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Fair Trade Laws—Requirement of Fair and Open Competition—Admission by Defendant in His Answer is Insufficient to Prove Fair and Open Competition in the Gasoline Market.—Gulf Oil Corp. v. Mays

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regardless of whether the shareholders vote to sue or not. It is beneficial to distinguish between violations of statutes and violations of the fundamental "corporate compact" or in fraud of the rights of stockholders. The need to grant minority stockholders the power unilaterally to institute suit contrary to a negative stockholders' vote would not be so great when violation of a statute is the subject of the action, as it would be when there is a breach or violation of the "corporate compact" or a fraud on the rights of stockholders. Thus, a situation where a board of directors surcharges the corporation would call for greater protection of the minority stockholder than where the directors violate a federal statute, if public policy is to be invoked in the interest of inhibiting dishonest conduct.

The court referred to *Seigman v. Electrical Vehicle Co.* as a leading case representing the concept that a negative shareholders' vote will not bar a derivative suit, adopting the view that a vote not to sue is in reality an attempted ratification of an illegal act and is therefore unlawful. However, that case can be reconciled by application of the above distinction between violations of statutes and violations of the "corporate compact" or in fraud on the stockholders' rights. There the stockholders attempted to "ratify the illegal act" by voting not to sue former directors who allegedly declared dividends out of capital assets and not surplus assets. Such action struck to the core of the corporate organization, denying the shareholders their interest guaranteed by the corporate structure. Clearly, an illegal alteration of the basic corporate structure calls for greater protection of the minority shareholder than the decision not to exercise the corporation's right to bring suit under a Federal statute.[18] A derivative suit based on alleged violations of antitrust legislation need not be granted in the interest of "public policy" to inhibit dishonest conduct by directors, as statutory provisions for enforcement of those statutes serve that end.

KENNETH H. ZIMBLE

Fair Trade Laws—Requirement of Fair and Open Competition—Admission by Defendant in His Answer is Insufficient to Prove Fair and Open Competition in the Gasoline Market.—*Gulf Oil Corp. v. Mays.*[1]—Gulf Oil Corporation brought a bill in equity against a gasoline retailer seeking to enjoin him from selling Gulf gasoline below the minimum price established in contracts between Gulf and other retailers pursuant to the Pennsylvania

18 "The fact that the bill calls for an inquiry into the illegality of the transaction does not overcome the obstacle that ordinarily stockholders have no standing to interfere with the management. Mere belief that the corporate action, taken or contemplated, is illegal gives the stockholder no great right to interfere than is possessed by any other citizen. Stockholders are not guardians of the public. The function of guarding the public from acts deemed illegal rests with public officials." Ashwander v. Tenn. Valley Authority, 297 U.S. 288, 343 (1936) (Brandeis, J.).

1 164 A.2d 656 (Penn. 1960).

Fair Trade Law.[2] The defendant had not signed any of these contracts but since notice of their existence was received by him, he was required by the statute to comply with their terms.[3] On appeal, the Supreme Court of Pennsylvania reversed a decree by the lower court enjoining defendant from selling Gulf gasoline at less than stipulated prices. HELD: An admission by defendant in his answer, that plaintiff's products were in "fair and open competition" throughout the state with gasoline of the same general class produced by others, is insufficient to allow plaintiff to invoke the Fair Trade Act without further evidence of such "fair and open competition."

Minimum resale price contracts pursuant to state Fair Trade Laws have been the subject of much litigation in this country. The early opposition to these contracts was based on a notion that they were contracts in restraint of trade and thereby violated the federal antitrust laws.[4] However, a series of Supreme Court rulings and two "enabling" amendments to the antitrust laws have resulted in federal approval of the state Fair Trade Statutes.[5]

The individual states, on the other hand, are split on the question of whether, in light of the provisions in state Constitutions, these minimum resale price contracts can be enforced against retailers who have not signed them.[6]

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[2] Pa. Stat. Ann. tit. 73, §§ 7-11 (1960).

[3] Pa. Stat. Ann. tit. 73, § 8 (1960).

[4] Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

[5] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936), upheld the constitutionality of the Illinois Fair Trade Law on the theory that it permits the protection of a property interest in the brand name or trade-mark; the Miller-Tydings Amendment, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958), expressly authorized these minimum resale price contracts pursuant to state statutes, with regard to goods in interstate commerce, if the products were in "free and open competition with commodities of the same general class produced by others"; the McGuire Amendment to the Federal Trade Commission Act, 66 Stat. 632 (1952), 15 U.S.C. § 45 (1958), specifically authorized the application of these minimum resale price contracts to "non-signer" retailers as well as to those who sign them. This statute has been construed and upheld in Eli Lilly & Co. v. Schwegmann Bros., 205 F.2d 788 (5th Cir. 1953).

[6] The states holding their Fair Trade Statutes constitutional on the non-signer question have followed the view of Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra note 5. See: Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A.2d 841 (1942); General Electric Co. v. Klein, 34 Del. Ch. 491, 106 A.2d 206 (Sup. Ct. 1954); Johnson & Johnson, Inc. v. G.E.M. Sundries Co., 43 Hawaii 103 (1959), aff'd, 283 F.2d 86 (9th Cir. 1960); Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc., 15 Ill. 2d 182, 154 N.E.2d 290 (1958); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176 (1939); General Electric Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652 (1956); W. A. Schaeffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 652 (1950); Corning Glass Works v. Max Dichter Co., 161 A.2d 569 (N.H. 1960); Lionel Corp. v. Grayson-Robinson Stores, Inc., 15 N.J. 191, 104 A.2d 304 (1954); General Electric Co. v. Masters, Inc., 307 N.Y. 229, 120 N.E.2d 802 (1954); Burche Co. v. General Electric Co., 382 Pa. 370, 115 A.2d 361 (1955); Miles Laboratories v. Owl Drug Co., 67 S.D. 523, 295 N.W. 292 (1940); Standard Drug Co. v. General Electric Co., 117 S.E.2d 289 (Va. 1960).

Those states invalidating the non-signer provisions have done so on three major grounds: (1) That they are a violation of due process of law: Union Carbide & Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin

In Pennsylvania, the jurisdiction in which the instant case was decided, non-signer provisions have been held constitutional.[7] In the case of *Sinclair Refining Co. v. Schwartz*,[8] decided shortly before the present case, the Pennsylvania court dissolved a preliminary injunction against a non-signing gasoline retailer on the grounds that the plaintiff distributor had not sufficiently shown the threat of irreparable harm or that its product was in "fair and open competition" with other gasolines. However, in its opinion, by way of dicta, the court stated that gasoline as a commodity was within the protection of the Fair Trade Act.[9] The same Pennsylvania court in the instant case cast doubt on this dicta in *Sinclair* and opined that in the light of the prevailing marketing practices of gasoline distributors there would be grave constitutional problems connected with the imposition of price-fixing contracts on non-signing retailers.[10]

The justification for the restriction placed on the non-signing retailer's right to determine the price at which he will sell his gasoline is found in the interest of a state in protecting the trade mark, brand or name of the businessmen of the community.[11] But, as the court in the instant case

Matheison Chemical Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Cox v. General Electric Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957); General Electric Co. v. American Buyers Cooperative, 316 S.W.2d 354 (Ky. 1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Mkts., 231 La. 51, 90 So. 2d 343 (1956); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Skaggs Drug Center v. General Electric Co., 63 N.M. 215, 315 P.2d 967 (1957); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); General Electric Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc. v. General Electric Co., 231 S.C. 636, 99 S.E.2d 665 (1957); General Electric Co. v. A. Dandy Appliance Co., 103 S.E.2d 310 (W. Va. 1958). (2) That they are a denial of equal protection of the laws: McGraw Electric Co. v. Lewis & Smith Drug Co., supra; General Electric Co. v. Wahle, supra. (3) That they are an unlawful delegation of legislative power to private persons or groups: Olin Matheison Chemical Corp. v. Francis, supra; Bissell Carpet Sweeper Co. v. Shane Co., supra; Quality Oil Co. v. E. I. DuPont de Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Mkts., supra; McGraw Electric Co. v. Lewis & Smith Drug Co., supra; Remington Arms Co. v. G.E.M., Inc., 102 N.W.2d 528 (Minn. 1960).

7 Burche Co. v. General Electric Co., supra note 6.

8 398 Pa. 60, 157 A.2d 63 (1959).

9 Id. at 63, 157 A.2d at 64. The language in the Pennsylvania Fair Trade Act construed to refer to gasoline is: "or the vending equipment from which the commodity is sold to the consumer." This language obviously refers to a vending device such as a gasoline pump.

10 Supra note 1, at 660.

11 In dealing with the due process objection to the non-signer clause of the Illinois Fair Trade Law in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra note 5, the United States Supreme Court stated (229 U.S. at 193):

> " . . . § 2 does not deal with the restriction upon the sale of the commodity qua commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accom-

pointed out:[12] (1) There is no danger of "loss leader" advertising[13] by single-product retailers such as are here involved. (2) Moreover, in many instances, there appears to be no protecting of the brand names of gasolines because gasoline distributors very often replenish their shortages, remove surpluses from the market, and cut transportation costs, by purchasing fuel from other oil companies. This practice might result, for example, in placing Shell gasoline in a Gulf pump. In such a situation, minimum resale price contracts would be protecting only the price of gasoline rather than the brand name of the distributor.[14]

However, the court did not decide the case on the above issue but preferred to accomplish its objective by imposing on the plaintiff the almost impossible burden of proving, by affirmative evidence, that its product is in "fair and open competition" with gasoline of other producers, as required by the Federal[15] and State[16] Fair Trade Legislation. This additional proof was required in spite of both the defendant's admission in his answer that plaintiff's products were in "fair and open competition" and also the Chancellor's finding this to be a fact. The court justifies this seemingly radical departure from appellate procedure[17] by declaring that the State has a *parens patriae* interest in seeing that unlawful price-fixing is not indulged in by the major gasoline distributors.

The plaintiff, in the instant case, will encounter extreme difficulty in proving that its product is in "fair and open competition" with other major gasolines[18] due to the standard marketing procedure utilized by the gasoline industry. The major gasolines are generally standardized and sell for substantially identical prices in each market area, a phenomenon known as "conscious parallelism." The price policies in each market area are generally set by one of the major distributors and followed by the others.[19] There

plishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself."

12 Supra note 1, at 660.

13 Offering a product for sale at a price below cost in order to draw patrons into the store. Herman, Fair Trade: Origins, Purposes, and Competitive Effects, 27 Geo. Wash. L. Rev. 621, 628 (1959).

14 Supra note 1, at 660; see Note, Competition in Gasoline Retailing: A Price War, 101 U. Pa. L. Rev. 644, 660-62 (1953).

15 Miller-Tydings Amendment, supra note 5; McGuire Amendment, supra note 5.

16 Pa. Stat. Ann. tit. 73, § 7 (1960).

17 Supra note 1, at 662 (Dissent).

18 Id. at 660.

19 "Most geographic market areas are dominated by a relatively small number of large companies, with a fringe of independents. The majors compete in the sale of an essentially standardized product. The product of the independents, where available, enjoys less consumer acceptance, ordinarily finds a market niche at a price differential, and does not, perhaps in most cases, disrupt the pattern of leadership. Markets thus dominated are certainly less likely than pure markets to be characterized by vigorous, continuous, and overt price competition." Dirlam and Kahn, Leadership and Conflict in The Pricing of Gasoline, 61 Yale L.J. 818, 825 (1952).

is a definite lack of price competition in the industry among the major distributors because they fear its destructive properties.[20] Consequently, gasoline distributors concentrate on a type of "non-price competition" with rivalries in advertising, service, and scientific developments. Or, they may engage in "indirect price competition" where the distributor improves the retailer's buildings and grounds without cost, or where tanks and pumps are loaned or given as a gift to the retailer. Preferential rental agreements are also included in the "indirect price competition" classification.[21] The above practices, which are unique in the gasoline field, do not appear to be the type of "fair and open competition" to which the statutes refer, in light of the "follow the leader" price policies of the industry. "In short, the intense competition, to which industry representatives so frequently allude, is . . . apparently of a limited, peripheral, exceptional character."[22]

Thus, the plaintiff in the instant case, is faced with a problem of proof which appears insurmountable. The impact of this decision will be felt in any future Fair Trade litigation in Pennsylvania by gasoline distributors. The extraordinary evidentiary requirement would, in effect, defeat any suit in this area *ab initio*. The court has taken a long step toward reading gasoline as a commodity out of the protection afforded by the Pennsylvania Fair Trade Law.

MORTON R. COVITZ

Labor Law—Discriminatory Hiring Arrangements—The Brown-Olds Dues Reimbursement Remedy.—*N.L.R.B. v. United States Steel Corporation (American Bridge Division)*.[1]—A complaint was issued by the Board against an employer and a union on a charge brought by an employee who claimed to have been discriminated against in hiring procedures. It was found that the employer and union had observed the provisions of an area-wide contract, which, in effect, gave the union indirectly almost complete control over the hiring and discharge of employees at the employer's plant. The hiring arrangement was declared unlawful because it limited employment to union members in good standing.[2] The Board found both

[20] Id. at 828: "Because of the threat of severe and destructive price competition majors try to avoid direct and open price rivalry. . . . In any event, all members of the industry feel the need 'to build a wall of insulation against the white heat of so-called free competition.' "

[21] Id. at 831.

[22] Id. at 845.

[1] 278 F.2d 896 (3d Cir. 1960), petition for certiorari filed in the Supreme Court, October Term, 1960.

[2] Such hiring schemes have often been held illegal. N.L.R.B. v. Local 420, Plumbers, 239 F.2d 327 (3d Cir. 1956); N.L.R.B. v. Philadelphia Iron Works, 211 F.2d 937 (3d Cir. 1954). By giving effect to such an agreement the employer violated §§ 8(a)(1) and (3) of the Act (which make it an unfair labor practice for an employer to discriminate in regard to hiring new employees or to use any illegal term or condition of employment which would encourage or discourage membership in a labor union, which