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The Unfair Practices Act of Colorado and Its Recent Amendment

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The Unfair Practices Act of Colorado and Its Recent Amendment

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Recency of amendment of and widespread prevalence of discussion concerning the Colorado Unfair Practice Act makes desirable at this time some discussion relative to the origin and purposes of the act, its effect upon trade, and the specific nature of recent changes.

Suggested by, or originating concurrently with, their Federal prototype, the Robinson-Patman Act,[1] the Unfair Practices acts—of which the Colorado statute is typical—now exist in twenty-nine states, and have for their fundamental purpose preservation of competition. Their principal features are prohibitions against area or locality discriminations in price, and prohibition of sales of goods at prices lower than the cost of those goods, with certain exceptions detailed hereinafter. Their social significance is broad by reason of their action as a buffer protecting smaller economic units, and so the general economic community, against "deep cut pricing," "loss-leader" selling, or "hot-shotting" of goods, practices whereby the wealthiest competing participant, able longest to withstand self-inflicted losses, may ultimately drive from the market monetarily weaker foes, deriving for himself the benefits, and inflicting upon the consuming community the detriments incident to monopolistic or oligopolistic enterprise.

The Unfair Practices Act is not a price-fixing law,[2] and is not to be confused as some publicists have, perhaps unwittingly, confused it with the Fair Trade Act,[3] a statute which does authorize the fixing of resale prices of trademarked or branded merchandise, as specifically permitted by the Miller-Tydings Act [4] by price maintenance contracts. With the Fair Trade Act this article is not concerned, the area of its effectiveness being quite different from that covered by the Unfair Practices acts, its purpose being basically different, and its current interest less.

Moreover, it is not the purpose of this article to present a discussion of the economic or sociological reasons for such legislation as the Unfair Practices Act, reasons which the author believes to be of impelling cogency and force, sought to be obscured by partisan and distorted comment recently, but it is rather the intention of the author to attempt to state what the act does and why.

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[1] 15 U. S. C., 13a, enacted June 19, 1936, and purposed to prevent discrimination among competing customers, based on rebates, discounts, advertising service charges, or other preferential pricing procedures applying to interstate commerce.

[2] *Dikeou et al. v. Food Distributors Association,* 107 Colo. 38, 50, 108 P. 2d 529 (1940).

[3] '35 C.S.A., Chapter 165, Section 20, enacted 1937.

[4] 15 U.S.C. 1, enacted August 17, 1937, as an amendment to Section 1 of tht Sherman Act (passed July 2, 1890), legalizing contracts prescribing minimum resale prices for trade marked goods where legal under State law.

Legislation to Preserve Competition

Because the concept of "competition" has been considered basic in our economy since the Industrial Revolution, it is only natural to assume that the law would attempt to preserve so universally sanctioned a societal practice. This is indeed the case, the law having early developed a theory of "unfair competition," consisting in the passing off or attempting to pass off upon the public the goods or business of one person as and for the goods of another,[5] or conducting a trade or business in such manner that there is an express or implied representation to that effect. Eventually, however, it become quite clear that the actual dangers to the highly desiderated "competition" did not lie in the direction covered by common-law protective devices. On the contrary, the system which elevated that concept to so high a station had implicit within it the germ of total destruction of the practice, as in monopoly, or complete perversion thereof, as in oligopoly. Since it was clear that these dangers could only be legislatively met, there were enacted in the United States four major pieces of legislation tending toward that end:

1. The Sherman Act, 15 U.S.C 1, July 2, 1890.
2. The Clayton Act, 15 U.S.C. 12, October 15, 1914.
3. The Federal Trade Commission Act, 15 U.S.C. 44, September 26, 1914.
4. The Robinson-Patman Act, 15 U.S.C. 13a, June 19, 1936.

While to some extent effective in the sphere of interstate commerce, or in areas affecting interstate commerce, effectiveness of the Federal legislation was primarily limited to the area of manufacturing and processing and to the field of wholesale selling. Matters of a purely intrastate nature, and the area of retail sales of goods and services first among them, were hardly regulable or cognoscible under the Federal acts. It is that fact that makes the Unfair Practices acts primarily necessary, and that fact that makes them in effect, although not so limited by their terms or by any other substantive requirement of law, primarily applicable to the field of retail selling.

The Unfair Practices Act of the State of Colorado was first enacted in 1937,[6] originating as House Bill No. 642. It was subsequently amended in 1941,[7] and as amended, appears in 1 C.S.A., Chapter 48, Section 302. It has been again amended by the 37th General Assembly, in 1949, by Senate Bill 108, approved by the Governor May 20, 1949.

Whom The Act Covers

The present act, as did its predecessors, applies to "any person, firm, or corporation doing business in the State of Colorado and engaged in the production, manufacture, distribution or sale of any commodity, or products,

[5] 38 Cyc. 756.
[6] Session Laws of Colorado, 1937, Chapter 261.
[7] Session Laws of Colorado, 1941, Chapter 227.

or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility."[8] However, motion picture films, delivered under lease to motion picture houses, are not deemed a "commodity or production of general use or consumption," and there are expressly exempted from coverage services or products sold, rendered, or furnished by a public utility, subject to regulation by the Colorado Public Utilities Commission, or by any municipal body.

What The Act Prohibits

1. *Area Discriminations.* Persons covered are prohibited from discriminating between different sections, communities or cities or portions thereof, or different locations therein, by selling or furnishing commodities, products, or services at a lower rate in one such section, community or city or portion thereof, or in one location therein, than in another. Under such acts, meaning of the geographical divisions is quite clear, and the word "location" is used as synonymous with "outlet" in business parlance, the intention being to prevent baseless price differentials in different outlets, in the same area, belonging to the same purveyor of commodities, products, or services.

This prohibition, however, is not absolute, but is subject to certain very definite limitations:

a. *Intent:* In order to come within the prohibited area, the person covered must so discriminate "with intent to destroy the competition of" (i) any regularly established dealer in such commodity, product, or service, or (ii) any person, firm, or private, municipal, or public corpoation which "in good faith intends and attempts to become such dealer."

b. *Meeting Competition:* It is specifically provided that "This Act shall not be construed to prohibit the meeting in good faith of a competitive rate."[9]

c. *Grade, Quality, Quantity, and Transportation:* The act specifically permits differentials, area-wise, predicated upon allowance for differences in grade, or quality, or quantity, or based upon differential cost of transportation of a raw material or commodity from the point of production; or of a manufactured product or commodity, from the point of manufacture.

Cases at *nisi prius* under this section of the act have been rare, and there are, to the author's knowledge, none reported by appellate tribunals, primarily because the interdicted practices, being most likely to involve persons engaged in or whose activities affect interstate commerce, come generally within the purview of Federal legislation. However, should the points arise under state law, it is logical to assume that the courts would give to the concepts of "intent" and of "competition" the same basic treatment accorded them with reference to other sections of the act, particularly those concerning sales below cost.

[8] 37th General Assembly, Senate Bill 108, Sec. 1.
[9] *Ibid.*,

2. *Sales Below Cost:* Persons covered, including any person, partnership, firm, corporation, joint stock company, or other association engaged in business in the State of Colorado, are forbidden to (i) sell, (ii) offer for sale, or (iii) advertise for sale "any article or product, or service or output of a service trade" for less than the cost thereof to such vendor.

Not only are sales below cost so prohibited, but one is not allowed to (i) give, (ii) offer to give, or (iii) advertise the intent to give away "any such article, product, service, or output of a service trade."

The prohibition, however, as in the case of area discriminations, is not an absolute one, but subject to various conditional limitations, and to certain clearly stated exceptions:

a. *Intent:* In order to come within the prohibited area, the person covered must do the prohibited act "for the purpose of injuring competitors and destroying competition."[10] It should, of course, be borne in mind that one is normally presumed to intend the usual consequences of his act, and accordingly if it can be shown that competition is injured or destroyed and competitors are injured as a consequence of the act, and that such consequences were reasonably foreseeable by the author of the act, then intent is probably sufficiently established.[10a]

b. *Exceptions:* Prohibitions upon sales below costs, and give-away sales, as above mentioned, do not apply to the following situations:

(i) Closing out, in good faith, the owner's stock, or any part of it, for for the purpose of discontinuing trade in such stock or commodity.[11]
(ii) Sale of seasonal goods.[12]
(iii) Bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation.[13]
(iv) Sale of goods which are damaged or deteriorated in quality.[14]

In each of the above four cases, however, the exception is subject specifically to the proviso that notice be given to the public. The act does not specify the nature of the "notice" which must be given, that being a matter best ascertained in the light of specific circumstances, upon the criterion of actual suitability to purpose of the device or devices adopted.

(v) Judicial sales.[15]
(vi) Sales "in an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product,

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[10] *Id.*, Sec. 3.
[10a] *Supra*, note 2, at page 48.
[11] Senate Bill 108, Sec. 6(a).
[12] *Ibid.*
[13] *Ibid.*
[14] *Id.*, Sec. 6(b).
[15] *Id.*, Sec. 6(c).

or services or output of a service trade, in the same locality or trade area."[16]

Though very little question arises concerning five of the exceptions—save with reference to the question of *bona fides* in the first and the substantive adequacy of notice with reference to the first four, as heretofore mentioned—numerous problems arise as to the sixth exception, which is, or has heretofore been, the basis of defense in the larger number of cases at *nisi prius*. Accordingly, one of the principal provisions of the amendment to the act, recently adopted, has as its purpose clarification of the concepts involved therein.

3. *Secret Rebates:* Like its Federal prototype, the Robinson-Patman Act, the Colorado Unfair Practices Act discountenances secret rebates, and similar allowances, disallowing "the secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions." [17]

a. *Intent:* The interdicted practices are prohibited only where they are "to the injury of a competitor," and where they "tend to destroy competition."

Though of very apparent substantive importance, such provisions of the state acts have as yet been very little interpreted in the courts, since, by reason of their parallelism with Federal legislation, many cases which might otherwise come within their purview are Federally processed. However, inasmuch as there is a very strong similarity between these provisions and those of Robinson-Patman Act, and some provisions of the Clayton Act, there is an abundance of Federal authority at hand to assist in interpretation, should incidence of violations make it requisite.

What Is "Cost"?

As we have seen, the act provides a trinity of prohibitions, but, of them all, the most important is the prohibition against sales below cost, or give-away sales, since it is in that particular area that the Unfair Practices acts go beyond existing Federal legislation, and it is that feature of the acts which makes them of greatest importance in both retail and wholesale selling operations.

1. *Definitions:*

a. *Production:* Cost, when applied to production, includes cost of raw materials, cost of labor, and all "overhead expenses" of the producer.[18]

b. *Distribution:* As applied to distribution, "cost" is the invoice or replacement cost of the article or product, to the distributor or vendor, whichever of those costs may be lower, plus "cost of doing business."

c. *Overhead Expense:* For purposes of the act, "overhead expense" and

[16] *Id.*, Sec. 6(d).
[17] *Id.*, Sec. 7.
[18] *Id.*, Sec. 3(a).

"cost of doing business" are identical terms, and include all costs of doing business incurred in the conduct of such business. Certain enumerated items must be included unequivocally: (i) Labor, including salaries paid executives and officers, (ii) Rent, (iii) Interest on borrowed capital, (iv) Depreciation, (v) Selling cost, (vi) Maintenance of equipment, (vii) Delivery costs, (viii) Credit losses, (ix) Licenses, (x) Taxes, (xi) Insurance, (xii) Advertising.

For a considerable period of time prior to the war, the cases which were brought under Unfair Practices acts primarily concerned themselves with the element of "cost of doing business" or "overhead costs," inasmuch as the cutting of prices was usually not cutting below the actual cost to the seller of the merchandise being sold. More recently, emphasis has shifted because of the so-called "deep-cutting" of prices, which involves sales at a price below actual replacement or inventory cost of the goods so sold. In cases involving the first type of sale, determination of overhead or operating expenses is naturally of vital importance. In cases of the second type, it is not consequential. Since, where the sale is below cost of the goods, violation is clear without considering overhead. Variant economic and merchandising situations, however, will produce varying patterns of violation, and the problem of overhead or operating costs, though not recently pressing, remains of substantial significance.

Our court, in *Dikeou et al. v. Food Distributors Association,*[19] had before it the problem of overhead costs, and finally decided that "in determining the 'cost of doing business' under the Unfair Practices Act, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable and does not disclose an intent to evade the law, the method so adopted should be accepted as correct."[20]

That particular case involved cash and carry cigarette sales, and depended upon a matter of mills for its determination. There was introduced into evidence by the defendant a cost survey, made by an accountant hired by defendant, theoretical in its nature, and attempting to departmentalize the cost of the business, though in fact the books did not reveal such departmentalization. Adopting a rule of "reasonableness" with reference to the problem, the court stated:[21]

> "There is no contention here that the cost must be absolutely exact. Good faith, however, is necessary. The evidence warrants a finding of lack of good faith in the instant case. This involves also the reasonableness of the theoretical separation of the service department and the cash-and-carry department in ascertaining the cost of doing business. The separation is seriously challenged by plaintiff. The Montana case cited above holds that what is meant by 'cost' is 'what busi-

[19] *Supra*, note 2.
[20] *Id.*, Syllabus 4.
[21] *Id.*, at page 46.

ness men generally mean, namely, the approximate cost arrived at by a reasonable rule.' "

The court then went on to state that under the rule, the theoretical departmentalization—a device attempted to be used by many defendants who do not actually departmentalize upon their books—would not be considered a satisfactory or "reasonable" cost basis.

2. *Establishment.* We have noted above that, as applied to distribution, "cost" is invoice or replacement cost to the vendor, whichever is lower, plus overhead costs. An exception, however, is made in the case of articles, goods, or products purchased at forced, bankrupt, or closeout sale, or sale outside of the ordinary channels of trade. In order that such a cost may be considered, for the purposes of the act, the invoice cost, several special conditions must be met:[22]

a. *Segregation:* The goods, articles, or products must be kept separate from those purchased in ordinary channels of trade.

b. *Advertising:* The goods must be advertised and sold as goods purchased other than through normal channels of trade, and the advertisement must state:

(i) Conditions under which goods were purchased.

(ii) Quantity of goods to be sold or offered.

3. *Cost Surveys:* Where there exists, in the trade or industry of which a violator of the act is a member, an established cost survey for the area in which the alleged violations have taken place, then it "shall be deemed competent evidence"[23] to be used in proving violation of the provisions relating to sales below cost.

There have been, from time to time, problems which have arisen with reference to surveys, as with reference to individual cost studies. They are problems of cost accounting, which is, of course, rather an involved field. Presumably the Colorado court, which has not had occasion specifically to pass upon the matter, would apply to such a survey the same rule of reasonableness applied to individual cost studies in the *Dikeou* case.

Some problems may also arise out of a misuse of the cost survey, for, should any industry be so unwise as to attempt to *agree* upon cost of doing business, rather than to determine statistically what is an industry-wide cost, there could be repercussions under the Sherman Act. It is not necessary to state here, of course, that the Unfair Practices acts in no way countenance such abuses, and the Federal courts, particularly in the California cases involving that problem, have been careful to state that the validity of the act was in no way questioned, but only the propriety of conduct of the particular defendants there involved.

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[22] Senate Bill 108, Sec. 4.

[23] *Id.*, Sec. 5.

Enforcement of The Act

Before enactment of the 1949 amendatory legislation, enforcement of the act could be had in several different ways:

1. *Injunction.* Any person, firm, private corporation, municipal or other public corporation, or trade association might, and still may, bring action to enjoin violation of the act.[24] It was specifically held in the *Dikeou* case that a non-profit corporation was properly a party plaintiff,[25] and most of the cases brought under the act have been by such groups heretofore, though, of course, many are instituted by individuals claiming injury.

a. *Damages:* It is not necessary that actual damage to the plaintiff be alleged or proved.[26]

b. *Allegations:* It is sufficient, in an injunction proceeding or prosecution of any person as officer, director, or agent, to allege and prove unlawful intent of the person, firm, or corporation, for whom he acts,[27] any director, officer, or agent being equally responsible for violation with the person, firm, or corporation for whom or which he acts.[28]

2. *Treble Damages.* If a plaintiff does prove damage, then, in addition to the injunctive relief mentioned, he is entitled to recover three times the amount of actual damage sustained.[29]

3. *Criminal Provisions.* Violation of the provisions of the act constitutes a misdemeanor, whether such violation be as principal, agent, officer, or director. Each "single violation" constitutes such misdemeanor, and the penalty consists of a fine of not less than $100, nor more than $1,000, or imprisonment not exceeding six months, or both.[30]

4. *Contracts.* Any contract which is made in violation of the act is illegal, and no recovery may be had upon it by process of law, there being an express proviso protecting payment of patronage refunds by cooperatives.[31]

Each and every one of the foregoing provisions, still extant in the law, has existed in the previous law, and as a consequence the law, in its major substantive particulars, despite the publicity given it of late, is in no way altered by the amendments, which are primarily procedural in their nature.

Moreover, the constitutional validity of the legislation has not been successfully questioned, and the indication is clear that, if questioned, our court would uphold the law, refusing to inquire into the wisdom of the policy behind it:[32]

"The constitutionality of the act is not challenged either in the

[24] *Id.*, Sec. 9(a).
[25] *Supra*, note 2, at pages 41-42.
[26] Senate Bill 108, Sec. 9(a).
[27] *Id.*, Sec. 5.
[28] *Id.*, Sec. 2.
[29] *Id.*, Sec. 9(a).
[30] *Id.*, Sec. 14.
[31] *Id.*, Sec. 8.
[32] *Supra*, note 2, at page 41.

> briefs or assignments of error. Substantially similar acts have been held by four state supreme courts not to be in violation of federal and state due-process-of-law clauses. *Wholesale Tobacco Dealers v. National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 82 P. 2d 3; *Associated Merchants v. Ormesher*, 107 Mont. 530, 86 P. 2d 1031; *Rust v. Griggs*, 172 Tenn. 566, 113 S. W. 2d 733; 86 U. of Pa. L. Rev. 780; *State v. Langley*, 53 Wyo. 332, 84 P. 2d 767. It has been said that the true purpose of acts of this character was to eliminate destructive price competition and the economic effect of the sale of "loss leaders." It also has been argued that free competition may as easily be destroyed by the unfair practices of below-cost selling as by combinations in restraint of trade. Whether such arguments are sound or such legislation is wise or unwise, is solely a problem for the lawmakers. It is not necessary to cite the numerous authorities which have so held."

Injunctive action under the act was, moreover, upheld in *Old Homestead Bread Company et al. v. Marx Baking Company.*[33]

Moreover, in *Smith Brothers Cleaners & Dyers, Inc. v. People ex rel Rogers,*[34] the court, although holding that certain administrative provisions of chapter 113, S. L. '37, relating to cleaning and dyeing trade were invalid procedurally, held that the basic act was perfectly valid, it being a fair practices act, one section of which very much resembles the Unfair Practices Act. As to this legislation, the court said, quoting *Nebbia v. New York* [35]:

> "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflect injury upon the public at large, or upon any substantial group of people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unwarranted interference with individual liberty."

Concluding that there was an adequate basis in policy even for fixing minimum prices in the cleaning industry, the court held the act substantively valid.

The 1949 Amendments

The basic structure of the act remaining, then, intact, and verbatim as previously enacted, the basic changes which have been made are four:

1. *Enforcement.* Inasmuch as the provisions previously existing in the act left its civil enforcement wholly in private hands, and inasmuch as little reliance was, in practice, had upon the criminal sanctions, enforcement of the act tended to gravitate into the hands of trade associations and other

[33] 108 Colo. 375, 117 P. 2d 1007 (1941).
[34] 108 Colo. 448, 119 P. 2d 623 (1941).
[35] 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940.

corporate bodies, who were faced with a nearly impossible task, both from the point of time involved, and from the point of view of finance. The situation was not unlike that which had faced many other states subsequent to enactment of their basic Unfair Practices legislation, and that problem has been elsewhere solved by provision for administrative processing of civil enforcement features.

Accordingly, Section 9 of the Act was amplified and broadened to give certain administrative powers to the Director of Revenue:

a. *Powers of Director:* Without prejudice to any of the private rights of enforcement elsewhere detailed, the act provides that "the Director of Revenue of the State of Colorado shall, as an incident to and power of his office, have like and similar powers to those above set forth, and it shall be his duty, upon showing by any person, firm, private corporation, municipal corporation, or trade association, that there is cause or reason to believe that any person or persons subject to the provisions of this Act are violating any term or provision of Section 1 to 7 hereof, inclusive, to prosecute actions for violation of any of the said provisions and of all provisions of this Act, and seek injunctions or restraining orders to enjoin the continuance thereof by any defendant or defendants."[36]

b. *Mandatory Action:* It is mandatory that the Director seek injunctive relief or restraining order to enjoin continuance of violation if any person, firm, corporation, or trade association, in writing and under oath, presents a statement setting forth facts sufficient to constitute a *prima facie* case of violation, and he is empowered for that purpose to sue in the courts.[37]

c. *Counsel:* It is made the duty of the Attorney General and every District Attorney, when requested by the Director, to advise and consult with him concerning institution and prosecution of actions provided for, and to act as counsel, but the Director may select, appoint, and recompense from public funds any attorney-at-law as special prosecutor.[38]

d. *Rules and Regulations:* The Director is given authority to promulgate rules and regulations not inconsistent with the provisions of the act and to publish the same.[39]

e. *Finance:* Provision is made for financing such arrangements by means of a license, at an annual fee of $1.00, required of all persons, firms, corporations, or organizations now required to have store licenses under state law. Such licenses are to issue for the same period as store licenses, and the proceeds are to be credited to the Department of Revenue Administration Fund for enforcement of the provisions of the act, and for no other purpose, overplus to be rendered into the general fund at the end of each year.[40]

[36] Senate Bill 108, Sec. 9(a).
[37] *Id.*, Sec. 9(b).
[38] *Id.*, Sec. 9(c).
[39] *Id.*, Sec. 9(d).
[40] *Id.*, Sec. 9(e).

Such enforcement provisions are in no way unusual. Montana provides for enforcement of its act by the Montana Trade Commission, without additional compensation, the Attorney General acting as counsel to the Commission.[41] Utah provides for enforcement by the Utah Trade Commission, which may hold hearings, and institute action for injunctive relief, such proceedings being conducted by the District Attorneys.[42] Idaho has an arrangement almost identical with that we have recently adopted, whereby enforcement is in the hands of the Commissioner of Finance, to be assisted by the Attorney General.[43] Minnesota has created a Department of Business Research and Development, charged with enforcement of a number of acts, including the Unfair Practices Act,[44] while in Kansas,[45] North Dakota,[46] and Wyoming [47] special duties are given to the Attorney General and to State, County, or Prosecuting Attorneys to enforce the civil provisions of the various state Unfair Practices acts.

2 *Evidence:* It is specially provided, because of certain questions arising under Article V of the amendments to the Constitution of the United States, and Article II, Section 18, of the Constitution of the State of Colorado, being those sections dealing with self-incrimination, that any defendant may be required to testify, under subpoena duly issued, or pursuant to the Rules of Civil Procedure, in actions brought under provisions of the act, and that the books and records of such defendant may be introduced into evidence. It is provided, specifically, that no information so obtained may be used as a basis for a misdemeanor prosecution instituted against such defendant.[48]

3. *Advertising:* Because it has for many years been a patent abuse in the retail trade to advertise "loss leaders" which the persons so advertising did not intend to supply, merely to divert persons into the stores of such advertisers, it is made specifically unlawful to advertise goods, wares, or merchandise which the advertiser is not prepared and able to supply in pursuance of such advertisements.[49]

4. *Prima Facie Case:* By reason of the provisions of the Robinson-Patman Act, persons on the jobbers lists, that is, wholesalers buying from jobbers in carload lots, are necessarily able to purchase goods each at the same price, having attained maximum quantities and so maximum quantity discounts, and similarly, it is impossible for them to purchase—save in case of distressed sales—at prices lower than those accorded under circumstances of maximum quan-

[41] Session Laws of Montana, 1939.
[42] 2 Utah Code Annotated, Chapter 4, Sec. 16A-2-14.
[43] Session Laws of Idaho, 1945, Chapter 206, page 387.
[44] Session Laws of Minnesota, 1947, Chapter 567, pages 1004-1013.
[45] '35 General Statutes, Chapter 50, Article 4 (1947 supplement).
[46] '43 Revised Code, Chapter 51-10, page 3440.
[47] '45 Statutes, Volume 3, Chapter 39, Section 402.
[48] Senate Bill 108, Sec. 10.
[49] *Id.*, at 12.

tity discount. In recent times the most patent violations of the act involved in this discussion have been sales of goods, by retailers, at prices below the prices at wholesale, to such persons upon the jobbers lists. Inasmuch as it is clear that, under such circumstances, the goods so sold could not be purchased legally at such prices, it is provided that showing that the sales price is below such minimal wholesale cost is a *prima facie* case of violation, though, of course, it is specifically provided that such *prima facie* case is rebuttable by showing by the defendant that he has purchased the goods at a price below wholesale price, or prices to persons on the jobbers' lists, or by showing that he has in good faith met the legal price of a competitor.

The statutory provision,[50] is merely an embodiment of a procedural standard necessarily arising out of legally required merchandising techniques, and heretofore uniformly applied at *nisi prius,* doing nothing more than establishing the method of proving a *prima facie* case, though allowing very definitely rebuttal by cogent evidence.

5. *Legal Prices of a Competitor:* The principal defense presented in recent times in cases at *nisi prius* under the Unfair Practices acts is that the defendant has been meeting prices of competitors. However, in order to constitute a defense, it is necessary that it be shown that the prices met are the "legal" prices of a competitor. The phrase "legal price" has proven to an extent confusing, and indeed our Supreme Court said, in the *Homestead* case,[51] "As to the phrases, 'legal consideration' and 'legal price,' no court can anticipate the meaning of such words in advance of their use in particular situations. It will be time enough to pass upon their significance as and when questions concerning them arise. Their meaning here as applicable to admitted facts was plain enough."

While defendants frequently present evidence of prices of competitors, that evidence often relates to persons outside the competitive area of the defendant—as in the cases wherein merchants have boasted that they will meet any posted price in a city—or is distant in time, or clearly covers a price concerning the legality of which no inquiry has been made. To be sure, it is unlikely that any business man can know to a certainty the fiscal arrangements of his competitors, but he should at least be put upon inquiry, and made to show *bona fides* in the meeting of deep-cut prices, before being allowed to escape the consequences of below-cost selling upon a plea of "meeting competition." Any other policy leads to circular violations of the act and to basic violation of its principles.

Accordingly, there have been set up in the act, as procedural guides, certain standards of conduct, with relation to "legal price," in keeping with judicial standards adopted in numerous decided cases, and followed uniformly by the Colorado courts at *nisi prius.*

[50] *Id.*, at 13.
[51] *Supra,* note 33, at 380.

In order that a price met be considered a "legal price" within the act, it is incumbent on the defendant to show:

a. Meeting of a specific price or prices;

b. Of a specific competitor or competitors;

c. In an area directly competitive with defendant;

d. At a time or times when such price or prices were actually competitive with those offered by such competitor.[52]

e. Quotation of such price by such competitor on the same or similar goods, wares, or merchandise.[53]

f. Sale or offer of sale of such goods, wares or merchandise of the competitor in the trade area of the defendant.[54]

g. Quotation of price by defendant directly and immediately in an endeavor in good faith to meet the prices quoted by competitor.[55]

h. Making by the defendant of a *bona fide* effort to determine legality of price.[56]

Amendments Primarily Procedural

Again, this matter is not primarily a change in substance of the act, which remains, as to the basic exception, precisely as it has always been, but it is a statement of procedure, a clarification of elements of proof.

The act in question is one of great economic importance. It is one which has been on our statute books for a period of a dozen years, and under which numerous actions have been brought. It is an act around which controversies of policy rage. It should, however, be understood for what it is, and recognized as being not anomalous, but a normal part of our economic system, prevalent in similar form upon the Federal statute books, and those of more than half of all American jurisdictions.

For the somewhat pedantic form of the article the author apologizes to the reader, but states, in explanation, that, copies of the new enactment being not yet widely available, the form of presentation was hoped to be the most useful in which information, perhaps of practical utility, might be presented.

Allan F. Asher, Independence Bldg., Colorado Springs would like to purchase volumes 100 and 104 in order to round out his set of Colorado reports.

George K. Thomas announced the opening of an office at 807 Ernest & Cranmer Building, Denver, on June 1st.

Inadvertently omitted from previous DICTA was notice of the death of Norman A. Hutchinson, member of the Denver Bar Association. Mr. Hutchinson was only 49 at the time of his death on April 29, 1949.

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[52] Senate Bill 108, Sec. 13(1).
[53] *Id.*, Sec. 13(2).
[54] *Ibid.*
[55] *Id.*, Sec. 13(3).
[56] *Id.*, Sec. 13(4).