

the subject of the sale does not come within the concept of retailable items contemplated by the statute, there can be no recognition in any industry of the sale of the goods or services as retail, for purposes of the Act, even though the nomenclature used by the industry members may put a retail label on the transaction. (See *Wirtz v. Steepleton General Tire Co.*, 383 U.S. 190; *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290.)

## SALES NOT MADE FOR RESALE

**§ 779.330 Third requirement for qualifying as a “retail or service establishment.”**

The third requirement for qualifying as a “retail or service establishment” within that term’s statutory definition is that 75 percent of the retail or service establishment’s annual dollar volume must be from sales of goods or of services (or of both) which are not made for resale. At least three-fourths of the total sales of goods or services (or of both) (measured by annual dollar volume) must not be made for resale. Except under the special provision in section 3(n) of the Act, discussed in § 779.335, the requirement that 75 percent of the establishment’s dollar volume be from sales of goods or services “not for resale” is a separate test and a sale which “for resale” cannot be counted toward the required 75 percent even if it is recognized as retail in the particular industry. The prescribed 75 percent must be from sales which are both not for resale and recognized as retail.

**§ 779.331 Meaning of sales “for resale.”**

Except with respect to a specific situation regarding certain building materials, the word “resale” is not defined in the Act. The common meaning of “resale” is the act of “selling again.” A sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold, whether in their original form, or in an altered form, or as a part, component or ingredient of another article. Where the goods or services are sold for resale, it does not matter what ultimately happens to such goods or services. Thus, the fact that the goods

are consumed by fire or no market is found for them, and are, therefore, never resold does not alter the character of the sale which is made for resale. Similarly, if at the time the sale is made, the seller has no knowledge or reasonable cause to believe that the goods are purchased for the purpose of resale, the fact that the goods later are actually resold is not controlling. In considering whether there is a sale of goods or services and whether such goods or services are sold for resale in any specific situation, the term “sale” includes, as defined in section 3(k) of the Act, “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” Thus, under the definition sales by an establishment to a competitor are regarded as sales for resale even though made without profit. (*Northwestern-Hanna Fuel Co. v. McComb*, 166 F. 2d 932 (CA-8).) Similarly, sales for distribution by the purchaser for business purposes are sales for resale under the “other disposition” language of the definition of “sale” even though distributed at no cost to the ultimate recipient. (See *Mitchell v. Duplicate Photo Service*, 13 WH Cases 71, 31 L.C. Par. 70,287 (S.D. Cal. 1956) accord, *Mitchell v. Sherry Corine Corporation*, 264 F. 2d 831 (CA-4) (sale of meals to airlines for distribution to their passengers).) It should be noted, however, that occasional transfer of goods from the stock of one retail or service establishment to relieve a shortage in another such establishment under the same ownership will not be considered as sales for resale.

**§ 779.332 Resale of goods in an altered form or as parts or ingredients of other goods or services.**

Sale for resale includes the sale of goods which will be resold in their original form, in an altered form, or as a part or ingredient of another article. A sale of goods which the seller knows, or has reasonable cause to believe, will be resold after processing or manufacture is a sale for resale. Thus, sales of parts with the expectation that they will be incorporated in aircraft and that the aircraft will be sold clearly are sales for resale. (*Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388.) Similarly, the sale of lumber to furniture or box

factories, or the sale of textiles to clothing manufacturers, is a sale for resale even though the goods are resold in the form of furniture or clothing. The principle is also illustrated in cases where the article sold becomes a part or an ingredient of another, such as scrap metal in steel, dyes in fabrics, flour in bread and pastries, and salt in food or ice in beverages. (*Mitchell v. Douglas Auto Parts Co.*, 11 WH Cases 807, 25 L.C. Par. 68, 119 (N.D. Ill., 1954).) The fact that goods sold will be resold as a part of a service in which they are used or as a part of a building into which they are incorporated does not negate the character of the sale as one "for resale." (*Mitchell v. Furman Beauty Supply*, 300 F. 2d 16 (CA-3); *Mayol v. Mitchell*, 280 F. 2d 477 (CA-1), cert. denied 364 U.S. 902; *Goldberg v. Kleban Eng. Corp.*, 303 F. 2d 855 (CA-5).)

**§ 779.333 Goods sold for use as raw materials in other products.**

Goods are sold for resale where they are sold for use as a raw material in the production of a specific product to be sold, such as sales of coal for the production of coke, coal gas, or electricity, or sales of liquefied-petroleum-gas for the production of chemicals or synthetic rubber. However, the goods are not considered sold for resale if sold for general industrial or commercial uses, such as coal for use in laundries, bakeries, nurseries, canneries, or for space heating, or ice for use by grocery stores or meat markets in cooling and preserving groceries and meat to be sold. Similarly, ice used for cooling soft drinks while in storage will not be considered sold for resale. On the other hand, ice or ice cubes sold for serving soft drinks or other beverages will be considered as sales for resale.

**§ 779.334 Sales of services for resale.**

The same principles apply in the case of sales of services for resale. A sale of services where the seller knows or has reasonable cause to believe will be resold is a sale for resale. Where, for example, an establishment reconditions and repairs watches for retail jewelers who resell the services to their own customers, the services constitute a sale for resale. Where a garage repairs automobiles for a secondhand auto-

mobile dealer with the knowledge or reasonable cause to believe that the automobile on which the work is performed will be sold, the service performed by the garage is a sale for resale. The services performed by a dental laboratory in the making of artificial teeth for the dentist for the use of his patients is a sale of services (as well as of goods) for resale. The services of a fur repair and storage establishment performed for other establishments who sell these services to their own customers, constitute sales for resale. As in the case of the sale of goods, in certain circumstances, sales of services to a business for a specific use in performing a different service which such business renders to its own customers are in economic effect sales for resale as a part of the service that the purchaser in turn sells to his customers, even though such services are consumed in the process of performance of the latter service. For example, if a storage establishment uses mothproofing services in order to render satisfactory storage services for its customers, the sale of such mothproofing services to that storage establishment will be considered a sale for resale.

**§ 779.335 Sales of building materials for residential or farm building construction.**

Section 3(n) of the Act, as amended, excludes from the category of sales for resale "the sale of goods to be used in residential or farm building construction, repair or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry." Under this section a sale of building materials to a building contractor or a builder for use in residential or farm building, repair or maintenance is not a sale for resale, provided, the sale is otherwise recognized as a bona fide retail sale in the industry. If the sale is not so recognized it will be considered a sale for resale. Thus, only bona fide retail sales of building materials to a building contractor or a builder for the uses described would be taken out of the category of sales for resale. (*Sucrs. De A. Mayol & Co. v. Mitchell*, 280 F. 2d 477 (CA-1); *Elder v. Phillips & Buttroff Mfg. Co.*, 23 L.C. Par. 67,524 (Tenn., 1958).) The legislative history of the