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Unfair Competition—Fair Trade Law Held to Prohibit Cash Register Receipt Discount Plan

Mary K. Davey

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BUFFALO LAW REVIEW

aggrieved by a municipality is not to be denied; the usual reasons advanced for any statute of limitations apply *a fortiori* to the need for a speedy notification of claim against a municipality.

However, the decision may well be classed as sound legislative interpretation resulting in unsound law. In the light of § 60 of the Civil Practice Act, which saves to an infant a right of action during his infancy, § 50-e of the General Municipal Law, as interpreted, would appear to cause a result not favored by the sound public policy of protecting infants.

Perhaps the Legislature will take the hint of the court when it said: "Wise or unwise, fair or harsh, that law is binding on the courts as it is on the petitioner." The Legislature should amend § 50-e as soon as possible for it would be an anomaly to have an exception to § 60 of the Civil Practice Act where public corporations are the defendants.

Burton B. Sarles

Edward J. Schwendler, Jr.

UNFAIR COMPETITION — FAIR TRADE LAW HELD TO PROHIBIT CASH REGISTER RECEIPT DISCOUNT PLAN

Plaintiff, a manufacturer and distributor of well-known drug products sold under distinctive trade-marks, brought an action to enjoin defendants, fifteen merchants, from continuing a merchandising plan, called a "Dividend Club." Under the plan, cash register receipts were given on all purchases, whether of fair-traded goods or not; these receipts were redeemable at 2½% of their amount in any merchandise of the member stores. *Held* (5-2): injunction granted on the ground that the plan constitutes price-cutting and is within the prohibition of the Fair-Trade Law. *Bristol-Meyers Co. v. Picker*, 302 N. Y. 61, 96 N. E. 2d 177 (1950).

Violations of the Fair-Trade Law are properly remedied by injunctive relief, which will be granted without proof of actual damages if it is established that there is good will to be protected, but injury to good will is ordinarily presumed if there is unlawful price-cutting. *Guerlain v. Woolworth Co.*, 297 N. Y. 11, 74 N. E. 2d 217 (1947); *accord: Seagram Distillers Corp. v. Nussbaum Liquor Store*, 166 Misc. 342, 2 N. Y. S. 2d 320 (Sup. Ct. 1938); *Calvert Distillers Corp. v. Stockman*, 26 F. Supp. 73 (E. D. N. Y. 1939). The validity of the fair-trade statutes is predicated on the protection which they afford to the manufacturer as the owner of the identified goods. *Old Dearborn District Co. v. Seagram Distiller Corp.*, 299 U. S. 183 (1936), followed in *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. 2d 30 (1937).

Other jurisdictions have refused relief in the instance of trading stamp

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plans, indistinguishable from the "Dividend Club" in the instant case. For example, the courts of Pennsylvania have held that such a plan constitutes only "indirect" price-cutting and therefore does not come within the prohibition of the Act; but that in any event, the maxim *de minimis non curat lex* is applicable. *Bristod Meyers Co. v. Lit Bros.*, 336 Pa. 81, 6 A. 2d 843 (1939).

The handling of the problem in California is especially interesting in view of the fact that the New York statute (§ 369-b of the General Business Law) is modeled after the California Fair-Trade Act. There, such plans have been held not to offend the Fair-Trade Act, on the rationale that they are merely an advertising device to attract customers, analogous to the giving of free parking space to those who make purchases; and further, that the giving of trading stamps is a separate transaction which amounts to an award for the prior payment of cash.

The majority opinion in the principal case, refusing to follow the California authorities, points out that the very practices outlawed by the Fair-Trade Act were devices designed to advertise the seller and increase his volume of sales. The court argued along the lines of *unius expressio*: "It [the Legislature] could well have provided for this exception as it has in others . . . It has not done so . . ." 302 N. Y. at —, 96 N. E. 2d at 181. (For example, § 101-b(2)b of the Alcoholic Beverage Control Law allows a 1% discount for cash payment.) The court takes the position that the giving of any discount—no matter how small—constitutes price-cutting, and to allow the discount in this case would "invite the flood" of cutthroat competition which the manufacturers can prevent under the Fair-Trade Act. See Shulman, *The Fair-Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607.

In a spirited dissent, Judge Fuld conceded that cash register receipts did amount to a "mathematical" reduction in the selling price, but that this was not price-cutting in the conventional sense, claiming that the majority decision was based on a strained construction of the Act. The dissenters reasoned that to allow the instant practice to continue would not be the creation of a new exception to the statute, but would be rather a literal construction, requiring for injunctive relief a wilful price-cutting likely to cause an assault on the manufacturer's good will.

The decision is ambiguous as to whether the onus of the plan lies in the giving of the discount on fair-trade items only, or the redeeming of the coupons with such merchandise. In either case, the repercussions will disrupt long-established business practices. If a merchant gives cash register receipts for non-fair-traded items and redeems them with like goods, there is no question of fair-trade, of course. The instant decision prevents the giving of a discount on fair-traded items. As stated above, the questionable area is where receipts

are given on non-fair-traded items redeemable with those that are fair-traded. It does not seem tenable that the last-mentioned situation could be considered within the purview of the statute. If discounts are given on merchandise which is not fair-traded, and that is the only point at which a price reduction is effected, the discount will have been completed and the transaction consummated before fair-traded merchandise enters the picture, regardless of what is thereafter done with receipts evidencing the transaction.

Mary K. Davey

CONSTITUTIONAL LAW—CIVIL RIGHTS — “THREAT” TO PUBLIC ORDER HELD SUPERIOR TO FREEDOM OF SPEECH

Feiner, a Syracuse University student, speaking through a loud speaker system from a box located near a street intersection in Syracuse, New York, addressed a mixed crowd of whites and Negroes urging attendance at a speech by O. John Rogge that night in the Syracuse Hotel. In the course of his speech, he made derogatory remarks about the President, other public officials and the American Legion, and also indicated that Negroes did not have equal rights. It was found by the trial judge that he then called upon them to rise up in arms. This statement, although emphasized by the majority of the Supreme Court, was disputed by other witnesses who swore that petitioner's statement was that his listeners “could rise up and fight for their rights by going arm in arm to the Hotel Syracuse, black and white alike . . .” In any event, one man threatened that if the police “don't get that son of a bitch off, I will go over and get him myself.” Feiner was first asked, then told, finally commanded to step down. All the time, he continued to urge attendance at the Rogge meeting. He was arrested and charged with violation of § 722 of the New York Penal Law—disorderly conduct. His conviction was upheld in the United States Supreme Court by five of the Justices in an opinion by Mr. Chief Justice Vinson on the ground that a clear danger of disorder was threatened and hence the preservation of peace and order on the streets was superior to defendant's right of free speech. Mr. Justice Frankfurter concurred in a separate opinion. Mr. Justice Black in his dissent took direct issue with this view, contending that the police officer should have protected “petitioner's right to talk, even to the extent of arresting the man who threatened to interfere.” It was Black's contention that the defendant had been sentenced for the expression of unpopular views. Justices Douglas and Minton concurred in a dissent on the ground that the record showed merely an unsympathetic audience and the threat of one man to interfere with the speaker. *Feiner v. New York*, — U. S. —, 71 S. Ct. 303 (1951).

There have been only a few cases wherein the social interests of public order and freedom of speech have clashed. Outstanding have been *Cantwell*