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TRADE RESTRAINTS - CONSTITUTIONALITY OF STATUTE PROHIBITING PRICE DISCRIMINATION BY PURCHASERS - "ACTUAL COST" PROVISION VAGUE AND INDEFINITE

Robert Meisenholder
University of Michigan Law School

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TRADE RESTRAINTS — CONSTITUTIONALITY OF STATUTE PROHIBITING PRICE DISCRIMINATION BY PURCHASERS — “ACTUAL COST” PROVISION VAGUE AND INDEFINITE — Defendant was charged with violating a statute¹ which provided that purchasers of certain farm products for manufacture or resale should not discriminate in prices between sections and between individual sellers. The statute required the purchaser to deduct full transportation costs from the purchase price paid or to deduct the actual costs of hauling from the point of purchase to the locality of manufacture or resale. No definition of actual cost was set out. *Held*, two justices dissenting, the term “actual cost” was so vague and indefinite that the statute denied due process of law. *State v. Northwest Poultry & Egg Co.*, 203 Minn. 438, 281 N. W. 753 (1938).

Statutes have been enacted in many states prohibiting purchasers of farm products and other commodities from discriminating between sections and localities or between individual sellers.² Such statutes are a proper exercise of the police power of the state when directed against discrimination which is intended to destroy or prevent competition, or to create a monopoly.³ But in *Fairmont*

*Creamery Co. v. Minnesota*⁴ the United States Supreme Court held a statute unconstitutional which prohibited all price discrimination and did not require an intent to destroy or injure competition. The Court stated there was no reasonable relation between the prohibition of all price discrimination without exception and the proper purpose of the statute to prevent monopolies.⁵ Since the instant statute requires no intent to destroy competition or create a monopoly, it might be attacked on the same ground. However, it exempts discrimination to meet competition and thus is more directly related to the legislative purpose of preventing monopoly than the statute in *Fairmont Creamery Co. v. Minnesota*.⁶ The instant case appears to be the first successful attack on this type of anti-discrimination statute on the ground that the term "actual cost" is vague and indefinite.⁷ No precise test to determine whether a statute is too vague and indefinite to afford due process can be ascertained from the cases.⁸ Within the general rules and depending on the practical application of the statute to the fact situations, it seems a court has some leeway to declare doubtful terms too indefinite or not. The general rule is that a criminal statute, when applied to the situations it purports to govern, must be sufficiently definite and certain in its terms to inform the average intelligent person what conduct will subject him to penalties.⁹ Enactment of similar statutes and evidence of a long period of satisfactory administration of the law should be taken into consideration.¹⁰ Further, a court should resort to all rules of construction to determine the legislative intent.¹¹ The uncertainty in the present case is confined to a choice between cost systems. The standard is not hypothetical nor divorced from the actual

(1912) (discrimination in purchasing); *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527 (1910) (discrimination in selling).

⁴ *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 47 S. Ct. 506 (1927).

⁵ "We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition." *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1 at 9, 47 S. Ct. 506 (1927).

⁶ "It shall not be unfair discrimination for any person to pay . . . a price equal to that actually paid on the same day by any bona fide competitor. . . ." Minn. Stat. (Mason, Supp. 1938), § 6248-3. It is to be noted that in *Fairmont Creamery Co. v. Minnesota*, supra, three justices dissented. Perhaps a changed attitude on the part of the United States Supreme Court in regard to the question in that case is indicated by the case of *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505 (1933).

⁷ The cases considering the constitutionality of the statutes are cited in note 3, supra. None discussed the possibility of vagueness in the price discrimination statutes considered therein. But in *H. Earl Clack Co. v. Public Service Commission*, 94 Mont. 488, 22 P. (2d) 1056 (1933), the court held that a statute prohibiting price discriminations unless shown to be "justified" was vague and indefinite.

⁸ See Aigler, "Legislation in Vague or General Terms," 21 MICH. L. REV. 831 (1923); 45 HARV. L. REV. 160 (1931).

⁹ *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126 (1926); *Pacific Coast Dairy v. Police Court*, 214 Cal. 668, 8 P. (2d) 140 (1932).

¹⁰ *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641 (1926).

¹¹ *State v. Livingston Concrete Bldg. & Mfg. Co.*, 34 Mont. 570, 87 P. 980 (1906); *State v. Excelsior Springs Light, Power, Heat and Water Co.*, 212 Mo. 101, 110 S. W. 1079 (1908); *County of Tulare v. City of Dinuba*, 188 Cal. 664, 206 P. 983 (1922).

facts.¹² These considerations favor certainty, but it is submitted that the purchaser must still choose at his peril the method to be used in ascertaining "actual cost." The statute requires no specific evil intent, and in such cases the courts are inclined to call doubtful terms too vague.¹³ The term "actual cost" has no common-law meaning nor a set special meaning.¹⁴ Inability to state a more definite standard is not a reason for upholding the statute,¹⁵ for it seems entirely possible for the legislature to accomplish its purpose and yet define the term "actual cost" more particularly.¹⁶

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¹² In *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 S. Ct. 853 (1914), the Court held vague and uncertain a statute forbidding combinations for the purpose of controlling prices or fixing prices greater or less than the "real value" of the article. It was said that this standard deals with an imaginary condition.

¹³ This consideration was important in *Hillsboro Coal Co. v. Knotts*, (D. C. Ill. 1920) 273 F. 221, and in *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 45 S. Ct. 141 (1924). An important distinction can be made on the basis of the specific intent required, in relation to certainty, in price discrimination statutes.

¹⁴ The term is not too vague if it has a common-law meaning. *Nash v. United States*, 229 U. S. 373, 33 S. Ct. 780 (1912).

¹⁵ In *State v. Schaeffer*, 96 Ohio St. 215, 117 N. E. 220 (1917), the court stated that the desirability of a broad standard in regulating automobile speeds was an important factor in upholding a statute prohibiting speeds greater than are reasonable and proper. See also *Miller v. Strahl*, 239 U. S. 426, 36 S. Ct. 147 (1915).

¹⁶ Just one particular type of activity (purchasing of farm products) is regulated by the statute, and there is not the same need for a broad standard as in statutes with cost provisions that cover many types of trades using different types of accounting systems. In the statutes which prohibit sales below cost by many different types of businesses, it would be difficult to effectively prohibit such sales if the legislature prescribed a detailed system of accounting. Yet a statute with a broad standard was declared vague and uncertain in respect to the cost provisions in *Balzer v. Caler*, (Cal. App. 1937) 74 P. (2d) 839, *affd.* (Cal. 1938) 82 P. (2d) 19. *Contra: People v. Kahn*, 19 Cal. App. 758, 60 P. (2d) 596 (1936). See 5 *UNIV. CHI. L. REV.* 524 (1938).