FAIR TRADE RETURNS TO OHIO

Hudson Distributors, Inc. v. The Upjohn Co.
Hudson Distributors, Inc. v. Eli Lilly & Co.
174 Ohio St. 487 (1963)

The holding in the instant case can best be understood after a brief review of the history of fair trade in Ohio. During the depression era one of the attempts to regain economic stability was based upon the premise that businesses should be encouraged and preserved by protection from the economic depredations of price cutting competition by giant retailers. In 1936, the Ohio legislature, acting upon this premise, passed a statute popularly known as the Ohio Fair Trade Act.[1] In six relatively short sections this act allowed producers of trade-marked items to enter into contracts establishing a minimum resale price of such trade-marked or brand-named items. Anyone who willfully and knowingly failed to maintain these minimum resale prices was declared to be engaging in unfair competition and unfair trade practices. The price cutter was liable to anyone damaged by his actions and the price cutter could be enjoined from continuing the practice. The heart of this act, the so-called non-signer clause, imposed the same liability and penalties upon the merchant even if he was not a party to one of the price maintenance contracts.[2]

This 1936 Ohio Fair Trade Act remained in force until 1958 when the Ohio Supreme Court declared the non-signer clause unconstitutional in *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*[3] Union Carbide had sought an injunction to restrain Bargain Fair from selling Prestone Anti-Freeze below the then existing fair trade price. The court found the section unconstitutional because it represented an unauthorized exercise of police power in a matter unrelated to the public safety morals or welfare, delegated legislative power to private persons, and also denied to the owner of property the right to sell it on terms of his own choosing.

In 1959, in order to overcome the constitutional objections raised in *Bargain Fair*, the legislature passed a new act[4] modeled after the 1958 Virginia Fair Trade Act.[5] The new act includes sections, absent in the old

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[1] Ohio Gen. Code §§ 6402.3-6402.9 (1936) (now Ohio Rev. Code §§ 1333.05-1333.10 (1953)).

[2] Ohio Rev. Code § 1333.07 (1953):

> Whoever knowingly and willfully advertises, offers for sale, or sells any commodity at less than the minimum price stipulated in any contract entered into under Sec. 1333.06 Revised Code, *whether said person* advertising, offering for sale or selling such commodity *is or is not a party to such contract*, is engaging in unfair competition and unfair trade practices and is liable to any person damaged thereby. (Emphasis added.)

Section 1333.06 referred to above is that which states that contracts between vendors and vendees setting minimum prices are not in violation of law.

[3] 167 Ohio St. 182, 147 N.E.2d 481 (1958).

[4] Ohio Rev. Code §§ 1333.27-1333.34 (1959).

[5] 9 Va. Code Ann. §§ 59-8.1 to 59-8.9 (Supp. 1962).

statute, declaring that the statute is enacted to promote the public welfare[6] and that a proprietor retains an interest in his trade-marked commodity even after he has sold it.[7] Under the old act only the producer of the trade-marked item could set the minimum price while now the producer may grant this right to anyone he desires.[8] Further, the old act required at least one actual contract to become operative whereas at present the proprietor may establish minimum prices by notice or contract.[9] Methods for giving notice of the establishment of minimum resale prices are elaborately outlined.[10] Notice as such under the old statute was only an implied requirement since one had to willfully and knowingly sell at less than the established resale price to violate the act. The crux of the new act, the equivalent of the old non-signer clause, is to be found in the definition of contract which means "any agreement written or verbal or arising from the acts of the parties." If a person has notice of the establishment of a minimum resale price of a commodity, he agrees (and enters into a contract by definition) to maintain that price by accepting the commodity.[11]

The principal case was the first reported case arising under the new act.

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[6] Ohio Rev. Code § 1333.27 (1959).

[7] Ohio Rev. Code § 1333.31 (1959).

[8] Ohio Rev. Code § 1333.28(K) (1959):

Proprietor means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, *unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity*;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish minimum resale prices for such commodity in the state. (Emphasis added.)

[9] Ohio Rev. Code § 1333.29 (1959): "It shall be lawful . . . for a proprietor to establish and control *by notice* to distributors, *or by contract*, stipulated minimum resale prices . . . ." (Emphasis added.)

[10] Ohio Rev. Code § 1333.28(J) (1959):

"Notice" means actual notice given by any method provided in Section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

Ohio Rev. Code § 1333.30 (1959):

Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages or dispensers thereof, or on the invoice therefor, or imparted orally . . .

[11] Ohio Rev. Code § 1333.28(I) (1959):

. . . Any distributor, (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such a commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

Plaintiff corporation, a retail drug dealer and a distributor[12] under the act, brought this action in Cuyahoga County asking a declaratory judgment that the act, like a portion of its predecessor, is unconstitutional. Plaintiff stated that it had not and never would enter into any contract or agreement with defendant proprietor or any other person[13] which would forbid plaintiff from selling defendant's products at less than the minimum price stipulated by defendant. Plaintiff admitted receipt of a circular distributed by defendant announcing that defendant had entered into minimum price contracts with other persons in Ohio, which indicated that defendant had complied with the notice requirements of the act. Plaintiff claimed that the act violated its constitutional right to equal protection of the laws and deprived it of property without due process. Plaintiff further contended the act is an unconstitutional exercise of the police power in that it bears no relation to public health, welfare or morals and is an unlawful delegation of legislative power to private persons. The Cuyahoga County Common Pleas Court found that regardless of any other changes in the act, the new act, like the old one, contained an invalid delegation of legislative power and discretion to private persons and therefore the court declared the new act unconstitutional.[14]

The Court of Appeals for the Eighth Judicial District then reversed by a margin of 2-1 and declared the new act to be constitutional.[15] This decision relied heavily upon the reasoning in the Virginia case of *Standard Drug Co. v. General Electric Co.*[16] and the now classical case of *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*[17] In *Standard Drug* the Virginia Supreme Court found that the new Virginia statute,[18] used as a model for the new Ohio statute, was constitutional. *Old Dearborn* declared that an Illinois Fair Trade Act,[19] as applied to intrastrate commerce did not deprive a price cutting distributor of any rights guaranteed to him by the federal constitution. The court of appeals did not comment on the characteristic which distinguishes these cases from the instant case, *i.e.*, the *facts* in neither of them brought into question the validity of the non-signer contract provisions of the acts. While it is true that *Old Dearborn* is cited as upholding the validity of the entire fair trade act, the record involved a fair trade contract which was signed by the secretary-treasurer of the price cutting

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12 Ohio Rev. Code § 1333.28(E) (1959): "'Distributor' means any person who acquires a commodity for the purpose of resale."

13 Ohio Rev. Code § 1333.28(F) (1959): "'Person' means an individual, corporation, partnership, association, joint stock company, business trust, or any unincorporated organization."

14 Hudson Distrib. Inc. v. Upjohn Co., 1960 CCH Trade Cas. ¶ 69778 (Ohio C. P. July 28, 1960.)

15 Hudson Distrib. Inc. v. Upjohn Co., 117 Ohio App. 207, 176 N.E.2d 236 (1961).

16 202 Va. 367, 117 S.E.2d 289 (1960).

17 229 U.S. 183 (1936).

18 Statute cited note 5 *supra.*

19 Ill. Ann. Stat. Ch. 121½, §§ 188-191 (Smith-Hurd 1935).

defendant.[20] In *Standard Drug* the price cutter dealt with and purchased directly from the manufacturer. That this fact was given some weight is illustrated by the following quote from the Virginia court:

> The admitted facts established that Standard, the retailer, contracted directly with General Electric, the manufacturer of the trade-marked flash-bulbs, and when the purchase was made, Standard, by the express terms of the contract, agreed not to resell at less than specified minimum prices. It cannot now justly complain because it is not free to use and impair the good will of General Electric by selling the bulbs at a price less than it agreed to maintain.[21]

In the instant case, the price cutter had signed nothing nor was there any indication of his dealing directly with the manufacturer.

The Ohio Supreme Court affirmed this decision by a minority of 3-4. The minority prevailed in this case because of the archaic peculiarity in the Ohio Constitution which requires the concurrence of all but one member in order that the supreme court may declare unconstitutional a statute which has been found constitutional by a court of appeals.[22] The prevailing minority found the 1959 act cured the constitutional defects of the old act by introducing two "new" concepts into the area of fair trade law. The opinion refers to one of these new concepts as the implied contract doctrine. Under the new act any person[23] having notice[24] of a minimum price established by the proprietor[25] who acquires a commodity has entered into an agreement not to resell at less than that minimum price. This agreement is said to be a contract, as defined in section 1333.28, which arises from the acts of the parties. It is difficult to see where these requirements differ materially from the old act which required that the person willfully and knowingly sell at less than the minimum price.[26] A well recognized principle of contract law is illustrated in that when one rides in a taxicab he has agreed to pay the fare. He does not have to promise or agree to pay in words. His actions in entering and riding in the cab bind him to the contract. A common occurrence in many households is the arrival of unsolicited merchandise accompanied by a price list. We know that if the recipient uses

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[20] Seagram-Distillers Corp. v. Old Dearborn Distrib. Co., 363 Ill. 610, 612, 2 N.E.2d 940, 941 (1936).

[21] Standard Drug Co. v. General Elec. Co., 202 Va. 367, 374, 117 S.E.2d 289, 295 (1960).

[22] Ohio Const. Art. IV, § 2 (1912):

> . . . No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void . . . .

[23] Defined note 13 *supra*.

[24] Defined note 10 *supra*.

[25] Defined note 8 *supra*.

[26] Statute cited note 2 *supra*.

the merchandise he is obligated to pay the price listed. Once again he is bound by his actions and not by his words. Indeed this "new" concept appears to be merely a statutory definition and application of a relatively old common law concept heretofore known as a contract implied in fact.

An interesting comment upon this new concept is to be found in the exhaustive opinion of Judge Leach of Franklin County in a case arising under the 1959 act.[27] In declaring the new act unconstitutional he observed:

> [T]he assertion that the two acts may be constitutionally distinguished on the basis that under the 1959 Act the defendant has "agreed" thereto, is to say that even though a General Assembly cannot constitutionally regulate a course of conduct by certain means (as held in *Union Carbide*), such constitutional limitations have no application where the General Assembly provides that a certain act of the *party sought to be regulated* shall constitute an agreement to be so regulated. Under such a philosophy, there is scarcely any constitutional principle which could not thus be voided.[28] (Emphasis added.)

The other new concept in the 1959 act is found, according to the prevailing minority, in section 1333.31 which states that a proprietor retains a proprietory interest in his commodity even after he has sold it because of "his interest in protecting the good will associated with his trade-mark or trade name." This concept is at least as old as fair trade itself, as indicated in *Old Dearborn* where the Supreme Court said "the ownership of the good will . . . remains unchanged notwithstanding the commodity has been parted with."[29]

In addition to the principal case, two other reported cases arose under the new act. *The Bulova Watch Co.* case in Franklin County which declared the act unconstitutional has already been referred to. The third case arose in Hamilton County where a proprietor sought an injunction to restrain a price cutting retailer.[30] The Hamilton County court, after noting the legislative attempt to overcome the constitutional objections raised by the *Bargain Fair* case, stated that section 1333.28 which defines proprietor is clearly violative of the Ohio Constitution[31] in that it delegates legislative authority to private persons. Pending further litigation in each appeals district the minority decision of the supreme court in the instant case forebodes a morass in the application of the new fair trade act as the act may be enforced in some districts and ignored in others. This is so because there is some authority for the proposition that a minority decision in the

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[27] Bulova Watch v. Ontario Stores, 176 N.E.2d 527, 86 Ohio L. Abs. 585 (C.P. 1961).

[28] *Id.*, 176 N.E.2d 527, 534, 86 Ohio L. Abs. 585, 597.

[29] Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., *supra* note 17, at 195.

[30] Helena Rubenstein v. Cincinnati Vitamin Distrib., 167 N.E.2d 687, 84 Ohio L. Abs. 143 (C.P. 1960).

[31] Ohio Const. Art. II, § 1 (1912): "The legislative power of the state shall be vested in a general assembly . . . ."

Ohio Supreme Court is no more binding on lower courts than a tie decision in the United States Supreme Court.[32]

Both the new and old fair trade statutes are couched in terms of protecting the manufacturer's property interest in his good will and trade-mark. It is interesting to note, however, that "retail dealer associations *rather than manufacturers* have been the outstanding protagonists of fair trade legislation."[33] The Oregon Supreme Court stated the matter succinctly when it said the "protection of the good will of the trade-mark owner is simply an excuse and not a reason for the law."[34] The fair trade acts protect this good will of the manufacturer on the basis of contract law, the newer type acts protecting it by what the Ohio Supreme Court calls an implied contract. However, "contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing."[35]

Many feel that the most cogent constitutional objection to fair trade was to be found in that which concerns the delegation of legislative power to private persons.[36] The Ohio Supreme Court in the instant case disposes of this objection in two short paragraphs[37] by stating that it is not price fixing as understood in the law when the producer of goods in free and open competition with similar goods fixes only the price of his own commodity. Indeed this is one of the types of price fixing which the anti-trust statutes were designed to abolish. Therefore special legislation had to be drawn to exempt fair trade agreements from the operation of the anti-trust acts, on both the federal and state levels.[38] In the face of this history the assertion that it is not price fixing as understood in the law is incomprehensible. In this connection the court says that free and open competition will prevent a producer from overpricing his goods. This statement overlooks the common "coincidence" that in most fair trade areas a giant size of any major brand of tooth-paste, for example, is the same price as those which are in free and open competition with it.[39] Secondly, the court states that this is not legislative price fixing, and by some process of logical legerdemain, this statement is used as a reason which overcomes the objection of legislative delegation to private persons. The court is correct that this is not legislative price fixing.

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[32] The ramifications of the minority decision in the instant case are examined in Pogue, "Hudson Fair Trade Case—The Need for Constitutional Amendment," 12 Clev.-Mar. L. Rev. 513 (1963).

[33] Eli Lilly & Co. v. Schwegmann Bros. Giant Super Mkts. 109 F. Supp. 269, 270 (E.D. La. 1953), *aff'd*, 205 F.2d 788 (5th Cir. 1953).

[34] General Elec. Co. v. Wahle, 207 Ore. 302, 317, 296 P.2d 635, 643 (1956).

[35] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 390 (1951).

[36] See note, 27 U. Cinc. L. Rev. 333 (1958).

[37] Hudson Distrib. Inc. v. Upjohn Co., 174 Ohio St. 487, 496 (1963).

[38] See, *e.g.*, Miller-Tydings Act 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958). Ohio Rev. Code § 1333.29(A) (1959): "It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding . . . ."

[39] Fulda, "Resale Price Maintenance," 21 Chi. L.R. 175, 198 (1954).

It is price fixing by private individuals and thus is precisely what the court found to be unconstitutional in *Bargain Fair*.

Ever since *Munn v. Illinois*[40] and the *Minnesota Rate Cases*[41] it has been accepted that rate making is a legitimate legislative function. *Nebbia v. New York*[42] expanded this concept and said that price fixing on the retail level is a legitimate function of the legislature and is not a violation of federal due process. Then the question is: are fair trade laws a proper exercise of the legislative function? We think not, because regardless of how the statutes are drawn, their purpose is price fixing by private individuals. The Oregon Supreme Court once again incisively digs into the heart of the matter:

> [T]he prices so fixed . . . are to become the law of the state; but if no agreement is entered into then there is to be no law. [It takes an agreement between *private persons* to make the Fair Trade Act operative.] This leaves wholly to persons outside the legislature the power to determine whether there shall be a law at all and, if there is to be a law what the terms of that law shall be. It is impossible to conceive of a more complete delegation of legislative power . . . .[43]

This price fixing is determined not by the legislature itself nor by its legally created agency, but by private individuals and as such is an unconstitutional delegation—even abdication—of legislative power. This same rationale is valid in any fair trade act case. It is strange indeed that the same court which is so particular and stringent when denying legislative delegation to administrative agencies[44] in the absence of adequate standards and controls will permit this same legislative delegation to private individuals without requiring any standards or controls whatsoever, as it does in the instant case.

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[40] 94 U.S. 113 (1876).

[41] 230 U.S. 352 (1913).

[42] 291 U.S. 502 (1934).

[43] Van Winkle v. Fred Meyers, Inc., 151 Ore. 455, 463, 49 P.2d 1140, 1143 (1935).

[44] 1 Ohio Jur. 2d, *Administrative Law and Procedure* §§ 25-28 (1953).