

# Michigan Law Review

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Volume 54 | Issue 5

---

1956

## Regulation of Business - Fair Trade Acts - Availability of Injunction Against Nonsigner's Inducing Breach of Fair Trade Agreement

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### Recommended Citation

William R. Jentes S.Ed., *Regulation of Business - Fair Trade Acts - Availability of Injunction Against Nonsigner's Inducing Breach of Fair Trade Agreement*, 54 MICH. L. REV. 711 (1956).

Available at: <https://repository.law.umich.edu/mlr/vol54/iss5/14>

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REGULATION OF BUSINESS—FAIR TRADE ACTS—AVAILABILITY OF INJUNCTION AGAINST NONSIGNER'S INDUCING BREACH OF FAIR TRADE AGREEMENT—Plaintiff manufacturer had extensive agreements with its distributors under the Michigan Fair Trade Act.<sup>1</sup> The circuit court enjoined the defendant, who was not a party to any of these contracts, from inducing the plaintiff's distributors to sell products to the defendant below the agreed fair trade price. On appeal, *held*, reversed, three justices dissenting. Defendant is privileged to induce the breach of a fair trade agreement which restricts his business opportunities and is contrary to the state's policy against the enforcement of the nonsigner provision of its fair trade law. *Argus Cameras, Inc. v. Hall of Distributors, Inc.*, 343 Mich. 54, 72 N.W. (2d) 152 (1955).

The effectiveness of the fair trade acts depends fundamentally upon the efficacy of the provision authorizing the fair trader to enforce his designated price against nonsigners of fair trade agreements.<sup>2</sup> Although the McGuire Act<sup>3</sup> removed the last barriers to state fair trade acts raised by federal legislation or court decision, some state courts have declared the nonsigner provisions of their acts to be violative of their state constitutions.<sup>4</sup> These decisions prevent attempts to enforce the nonsigner's adherence to the fair trade price by refusing to enjoin his sales below that price. Having previously declared the nonsigner provision unconstitutional,<sup>5</sup> the Michigan court, in the principal case, prevents a more indirect enforcement by refusing to enjoin the nonsigner's purchases from the fair trader's distributors in interference with the latter's contractual relationships. The courts, although in general holding a person liable for the damages resulting from his intentional interference with the contractual relations of another,<sup>6</sup> recognize that this interference may be privileged.<sup>7</sup> The Michigan court finds its justification for the defendant's acts in section 774 of the *Restatement of Torts*.<sup>8</sup> This section

<sup>1</sup> Mich. Comp. Laws (1948) §445.151.

<sup>2</sup> REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANITRUST LAWS 151 (1955).

<sup>3</sup> 66 Stat. L. 631 (1952), 15 U.S.C. (1952) §45. The McGuire Act specifically exempts price fixing under fair trade nonsigner provisions from the federal antitrust laws, thus removing the objections raised in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745 (1951).

<sup>4</sup> For the current status of the nonsigner provision in the forty-five states having fair trade acts, see 1 CCH TRADE REG. REP., 10th ed., ¶3258. The Michigan nonsigner provision was declared unconstitutional in *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W. (2d) 268 (1952).

<sup>5</sup> *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, note 4 *supra*.

<sup>6</sup> 4 TORTS RESTATEMENT §766 (1939); PROSSER, TORTS, 2d ed., 720 (1955).

<sup>7</sup> 4 TORTS RESTATEMENT §767 (1939); PROSSER, TORTS, 2d ed., 735-738 (1955).

<sup>8</sup> *Sunbeam Corp. v. Masters of Miami, Inc.*, (5th Cir. 1955) 225 F. (2d) 191, on almost identical facts, adopts the same basis for holding the defendant's interference privileged. It is clear that the defendant in this situation has no privilege based solely upon the public interest in free competition as he would if plaintiff had no existing contract. See *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598 (1889). Likewise, the defendant himself has no prior contract which would justify his preventing the performance of another's contract which threatens his own. *Williams v. Adams*, 250 App. Div. 603, 295 N.Y.S. 86 (1937). Nor does the defendant have a privilege of interference in the public interest, since this privilege is traditionally restricted to protection of the public health or morals. *Legris v. Marcotte*, 129 Ill. App. 67 (1906); *Brimelow v. Casson*, [1924] 1 Ch. D. 302.

states that a defendant is privileged to induce the non-performance of a contract "the purpose or effect of which is to restrict his business opportunities in violation of a defined public policy."<sup>9</sup> This privilege is not restricted to contracts which are wholly void, but may exist even though the contract is enforceable between the contracting parties.<sup>10</sup> If section 774 is to be applied in the principal case, the only contracts to which it can refer are those between plaintiff and his distributors. Since the legislature has expressly given validity to such contracts by a provision of the fair trade act which the court has not heretofore questioned on constitutional grounds, it is difficult to view these contracts as "violative of a defined public policy."<sup>11</sup> The Michigan court, however, decided that although the contract is not violative of public policy and is, therefore, enforceable as between the *contracting* parties, it is violative of public policy and unenforceable as to *third* parties. Aside from any consideration of the validity of such a distinction, it creates an anomalous result in these cases. The fair trader is left with contracts which he is told are "valid," but which he discovers are quite worthless in his legal battle to enforce them against the price-cutting nonsigner. In partial defense of the Michigan court's decision, it should be noted that if the contract is not viewed as violative of public policy in its application to non-contracting parties and if, therefore, no privilege is recognized, an equally anomalous result would be reached. The nonsigner could not constitutionally be prevented from selling below a price to which he had not agreed, but he could be prevented from interfering with fair trade agreements in his efforts to purchase at the reduced prices necessary to those sales. Although such a distinction between a person's selling and his purchasing, both contrary to the provisions of a fair trade agreement to which he is not a party, is justifiable in theory,<sup>12</sup> its practical effect is to permit enforcement of the fair trade acts against the nonsigner when the court has already determined that such a result is unconstitutional. As noted at the outset, the effectiveness of the fair trade acts depends upon their nonsigner provisions. In the light of the anomalous results which follow when this fact is overlooked and an attempt is made to hold the acts valid as to contracting parties and invalid as to nonsigners, the courts would do well either to uphold or to overturn the acts in their entirety when first called upon to determine their validity.

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<sup>9</sup> 4 TORTS RESTATEMENT §774 (1939).

<sup>10</sup> *Id.*, comment *a*.

<sup>11</sup> Dissenting opinion in *Sunbeam Corp. v. Masters of Miami, Inc.*, note 8 *supra*. Cf. Cook, "The Continuing Fair Trade Battle," 29 *ST. JOHN'S L. REV.* 66 at 81 (1954).

<sup>12</sup> In *Sunbeam Corp. v. Economy Distributing Co.*, (D.C. Mich. 1955) 131 *F. Supp.* 791, it was argued that the distinction is not only justifiable in theory but also in practice since, in order to protect himself from the nonsigner, the fair trader must enter into fair trade agreements with *all* of his distributors rather than only one of them as is the case if the nonsigner provision of the acts is effective.