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## Trade Regulation—Miller-Tydings Amendment—Redemption of Trading Stamps for Fair-Traded Goods.—Vornado, int. v. Corning Glass Works

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hold that "it is desirable to have a central body to improve upon those standards and to promulgate codes of practice and conduct."<sup>42</sup> The court's sympathy with private regulatory programs should be in proportion to its estimation of their value as applied by the particular profession involved. This, in turn, should be determined by the degree to which considerations other than control of competition motivate the learned professions to form private associations and exercise their "administrative" power.

ROBERT ZIMMERMAN

**Trade Regulation—Miller-Tydings Amendment—Redemption of Trading Stamps for Fair-Traded Goods.—Vornado, Inc. v. Corning Glass Works.**<sup>1</sup>—Corning Glass Works is a manufacturer of household goods such as the popularly known "Corning Ware." Vornado is a discount retail company, selling food items and a wide range of other merchandise. Vornado also operates its own trading stamp plan, issuing stamps on the sale of its food items, and redeeming the filled stamp books for non-food items. Corning required Vornado to execute a fair-trade agreement which included a minimum price schedule. Vornado abided by this schedule on all cash sales of Corning's products, but did not always so abide when selling them in exchange for a combination of filled stamp books and cash. The actual value of this combination was sometimes below the scheduled minimum price.<sup>2</sup> Corning informed Vornado that this practice constituted a violation of their fair-trade agreement, and insisted that Vornado cease such exchanges. Following the latter's refusal to comply, Corning instructed its distributors to stop supplying Corning's products to Vornado. Vornado subsequently instituted this litigation in the United States District Court for New Jersey.

Vornado contended that its ability to engage in price competition was reduced by Corning's retail price-fixing program, and that Corning's refusal, in concert with its distributors, to continue selling its products to Vornado was a conspiracy in violation of the antitrust laws. Vornado claimed that Corning's failure to subject trading stamp operations, other than Vornado's, to resale price restrictions amounted to such discrimination as to remove Corning from within the fair-trade exemption contained in the Miller-Tydings Amendment to the Sherman Act.<sup>3</sup> Corning has never treated trading stamp companies (e.g., Sperry & Hutchinson Company, Top Value Enterprises, Inc., E. F. McDonald Stamp Company) as within the operation of its fair-trade program. Nor has Corning regulated the number of filled stamp books required to be exchanged for its products. The district court HELD: Corning's fair-trade agreement with Vornado was valid, and therefore Vornado

<sup>42</sup> Note, 15 Rutgers L. Rev. 327, 356 (1961).

<sup>1</sup> 255 F. Supp. 216 (D.N.J. 1966).

<sup>2</sup> For example, Vornado might offer a Corning product, having a fair-trade price of \$10.95, for \$4.95 in cash and one filled stamp book normally valued at \$2.25. The total actual value of the stamp and cash combination would be \$7.20. *Id.* at 222.

<sup>3</sup> 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1964).

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violated such agreement by selling below the minimum price, justifying Corning's termination of its supply contract. In withholding the merchandise there was no conspiracy between Corning and its distributors, but merely the exercise by the latter of their fair-trade contractual obligations. The court rejected Vornado's charge of discrimination because Corning had never treated "pure" trading stamp companies as within its fair-trade program, and because such companies are not prospective resellers within the contemplation of the Miller-Tydings Amendment and the New Jersey Fair Trade Law.<sup>4</sup>

The conclusion that trading stamp companies are not prospective resellers within the contemplation of the fair-trade laws was summarily stated by the district court without the benefit of legal precedent<sup>5</sup> or logical analysis. Since a distinction between the operations of stamp companies and retailers' stamp plans is not readily apparent, this conclusion is seemingly in conflict with the court's holding that Vornado's trading stamp plan was subject to minimum price enforcement under Corning's fair-trade program.<sup>6</sup> In other words, the court has said that one who issues and redeems his *own* stamps is a prospective reseller of goods, whereas one who sells stamps to a retailer for issuance, but redeems them himself, is not a prospective reseller. If, for purposes of the fair-trade laws, a valid distinction can be made between these two types of stamp operations, the appearance of conflict vanishes. If, however, a valid distinction does not exist, the conflict remains, and prejudicial discrimination has been sanctioned by the court. The questions inadequately resolved by the district court, therefore, are whether the two types of stamp operations are so similar as to require equal fair-trade treatment and, if so, whether the two are within the purview of the fair-trade laws. It is submitted that both questions must be answered affirmatively.

While a retailer operating his own trading stamp plan is not a trading stamp company by definition,<sup>7</sup> his stamp operation is very similar with respect to the relationship between the fair-traded items and the consumer. In both cases the consumer saves stamps received with the purchase of goods and later is able to obtain a product by having the stamps redeemed. The fair-trade laws are concerned with protecting the integrity of the manufacturer's product in the eyes of the consumer through authorization of minimum prices fixed by the manufacturer. For a distinction between stamp

<sup>4</sup> N.J. Stat. Ann. § 56:4-3 to -6 (1964).

<sup>5</sup> There is an absence of decisional and statutory law regarding the effect of the fair-trade laws on the furnishing of fair-traded products in *redemption* of trading stamps. For cases holding that the *issuance* of trading stamps with the sale of fair-traded articles can be a violation of these laws, see *Colgate-Palmolive Co. v. Max Dichter & Sons*, 142 F. Supp. 545 (D. Mass. 1956); *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 337 Mass. 221, 148 N.E.2d 861 (1958). For a case holding that the issuance of trading stamps with the sale of fair-traded articles is *not* a violation of the fair-trade laws, see *Gever v. American Stores Co.*, 387 Pa. 206, 127 A.2d 694 (1956). For a discussion of this issue, see Annot., 22 A.L.R.2d 1212 (1952).

<sup>6</sup> 255 F. Supp. at 217, 219.

<sup>7</sup> The business carried on by the Trading Stamp Company has at least two essential basic aspects. (1) The selling of stamps to merchants who distribute them to their customers coincident with the sales of merchandise, and (2) the redemption of those stamps by this Trading Stamp Company.

*M. & M. Stamp Co. v. Harris*, 212 Tenn. 158, 162, 368 S.W.2d 752, 754 (1963).

operations to be relevant to the fair-trade laws, it is necessary, therefore, to find a basic difference in the method of furnishing goods to the consumer, rather than a difference in corporate structure. Apparently, however, the two operations bear substantially the same relation to the consumer.

The district court did not explicitly discuss this similarity of relation to the consumer, but did make reference to two dissimilarities between the consumer operations of Vornado and the "pure" trading stamp company. The court referred to Vornado's policy of fluctuating the value of filled stamp books, and to Vornado's policy of furnishing goods to the consumer for a combination of cash and stamps, indicating that neither of these practices was carried on by the trading stamp companies.<sup>8</sup> Conceding the truth of this observation, it is questionable whether these practices are sufficient to establish a fair-trade distinction, since trading stamp companies *are not prohibited* from engaging in either.<sup>9</sup> If a stamp company should feel it necessary to bolster consumer interest in its stamps, it could offer a \$15.00 fair-traded product, normally exchanged for five filled stamp books valued at \$3.00 each, for only three such books. In so doing, the stamp company would be trading below the minimum price. Alternatively, the books would then have an exchange value of \$5.00 each, and the stamp company would be imitating Vornado's practice of fluctuating the value of the books.

Any distinction based upon Vornado's cash and stamp combination plan was disposed of by Corning itself, through a strict interpretation of the terms "sale" and "resale":

[I]t should be noted the New Jersey Fair Trade Law speaks in terms of "sales" or "resales" . . . Clearly contemplated are normal sales at cash prices below the dollar amounts set by the fair trader . . . .<sup>10</sup>

If this interpretation were accurate, the fair-trade law would exclude Vornado's cash and stamp combination as readily as trading stamp company transactions, for neither is a "normal cash sale." If not accurate, and in view of the previously mentioned similarity, the law could not include the one without including the other.

The fair-trade laws are not punitive laws, but are preventive in nature; they are designed to prevent the injury resulting from retail sales below

<sup>8</sup> 255 F. Supp. at 221.

<sup>9</sup> No law exists in New Jersey which provides that trading stamp companies must require a given number of filled stamp books for merchandise of a given value, or that they may not furnish goods on a cash and stamp combination basis. It has been argued that

the stamp companies could effectively meet the chain store's competition by giving the same value in merchandise as the chain stores upon redemption, and by allowing the consumer to use the stamps with cash in purchasing merchandise rather than forcing her to wait until she acquires the required number of stamps.

Comment, Trading Stamps, 37 N.Y.U.L. Rev. 1090, 1108 n.95 (1962). One commentator, after examining representative stamp catalogues, found that "there is considerable variation among catalogues in average values, and wide differences for given catalogues in the worth of different premiums." Beem, Who Profits from Trading Stamps? 35 Harv. Bus. Rev., Nov.-Dec. 1957, p. 123, at 129.

<sup>10</sup> Brief for Defendant, p. 11.

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established minimum prices.<sup>11</sup> To be effective, therefore, it is necessary that the laws apply to *all* retailers capable of so injuring product integrity, whether or not these retailers are currently engaged in improper activity. In view of those propositions, any distinction between Vornado and the trading stamp companies which is based on the former's violative practices and the latter's currently nonviolative practices is invalid.

Where a retailer's stamp plan has been compared to a trading stamp company in cases considering the validity of laws prohibiting the latter, the great majority of courts have refused to find a distinction between the two.<sup>12</sup> These courts have held that statutes prohibiting the one, but not the other, are unconstitutional as a denial of equal protection of the law.<sup>13</sup> In a leading case in support of this holding, the court stated: "A law is uniform if it operates alike upon all within a reasonable classification. If the classification is not reasonable, but instead is arbitrary . . . the law is unconstitutional as not uniform in operation."<sup>14</sup> In an earlier case which reached the same result, it was held that

classification, to meet the requirements of the Constitution, must be based upon something substantial—something which distinguishes one class from another in such a way as to suggest the reasonable necessity for legislation based upon such a classification.<sup>15</sup>

Furthermore, it has been judicially observed that

there is no real and substantial difference between a merchant who uses stamps and redeems his own stamps, and a merchant who uses

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<sup>11</sup> *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N.Y.S.2d 320 (Sup. Ct. 1938).

<sup>12</sup> There have been two cases which have held state prohibition or regulation of trading stamp companies to be valid, despite the fact that retailers' trading stamp plans were exempt from such interference. *Blue & Gold Stamps—U-Save Premium Co. v. Sobieski*, 190 F. Supp. 133 (S.D. Cal. 1961); *Steffey v. City of Casper*, 358 P.2d 951 (Wyo. 1961). The courts based the distinction on the stamp company's role as a middleman between the retailer and the consumer. Due to the fact that they sell stamps to retailers and later redeem them from the retailers' customers, the stamp companies were felt to be in a position to adversely influence both elements: they could cause the retailer to become so involved in the stamp program that he could not, without great loss, extricate himself. In addition, they could induce unwise or wasteful buying practices on the part of consumers who desire to accumulate stamps rapidly. The courts felt that the retailer's stamp plan could not produce these same harmful results, although there appears to be no reason why the consumers' buying practices would differ. In *Blue & Gold*, the court did not specifically find a distinction, but did refuse to declare that a state law which incorporated a distinction was unconstitutional. *Steffey*, decided in one of the two states which now prohibit use of trading stamps (the other is Kansas), upheld the exemption of retailer-owned stamp plans from a statute which generally prohibited trading stamps.

<sup>13</sup> See, e.g., *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 65 N.W.2d 410 (1954); *In re Opinion of the Justices*, 226 Mass. 613, 115 N.E. 978 (1917); *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N.Y. Supp. 497 (1905); Legislative Research Council, Report Relative to Trading Stamps, S. Rep. No. 912, Mass. Leg. Docs., at 65-66 (1964).

<sup>14</sup> *Sperry & Hutchinson Co. v. Hoegh*, supra note 13, at 19, 65 N.W.2d at 416.

<sup>15</sup> *State ex rel. Welsh v. Darling*, 216 Iowa 553, 555, 246 N.W. 390, 391 (1933).

stamps and for a consideration has someone else to redeem them for him.<sup>16</sup>

Since there is no valid difference between the two types of merchants mentioned above, there should likewise be no distinction between two types of trading stamp operations, both of which give and redeem stamps for the same merchandise. There being no acceptable reason to treat the two stamp operations differently, it follows that they must receive equal treatment with respect to the fair-trade laws.

Assuming the correctness of the above conclusion, it is appropriate to consider whether stamp operations are within the purview of the fair-trade laws. Neither the Miller-Tydings Amendment to the Sherman Act, nor the New Jersey Fair Trade Law, expressly excludes trading stamp operations from its provisions. Since these acts were passed during a period which succeeded the decline of initial stamp popularity and preceded the trading stamp rebirth and boom, at a time when the ultimate size and economic importance of the stamp industry could not have reasonably been foreseen, there is nothing in the legislative history of these laws which pertains to trading stamps.<sup>17</sup> However, an examination of the language and purpose of these laws serves to define their scope.

The Miller-Tydings Amendment provides that "nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity . . . ."<sup>18</sup> The New Jersey Fair Trade Law provides that

no contract relating to the sale or resale of a commodity . . . shall be deemed in violation of any law of this State by reason of any of the following provisions . . . :

(a) that the buyer will not resell such commodity except at the price stipulated by the vendor . . . .<sup>19</sup>

The only possible language impediment to an automatic inclusion of trading stamp operations within the ambit of these laws exists in the scope of the terms "sale" and "resale," and *only* through the strictest interpretation of these terms can an implied exclusion of stamp operations be found. Corning's interpretation of "resale" as clearly contemplating "normal sales at cash prices"<sup>20</sup> is an example of such an interpretation. Corning offered no reason, and none is apparent, as to why "normal sales at cash prices" are "clearly contemplated."<sup>21</sup> Supporting the proposition that the terms "sale" and "re-

<sup>16</sup> Logan's Supermkt., Inc. v. Atkins, 202 Tenn. 438, 446, 304 S.W.2d 628, 632 (1957).

<sup>17</sup> The New Jersey Fair Trade Law, passed in 1935, and the Miller-Tydings Amendment, passed in 1937, preceded the great expansion and prominence experienced, and being experienced, by the trading stamp companies commencing in 1951. See Haring & Yoder, Trading Stamp Practice and Pricing Policy, at ix-x (Ind. Bus. Rep. No. 27, 1958). Regarding the economic importance of trading stamps, see Legislative Research Council, Report Relative to Trading Stamps, supra note 13, at 21-23.

<sup>18</sup> 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1964).

<sup>19</sup> N.J. Stat. Ann. § 56:4-5(1) (1964).

<sup>20</sup> Brief for Defendant, p. 11. See p. 378 supra.

<sup>21</sup> There is an interesting implication to Corning's strict interpretation of the New

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sale" are broad enough to include a transaction involving the redemption of stamps is a Treasury Regulation which provides that

the giving of a premium [*i.e.*, product, article, commodity] in consideration of the return of . . . trading stamps, or other script, delivered or sold in connection with the sale of a commodity, constitutes a taxable transaction, and the person so giving the premium is considered to be the one who *sells* it at retail.<sup>22</sup> (Emphasis added.)

Even strictly interpreted, the New Jersey Fair Trade Law should not exclude trading stamp companies in view of that state's Fair Sales Act definition of "sales at retail" as

any transfer of title to tangible personal property for a valuable consideration where such property is to be used by the purchaser for purposes other than resale, manufacture, or further processing.<sup>23</sup>

Furthermore, a New Jersey court has recently stated that

a sale involves and implies the passing of title. Indeed, "title" is an implicit element under the Uniform Commercial Code . . . wherein it is stated [in section 2-106(1)] that a "'sale' consists in the passing of title from the seller to the buyer for a price."<sup>24</sup>

Taking this definition one step further, the Uniform Commercial Code at section 2-304(1) indicates that "price" can be made payable in money *or otherwise*. The court cited above went on to expand its definition of "sale," saying that "the broad aspect of the term 'sale' signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is payable."<sup>25</sup> A filled stamp book is a valuable consideration, since its contents are acquired by the purchase of goods and it has a stated redemption value. Therefore, the

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Jersey Fair Trade Law as applying only to "normal" *cash* sales. In its contract, Vornado agreed "not to advertise, offer for sale or sell . . . any Corning Ware . . . at prices less than those now or hereafter designated . . ." 255 F. Supp. at 223. Therefore, given this interpretation, it is questionable that Vornado ever agreed to maintain minimum prices in furnishing goods for a combination of stamps plus cash. If an agreement concerning this phase of Vornado's sales was never in existence, Corning, by stopping the supply of its products, breached its contract with respect to Vornado's cash sales, which *were* kept at the fair-trade price.

<sup>22</sup> Treas. Reg. 51, § 320.5(d) (1951).

<sup>23</sup> N.J. Stat. Ann. § 56:4-7(d) (1964). In the absence of a definition of "sales at retail" in the New Jersey Fair Trade Law, the definition provided by the New Jersey Fair Sales Act seems relevant, as the latter is entitled "an Act to insure and protect fair trade practices . . . prohibiting the advertisement, offer for sale, or sale of merchandise at less than cost . . ." N.J. Sess. Laws 1938, c. 394, at 976.

<sup>24</sup> *State v. Weissman*, 73 N.J. Super. 274, 281, 179 A.2d 748, 752, cert. denied, 37 N.J. 521, 181 A.2d 782 (1962). Another New Jersey court has stated that "a 'sale' is a transmutation of property from one party to another in consideration of some price or recompense in value. The consideration may be any agreed equivalent." *Caldwell Bldg. & Loan Ass'n v. Henry*, 120 N.J. Eq. 425, 430, 185 Atl. 394, 397 (1936).

<sup>25</sup> *State v. Weissman*, *supra* note 24, at 281, 179 A.2d at 752.

exchange of such filled stamp books for merchandise must be a "sale" within the meaning of the fair-trade laws.

In order to bring trading stamp operations within these laws, semantics should not, and need not, be solely relied upon.

The inquiry in the final analysis is the true intention of the law. . . . The words used may be expanded or limited according to the manifest reason and obvious purpose of the law . . . . The language is not to be given a rigid interpretation when it is apparent that such meaning was not intended . . . . The will of the lawgiver is to be found . . . by the exercise of reason and judgment in assessing the expression as a composite whole.<sup>26</sup>

The intention or purpose of the fair-trade laws is to protect the manufacturer of trademarked goods from retail practices which are injurious to the "good-will"<sup>27</sup> and "valuable property right"<sup>28</sup> he has acquired in his products. By reducing the price of a product below the recognized consumer level, the quality and integrity of that product are diminished in the eyes of the consuming public.<sup>29</sup> A trading stamp operation is certainly able to effectuate a sale at less than the fair-trade minimum price. In *General Elec. Co. v. Two Guys from Harrison*,<sup>30</sup> in reference to establishments which give fair-traded products in exchange for trading stamps, the court stated that

whether the giving of a General Electric appliance in exchange for such stamps or coupons is a sale of such appliance at less than the stipulated price obviously depends upon the value of such stamps or coupons.<sup>31</sup>

If a consumer discovers that he can obtain a given product for fewer filled books (*i.e.*, less real value in stamps) than he anticipated or understood to be required, the integrity of the manufacturer's product is injured to no less an extent than if the same consumer discovers the same relative price differential on making a cash purchase. In either case, the consumer is required to give less than he expected in order to obtain a product, or alternatively, the value of that product as gauged by price has been lessened. If product integrity suffers in the one case, it must suffer in the other. Since a trading stamp operator is able to sell a fair-traded article below the scheduled minimum price as readily as any other merchant,<sup>32</sup> it is reasonable, in fact necessary, to include trading stamp operations as "resellers" under the fair-trade laws.

<sup>26</sup> *Alexander v. New Jersey Power & Light Co.*, 21 N.J. 373, 378, 122 A.2d 339, 342 (1963).

<sup>27</sup> *United States Time Corp. v. Grand Union Co.*, 64 N.J. Super. 39, 165 A.2d 310 (1960); *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 27 N.J. Super. 54, 98 A.2d 623 (1953), *rev'd on other grounds*, 15 N.J. 191, 104 A.2d 304 (1954).

<sup>28</sup> *General Elec. Co. v. Home Util. Co.*, 131 F. Supp. 838 (D. Md.), *aff'd*, 227 F.2d 384 (4th Cir. 1955).

<sup>29</sup> *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, *supra* note 11.

<sup>30</sup> 1956 Trade Cas. ¶ 68,458 (N.Y. Sup. Ct. 1954).

<sup>31</sup> *Id.* at 71,906.

<sup>32</sup> See note 9 *supra*.



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Finally, it does not appear that trading stamp operations can be excluded from the purview of the fair-trade laws based on any judicially-carved exemption or exception. In some cases, courts have permitted fair-trade exceptions for the benefit of certain purchasers, generally institutional consumers.<sup>33</sup> These cases, and a New Jersey case<sup>34</sup> cited by the district court as having exempted trading stamp companies from a manufacturer's fair-trade program, make no mention of stamp companies or any analogous institutions.<sup>35</sup> One court did allow a manufacturer to forego application of his fair-trade program with respect to certain sales which were of "comparative insignificant extent" in relation to the manufacturer's total sales.<sup>36</sup> In the instant case, however, approximately ten per cent of Corning's sales in New Jersey were accounted for by trading stamp companies,<sup>37</sup> not including sales to Vornado-like retailers which resulted in stamp redemption transactions. It is apparent, therefore, that the court could not support the exclusion of trading stamp operations from the fair-trade laws on the basis of the "comparative insignificant extent" of total sales.

A manufacturer's unequal treatment of establishments which supply his fair-traded products to consumers amounts to unlawful discrimination and can result in the loss of the manufacturer's right to enforce his program.<sup>38</sup> If trading stamp operations are within the coverage of the fair-trade laws and do not fall within any of the judicial exemptions thereto, Corning may have forfeited its enforcement right by failing to apply its fair-trade program equally to all stamp operations.<sup>39</sup> The New Jersey Fair Trade Law

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<sup>33</sup> The following exceptions have been allowed: sales to employees of the fair-trade manufacturer, to government agencies, and to commercial establishments buying for their own use, *General Elec. Co. v. Hess Bros.*, 155 F. Supp. 57 (E.D. Pa. 1957); sales for industrial and fleet use, *Union Carbide & Carbon Corp. v. White River Distribs., Inc.*, 118 F. Supp. 541 (E.D. Ark. 1954); sales to educational and other institutions, *World Publishing Co. v. E. J. Korvette, Inc.*, 1959 Trade Cas. ¶ 69,423 (N.Y. Sup. Ct.).

<sup>34</sup> *Burroughs Wellcome & Co. v. Weissbard*, 129 N.J. Eq. 563, 20 A.2d 445 (1941), aff'd, 130 N.J. Eq. 605, 23 A.2d 396 (Ct. Err. & App. 1942).

<sup>35</sup> The *Burroughs* case held that an exemption from a manufacturer's fair-trade program could be granted to "physicians, dentists, veterinarians, clinics, hospitals, and charitable institutions . . ." *Id.* at 565, 20 A.2d at 446.

<sup>36</sup> *Lanvin-Parfums, Inc. v. Carlton Drug, Inc.*, 1963 Trade Cas. ¶ 70,645 (N.Y. Sup. Ct.).

<sup>37</sup> See 255 F. Supp. at 220.

<sup>38</sup> State and federal trade laws have left to the courts the job of determining sanctions for unequal treatment. *Victor Fishel & Co. v. R. H. Macy & Co.*, 1965 Trade Cas. ¶ 71,601 (N.Y. Sup. Ct.). The courts, in turn, have established equitable standards whereby a delinquent manufacturer can be barred from injunctive relief against a violator of his fair-trade program. *Johnson & Johnson v. Wagonfeld*, 206 F. Supp. 30 (S.D.N.Y. 1960); *United States Time Corp. v. Grand Union Co.*, supra note 27. A New Jersey case held that if by a manufacturer's acts or conduct it "can be said to have waived its right to see that other retailers observe the requirements of the [fair-trade] act, it would be inequitable to assist" the manufacturer in enforcing the provisions of the act against price-cutting retailers. *Calvert Distilling Corp. v. Gold's Drug Stores, Inc.*, 123 N.J. Eq. 458, 461, 198 Atl. 536, 538 (1938).

<sup>39</sup> The fact that trading stamp companies have not signed fair-trade agreements with Corning does not prevent Corning from enforcing its fair-trade program against them. The McGuire Amendment to the Federal Trade Commission Act, 66 Stat. 632 (1952), as amended, 15 U.S.C. § 45 (1964), was enabling legislation designed to remove

incorporates "the fundamental equitable concept that he who seeks equity must do equity; . . . the manufacturer must refrain from causing any unjust discrimination among the retail dealers . . ." <sup>40</sup> The court in *Frank Fisher Merchandising Corp. v. Ritz Drug Co.* <sup>41</sup> noted and amplified this same principle:

A manufacturer or other such person entitled to operate under this statute must subject all retailers selling his commodity to restrictions which are uniform, otherwise he permits discrimination between classes of consumers and classes of retailers . . . . A manufacturer may not require or permit one group of retailers to sell at a fixed price leaving another group free to pursue its own price policy . . . . Exemptions from price restrictions cannot be left to the sole uncontrolled, arbitrary act of the manufacturer. <sup>42</sup>

There are factors which can operate to overcome the legal effects of discrimination by a manufacturer, but the courts decide whether these factors are applicable according to the equities of each individual case. <sup>43</sup>

In conclusion, it is submitted that the district court, in holding that Vornado could not succeed against Corning, failed to give adequate consideration to the possible existence of unlawful discrimination. The applicability of the fair-trade laws to the *redemption* of trading stamps is a question of first impression and should be dealt with directly, especially in view of the importance of the stamp industry in the retail market. <sup>44</sup> This question does not require legislative consideration, because there is ample room within existing fair-trade laws for inclusion of the redemption phase of trading stamp operations. It is submitted that inclusion of such operations is the result intended by the fair-trade laws, and that if the courts properly construe and apply these laws they will, necessarily, be led to this result.

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all barriers to the free enforcement, by the states, of the "non-signer" clauses of their fair-trade laws. *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 104 A.2d 304, appeal dismissed, 348 U.S. 859 (1954). The "non-signer" clause provides for the enforcement of fair-trade contracts or agreements against one who is not a party to such contracts or agreements but who has notice of the scheduled minimum prices. See, e.g., N.J. Stat. Ann. § 56:4-6 (1964).

<sup>40</sup> *United States Time Corp. v. Grand Union Co.*, supra note 27, at 47, 165 A.2d at 314-15.

<sup>41</sup> 129 N.J. Eq. 105, 19 A.2d 454 (1941).

<sup>42</sup> *Id.* at 108-09, 19 A.2d at 457.

<sup>43</sup> Factors which may remove a bar to the enforcement of a fair-trade program by a manufacturer who has practiced unequal enforcement include: (1) the price-cutting retailer's failure to show injury to his competitive position as a result of the nonenforcement, *Westinghouse Elec. Corp. v. Charles Appliances, Inc.*, 1954 Trade Cas. ¶ 67,838 (N.Y. Sup. Ct.); (2) the consistent and wilful violations of the party alleging non-enforcement, *Revlon, Inc. v. Chester Discount Health & Vitamin Center*, 225 F. Supp. 274 (E.D. Pa. 1963); and (3) the existence of a legitimate doubt as to whether or not a fair trader should have taken steps with reference to particular fair-trade enforcement, *Gadol v. Dart Drug Co.*, 222 Md. 372, 161 A.2d 122 (1960).

<sup>44</sup> Thus a market research poll taken in 1961 indicated that 40 million, 76% of all 53 million American families, were stamp savers. In the following year, this figure jumped to 45.9 million, or 85% of all 54.6 million American families. Legislative Research Council, Report Relative to Trading Stamps, supra note 13, at 21.

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Such judicial construction of the fair-trade laws will insure uniform treatment of all resellers capable of causing those injuries which the laws seek to prevent, and will protect against unlawful discrimination in the fair-trade area.

PETER W. BRADBURY