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Fair Trade—Non Signer Provisions Held Unenforceable as Violative of Sherman Act

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RECENT DECISIONS

FAIR TRADE—NON SIGNER PROVISIONS HELD UNENFORCEABLE AS VIOLATIVE OF SHERMAN ACT

Plaintiff, a foreign corporation, is a distributor of gin and whiskey in Louisiana. Plaintiff has a price-fixing scheme whereby it tries to maintain uniform retail prices for its products through contracts with retailers, in which the retailers promise to sell at not less than prices stated in plaintiff's schedules. Although, under Louisiana law these agreements were binding upon non-signers, the defendant, a retailer in New Orleans, refused to agree to the price-fixing scheme and sold plaintiff's products at a cut-rate price. Plaintiff sought an injunction relying upon the Miller-Tydings Act, which exempts contracts prescribing minimum prices for the resale of trade-marked commodities from the prohibition of the Sherman Anti-Trust Act, where such contracts are lawful under local law. The Court of Appeals affirmed the District Court which gave judgment for the plaintiff. The Supreme Court with 3 judges dissenting, reversed, holding that the plaintiff's price-fixing scheme was unenforceable in Louisiana as against non-signers, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act, which validated the State Fair Trade Acts in regard to interstate commerce, sanctions only *"contracts and agreements"* and does not contain any non-signer provisions. *Schwegmann Bros. et al.* v. *Calvert Distillers Corp.*, 341 U. S. 384. 71 Sup. Ct. 745, 95 L Ed. 1035 (1951).

The fair trade movement, whether or not economically wise, had attained a signal success in the enactment of the State Fair Trade Acts and the Miller-Tydings Act. Under this legislation, a manufacturer or distributor of trade-marked products could protect his good will in both interstate and intrastate commerce through resale price maintenance contracts apparently binding upon signers and non-signers alike. This decision has resulted in an emasculation of the fair trade movement.

Prior to 1890, the Supreme Court had held that resale price maintenance by contract was valid if it were not an unreasonable restraint of trade. *Fowles* v. *Parke,* 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67 (1889). However, the sole right to vend granted by copyright did not carry with it the right to limit or restrict future sales at a specified price, and a notice in the book that a sale at a different price would be treated as an infringement was held ineffectual as against one not bound by contract or license agreement. *Bobbs-Merill Co.* v. *Straus,* 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086 (1908). Similarly, a patent. *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041 (1913).

The Sherman Anti-Trust Act was passed in 1890, 26 Stat. 209, (1890), 15 U. S. C. sec. 1-7, but its potential was not immediately recognized. It was not until 1911 that it was used to strike down price-fixing contracts between manufacturer and distributors of an article manufactured under secret process, binding the signer and all those who bought from him, the court holding that it amounted to restrain of trade and so far as it affected interstate commerce, invalid under the Sherman Act. *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911).

The manufacturer could, however, in absence of any intent to create or maintain a monopoly, announce in advance the resale prices and refuse to deal with wholesalers and retailers who did not conform to such prices. *U. S.* v. *Colgate & Co.,* 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992 (1919). Also, where the manufacturer maintained genuine agents, not purchasers in disguise, resale price maintenance by contract was not a violation of the Sherman Act. *U. S. v. General Electric Co. et al.,* 272 U. S. 476, 47 Sup. Ct. 192, 71 L. Ed. 362 (1926).

There were disadvantages to the use of refusal-to-sell and agency methods of price-fixing. The former method was never really effective since the manufacturer could not always prevent the retailer from securing his product from another source. The latter method was more effective but subjected the manufacturer to much expense and market risks, which, otherwise, would have been distributed over many independent retailers. 28 Col. L. Rev. 312 (1928).

After the Dr. Miles decision, supra, it was apparent to proponents of price maintenance, that the only solution was legislation. On the national level such legislation was not immediately accepted, and two bills designed to legalize resale price maintenance introduced in 1914 were not approved. H. R. 13305 and 13860, 63rd Cong., 2d Sess. (1914). Similar bills were introduced in each session from the 63rd to 73rd Congress. The Capper-Kelly bill, which was first introduced in 1917, and never enacted although introduced in every session following 1917, to 1933, is representative of the type of federal legislation sought. It envisaged a system of uniform federal legislation which would in effect have established a federal code of fair trade practice. It did not have a non-signer provision. See 3 Vanderbilt L. Rev. 24 (1949). On the state level, resale price maintenance legislation was more successful. In 1931, California enacted the first State Fair Trade Law, modeled after the Capper-Kelly bill. It allowed a manufacturer to establish resale prices binding only upon the distributors who entered into a contract with him. Two years under the law was sufficient to show that unless such contracts could be made binding upon non-signers who had notice of such price-fixing, it could not achieve its purpose. In 1933 California had amended this act to make resale price maintenance binding upon non-signers with notice. Cal. Laws 1931, c 278 as amended by Cal. Laws 1933, c 260. This fair trade law as amended became the model for most state fair trade acts.

In 1936 the U. S. Supreme Court sustained the constitutionality of the California Law and a similar Illinois Fair Trade Law, under the due process clause of the 14th Amendment, but warned in dictum that if such contracts affected interstate commerce they would be invalid under the Sherman Act. *Old Dearborn Distributing Co.* v. *Seagrams Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936); *Pep Boys* v. *Pyroil Sales Co.*, 229 U. S. 198, 57 Sup. Ct. 147, 81 L. Ed. 122 (1936).

These decisions gave the required impetus to state legislation, and by 1937, 42 states had passed Fair Trade Acts. Today all of the states have such laws except Missouri, Texas, and Vermont. These acts have two basic provisions. Section 1, the contract clause, provides that a contract relating to the sale of a commodity which bears the trade-mark, brand, or name of a producer, and which is in fair and open competition with commodities of the same general class produced by others, shall not be invalid by reason of resale price-fixing provisions. Section 2, the non-signer clause, imposes resale price-fixing on non-contracting retailers who have notice of such price-fixing by producer. 2 C C H Trade Regulations Service, sec. 7011 ff.

The Dr. Miles case, supra, remained an impediment to effective use of the state laws, for under this decision the immunity provided price-fixing contracts by the state laws was a nullity if the transaction affected interstate commerce. Producers were accordingly forced to localize their activities by various devices, such as domiciling in each state or establishing genuine agencies with the accompanying disadvantages, in order to come within the pale of intrastate commerce. Once within the pale of intrastate commerce, the price-fixing contracts could be effectively enforced against both signers and non-signers.

To remove this impediment the Miller-Tydings Amendment was enacted as a rider to a Revenue Bill for District of Columbia. 50 Stat. 693 (1937), 15 U. S. C. sec. 1. It excepted from the Sherman Law "contracts and agreements" prescribing minimum prices for the resale of trade-marked commodities where such contracts or agreements were valid under State statute or policy. It was an enabling act to "permit the public policy of the States having 'fair trade acts' to operate with respect to interstate contracts for the resale of goods within these States." H. R. Rep. No. 382, Part I, 75th Cong., 1st Sess. Or as Senator Tydings (co-sponsor) explained it: "What we have attempted to do is what 42 states have already written on their statute books. It is simply to back up those acts, that is all; to have a code of fair trade practices written . . . by each state so that the people may go to the state legislatures and correct immediately all abuses that may develop." 81 Cong. Rec. 7496.

From its enactment, the Miller-Tydings Act had been generally construed as doing "no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful," ergo, as applying to non-signer provisions of the States' Fair Trade Acts. Sen. Rep. No. 2053, 74th Cong., 2d Sess. The Chairman of Federal Trade Commission, which is the official public body entrusted with supervision of trade practices, had acceded to this interpretation. 2 C C H Trade Regulations Service, sec. 7091. The Dept. of Justice instituted no prosecutions because of enforcement of "fair trade" acts against non-signers, and only two cases were presented to the courts, for which it had been contended, unsuccessfully, that the Miller-Tydings Act did not validate the non-signer provisions of the State Fair Trade Acts. *Pepsodent Co. v. Krauss Co.,* 56 F. Supp. 922 (1944); *Calamia v. Goldsmith Bros. Inc.,* 299 N. Y. 795, 87 N. E. 2d 687 (1949). Thus for fourteen years, the business world carried on extensive operations relying upon such a construction.

The majority opinion in the instant case giving a literal interpretation to the words "contracts and agreements" is based primarily upon an argument, reminiscent of the *unius expressio* canon, to the effect that had Congress intended to include the non-signer provision, it would have so expressly provided. The argument is then supported by legislative history, with the court taking the position that the Capper-Kelly bill was the predecessor of the Miller-Tydings bill, and since the words in the former bill could not possibly refer to the then non-existent non-signer provisions of the State Acts, and since the latter bill used similar language as that used in the former bill, the conclusion must be drawn that the draftsmen intended to follow the meaning ascribed to the words as used in the Capper-Kelly bill. The court disregards, however, that the Capper-Kelly bill was presented for the last time (in 1932), previous to the amendment of the Cal. Fair Trade Act in 1933 which added the non-signer provision, previous to the Old Dearborn case supra, which upheld constitutionality of non-signer Fair Trade Acts, and that it was not essentially an enabling act, but envisaged a federal code of fair trade practices. On the other hand, the Miller-Tydings bill was first presented to Congress after many of the States had passed fair trade acts with non-signer provisions and was essentially an enabling act. In short, while the two bills sought the same end, overriding the decision in the Dr. Miles case, supra, they employed different means—the former by direct federal legislation and the latter by validating the State Fair Trade Acts in regard to interstate commerce. It is noteworthy that Mr. Justice Frankfurter in the dissent, using the same legislative history, comes to the conclusion that the words "contracts and agreements" applied to the non-signer provisions of the State Acts.

The effect of the decision in the principal case has been to deprive the State Fair Trade Acts of effectiveness in transactions affecting interstate commerce and has made the Miller-Tydings Act practically meaningless and ineffective. Where formerly a producer entered into fair-trade contracts with retailers in a foreign state could protect his good will, usually built up at great expense, by enforcement of his prices against all retailers selling his products, whether or not they had so contracted, he can now only enforce such contracts against the signatories. Contracting with every outlet is obviously impossible in most cases, and to require such a contract as a basis for enjoining price cutters, cripples the whole resale price maintenance program. It is for this very reason that all of the State Fair Trade Acts include non-signer provisions. See 24 Calif. L. Rev. 640 (1949). It is believed that the present interpretation of the Miller-Tydings Act which disrupts long established business practices and reduces the intent of Congress to a legislative anachronism will soon be met by remedial legislation.

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NEGLIGENCE—MacPHERSON v. BUICK HELD INAPPLICABLE WHERE ALLEGED DEFECT IS OBVIOUS TO USER

Plaintiff was injured when he caught his fingers in an onion topping machine manufactured by defendant. Plaintiff, a remote user, (not in privity of contract with defendant), claimed that the defendant was negligent in manufacturing a dangerous machine in that: (1) the cutters were not guarded and (2) the operator had no means of stopping the machine from where he stood. The trial court denied a motion by defendant to dismiss the complaint and the Appellate Division reversed. The Court of Appeals in affirming the Appellate Division held: the complaint does not state a cause of action in negligence; there is no duty owed by a manufacturer to a remote user when the alleged defects are obvious. *Campo* v. *Scofield,* 301 N. Y. 468, 95 N. E. 2d 802 (1950).

It was the "general rule" at common law that manufacturers and suppliers were not liable for injuries caused by their negligence to anyone except those with whom they had privity of contract. *Winterbottom* v. *Wright,* 10 M. & W. 109, 152 Eng. Rep. 402 (1842). Reasons advanced in support of this rule were that the manufacturer could not foresee injury to persons other than the purchaser, *Huset* v. *J. I. Case Threshing Machine Co.,* 120 F. 865 (8th Cir. 1903), and that industry could not bear the onus of responsibilty to so large a class of people. *Longmeid* v. *Holliday,* 6 Ex. 761, 155 Eng. Rep. 752 (1851). See 164 A.L.R. 569, Manufacturers Liability For Negligence . . . There were several exceptions to this general rule. A duty was owed to the one injured: (1) where the article was imminently dangerous to life or health, (2) where there was an invitation to use a defective product on the owner's premises, and (3) where the defendant knew the article to be dangerous and failed to give notice. *Huset* v. *J. I. Case Threshing Machine Co.,* supra at 870.

Early New York cases recognized similar exceptions and a duty was held