2d) 401 (1957); Kansas v. Commercial Candy Co., 166 Kan. 432, 201 P. (2d) 1034 (1949); Henderson v. Hogue, (Tenn. Ct. App. 1956) 1956 CCH Trade Cas. ¶ 68,462; Blum v. Engelman, 190 Md. 109, 57 A. (2d) 421 (1948); Commonwealth v. Zasloff, 338 Pa. 457, 13 A. (2d) 67 (1940).

49 For an account of trade association activities in promoting the California legislation, see Grether, "Experience in California with Fair Trade Legislation Restricting Price Cutting," 24 CALIF. L. REV. 640 (1936). See also comment, 32 ILL. L. REV. 816 at 846 (1938).

50 See State v. Walgreen Drug Co., 57 Ariz. 308, 113 P. (2d) 650 (1941).

51 See note 23 supra.

52 291 U.S. 502 (1934).

53 See, e.g., Lief v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A. (2d) 291 (1939); Commonwealth v. Zasloff, 338 Pa. 457, 13 A. (2d) 67 (1940); Great Atlantic and Pacific Tea Co. v. Ervin, (D.C. Minn. 1938) 23 F. Supp. 70. Cf. State v. Lanesboro Produce & Hatchery Co., 221 Minn. 246, 21 N.W. (2d) 792 (1946) (dissenting opinion); May's Drug Stores, Inc. v. State Tax Commission, 242 Iowa 319, 45 N.W. (2d) 245 (1951). See comments, 14 NOTRE DAME LAWYER 286 (1939); 47 YALE L.J. 1201 (1938); 32 ILL. L. REV. 816 (1938). Compare the quoted excerpts in notes 23 and 26 supra.

54 Cal. Stat. (1933) 1280.

55 See note 23 supra.

Assuming that specific intent is required, there remain for consideration those statutes which require merely an intent to (1) induce purchase of other merchandise or (2) unfairly divert trade from a competitor. It would seem that a merchant's general intent would be specific as to the former.

The first provision is obviously directed toward the use of loss leaders.[56] Of the nine statutes incorporating it, all but one have the additional requirement that the sale have certain results,[57] of which a tendency to deceive purchasers is most clearly applicable here. Thus, there is no violation unless the purchaser is led to believe that other merchandise may be obtained at comparable savings.[58] It could be argued that the modern housewife is no longer the gullible consumer whom the law was designed to protect; hence, a tendency toward deception should not necessarily be presumed. Nevertheless, this provision seems a clear legislative disapproval of tactics designed to lure the purchaser onto the premises so that he may be subjected to sales pressure on items other than those advertised.[59] As such, it should be rigidly enforced.

The policy against injury to the uninformed should be weighed against the real benefit afforded the ultimate consumer through lowered prices, particularly on staple items. The other "results"[60] which would fulfill the statutory requirements under this provision are phrased in terms which have come to include the application of a rule of reason. This would seem to indicate a legislative intent that a similar rule of reason be applied in deception cases. Proper balancing of interests can be achieved under such an interpretation, which would take into account the seller's purpose, market power, and the effects of his acts.

As to provision (2), the meaning of "unfairly divert trade" in this context is debatable, since none of the statutes undertake to define it. If it is not so vague and indefinite as to be unconstitutional,[61] the phrase at least suggests that more is required than the intent merely to entice customers away from a competitor. A rule of reason approach is essential to its interpretation.

[56] Some of the acts, in a separate provision, prohibit the advertisement of goods which the merchant cannot supply. See, e.g., Colo. Rev. Stat. Ann. (1953) §55-2-12.

[57] Arizona, Idaho, Louisiana, Nebraska, North Dakota, Oklahoma, Tennessee, and Utah require, as a result, a tendency to deceive any purchaser, substantial lessening of competition, unreasonable restraint of trade, or a tendency to create a monopoly. Wisconsin has no requirement that result be shown.

[58] See Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., 360 U.S. 334 (1959).

[59] Cf. F.T.C., "Guides Against Bait Advertising," 24 Fed. Reg. 9755 (Dec. 4, 1959).

[60] See note 57 supra.

[61] See Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A. (2d) 201 (1940), where the court invalidated a statute containing such a provision.

B. *The Requirement of Effect*

The statutes which are satisfied by a showing of intent or effect in the alternative present many of the same considerations discussed above under the intent type. The normal consequences of a merchant's accomplishment of his general intent to bolster his trade are injury to competitors and diversion of their customers. Are all sales below cost therefore prohibited by "intent or effect" statutes? While there is little doubt that the statutes could be interpreted as a blanket legislative condemnation,[62] it is submitted that they should not be so construed.

If a merchant is to avoid violating such a statute, he must first determine his cost of doing business to arrive at a lawful price. This would include that portion of salaries, heat, light, taxes, and rent which are attributable to each item in stock. Even if it were possible to apportion accurately these overhead costs, the accounting expenses involved in the determination would probably be prohibitive. The longer an item remained on the shelf, the higher would be its apportioned overhead and hence the higher its cost; therefore, a price which originally was greater than cost would become an unlawful price merely because of a slow turnover. Thus, a merchant would have to increase the price of an item when the logical and practical move would be to decrease its price in order to speed sales. To hold that the statute furnishes the merchant with clear guides to lawful conduct under these circumstances is to disregard reality.[63]

As an alternative, a court may require a merchant to add his average overhead expense, from a previous accounting period, to his other costs and thus arrive at a lawful price.[64] Those items which have a rapid turnover and hence are in fact profitable at a low percentage markup would then be salable only at an artificially

62 This discussion assumes the constitutionality of a sales-below-cost statute imposing criminal sanctions but which requires no criminal intent. McElhone v. Geror, 207 Minn. 580, 292 N.W. 414 (1940); McIntire v. Borofsky, 95 N.H. 174, 59 A. (2d) 471 (1948). See May's Drug Stores, Inc. v. State Tax Commission, 242 Iowa 319, 45 N.W. (2d) 245 (1951). *Contra:* Lief v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A. (2d) 291 (1939); Commonwealth v. Zasloff, 338 Pa. 457, 13 A. (2d) 67 (1940).

63 Cf. State v. Walgreen Drug Co., 57 Ariz. 308, 113 P. (2d) 650 (1941).

64 ". . . it cannot be that after the law has so carefully defined what enters into the cost of doing business . . . the party charged with violation thereof may, as a defense, allege and show that the particular item of merchandise upon which the accusation rests may be segregated from the entire business for the purpose of allocating as to it the 'cost of doing business.'" McFadden Lambert Co. v. Winston & Newell Co., 209 Minn. 242 at 246, 296 N.W. 18 (1941). *Contra,* Standard Store v. Safeway Stores, Inc., (Colo. Dist. Ct. 1955) 1955 CCH Trade Cas. ¶68,153.

high price. Because such items are usually staple commodities, it is unwise from a policy standpoint to adopt this method.

A third alternative would require the merchant to accept either the presumed markup or the cost of doing business determined by a survey, whichever method is allowed by the statute. This is equivalent to price-fixing. It deprives purchasers of the savings to be derived from efficient business conduct, and diverts them to the merchant whose costs are lowest. While the power of a state to fix prices is well established,[65] the advisability of employing this alternative is questionable in view of the avowed statutory purposes to promote competition and prevent monopoly.[66] Furthermore, when the state statute is utilized by private interests, such as trade associations, to enforce a uniform markup, there would appear to be irreconcilable conflict with the Sherman Act's prohibition of private price-fixing as being unreasonable "per se."[67]

The practical impossibility of computing costs under the first procedure, and the questionable desirability of requiring unrestricted use of either of the two other procedures are cogent reasons for applying a rule of reason in determining whether violation exists when only adverse effect is alleged and required for a finding of violation.[68] Admittedly, reading the requirement to be one of "unreasonable" injurious effect does little to clarify the elements of violation. However, it would allow the exercise of discretion. Competition is no longer limited to price alone, and frequently the merchant who is struggling to gain or maintain a foothold in a market area cannot compete with an established rival in service or facilities. In such a situation, it would seem

[65] Parker v. Brown, 317 U.S. 341 (1943).

[66] E.g., Cal. Bus. and Prof. Code (Deering, 1951) §17000: "The legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed and prevented." A more lengthy statement of policy and purpose, as in the Colorado statute, enjoys wider popularity. After reciting the calamitous effects (including economic depression) attributable to below-cost sales, it declares the state policy to be the protection of its citizens through the elimination of unfair methods of competition, to which class these sales belong. Colo. Rev. Stat. Ann. (1953) §44-1462. The terminology throughout might indicate a greater attention to emotional appeal than to dispassionate legislative findings. See Clark, "Statutory Restrictions on Selling Below Cost," 11 VAND. L. REV. 105 (1957).

[67] California Retail Grocers & Merchants Assn. v. United States, (9th Cir. 1943) 139 F. (2d) 978, cert. den. 322 U.S. 729 (1944). See comment, 57 YALE L.J. 391 (1948). For an excellent illustration of trade association success in establishing uniform prices, see Los Angeles Laundry-Owners Assn. v. Cascade Laundry, (Cal. Super. 1950) 1950-51 CCH Trade Cas. ¶ 62,667.

[68] See, generally, Clark, "Statutory Restrictions on Selling Below Cost," 11 VAND L. REV. 105 (1957).

reasonable to allow his use of the only competitive weapon he may have, even when his sales below cost have the effect of diverting trade to him. To hold that his rival may enjoin his sales at lower prices would not promote competition, but instead would stifle it. And, even though the price-cutter's intent is clearly that of inducing purchase of other goods, and customers are so induced, there would seem to be no purpose in condemning his acts unless an unreasonably high price were charged for the other merchandise. Again, the frequent use of words of art suggesting a rule-of-reason approach lends support to the conclusion.[69]

III. THE DEFENSE OF MEETING COMPETITION[70]

All but three statutes[71] provide, as a defense, that in a sale of merchandise below cost it may be shown that the price was set to meet that of a competitor. Whether the defense is another relic of the *Fairmont Creamery* case,[72] was patterned after the Robinson-Patman proviso,[73] or has been inserted for other reasons is not clear. However, both the wording of the statutes[74] and the interpreting cases[75] support the proposition that the defense is substantive, and not merely procedural.[76] Thus the defendant can escape liability even when it is proved that the required intent or effect was present.

A. *Lawful Price*

A majority of the statutes condition the defense of meeting competition upon a requirement that the competitor's price that is met be "legal," or "lawful." A minority contain no such

69 See note 57 supra.

70 See, generally, comment, 12 S.W. L. J. 482 (1958).

71 Connecticut, Rhode Island, South Carolina.

72 Cf. dissent in State v. Lanesboro Produce & Hatchery Co., 221 Minn. 246 at 263, 21 N.W. (2d) 792 (1946).

73 ". . . *Provided, however,* that nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ." 49 Stat. 1526 (1936), 15 U.S.C. (1958) §13 (b).

74 E.g., "The provisions of this act shall not apply to sales at retail or sales at wholesale . . . (7) where the price of merchandise is made in good faith to meet competition. . . ." Neb. Rev. Stat. (1943; reissue of 1952) §59-1206. Compare with Robinson-Patman proviso, note 73 supra.

75 See People v. Pay Less Drug Store, 25 Cal. (2d) 108, 153 P. (2d) 9 (1944); Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A. (2d) 267 (1951). It seems immaterial whether it is interpreted as a legislative declaration that sales to meet competition are not to be regarded as made with the required intent, or as an exclusion from the act as a whole.

76 The Robinson-Patman proviso was given the same interpretation in Standard Oil Co. v. FTC, 340 U.S. 231 (1951). See also FTC v. Standard Oil Co., 355 U.S. 396 (1958).

limitation,[77] and at least one court has refused to imply such a requirement.[78] It would seem that such a decision deprives the statute of any practical effect, since only the first price-cutter could be immediately restrained thereunder, with his imitators to be enjoined in the same sequence in which they initially cut their prices. The requirement of meeting a lawful price thus seems a practical essential.

Is it necessary that defendant prove that the competitor's price was in fact legal? The difficulty of determining one's own cost of doing business, much less that of another, emphasizes the futility of the defense if such a burden were placed on defendant. A number of statutes requiring that the price be set "in good faith"[79] to meet a competitor's price have usually been construed to mean that if the merchant believes in good faith that the price he meets is lawful, there is no violation.[80] This would appear to be the proper interpretation for these statutes as well as for those statutes which do not incorporate the good faith phrase. Today's merchant is usually aware of the approximate invoice price which a competitor pays, and this figure establishes a floor for a reasonable belief of legality. Above this floor, belief may or may not be reasonable in particular factual settings.

77 Arizona, Idaho, Kansas, Maryland, Massachusetts, Nebraska, Pennsylvania, Wisconsin.

78 Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A. (2d) 267 (1951). The court distinguished Standard Oil Co. v. FTC, 340 U.S. 231 (1951), which it read as indicating that only the meeting of lawful prices of a competitor would be a defense under the Robinson-Patman proviso. However, for federal court cases interpreting the Standard Oil decision as requiring only "good faith" in meeting competitor's prices, see Standard Oil Co. v. Brown, (5th Cir. 1956) 238 F. (2d) 54, and Balian Ice Cream Co. v. Arden Farms, Inc., (9th Cir. 1955) 231 F. (2d) 356, cert. den. 350 U.S. 991 (1956), reh. den. 351 U.S. 928 (1956).

79 E.g., Minn. Stat. (1957) §325.06 (4).

80 Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., (Okla. 1957) 322 P. (2d) 179, affd. 360 U.S. 334 (1959); State v. Wolkoff, 250 Minn. 504, 85 N.W. (2d) 401 (1957); Kansas v. Commercial Candy Co., 166 Kan. 432, 201 P. (2d) 1034 (1949); McIntire v. Borofsky, 95 N.H. 174, 59 A. (2d) 471 (1948); State v. Sears, 4 Wash. (2d) 200, 103 P. (2d) 337 (1940). Requiring defendant to prove the absolute legality of the prices he meets may be unconstitutional, see Commonwealth v. Zasloff, 338 Pa. 457, 13 A. (2d) 67 (1940); Lief v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A. (2d) 291 (1939). Cf. the discussion of §2 (b) of the Robinson-Patman Act [15 U.S.C. (1958) §13 (b)] in REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 179-186 (1955).

Other matters can be relevant to the question of a defendant's good faith. People v. Pay Less Drug Store, 25 Cal. (2d) 108, 153 P. (2d) 9 (1944) (below cost sales continued long after abandonment by competitors negatived any presumption of good faith); Northern California Food Dealers, Inc. v. Farmer's Market of Northern California, Inc., (Cal. Super. 1956) 1956 CCH Trade Cas. ¶68,402 (below-cost sales, even though initiated six weeks after competitor's sales, were in good faith); Sandler v. Gordon, 94 Cal. App. (2d) 254, 210 P. (2d) 314 (1949) (sales below cost, even though below the lowest competitive price, held not to be a violation).

B. *Other Limitations on the Defense*

In meeting a competitor's price, is the merchant restricted to sale of merchandise of the same brand and variety as that offered by his competitor? It is inadvisable to lay down a general rule in this area.[81] Rather, the answer should depend upon the particular facts and upon the existence or non-existence of cross-elasticity of demand between the merchandise offered by defendant and that by his competitor. The small merchant, carrying only a few major brands whose cost is high, should not necessarily be put at a competitive disadvantage when his competitor's stock includes more obscure brands whose cost is relatively low.[82]

Is the distribution of trading stamps equivalent to a reduction in price on individual items sold? A recent Oklahoma decision held that it was not,[83] and so the statute was not violated when deduction of the value of the stamps would have resulted in a net price of less than cost. In reaching this result, the court characterized the giving of trading stamps as a discount for cash, rather than a reduction in price. The decision was affirmed by the Supreme Court, despite arguments of denial of due process and equal protection of the laws.[84]

Unfortunately, the frequent attempts to distinguish a reduction in price from a discount for cash[85] have obscured the real issue. Whether trading stamps actually benefit the public or whether they merely increase the overall prices which the consumer pays is a currently unsettled point.[86] The Oklahoma court was of the opinion that trading stamps serve a useful purpose to the public, and hence their use should be excepted from the operation of a statute prohibiting sales below cost.

CONCLUSIONS

Statutes prohibiting sales below cost were conceived in an era of falling prices and consequent business failures. One of their

81 See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 184 (1955).

82 Northern California Food Dealers, Inc. v. Farmer's Market of Northern California, Inc., 1956 CCH Trade Cas. ¶ 68,402 (competition met by sales of merchandise of comparable cost and quality).

83 Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., (Okla. 1957) 322 P. (2d) 179.

84 Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., 360 U.S. 334 (1959).

85 See, e.g., The Sperry and Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A. (2d) 310 (1954).

86 See, generally, Charvat, "Economics of Trading Stamps," 7 J. PUB. L. 450 (1958); comments, 12 FLA. L. REV. 213 (1959), 105 UNIV. PA. L. REV. 242 (1956).

unrecited purposes undoubtedly was to inhibit this downward trend, and enforcement according to the literal wording of the statutes was probably appropriate to achieve this end. Today's markets and inflationary prices create a quite dissimliar economic atmosphere, and a disregard for the avowed statutory purposes is no longer justified.

Where unprofitable sales are utilized for predatory purposes the statutes afford a quick and efficient means of protection to the parties whose competitive existence is jeopardized. A predatory purpose may validly be inferred when below-cost sales are carried out with such frequency and scope as to indicate a reckless disregard for the consequences of such sales.[87] And, when below-cost merchandise is advertised to lure customers onto the premises where they are discouraged from purchasing the advertised goods and urged to purchase "superior" products at advanced prices, violation of the acts' purposes should be clear.

Outside this area, which might be regarded as the area of "per se" illegality, the statutory purposes should be kept in view to insure that the statute is not used to suppress competition.[88] The interest of the consuming public in having goods available at low prices and the practical difficulty of strict conformance with the statutory mandate, should be factors dictating the employment of a rule of reason in enforcing these statutes.

Robert B. Jones, S. Ed.

87 See note 46 supra.

88 ". . . thus, an act which can be sustained only on the basis that it prevents monopoly and fosters competition is twisted to accomplish the direct opposite, namely, the sale of cigarettes at wholesale in Ohio at a uniform price." Serrer v. Cigarette Service Co., (Ohio App. 1947) 1946-47 CCH Trade Cas. ¶57,563 at p. 58,522, affd. 148 Ohio St. 519, 76 N.E. (2d) 91 (1947).