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Contracts - Fair Trade Laws - Resale Price - Maintenance Agreements

Lyle E. Ball

CONTRACTS—FAIR TRADE LAWS—RESALE PRICE—MAINTENANCE AGREEMENTS—Under modern resale price maintenance laws, the producer or distributor of a brand name or trade-marked product competing with other products of the same general class may set a minimum price below which a retailer may not resell.[1] Such legislation serves a definite economic purpose. Manufacturers customarily attempt to develop in their consumers a brand preference for their product. This preference, if developed, is usually the result of a costly advertising campaign as well as extensive research and quality control.[2] Once this brand preference—a form of good-will—has been created, it is of great value to the producer. Justice Sutherland stated in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*[3] that "The primary aim of the law is to protect the property—namely, good will—of the producer."[4]

The producers of proprietary medicines were the first to use resale price maintenance contracts to prevent retailers from using their brand name products as leaders or loss leaders.[5] The United States Supreme Court in *Fowle v. Park*,[6] the earliest case of importance, held that the following ancillary contract supplementing a sales agreement was not an unreasonable restraint of trade:

> The vendees agreed they "will not sell, or cause any of said medicine to be sold, at less price than seven dollars for each and every dozen, except to such persons as shall become their agents for a whole state or territory; and in all cases where such agencies are granted they also promise and agree to take from such agents an agreement, with a sufficient guaranty of penalty, that no sales of said medicine shall be made at a less price than that above named. . . "

Students of the common law today are not in agreement as to whether vertical[7] resale price maintenance agreements were con-

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1. Miller-Tydings Act, 15 U.S.C. § 1 (1946); McGuire Act, 15 U.S.C. § 45 (1946).
2. See Oppenheim, Unfair Trade Practices, 22 (1950).
3. 299 U.S. 183 (1936).
4. 299 U.S. 183, 193 (1936) (dictum).
5. See Chain Stores Leaders and Loss Leaders, Sen. Doc. No. 51, 72d Cong., 1st Sess. 2 (1932). "A loss leader is . . . an article sold below net invoice cost, net purchase cost or net manufacturing cost as the case may be, or it may be applied to goods sold below the net purchase cost of the goods plus operating costs, or simply to goods sold below the usual mark-up . . .. Leaders . . . are merchandise featured or sold at reduced prices to attract buyers and thereby stimulate sales of these leaders and other goods."
6. 131 U.S. 88 (1889).
7. Grether, Price Control under Fair Trade Legislation, 4 (1939). ". . . vertical price control is defined as a price constraint between sellers on different levels, as for instance between manufacturers and wholesalers and retailers. The most pronounced form of vertical price control has long been known as 'resale price maintenance,' Horizontal price control is defined as a constraint between sellers on a given level. For instance, when retailers in a local market employ measures of price regulation by agreement among themselves, this activity would be classified as 'horizontal'; if maufacturers put the devices into effect for the retailers the procedure would be classified as 'vertical.' "

sidered an unreasonable restraint of trade.[8] The Sherman Anti-Trust Act,[9] adopted in 1890, provided that "every contract, combination. . . or conspiracy in restraint of trade or commerce among the several states is hereby declared to be illegal." Vertical price maintenance agreements were considered legal under this Act until 1911. In that year the Supreme Court in *Dr. Miles Medical Co. v. Park & Sons Co.*[10] struck down a system of resale price maintenance agreements as being invalid restraints of trade under the common law. The Court also implied that the agreements were invalid under the Sherman Act.[11] While technically a form of vertical price mainenance, the contracts between producer and distributors involved in the *Dr. Miles* case were actually so complete as to have the effect of horizontal resale price fixing.[12]

The decision in the *Dr. Miles* case eliminated one of the most effective methods the producers had of controlling the resale prices of their branded products. They could still attempt to control prices by refusing to deal with dealers who would not sell at their stipulated price[13] or they could distribute their products through their own retail chain agencies.[14] These methods, however, did not give the producer adequate protection. Although the producers could refuse to make future deliveries to dealers not selling at the suggested price, this did not prevent dealers from selling their stock on hand as loss leaders. The majority of the producers did not have the machinery to sell through their own retail chain outlets or agencies.

The American Fair Trade League was consequently organized in 1913 for the support of resale price maintenance legislation. Numerous bills were thereafter presented to the Congress for the

8. See Kennedy, Stormy Weather for Trade, Vol. 27 Iowa Business Digest, 1 (Jan. 1956).
9. 15 U.S.C. § 1-7 (1952).
10. 220 U.S. 373 (1911). (The *Dr.* Milles company produced proprietary medicines under secret formulas. Contracts were enter into with over four hundred jobbers and wholesalers requiring them to sell only to retail or wholesale agents of said proprietor and at not less than stipulated prices. The Dr. Miles company also entered into contracts with twenty-five thousand retailers requiring them not to sell at less than the full retail price printed on the packages, without reduction for quantity and not to sell the the said proprietary medicines at any price to dealers not accredited agents of the Dr. Miles Medical Company. Park & Sons Company, a wholesale drug concern refused to enter into the wholesale contract. Park & Sons. Co. procured supplies of the Dr. Miles Co. medicines and sold them at leader prices. Dr. Miles Co. asked for an injunction alleging that the defendant was inducing violations of the vertical resale price contracts. Relief was denied.)
11. *Ibid.*
12. Papandreou and Wheeler, Competition and Its Regulation, 441 (1954).
13. U.S. v. Colgate & Co., 250 U.S. 300, 307 (1919) (dictum); *But see* U.S. v. A. Schroeder's Sons, Inc., 252 U.S. 85 (1920) (Could not be used to enforce an illegal agreement to maintain a resale price); F.T.C. v. Beechnut Packing Co., 257 U.S. 441 (1922) (Could not be carried to the extent of spying on distributors and threatening to withhold supplies).
14. U.S. v. General Electric Co., 272 U.S. 476 (1926); U.S. v. General Electric Co., 82 F. Supp. 753 (D. N.J. 1949).

purpose of legalizing price maintenance practices.[15] However, none of these were enacted. Congress not only refused to pass a national resale price maintenance law but also took a step in the opposite direction by passing the Federal Trade Commission Act of 1914.[16] Section 5 of this Act declared that "unfair methods of competition are hereby declared unlawful." However, that same year the Clayton Act[17] was passed. This allowed a manufacturer, in the absence of any intent to create a monopoly, to refuse to sell to wholesalers or retailers who failed to resell at the producer's price. This was at most a qualified victory for advocates of fair trade enactments.

Promoters of resale price maintenance on the state level did not have major success until 1931. In that year a grocer introduced a fair trade bill in the lower house of the California legislature. This bill was passed with the help of strong support from the druggists.[18] However, it did not provide for a non-signer clause and a number of cut-rate druggists refused to sign price maintenance contracts with the producers. These druggists purchased branded products from other sources and continued to undersell dealers who had signed fair trade agreements. In 1933 this defect in the California statute was corrected by a change in wording which included persons advertising, offering for sale or selling fair trade products *whether they were or were not parties to the resale price maintenance contract.* The producer could now, by contracting with only one dealer, control in that jurisdiction the resale price of the protected commodity sold by all dealers having knowledge of the contract. This non-signer clause read as follows:

> "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision. . . of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."[19]

This provision, copied in Illinois, was upheld in 1936 by the United States Supreme Court,[20] against the assertions that it violated the due process of law clause and the equal protection of the laws clause of the Fourteenth Amendment to the United States

15. H.R. 13305, 63 Cong. 2 Sess. (1914) (Stevens Bill); H.R. 13860, 63 Cong. 2 Sess. (1914) (Metz Bill); Representative Clyde Kelly of Pa. introduced bills in each session of Congress from the Sixty-fifth through the Seventy-second and each failed to pass, See note 12 *supra*, at 442.
16. 15 U.S.C. § 41-58 (1946).
17. 38 Stat. 730 (1914).
18. See 6 Syracuse L. Rev. 328 (1954-1955).
19. Cal. Ann. Code § 16904 (West 1954).
20. See Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

Constitution.[21] Twenty-nine states enacted fair trade laws during the next year.[22]

Promoters of fair trade laws on the state level now had to overcome the federal anti-trust laws. The National Association of Retail Druggists, the National Retail Grocers Association, and the National Institute of Wine and Spirits Distributors actively supported the passage of federal resale price maintenance legislation.[23] In 1937 the Miller-Tydings Amendment to the Sherman Anti-Trust Act was passed, amending section 2 of the Sherman Act of 1890.[24] The amendment legalized vertical minimum resale price maintenance contracts regulating branded merchandise sold in interstate commerce. It was provided, however, that the merchandise had to be in free and open competition with commodities of the same general class and had to be resold in states possessing fair trade laws. Later court interpretations of the Miller-Tydings Amendment made it evident that the law was not a blanket endorsement of fair trade resale price maintenance.[25] It was said that the Miller-Tydings Amendment "merely permits the individual states to function without federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the state laws. In other words, the bill does no more than remove Federal obstacles to the enforcement of contracts which the states themselves have declared lawful."[26] Following the Miller-Tydings Amendment, however, many additional states enacted Fair Trade legislation.[27]

Thereafter, however, loopholes began to develop in the coverage of fair trade legislation. In 1951 the United States Supreme Court held in *Schwegmann Bros. v. Calvert Distillers Corp.*[28] that the Miller-Tydings Amendment did not legalize state-enacted non-signer provisions with respect to goods moving in inter-state commerce. In the preceding year, the Third Circuit Court of Appeals had held in *Sunbeam Corp. v. Wentling*[29] that the Pennsylvania fair trade act non-signer provision covered price cutting by dealers only

21. *See* note 3 *supra*, at 191, 192; For a discussion of the constitutionality of the N.D. statute see 26 N.D. Bar Briefs 29 (1950). For other states see Max Factor & Co. v. Kunsman, Cal.2d 446, 55 P.2d 177 (1936); Miles Laboratories, Inc. v. Owl Drug Co., 67 S.D. 523, 295 N.W. 292 (1940), Sears v. Western Thrift Stores of Olympia, Inc., 10 Wash.2d 372, 116 P.2d 756 (1941).

22. See Oppenheim, Unfair Trade Practice, 901, 902 (1950).

23. See note 12, *supra* at 448.

24. 15 U.S.C.A. § 1 (Supp. 1955).

25. See United States v. Univis Lens Co., 316 U.S. 241 (1942); Eastman Kodak Company v. Federal Trade Commission, 158 F.2d 592 (2d Cir. 1946).

26. See Note 22, *supra*, at 945.

27. See note 22, *supra*.

28. 341 U.S. 384 (1951).

29. 185 F.2d 903 (3rd Cir. 1950).

in that state. Hence mail order houses in Pensylvania were free to buy fair trade merchandise in one state and sell the merchandise in another state below the fair trade price. The cumulative effect of these decisions destroyed the non-signer clause which is the heart of the resale price maintenance acts, and rendered the federal and state acts of little value in controlling the price of goods moving in interstate commerce.

As a result of the holding in the *Schwegmann* case, the McGuire Act was passed in 1952.[30] This act filled the non-signer loophole in the Miller-Tydings Amendment. Since passage of the McGuire Act, the Supreme Court has refused to review cases upholding the constitutionality of the non-signer clause.[31]

FAIR TRADE, PRO AND CON

One of the functions of the fair trade law is to prevent retailers from using brand name products as "leader" or "loss leaders" to attract trade as well as to prevent the present day discount houses from selling the products at far less than conventional retail stores. Manufacturers assert that if discount houses and large retail outlets sell their branded products for less than the small retailer, the small retailer will soon refuse to handle his product.[32] Lowering the price of a brand name product will tend to lower the value of the product in the eyes of many consumers.[33] It is said that manufacturers desire retail price maintenance and if they are denied the right under fair trade laws to maintain prices, they will attempt to control the resale price of trade-mark products with devices such as refusal to deal and the agency system. These methods are less desirable in terms of preserving price competition than is the present resale price maintenance legislation.[34]

Advocates of fair trade laws also claim that the use of leaders and loss leaders harm the consumer. Thus, when a consumer shops at a store to buy a leader, he may be induced to believe that he is saving on other items as well.[35] Studies assertedly have shown that price-wise the consumers benefit from fair trade laws.[36]

30. 15 U.S.C. § 45 (1946).
31. Schwegmann Bros. Giant Super Markets v. Eli Lilly Co. 205 F.2d 788 (5th Cir. 1953), *cert. denied* 346 U.S. 856 (1953).
32. See *War on the Discount House*, Business Week, Sept. 11, 1954, p. 170; *Discounter Embarrasses GE*, Business Week, Nov. 6, 1945, p. 54.
33. See Ingersoll v. Hahne & Co., 88 N.J. Eq. 222, 101 Atl. 1030 (1917).
34. See 64 Yale L. J. 967 (1955).
35. Wilcox, Public Policies Toward Business, 419 (1955).
36. Ostund and Vickland, Fair Trade and the Retail Drug Store, 115 (1940) ("Prices of leading proprietary items sold in North and South Dakota drug stores have declined 5.17 per cent, on the average, since the enactment in 1937 of the Fair Trade Acts which per-

Smaller retailers claim that without price protection they cannot compete with the large chain stores. In order to stay in business they must meet the lower prices set by the larger retail outlets. Price protection is necessary to keep small businesses operating.

Opponents of the fair trade laws assert that many manufacturers do not wish to control the resale price of their products but do so mainly at the urging of their dealers.[37] Manufacturers who wish to obtain maximum sales volume for their products by having them carried by the greatest number of retailers are reluctant to maintain prices at a level that would not meet with the approval of their higher-cost dealers.[38] Fair trade laws suppress competition in retailing and the consumer does not therefore get the benefit of savings brought about by the more efficient retailer. Resale price maintenance compels the low-cost retailer to sell the product at the same price as the high-cost retailer, the high-turnover retailer to charge as much as the low-turnover retailer, and the non-service retailer to sell for the same price as the service retailer.[39] Surveys allegedly have shown that there is a definite consumer benefit from loss leaders.[40] Thus, a 1948 study conducted in Maryland and the District of Columbia showed that of 117 drug items checked, 29 cost one-seventh less, 38 cost a quarter less, and 35 cost a third less in the non-regulated District of Columbia than in the fair trade state of Maryland.[41] Similarly, the average cost of 54 drug items checked in St. Louis, Missouri (a non-regulated state) was 16.2 per cent less than in East St. Louis, Illinois (a fair trade jurisdiction).[42]

It is further asserted by opponents of the legislation that resale price maintenance is not necessary to keep the small business operating. Proof of this is supplied by the fact that they are still operating at a profit in states which do not have fair trade laws.[43]

NORTH DAKOTA STATUTE COMPARED WITH NEW TYPE STATUTE

North Dakota enacted in 1937 a fair trade act which was taken almost verbatim from the 1933 California Act.[44] Justice Sutherland's

mitted manufacturer to set minimun resale prices on their trade-marked product. This conclusion is based on a survey on prices of fifty leading drug store items in 148 drug stores, 24 per cent of all the drug stores in the two states.").

37. Federal Trade Commission, Report on Resale Price Maintenance, United States Government Printing Office, 9 (1945).

38. *Ibid.*

39. See note 35, *supra* at 421.

40. *The Not-So-Fair-Trade Laws*, Fortune, Jan. 1949, p. 70.

41. *Ibid.*

42. *Ibid.*

43. See note 35, *supra*, at 420.

44. Compare N.D. Rev. Code Ch. 51-11 (1943) with Cal. Laws 1933, 793 § 1 ½.

opinion in the *Old Dearborn* case[45] in 1936 gave some new interpretations to the 1933 California statute. These interpretations influenced the National Association of Retail Druggists in the drafting of their 1937 Model Fair Trade Statute.[46] This new act was an improvement over the earlier California act and was readily adopted by a large number of states.

A comparison of the North Dakota statute with the more recent Model Act which has been adopted in South Dakota,[47] reveals that both statutes provide (1) that vertical resale price maintenance agreements are valid,[48] (2) that violations of the act are unfair competition and actionable at the suit of any person damaged,[49] (3) that non-signer provisions are valid,[50] and (4) that horizontal resale price contracts or agreements between producers, wholesalers, or retailers are excluded.[51]

The North Dakota act provides that the protected commodity must bear the trade-mark, brand or name of the producer or the owner.[52] Under the South Dakota act the trade-mark, brand or name mey be that of the producer or distributor.[53] South Dakota allows a distributor who does not own the trade-mark, brand or name to establish the resale price if he has the permission of the owner.[54] The North Dakota act provides that the protected commodity must be in "fair and open" competition; the South Dakota act uses the term "free and open" competition as does the Miller-Tydings Amendment and the McGuire Act. Both terms are equivalent in meaning, that is, "actual competition."[55]

Under the North Dakota act the commodity must be sold at the price stipulated by the vendor[56] while under the South Dakota act the only price restriction is that the commodity must not be sold for less than the stipulated minimum price.[57] The South Dakota Act is more effective than the North Dakota Act in controlling distributors when reselling to other middlemen. The South Dakota Act provides for a contract whereby the seller agrees not to sell to anyone who will not maintain the stipulated price, or who will not agree

45. See note 3, *supra*.
46. See note 22, *supra*, at 903, 904, 905.
47. S.D. Code Ch. 54.04 (1939).
48. N.D. Rev. Code § 51-1102 (1943); S.D. Code § 54.0402 (1939).
49. N.D. Rev. Code § 51-1104 (1943); S.D. Code § 54.0406 (1939).
50. *Ibid.*
51. N.D. Rev. Code § 51-1105 (1943); S.D. Code § 54.0407 (1939).
52. N.D. Rev. Code § 51-1102 (1943).
53. S.D. Code § 54.0402 (1939).
54. S.D. Code § 54.0404 (1939).
55. Weigel, The Fair Trade Acts, 40 (1938).
56. N.D. Rev. Code § 51-1102 (1) (1943).
57. S.D. Code § 54.0402 (1) (1939).

to require the persons to whom he sells to maintain the stipulated price.[58]

The North Dakota act exempts sales from the resale price maintenance contract when the goods are sold in a closing-out sale.[59] The South Dakota act is similar with the exception that the dealer must first offer to sell the goods back to the producer or distributor at the original invoice price, which gives added protection to the owner's good-will property right.[60] South Dakota allows a dealer to remove or obliterate the trade-mark, brand or name from the commodity and sell it for less than the fair trade price. However, he may not refer to the brand in advertising or selling the commodity.[61] The North Dakota act[62] and South Dakota act[63] alike exempt sales that are made by any officer acting under the orders of any court. North Dakota also provides that sales are exempt when the protected commodity is sold for taxes or other liens.[64] This latter clause seems to add nothing and could be deleted.

The new act differs from the North Dakota statute in that it prohibits the giving of any article of value such as would be involved in a two-for-one sale, a one-cent sale, or a free merchandise gift with the purchase of the protected commodity. It would also prohibit the giving of trading stamps with the purchase of the protected commodity. Concessions, such as free services that are normally charged for, may not be given with the purchase of a protected commodity.[65]

ENFORCEMENT

The fair trade laws of many states provide only for private enforcement of the act.[66] The North Dakota statute[67] provides that any person damaged[68] may bring an action for damages against signers or non-signers who willfully and knowingly offer for sale or sell below the fair trade price. However, the damaged person will often have trouble proving damages.[69] It may be very difficult to show the amount of business lost due to price cutting activities.

58. S.D. Code § 54.0402 (2) (1939).
59. N.D. Rev. Code § 51-1103 (1) (1943).
60. S.D. Code § 54.0405 (1) (1939).
61. S.D. Code § 54.0405 (2) (1939).
62. N.D. Code § 51-1103 (3) (1943).
63. S.D. Code § 54.0405 (4) (1939).
64. N.D. Rev. Code § 51-1103 (4) (1943).
65. See S.D. Code § 54.0403 (1939).
66. E.g. Ariz. Code Ann. § 74-204 (1939); Iowa Code Ann. § 550.3 (1946).
67. N.D. Rev. Code § 51-1104 (1943).
68. Port Chester Wine & Liguor Shop v. Miller Bros. Fruiterers, 1 N.Y.S. 2d 802, 807 (dictum) ("Statutory aim was threefold: to protect trade mark owners, distributors and the public.").
69. Weigel, The Fair Trade Acts, 78 (1938).

The loss of future business may be far greater than the loss which has already taken place.

Before a producer may bring an action for enforcement of the act he must have a fair trade price structure which has a real and not merely a paper or illusory existence.[70] He must have attempted a reasonable and diligent enforcement of the existing fair trade price.[71] The relief which he seeks must be for the sole purpose of enforcement and not for any ulterior purpose.[72] In *General Electric Co. v. R. H. Macy & Co.*,[73] Justice Greenberg stated that before a manufacturer asks for future injunctive relief it should (1) keep itself informed as to price cutting activities and other trends generally known in the industry or trade. (2) keep close scrutiny over prior violators and take appropriate action where needed, (3) investigate and follow up complaints vigorously, and (4) enforce fair trade prices by repeated legal action if necessary.[74]

In contrast to private enforcement in North Dakota, Minnesota provides for investigation of violations of their fair trade act by the Commissioner of Business Research and Development.[75] The duties of the Commissioner in regard to the fair trade statute include assisting the Trade Promotion Division in the enforcement of the act and suing for injunctive relief on behalf of the state.[76] Any injured person may also bring an action for damages in Minnesota.[77]

In Wyoming, the attorney general and the county prosecutors may bring quo warranto proceedings to forfeit the corporate charter of a violating domestic corporation and to withdraw the permit to do business of any foreign corporation violating the act.[78] Any injured person may bring an action for damages.[79]

The 1955 amendment to the Idaho fair trade act provides that the governor is responsible for the supervision and administration of the act.[80] He has authority to designate any department of

70. General Electric Co. v. R. H. Macy & Co., 199 Misc. 87, 103 N.Y.S. 2d 440, 446 (1951) (dictum).
71. *Ibid.*
72. *Ibid.*
73. 199 Misc. 87, 103 N.Y.S. 2d 440 (1951).
74. See note 70, *supra* at 452
75. Minn. Stat. § 362.14 (1949).
76. 21 U of Ch L. Rev. 205 (1953-54) ("About a hundred complaints were received by the Division in the nine months period following enactment of the McGuire Act. About 50% of the complaints came from manufacturers, the others originated with retailers. The Division sends a wire to the offender, stating that a complaint has been received and citing specific items allegedly sold below the fair trade price. A follow-up letter invites comments and insists on complicance. No suit for injunctions have been filed since the accused dealers agreed to discontinue violations . . . ")
77. Minn. Stat. § 325.12 (1949).
78. Wyo. Comp. Stat. Ann. § 39-308 1945).
79. Wyo. Comp. Stat. Ann. § 39-306 (1945).
80. Idaho Code § 48-310 (Supp. 1955).

the state government as the agency to inspect and investigate sales practices of all persons subject to the act; to ascertain violation, to prosecute all such violations by either injunction proceedings, criminal proceedings, or both; and to aid and assist the attorney-general and the county prosecuting attorney in the investigation of violations.[81] A violation of the act is a misdemeanor and is punishable by a fine of not more than five hundred dollars or by imprisonment of not longer than six months or by both.[82] In a civil suit the plaintiff is entitled to recover from the violator three times the amount of the actual damages. However, it is not necessary for the plaintiff to prove damages to obtain an injunction if he can show a violation of the act.[83]

As stated above, North Dakota leaves the enforcement of the act up to the "damaged person." A search has failed to uncover a North Dakota case involving a violation of the fair trade law of this state. This could mean that there has been no violation of the act to date; or that as yet no "damaged person" has felt that he can afford to devote the time and money to such litigation.

CONCLUSION

The advantages and disadvantages of the fair trade law have been the subject of much controversy. The decision to have a fair trade statute in North Dakota has been indicated by the enactment of our present law. If we are to have a fair trade law, it should be effective.

Defects in the present North Dakota fair trade law have been pointed out. The new type act, such as the present South Dakota statute, would remedy some of these defects. In addition to possible adoption of the new type fair trade act, adequate enforcement methods should be provided. The enforcement provisions of the fair trade laws, new or old type, are of little value as they now stand. Features of the Minnesota and Idaho acts should be studied for possible adoption. State supervision as provided for by the above two acts would bring to light present violations and would aid in deterring future violations of the act. The state should have the authority to both investigate and prosecute violations of the act. In addition to the granting of injunctions the statute should provide for punishment by fine or jail sentence or both. Treble damages would encourage the injured person to assert his rights.

81. *Ibid.*
82. Idaho Code § 48-309 (Supp. 1955).
83. Idaho Code § 48-308 (Supp. 1955).

An injunction should be granted upon proof of a violation and the plaintiff should not be required to prove damages.

LYLE E. BALL

INSURANCE—MOTOR VEHICLES—SCOPE OF THE OMNIBUS CLAUSE—The typical omnibus clause found in the modern automobile liability policy reads as follows:

> "With respect to the insurance for bodily injury and for property damage liability, the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either. . ."[1]

The omnibus clause is of comparatively recent origin, one authority having cited it as a creature of the late nineteen twenties.[2] Its existence has resulted from the twin factors of legislation and the fact its inclusion in the policy is regarded by the insurance industry as a "sales point."

Legislative action has developed the clause in two ways. Some states have enacted statutes which specifically require insurance policies to contain such clauses.[3] Other states have achieved the same result by the adoption of statutes imputing liability to the owner of the car for the negligence of the driver who had permission to drive it.[4] It has been held that where such a clause is required by statute, the policy will be treated as containing the required provision wheither it is actually present or not.[5]

The moving spirit behind the adoption of laws requiring inclusion of an omnibus clause is the desire to promote the interests of the public as well as the additional insureds.[6] Apparently this consideration of public policy has been the determining basis for construing the application of the clause in some jurisdictions.[7] Although courts have held that the omnibus clause is not am-

1. Taken from a speciment policy issued by the Association of Casualty and Surety Companies, 60 John Street, New York, New York (1954).
2. Appleman, Special Phases of the "Omnibus Clause" in Insurance Policies, 22 A.B.A.J. 613 (1936).
3. Ohio Rev. Code § 4509.01 (Baldwin 1953); Pa. Stat. Ann. tit. 75, § 1253 (Purdon 1953).
4. Cal. Code Vehicle Ann. § 402 (Deering 1948); Mich. Comp. Laws § 256.29 (1948).
5. Maxey v. American Cas. Co., 180 Va. 285, 23 S.E.2d 221 (1942); Employers Mut. Liability Ins. Co. v. Tollefsen, 219 Wis. 434, 263 N.W. 376 (1935).
6. Locke v. General Accident, Fire, and Life Assurance Corp., 227 Wis. 489, 279 N.W. 55, 58 (1938)(dictum).
7. Chatfield v. Farm Bureau Mut. Auto Ins. Co., 208 F.2d 250 (4th Cir. 1953).