

said merchandise is usually and customarily sold in the trade area, or areas, where the representation is made.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
SNAP-ON TOOLS CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 7116. Complaint, Apr. 10, 1958—Decision, Nov. 1, 1961

Order requiring the manufacturer of a complete line of tools ranging from simple hand tools to complex electronic devices and automotive testing equipment, to cease entering into restrictive agreements with its independent dealers which unlawfully established resale prices for its products, restricted sales territories and the persons to whom dealers could sell, and provided that dealers, upon termination of their agreements, could not engage in a similar business within the same State for one year.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Snap-On Tools Corporation, hereinafter referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in this respect as follows:

PARAGRAPH 1. Respondent herein is Snap-On Tools Corporation, a corporation organized, existing and doing business under the laws of Delaware. Respondent's principal office and place of business is at 8026 28th Avenue, Kenosha, Wisconsin.

PAR. 2. For a number of years in the past respondent has been, and now is, a manufacturer and nationwide seller of a line of products used by mechanics and industry consisting of wrenches, mechanics' hand tools and associated equipment. Net sales of the respondent during 1956 were \$19,864,878.

PAR. 3. Respondent sells its products directly to many industrial, railroad and governmental users and to approximately eight hundred

independent dealers who resell the products to automobile mechanics and other users.

PAR. 4. Respondent, in the course and conduct of its business in selling its products, ships or causes the products to be shipped from the places of manufacture to the locations of the purchasers in the various states other than the state of manufacture and the District of Columbia, and has been, and now is, engaged in "commerce," as that term is defined in the Federal Trade Commission Act, and there has been a current of trade in commerce in products manufactured and sold by respondent between and among the various states of the United States and in the District of Columbia. Respondent, in the course and conduct of its business of selling its products is in competition in commerce with other manufacturers and sellers of similar products and with dealers in its products.

PAR. 5. Respondent, before selling its products to retail dealers and as a continuing condition of selling to them, requires each dealer to enter into a standard form of written bilateral contract, entitled "Dealer Agreement," containing among others, terms, agreements and conditions providing that:

1. The dealer agrees that he will not sell any of the products purchased from the respondent at a price varying from the retail price fixed by respondent;

2. The dealer shall resell respondent's products only within the geographical limits of the territory described in his agreement;

3. The dealer shall not sell respondent's products to the certain persons or firms specified by name in his agreement;

4. The "Dealer Agreement" may be terminated by the company at any time, and at the termination of the agreement, whether by the respondent or by the dealer, the dealer agrees that he will not engage in a similar business within the state in which he had been selling respondent's products for one year after the termination.

PAR. 6. Respondent has enforced the agreements, conditions and terms of sale described in Paragraph Five.

PAR. 7. Respondent has been and is selling, or attempting to sell its products directly to the persons, firms and other potential customers which the dealers are restricted from selling by the terms of the dealer agreements described in Paragraph Five, subdivision 3, above, which persons, firms and other potential customers are users, not resellers of respondent's products. Respondent also sells directly to other users of its tools which are not specifically excluded from the contracts of the dealers.

PAR. 8. Respondent has agreed with each retail dealer that it will not sell its products to any other dealer in the geographical territory allotted to each such dealer.

PAR. 9. Each of the agreements, conditions of sale, acts practices and methods of competition of respondent described in Paragraphs Five, Six, Seven and Eight, above, and each of the other agreements, acts, practices and methods of competition of respondent taken pursuant and related thereto, either individually or collectively, is in undue restraint of trade in commerce and is being engaged in by respondent for the purpose, or with the effect of:

1. Agreeing with the dealers to fix and to maintain the resale prices of respondent's products in a manner and method not permitted by applicable federal or state statutes;

2. Unduly hindering and restraining competition between respondent and other manufacturers of similar products;

3. Unduly hindering and restraining competition, including price competition, between the retail dealers in the sale of respondent's products to users;

4. Unlawfully depriving the users of respondent's products and the public generally of the advantages of competition, including price competition, with respect to respondent's products;

5. Unreasonably restraining trade and commerce with and among the dealers and that of the dealers themselves by reason of the covenant not to engage in a similar business for a year after the termination of the dealer agreement;

6. Unduly restraining and controlling the operations, independence and business decisions of the dealers in making them subservient to respondent by virtue of its ability to arbitrarily terminate the dealers' agreements which brings into operation the oppressive covenant not to compete;

7. Unduly hindering and restraining the trade and commerce of the dealers by limiting the freedom of such dealers to resell respondent's products to persons, firms and users of their own choice, wherever located.

PAR. 10. Each and all of respondent's contracts, agreements, conditions of sale, acts, practices and effects thereof, as herein alleged, constitutes an unfair act and practice or unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C.A. Sec. 45)

Mr. John F. McCarty for the Commission.

Mr. Harry C. Alberts, Chicago, Ill., and *Mr. Kermit N. Caves*, Kenosha, Wis., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondent, Snap-On Tools Corporation, with entering into and enforcing certain restrictive

and anti-competitive agreements or covenants with the dealers who resell its products, in violation of the Federal Trade Commission Act. At the close of the Commission's case in chief, respondent moved for dismissal of the complaint on the ground that a prima facie case had not been established. On October 5, 1959, the motion was granted in part and denied in part by the hearing examiner.

Upon appeal to the Commission by counsel supporting the complaint, the Commission on January 21, 1960, vacated the hearing examiner's order and remanded the case for further proceedings. Thereafter respondent introduced its evidence. Proposed findings and conclusions have been submitted by both parties, oral argument having been waived, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. Respondent is a manufacturer and distributor of mechanics' service tools and related equipment and appliances, its main factory and offices being located in Kenosha, Wisconsin. Its products are used in such places of business as automotive repair shops, garages, service stations, and machine shops, and also in large industrial plants. The products currently number some 4,000 different items, which range from simple hand tools such as small wrenches and pliers to complicated electronic devices and automotive testing equipment. All of the products are sold under respondent's registered trade name "Snap-On".

3. Respondent markets its products primarily through independent dealers who make periodic calls upon customers and prospective customers within their respective territories. The dealers may aptly be described as "vendors on wheels", in that they operate and sell from walk-in motor trucks in which they carry a stock of the tools most frequently sold. This phase of respondent's business—sales by dealers to garages, service stations, repair shops, etc.—is known as the "mechanic trade".

The other phase of respondent's business is known as the "industrial trade", which includes sales to large industrial plants, railroads, government installations, etc. The dealers are free—in fact are encouraged by respondent—to call on industrial customers. However, there frequently are instances in which the dealers are unwilling, or are unable because of inadequate educational and engineering background, to solicit such business. In such cases respondent uses its own corps of "industrial salesmen" who are employees of respondent rather than independent dealers.

4. Respondent enters into written agreements with its dealers, and it is certain provisions in the form of the agreement which constitute

the principal subject matter of the present proceeding. One of the provisions has to do with the matter of exclusive territories. This is the real issue about which the proceeding centers. In fact, it is the only real controversy remaining in the case, as the other challenged provisions in the agreement have already been eliminated by respondent.

On the subject of exclusive territories, the agreement provides:

The Company hereby assigns to the Dealer, not as an agent, a non-exclusive franchise for the sale of its products only within the territory described below and under the conditions hereinafter outlined. (CX 3A)

While the dealers' territories are frequently referred to by respondent as "assigned territories" or "protected territories" rather than "exclusive territories", it seems clear that the territories are in fact exclusive and are so regarded by both respondent and the dealers. The reference in the provision quoted above to the franchise as "non-exclusive" evidently was intended only for the purpose of reserving to respondent the right, where necessary, to solicit and sell industrial customers.

5. Is the maintenance by respondent of exclusive territories for its dealers illegal? In the examiner's opinion it is not. The dealers, as already stated, operate and sell from motor trucks. Not only do they make periodic calls on customers; they extend credit, collect installment payments, adjust complaints, and replace tools and equipment found to be defective. In the case of certain equipment, they enter into rental arrangements with the customer and periodically collect the amount of rental due.

Moreover, customers frequently go to respondent's branch warehouses and make purchases direct. In such instances the dealers are entitled to their profit on the sale. In the absence of exclusive territories it would be almost impossible to determine the particular dealer to whom the credit was due.

In the circumstances there is merit in respondent's contention that the maintenance of exclusive territories is indispensable to the successful operation of its business; that "confusion and chaos" would result if it were forced to abandon the policy. In the absence of the maintenance of a very large corps of salesmen employees, the practice of exclusive territories for its dealers appears to be the only way in which respondent can be assured that sales territories will be adequately worked, that periodic calls will be made on customers, and that satisfactory service will be rendered customers.

6. Fundamental to consideration of this issue is the fact that competition in the sale and distribution of tools and equipment such as are here involved is very keen. There are many sellers in the field; the industry is highly competitive. The only possible adverse effect

of respondent's exclusive territory policy upon competition is that prospective purchasers are unable to play off one Snap-On dealer against another in the hope of obtaining a lower price. This would seem to be of little practical consequence in view of the fact that there are any number of sources available from which the purchaser can supply his needs.

7. As the examiner understands the authorities, the maintenance of exclusive territories by a seller certainly is not unlawful per se. On the contrary, the practice is unlawful only if it forms a part of a general plan or scheme which is unlawful. No such plan is involved here.

It is therefore concluded that respondent's policy of exclusive territories is not unlawful and that the complaint has not been sustained on this issue. This view appears to be in line with the decision of the Commission in Columbus Coated Fabrics Corporation, Docket No. 6677, and the authorities there cited. While reference was made in the Commission's opinion to the absence of agreement between Columbus and its dealers, it is not understood that that single point was decisive of the case.

8. The complaint also raises the issue of resale price maintenance. As will be seen later, the provision in the agreement relating to this subject has been eliminated by respondent and there is now no resale price maintenance. The provision formerly read as follows:

The Dealer agrees that he will not sell any of the articles purchased by him from the Company at a price varying from the retail price fixed by the Company. Retail prices may be changed from time to time by the Company by written or telegraphic notice to Dealer. Such change in retail price shall become effective immediately unless the notice specifies otherwise. This paragraph of the Agreement shall be operative only in those states in which so-called "Fair Trade Acts" are in effect. (CX 3A)

Insofar as sales to the mechanic trade were concerned, there seems to be no doubt that this provision was within the exemption provided by the amendments made to Section 5 of the Federal Trade Commission Act by the Miller-Tydings and McGuire Acts.

9. As for sales to the industrial trade, the issue is whether there was in fact any resale price maintenance in respect of such sales. The provision quoted above does not expressly except industrial sales. And there is testimony from the former manager of respondent's Albany, New York, branch to the effect that insofar as that branch was concerned the policy of price maintenance was understood as applying to industrial as well as mechanic sales.

On the other hand, there is positive, unequivocal testimony from respondent's principal officers that there has never been any policy or practice of resale price maintenance as to industrial sales; that the

provision in question in the agreement was never regarded as having any application whatever to such sales. It should also be noted that while the quoted provision did not except industrial sales, it does seem to have applied only to "retail" sales, and it is very questionable whether sales to large industrial plants, railroads, governmental agencies, etc., can properly be regarded as retail sales.

On the whole, the greater weight of the evidence on this issue is in favor of respondent. In any event, as already indicated and as will be seen later, respondent no longer has any policy of resale price maintenance in connection with any phase of its business.

10. A further charge in the complaint is that respondent's contract with its dealers provides that "the dealer shall not sell respondent's products to the certain persons or firms specified by name in his agreement." Actually, there appears to have been only one instance in which an agreement undertook to exclude customers. This instance involved a dealer in the Albany, New York, territory, the contract providing in substance that two large industrial companies were excepted from the dealer's territory. These two accounts were handled by respondent's Albany branch office.

The contract in question, which was executed in 1950, represents a single and isolated instance and appears clearly to have been contrary to respondent's general policy and practice. As already pointed out, respondent's dealers are free, and are encouraged by respondent, to solicit and sell industrial customers. The branch managers who negotiated this contract is no longer associated with respondent, relations between the two having been terminated some three years ago. In the examiner's opinion this single instance fails to constitute substantial evidence in support of the complaint on this issue.

11. Finally, the complaint attacks a provision which formerly appeared in the agreement to the effect that upon termination of the agreement the dealer should for a period of one year refrain from engaging in a similar business in the state in which he had been selling respondent's products. The provision read as follows:

It is understood and agreed between the Company and the Dealer that, in consideration of the execution and delivery of this agreement, the Dealer shall refrain from carrying on a similar business within the state or states in which he has been operating under this contract for one year from the date of termination thereof by either the Company or the Dealer (CX 2B)

12. The validity of covenants of this kind turns upon the question of their reasonableness. Here some restriction would appear to be reasonable, particularly in view of the fact that other provisions of the contract seem to contemplate that respondent will repurchase from the dealer all of the stock he has on hand at the time of termination of the relationship, and will also collect all of the dealer's outstanding

accounts with purchasers. At any rate it is respondent's practice to do both of these things.

13. Insofar as the time element of the restriction is concerned—one year—this would seem to be entirely reasonable. However, the geographical limitation imposed—the entire state in which the dealer has been selling—goes too far. It must be remembered that the dealers' territories are relatively small, frequently comprising only one city or even a part of a city. To say that a former dealer must refrain from engaging in a similar business anywhere in the entire state would seem to be unduly restrictive and an unreasonable restraint upon competition. A reasonable limitation would appear to be the area in which the dealer has been selling or possibly the city or county in which his sales territory was located.

14. In only two instances has any attempt been made to enforce this provision in the contract. In these cases suits were brought in 1955 by respondent's Albany, New York, branch manager against two former dealers or subdealers. Both suits resulted in injunctions against the dealers, but the geographical limitation imposed by the court was limited to the areas in which the respective dealers had been selling.

15. There is extended testimony by respondent's officers regarding this litigation. It appears that the Albany branch manager insisted upon the bringing of the suits and in fact contended that under his contract of employment with respondent he had a right to institute the litigation. Respondent's officers finally acquiesced in the bringing of the suits, with the understanding that the branch manager would himself pay all expenses in connection therewith. Also, it appears to have been contemplated by respondent that the suits would be filed in the name of the branch manager rather than under respondent's corporate name. The branch manager was not an officer of the corporation. Respondent's officers testified that the first knowledge they had of the use of the company's name was when they were supplied with a copy of the injunction. As already indicated, the branch manager in question is no longer connected with respondent, relations between the two having been terminated some three years ago.

16. There remains the question whether there is any necessity for the issuance of an order to cease and desist in connection with the geographical limitation imposed upon former dealers. The entire provision restricting former dealers from engaging in a similar business was dropped from the revised form of contract adopted by respondent in January 1958 (CX 3A-B), and in June 1958 all outstanding agreements with dealers were amended to provide, among other things, that—

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Any provision of the dealer agreement providing that the dealer shall refrain from carrying on a similar business for one year following termination of the dealer agreement is hereby cancelled. (CX 4)

17. The amendment also provided for cancellation of the entire provision relating to resale price maintenance.

18. Thus the restriction upon former dealers as to engaging in a similar business has been discontinued entirely, as has also the policy of resale price maintenance. True, the formal, written action amending the dealer agreements did not take place until June 1958, which was some two months after the issuance of the Commission's complaint. Actually, however, the discontinuance of the two policies was already in effect and had been for a substantial period of time. The action of June 1958 served merely to give formal written expression to changes which were already in effect.

19. There is positive, convincing testimony from respondent's principal officers that the discontinuance is complete and permanent; that the practices will never be resumed. The hearing examiner was impressed with the testimony and with the character of the witnesses. There is no reason to fear any resumption of the practices in the future.

20. In these circumstances neither the public interest nor any other useful purpose would be served by the issuance of an order to cease and desist.

21. In summary, it is concluded that the complaint has not been sustained except as to the issue of the geographical limitation upon the right of former dealers to engage in a similar business, and that as to this issue an order to cease and desist is unwarranted in view of the discontinuance of the restriction.

ORDER

It is ordered, That the complaint be, and it hereby is dismissed.

OPINION OF THE COMMISSION

By ELMAN, Commissioner:

This is an appeal from the hearing examiner's dismissal of the complaint.

Respondent, Snap-On Tools Corporation, manufactures a complete line of tools ranging from simple hand tools, such as small wrenches and pliers, to complex electronic devices and automotive testing equipment. Users of these products cover an equally wide range, from automobile mechanics to the largest industrial corporations.

Prior to 1950, respondent's products were sold through a distribution system in which its dealers were employees of the company. In

1950-51 this system was changed; under the new contracts the dealers were to be not employees or agents of the company but independent businessmen. At the same time, however, substantial control was retained over their operations by certain restrictive provisions which are the basis of the Commission's complaint.¹

The complaint alleges that respondent has required its dealers to enter into contracts which have, *inter alia*,

- (1) established resale prices for respondent's products,
- (2) restricted the territory within which, and the persons to whom, each dealer may sell these products, and
- (3) provided that, upon termination of his dealership agreement, a dealer may not engage in a similar business within the same state for a period of one year.

It charges that these restrictions, considered either individually or collectively, constitute unfair acts and practices, or unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

This is the second time this case is before the Commission on review.

Upon a motion to dismiss made by respondent at the close of the case-in-chief, the hearing examiner on October 5, 1959, held that a *prima facie* case had been proved on the issues of resale price maintenance and the restrictions against former dealers engaging in a similar business, but had not been made on the issues of exclusive territories and restrictions of the customers to whom dealers may sell. On appeal by counsel-in-support-of-the-complaint, the Commission on January 21, 1960, reversed the examiner's order, pointing out that "the complaint, in addition to challenging the legality of each of the conditions and limitations included in the contracts, strikes generally at the respondent's over-all course of dealing and places in issue the broad question of whether the respondent's entire method of doing business, including the imposition upon its dealers of all of the terms and conditions of the contracts and the use of all of the acts and practices engaged in pursuant thereto, considered together, constitute a restraint of trade in violation of the Federal Trade Commission Act."

The Commission held, therefore, that the ruling of the hearing examiner "based on considerations relating to separate fragments of the broad issue so presented, rather than to the issue as a whole," was erroneous, and that the motion to dismiss the complaint should have been denied *in toto*. Accordingly, the case was remanded with the instruction that the question of whether the maintenance of exclusive territories and the restriction of the dealers' customers contribute to

¹ In addition to the over 900 independent dealers who form the major part of its distribution system, respondent also employs salesmen who make direct sales to certain larger users of its products.

the illegality of the arrangement should be considered in its final disposition.

This direction was ignored, inexplicably,² in the initial decision of the examiner entered on remand, after the presentation of respondent's case. Despite the fact that his prior dismissal order had been reversed by the Commission because he had followed such a procedure, the examiner again considered separately and seriatim, as if each existed in isolation, the legality of the various restrictions upon respondent's dealers. Concluding that the complaint had not been sustained as to any of these practices, with the exception of one which had been discontinued, he dismissed the complaint.

Upon consideration of the full record, we are confirmed in the view expressed in our earlier opinion that all of the practices complained of should be considered as related and component parts of an entire course of dealing. Viewed in this way, we find that they constitute unfair acts and practices, and an unfair method of competition, in commerce in violation of Section 5 of the Federal Trade Commission Act.³

The basic issue here is, what degree of control may a manufacturer exercise over independent dealers who purchase and resell its products?

As already pointed out, respondent in 1950-51 changed from a system of distribution through employees of the company to one of independent dealers. At the same time it sought to retain control over these dealers by means of the restrictive provisions of its dealer agreements. But restrictions which are lawful when imposed on agents or employees of the company may be unlawful when imposed on independent businessmen. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States v. General Electric Co.*, 272 U.S. 476 (1926). Nor is it a novel principle of antitrust law that what a company may do within its own organization, it may not be able to do by agreement with others.

Basic guidelines for determining the scope of permissible restrictions upon independent dealers were laid down by the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra*. Although the restrictions upon distributors there considered were not identical to those here, their effect was much the same. Quoting the opinion of the lower court in *John D. Park & Sons v. Hartman*, 153

² It should not be necessary to repeat here the elementary proposition that under no proper conception of the "independence" of a hearing examiner is he free to ignore or disregard applicable provisions and rulings of law, including judicial mandates and agency instructions.

³ As examination of the individual provisions, *infra*, reveals, we believe that at least the majority of them are unlawful even when viewed alone. It is unnecessary, however, to make such a finding here.

Fed. 24 (C.A. 6, 1907), the Supreme Court summarized the effect of these restrictions:

Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant [manufacturer] it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers, to maintain prices and stifle competition, has been brought about. 220 U.S., at 400.

The Court concluded that "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic", and that the restrictions which prevented this competition violated the Sherman Act.

Since the *Dr. Miles* case, the Supreme Court has repeatedly—and most recently in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960)—struck down vertically imposed restrictions upon competition at the dealer level as violations of the Sherman Act, *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); and of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

In considering the lawfulness of Snap-On's distribution system, we are not dealing with a "single transaction, conceivably unrelated to the public interest." *Dr. Miles v. Park*, *supra*. As in the cases cited above, our inquiry is not whether a particular restraint upon an individual distributor is illegal *per se*, but rather whether all of the restraints imposed upon all of the respondent's dealers suppressed competition in the distribution of its products. Acts which may be lawful in themselves have long been held unlawful where they form part of a course of action unreasonably in restraint of competition. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

1. Exclusive Territories:

The examiner focused his attention primarily upon the territorial restrictions imposed by respondent's dealership agreements, terming this "the only real controversy remaining in the case." Each of these dealership agreements provided:

2. The Company hereby assigns to the Dealer, not as an agent, a non-exclusive franchise for the sale of its products only within the territory described below and under the conditions hereinafter outlined: ⁴

The examiner stated that the maintenance of exclusive territories by a seller is not unlawful *per se* but only if the practice forms a part

⁴ The word "non-exclusive" in this provision meant only that Snap-On reserved the right to sell directly to consumers in the territory.

of a general plan or scheme which is unlawful. The examiner concluded, "No such plan is involved here."

It is clear from the testimony of respondent's own officials, however, that the provision for exclusive territories was part of the over-all distribution plan which encompassed all of the restrictions here involved, and was designed to prevent competition among its dealers. More specifically, exclusive territories buttressed the resale price maintenance provision by preventing all competition, including price competition, among respondent's dealers.

The relationship of respondent's territory and price restrictions was also recognized by the examiner, who stated that the only effect of the former is "that prospective purchasers are unable to play off one Snap-On dealer against another in the hope of obtaining a lower price." This, he thought, established the legality of these restrictions. But we think that precisely the converse is true. "Playing off" one dealer against another "in the hope of obtaining a lower price" is the essence of competition, and these provisions deprived the public of the benefit of "whatever advantage may be derived from competition in the subsequent traffic" (*Dr. Miles v. Park*, *supra*, p. 409) in the distribution of respondent's products. We conclude, therefore, that respondent's system of exclusive dealer territories contributed to the illegality of its over-all distribution plan. Cf. *United States v. Bausch & Lomb*; *Ethyl Gasoline Corp. v. United States*, *supra*.⁵

The territorial restrictions have also worked to the disadvantage of the dealers themselves. The record shows that in at least one instance respondent has used this clause to reduce the territory of a dealer who had increased his business to the point of adding another employee, and in other instances it has prevented Snap-On dealers from expanding their business.

Moreover, the territorial restrictions here in question were imposed upon all of respondent's dealers and not merely upon one or a few of them. This was, of course, essential to achieve the acknowledged purpose of preventing competition among them.

We have here, therefore, a series of restrictive provisions imposed upon all distributors that have the same destructive effects on competition as the horizontal allocations of territory condemned in *United*

⁵ Cf. *United States v. Volkswagen of America, Inc.*, 182 F. Supp. 405 (D.N.J., 1960), where Judge Forman denied defendant's motion to dismiss that part of the complaint dealing with assignment of exclusive dealer territories, on the ground that the Government had alleged that this practice was used in aid of resale price-fixing. Cf. *Reliable Volkswagen Sales and Service Co., Inc. v. World-Wide Automobile Corp.*, 182 F. Supp. 412 (D.N.J., 1960).

States v. Addyston Pipe & Steel Co., 85 Fed. 271 (C.A. 6, 1898), and are no less unlawful.⁶

The cases relied upon by respondent are of little aid here. *Schwinn Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md., 1956), affirmed, 239 F. 2d 176 (C.A. 4, 1956), cert. denied, 355 U.S. 823, and *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (C.A. D.C., 1957), cert. denied, 355 U.S. 822, involved the entirely different situation of exclusive franchises where the manufacturer agreed to sell to no other dealer in a designated area. No restraint upon the dealer was involved.⁷ Somewhat closer to the present case is *Boro Hall Corp. v. General Motors Corp.*, 124 F. 2d 822 (C.A. 2, 1942), rehearing denied, 130 F. 2d 196, cert. denied, 317 U.S. 695 (1943), in which the court upheld an automobile manufacturer's right to prohibit one of its dealers from establishing a used car lot beyond its designated "zone of influence." The case did not, however, concern the dealer's right to sell beyond this zone; and, in any event, it involved only a single transaction and not a series of agreements having the effect of eliminating competition among all dealers concerned. See *Dr. Miles v. Park*, *supra*, p. 407.⁸

Respondent's claimed justification of its exclusive territorial agreements is that the prevention of competition among its dealers is essential to the orderly marketing of its products. Be that as it may, the law is clear that the public is entitled to the benefit of competition on the dealer level. This same argument was specifically considered and rejected by the Supreme Court a half-century ago in the *Dr. Miles* case, and we need not dwell on it any longer.

Nor do we concede that our holding here will have the dire consequences envisioned by respondent and the examiner. There is nothing to prevent Snap-On from assigning areas of primary responsibility to its dealers and insisting that they provide adequate sales coverage

⁶ The same conclusion was reached in *United States v. White Motor Co.*, 194 F. Supp. 562 (N.D. Ohio, 1961), where a series of dealer agreements establishing exclusive territories was held to violate Section 1 of the Sherman Act.

See also Kessler and Stern, *Competition, Contract, and Vertical Integration*, 69 Yale L. J. 1, 113: "Anti-cross-selling clauses [in automobile dealer franchise contracts] would seem to violate the section 1 Sherman Act *per se* rule against allocation of territory."

A number of bills which would permit the assignment of "protected" territories in automobile dealer franchise contracts have been introduced during recent sessions of Congress, but none has been enacted. See, e.g., S. 997, S. 2042, S. 2047, S. 2151, and H.R. 881, 86th Cong., 1st Sess. (S. 997 covered a category of "complex mechanical products") H.R. 10201, 86th Cong., 2d Sess.; H.R. 1212, and H.R. 1215, 87th Cong., 1st Sess.

⁷ For a further examination of this distinction, see Rifkind, *Division of Territories, in How to Comply with the Antitrust Laws* (Van Cise-Dunn ed. 1954) 127, 135.

⁸ In *General Cigar Co., Inc.*, D. 1879, 16 FTC 537 (1932), a complaint alleging the use of exclusive dealer territories was dismissed by this Commissioner. Since no majority opinion accompanied the Commission's order, the grounds of decision are unclear. In any event, that case can have little precedential significance now.

and service within these territories.⁹ Similarly, any direct sales made by respondent's branch warehouses may just as easily be credited to the appropriate dealer if his territory is one of primary rather than exclusive responsibility. All this it may accomplish without suppressing or eliminating competition among its dealers.

Respondent also contends that the territorial restrictions of its dealership agreements were unilaterally imposed and, therefore, within the exception provided by *United States v. Colgate & Co.*, 250 U.S. 300 (1919). But the provision here in question was an express term of the "Dealer Agreement" entered into by respondent and each of its independent dealers.¹⁰ As the Supreme Court pointed out in *United States v. A. Schrader's Son, Inc.*, 252 U.S., at 99-100:

It seems unnecessary to dwell upon the obvious differences between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.

2. Resale Price fixing:

Each of respondent Snap-On's dealer agreements contained the following resale price maintenance provision:

The dealer agrees that he will not sell any of the articles purchased by him from the Company at a price varying from the retail price fixed by the Company. Retail prices may be changed from time to time by the Company by written or telegraphic notice to the dealer. Such change in retail price shall become effective immediately unless the notice specifies otherwise. This paragraph of the agreement shall be operative only in those states in which so-called "Fair Trade Acts" are in effect.

Resale price maintenance agreements not within the Miller-Tydings and McGuire Acts are, of course, illegal *per se*. E.g., *Federal Trade Commission v. Beech-Nut Packing Co.*; *United States v. Bausch & Lomb Optical Co.*; *United States v. Parke, Davis & Co.*, *supra*. The question here is whether respondent could avail itself of the exception provided by these Fair Trade Acts. We conclude that it could not.

As already pointed out, all of the restrictive provisions of respondent's dealer agreements must be viewed as integral parts of a distribu-

⁹ See *Rifkind, supra*, n. 7, p. 135.

¹⁰ This difference also distinguishes the present case from *Columbus Coated Fabrics Corp.*, D. 6677, in which the respondent merely requested its dealers not to sell outside their assigned territories.

tion system, one of whose admitted purposes was the prevention of all competition in the sale of respondent's products at the dealer level. Where, as here, such a system violates the Sherman and Federal Trade Commission Acts, its integral parts are illegal, notwithstanding that one or another of them, taken separately, might be lawful under other statutory provisions. Cf. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 720, 724 (1944).

In any event, the resale pricing provisions of respondent's dealer agreements appear to fall within that section of the McGuire Act which provides:

Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. 15 U.S.C. 45(a) (5), 66 Stat. 632.

This provision was construed in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), to prevent a manufacturer which sold some of its products directly to retailers from fixing the resale prices of competing wholesalers to whom it also sold these products.

Although respondent admittedly sells its products both to its dealers and to certain consumers, it argues that its sales are really divided into two categories, the so-called "mechanic trade" to garages, repair shops, etc., which is sold entirely by its dealers, and the so-called "industrial trade" to large industrial plants, railroads, government agencies, etc. Sales in the latter category are made both by its dealers and by the respondent directly. Snap-On's officers testified that the price maintenance provision of its dealer contracts applied only to sales in the "mechanic" trade and that it was never understood, either by the company or by its dealers, to apply to "industrial" sales. Although a contrary understanding was expressed by one of Snap-On's former branch managers, the examiner accepted respondent's contention in this regard. Respondent also argued, and the examiner agreed, that respondent's industrial sales were not "retail" sales within the meaning of the price maintenance provision of its dealer agreements.

We cannot agree with the examiner's conclusion. The plain language of respondent's price maintenance provision applied to all sales made by its dealers. For the same reason that the courts are reluctant to consider parol evidence concerning the meaning of a written contract, we also are reluctant to credit oral representations which seek to negative the plain meaning of this provision of respondent's written dealer agreements.

More important, although respondent may have distinguished, for some purposes, between the so-called "mechanic" and "industrial" trades, these categories are obviously not capable of precise definition. Respondent's products are sold to all conceivable users of a wide variety of tools, and we find in the record no definition by which a dealer could tell whether for a particular sale he was or was not bound by his contract's resale price provision.

In any event, it is clear that respondent did compete with its dealers for sales in the "industrial" trade since its dealers often made sales at the branches or plants of companies to whose central purchasing offices respondent at the same time made direct sales.

The situation here is strikingly similar to that presented in *Esso Standard Oil Co. v. Secatore's Inc.*, 246 F. 2d 17 (C.A. 1, 1957), cert. denied, 355 U.S. 834. In that case the plaintiff sold gasoline both to retail dealers and to large "commercial accounts," such as truck or taxicab fleets. In many cases, however, the retail dealers also sold to the same large fleet operators by delivering gasoline to individual trucks or taxicabs driven to their stations. The court, while recognizing the differences in these sales techniques, concluded that Esso and its retail dealers nevertheless competed for this business, and that, under *McKesson*, Esso was not protected by the Miller-Tydings and McGuire Acts in fixing its dealers' resale prices. The court further held that this exclusion applied to all of Esso's sales and not merely to that portion in which it competed with its retail dealers.

In a concurring opinion, Judge Aldrich reached the same result on the ground that both Esso and its dealers were "retailers" within the meaning of the McGuire Act proviso. In his view, a retailer, for purposes of the Fair Trade Acts, includes anyone who sells to the ultimate consumer.

Under either of these interpretations Snap-On is clearly barred from fixing the prices at which its dealers may sell to any customers.

Finally, respondent asserts, and the examiner held, that the resale price maintenance provision of its dealer agreements was "discontinued" at some unspecified time prior to the issuance of the complaint and was specifically cancelled by written amendment to the agreements some two months after the complaint was issued. We cannot agree that this "discontinuance" of the pricing provision, when the Commission's hand was already on respondent's shoulder, in any way vitiated its illegal nature or made its injunction less necessary.

For the period prior to the written amendment the price-fixing provision remained in the dealer contracts and respondent's claim of discontinuance amounts merely to a contention that it did not seek to enforce the provision. But failure of enforcement will not justify an

otherwise unlawful agreement. *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 458 (1922). An agreement to fix prices is forbidden by the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940). And it is therefore an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission v. Motion Picture Advertising Service*, 344 U.S. 392 (1953).

The fact that respondent finally cancelled its resale price maintenance provisions subsequent to the filing of the Commission's complaint does nothing to alter our conclusion. Respondent's claim in this respect is even weaker than that of the defendant in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48. The Supreme Court there reversed the trial court's refusal to enjoin an established antitrust violation allegedly discontinued before issuance of the complaint, commenting that relief should not be denied "by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit." See also *Browning King & Company, Inc.*, D. 7060 (August 2, 1961).

3. Limitation of Customers:

In addition to establishing through its dealer agreements exclusive territories and resale prices, respondent in some instances prevented its dealers from selling to certain "industrial" customers, reserving these accounts for itself. The examiner found that in only one instance was such a restriction imposed by a dealer agreement, and that this did not constitute sufficient evidence to support the allegations of the complaint on this issue. It was made clear in the testimony of respondent's dealers, however, that similar restrictions upon the sale to particular customers were imposed by respondent in cases not specifically provided in the dealer agreements. Although the record does not reveal the extent of this practice, we believe sufficient evidence was introduced to indicate that it formed an integral part of respondent's unlawfully restrictive dealer system, and that in this context it should be prohibited by the order herein. Restrictions of the customers to whom dealers may sell have been condemned when a part of similar distribution arrangements. *Ethyl Gasoline Corp. v. United States*; *United States v. Bausch & Lomb*, *supra*. In the latter case the Supreme Court pointed out:

A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act. (p. 721).

See also *Baldwin-Lima-Hamilton Corp. v. Tutnall Measuring Systems Co.*, 169 F. Supp. 1 (E.D. Pa. 1958), *affd.* 268 F. 2d 395 (C.A. 3, 1959); *United States v. White Motor Co.*, *supra*.¹¹

4. Restrictions after Termination of Dealer Contracts:

The final restrictive provision of respondent's dealer agreements provided:

It is understood and agreed between the Company and the Dealer that, in consideration of the execution and delivery of this agreement, the Dealer shall refrain from carrying on a similar business within the state or states in which he has been operating under this contract for one year from the date of termination thereof by either the Company or the Dealer.

The examiner found this to be a reasonable and lawful restriction except to the extent that it prohibited a dealer from engaging in the same business in the entire state or states in which he had previously operated and not merely in his previous territory. Since the examiner also found, however, that the entire restriction had been discontinued in the same manner and at the same time as the resale price maintenance provision, he concluded that no order was necessary to correct this single unlawful aspect.

We cannot agree that in the context of this case this provision is a lawful one. Respondent's dealer agreements specifically provide for their termination by either party at any time, and may thus be terminated by the company upon violation by a dealer of the territorial, price or customer provisions, which we have already found unlawful. The restriction upon dealers' activities after termination provided a potent means of insuring compliance with these unlawful provisions. It is clearly an integral part of respondent's unlawful distribution system and should be enjoined by the order herein. *Dicograph Products, Inc. v. Federal Trade Commission*, 217 F. 2d 821 (C.A. 2, 1954), *cert. denied*, 349 U.S. 940; *Mytinger & Casselberry, Inc.*, D. 6962 (Sept. 28, 1960).

For the reasons stated in our discussion of respondent's resale price maintenance agreement, the alleged failure to enforce these post-termination restrictions, and their alleged discontinuance, afford respondent no defense in this proceeding.

Conclusion:

We conclude that the allegations of the complaint have been fully substantiated by the proof, and that an appropriate order should be entered dissipating the effects of the illegal practices found and prohibiting their continuance or future resumption. Although some of these practices might not be illegal standing alone, we believe it neces-

¹¹ This does not conflict with *Roux Distributing Co.*, D. 6636, which merely held that a limitation on the customers to whom a purchaser may resell is not illegal *per se*.

sary in the public interest, and in the exercise of our responsibility to provide effective relief, that the order ban them individually at least until such time as their collective effect upon competition has been completely erased. Cf. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957). If and when this has been accomplished, the Commission will entertain any application for modification of the order as may be appropriate.

The appeal of counsel supporting the complaint is granted. The initial decision of the hearing examiner is hereby vacated, and in lieu thereof the Commission is issuing its own findings as to the facts, conclusions, and order in accordance with this opinion.

Commissioner MacIntyre did not participate in the decision of this case.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named corporation on April 10, 1958, charging it with violating Section 5 of the Federal Trade Commission Act in connection with the sale and distribution of mechanic's service tools and related equipment and appliances by entering into and enforcing restrictive contracts or agreements with dealers in said products, and engaging in acts and practices pursuant to such agreements, with the purpose or effect of hindering, restraining, suppressing and preventing competition in the distribution of said products. In its answer, respondent denied the charges.

At the close of the introduction of evidence in support of the complaint, respondent filed a motion to dismiss the complaint on the ground that a *prima facie* case had not been established. By order filed October 5, 1959, the motion was granted in part and denied in part by the hearing examiner. Upon appeal to the Commission by counsel supporting the complaint, the Commission, on January 21, 1960, vacated the hearing examiner's order and remanded the case for further proceedings. Thereafter, further hearings were held before the hearing examiner and testimony and other evidence in opposition to the allegations of the complaint were received into the record. In an initial decision filed January 6, 1961, the hearing examiner found that the charges had not been sustained by the evidence and ordered that the complaint be dismissed.

Counsel supporting the complaint filed an appeal from said initial decision and the Commission, after considering said appeal and the entire record, has determined that the appeal should be granted and that the initial decision should be vacated and set aside. The Commission now makes this its findings as to the facts, conclusions drawn therefrom, and order to cease and desist, which, together with the

accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Snap-On Tools Corporation, is a corporation organized under the laws of the State of Delaware, with its principal office and place of business at Kenosha, Wisconsin.

2. Respondent is now and for many years has been engaged in the manufacture, sale and distribution of mechanic's service tools and related equipment and appliances. Since 1951, respondent has marketed a substantial portion of its products through independent dealers to garages, repair shops, service stations, industrial plants, railroads, Government installations, and other users of such products. Respondent has also sold directly to certain users through its own salesmen.

3. Respondent causes its products, when sold, to be shipped from the place of manufacture to the locations of the purchasers in various states other than the state of manufacture, and the District of Columbia, and maintains, and at all times mentioned herein has maintained, a course of trade in interstate commerce in said products.

4. In the course and conduct of its business of selling its products, respondent is now, and during the time mentioned herein, has been in competition in interstate commerce with other manufacturers and sellers of similar products and with dealers in its products.

5. Before respondent sells its products to any of its dealers, it requires each dealer to enter into a standard form of written contract, entitled "Dealer Agreement", which contains, *inter alia*, the following provisions:

The Company hereby assigns to the Dealer, not as an agent, a non-exclusive franchise for the sale of its products only within the territory described below and under the conditions hereinafter outlined:

* * *

The dealer agrees that he will not sell any of the articles purchased by him from the Company at a price varying from the retail price fixed by the Company. Retail prices may be changed from time to time by the Company by written or telegraphic notice to the dealer. Such change in retail price shall become effective immediately unless the notice specifies otherwise. This paragraph of the agreement shall be operative only in those states in which so-called "Fair Trade Acts" are in effect.

* * *

It is understood and agreed between the Company and the Dealer that, in consideration of the execution and delivery of this agreement, the Dealer shall refrain from carrying on a similar business within the state or states in which he has been operating under this contract for one year from the date of termination thereof by either the Company or the Dealer.

6. Although respondent has reserved the right to sell directly to certain users of its products in territories assigned to its dealers, both respondent and its dealers understand the aforementioned provision relating to an assigned franchise or territory as restricting the geographical area in which a dealer may sell respondent's products to the area specified in the dealer's contract. The testimony of respondent's officials fully supports a finding that said provision in the dealer contracts was for the purpose of preventing competition among respondent's dealers.

Respondent has also prevented certain of its dealers from selling to particular customers specified by respondent and in at least one instance this restriction was imposed by written agreement. The evidence shows that this practice formed an integral part of respondent's distribution system.

7. The aforesaid resale price maintenance provision was a component part of a plan or policy to prevent competition among respondent's dealers. There is conflicting testimony as to whether respondent intended this provision to apply to sales to so-called "industrial" users of its products. This provision by its express terms, however, applies to all sales made by respondent's dealers, including sales to the "industrial" trade. The record also discloses that respondent has not identified the "industrial" users of its products with such precision that its dealers would be able to determine in all instances whether certain customers come within that classification. Moreover, it is clear from the evidence that respondent has, in fact, competed with its dealers for sales to certain "industrial" users of its products.

8. In certain instances, respondent has threatened to enforce and in other instances has attempted to enforce the aforesaid provision in its dealer agreements that the dealer shall for a period of one year after termination of the agreement refrain from engaging in a similar business within the state or states in which he has sold respondent's products. Said provision is unduly restrictive, at least as to the geographical limitation imposed on the dealer. Since the agreement may be terminated by respondent upon violation by the dealer of any provision of the contract, the post termination covenant not to compete has the effect of insuring compliance with the aforesaid provisions of the contract which restrict the territory within which each dealer may sell respondent's products and which establish resale prices for such products. Said post termination covenant not to compete is an integral part of a plan or policy to prevent or eliminate competition in the distribution of respondent's products.

9. Respondent has introduced evidence to show that subsequent to the issuance of the Commission's complaint it amended its dealer agreements to eliminate the provision relating to resale price maintenance.

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nance and the provision restricting former dealers from engaging in a similar business, and its officials have testified that respondent does not intend to resume the use of such provisions in its dealer agreements. The showing made by respondent with respect to alleged discontinuance does not constitute sufficient basis for the Commission to withhold issuance of an effective order to protect the public against any resumption of the illegal practices found.

10. The aforesaid provisions of respondent's dealer agreements which have been imposed upon all of respondent's dealers are integral parts of a distribution system established for the purpose of preventing competition in the sale of its products at the dealer level, and such provisions and the acts and practices engaged in pursuant thereto have had the effect of preventing, restraining, lessening and suppressing competition in the sale of such products to the ultimate consumer.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The aforesaid acts and practices of respondent, as herein found, were all to the prejudice and injury of the public and constituted unfair acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, Snap-On Tools Corporation, a corporation, its officers, directors, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of mechanic's service tools and related equipment and appliances in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Putting into effect, maintaining or enforcing any merchandising or distribution plan or policy under which contracts, agreements or understandings are entered into with dealers in or distributors of its products which have the purpose or effect of:

(a) Limiting, allocating or restricting the geographical area in which, or the persons or classes of persons to whom, any dealer or distributor may sell such products; or

(b) Fixing, establishing or maintaining the prices at which such products may be sold by dealers or distributors; or

(c) Requiring or inducing any dealer or distributor to refrain from selling such products in any specified geographical area or to any specified persons or classes of persons; or

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(d) Preventing or restricting any dealer or distributor who has dealt in respondent's products from dealing in competitive products after he has discontinued dealing in respondent's products.

2. Entering into, continuing or enforcing, or attempting to enforce, any contract, agreement or understanding with any dealer in or distributor of its products for the purpose or with the effect of establishing or maintaining any merchandising or distribution plan or policy prohibited by paragraph 1 of this order.

It is further ordered, That respondent, Snap-On Tools Corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission. Commissioner MacIntyre not participating.