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Regulation of Business - Fair Trade Laws - Application of the McGuire Act to Mail Order Sales Emanating in a Non-Fair Trade Jurisdiction

Lawrence W. Sperling S.Ed.
University of Michigan Law School

REGULATION OF BUSINESS — FAIR TRADE LAWS — APPLICATION OF THE MCGUIRE ACT TO MAIL ORDER SALES EMANATING IN A NON-FAIR TRADE JURISDICTION — Defendant's store was located in the District of Columbia, a jurisdiction which does not have a statute permitting resale price maintenance. The defendant sent advertising and made mail order sales of plaintiff's product to consumers in Maryland, at prices below the resale price established by the plaintiff in accordance with the Maryland Fair Trade Act.[1] Plaintiff sued to enjoin such advertising and sales on the ground that they were violations of the Maryland statute. On defendant's motion to dismiss, *held,* overruled without prejudice. On the main point in issue, however, the court ruled that neither the Maryland Fair Trade Act nor the McGuire Act[2] was intended to allow suits predicated on mail-order sales emanating in a non-fair trade jurisdiction. *Revere Camera Co. v. Masters Mail Order Co. of Washington, D.C.,* (D.C. Md. 1955) 128 F. Supp. 457.

Absent enabling legislation by Congress, resale price maintenance agreements which involve commodities moving in interstate commerce would be violations of the Sherman Act.[3] The McGuire Act does not, in itself, permit the making of such agreements, nor does it create a cause of action against their violators.[4] Its function is simply to exempt[5] fair trade contracts which are made in accordance with state law from the operation of the federal

1 Md. Code Ann. (Flack, 1951) art. 83, §§102 to 110.

2 66 Stat. L. 631 (1952), 15 U.S.C. (1952) §45 (a).

3 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376 (1911).

4 The Keough bill, H.R. 6925, 82d Cong., 2d sess. (1952), which was introduced at the same time as the McGuire bill, would have created a federal cause of action against transactions involving interstate commerce which violated state fair trade laws. This bill was overwhelmingly rejected. 98 CONG. REC. 4948 (1952).

5 That Congress intended the McGuire Act to be only enabling legislation is clear. See the remarks of Congressman Harris, 98 CONG. REC. 4913 (1952).

antitrust laws[6] and from being an unlawful burden on interstate commerce.[7] The question posed in the instant case is whether the McGuire Act permits a fair trade state to apply its statute to mail order sales which emanate in a non-fair trade jurisdiction. Ostensibly, paragraph 3 of the act, which exempts from the antitrust laws actions against non-signers for "advertising, offering for sale or selling" products below fair trade prices, seems broad enough to permit such an action, since the mail order house is at least advertising within the fair trade state.[8] Relying on this paragraph and putting great emphasis on the purpose clause of the act[9] a New York court[10] found this same mail order house liable to suit for violation of the New York fair trade law.[11] Nevertheless, a strong argument may be made to support the view of the principal case that Congress did not intend the McGuire Act to permit a state to apply its fair trade law to this type of resale. An amendment proposed by Congressman Cole specifically prohibiting resales by a seller in a non-fair trade jurisdiction to a buyer in a fair trade state at a price below the latter state's fair trade price was defeated in the House.[12] However, defeat of the Cole amendment cannot be regarded as a conclusive showing of legislative intent. It is entirely possible that the amendment was rejected because of the opposition of many congressmen to that part of it which created a federal cause of action.[13] On the other hand, since the amendment was also opposed on its merits,[14] its defeat is significant.

Another argument supporting the view of the principal case is based on the wording of the statute. Paragraph 2, which exempts resale price maintenance contracts from the scope of the antitrust laws, limits this exemption to situations where the contract is lawful in "any state . . . in which

[6] This is intended to remedy the result reached in Schwegemann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745 (1951), where the Court held non-signer enforcement invalid under the Sherman Act as to commodities in interstate commerce.

[7] Section (4) was intended to remedy the result of Sunbeam Corp. v. Wentling, (3d Cir. 1950) 185 F. (2d) 903, revd. on other grounds, 341 U.S. 944, 71 S.Ct. 1012 (1951), which held that any attempt by a state to apply its fair trade law against a seller as to sales directly into interstate commerce would be an unconstitutional burden on interstate commerce. H. Rep. 1437, 82d Cong., 2d sess., pp. 2, 6 (1952).

[8] See Cook, "The Continuing Fair Trade Battle," 29 ST. JOHN'S L. REV. 66 at 82 (1954).

[9] ". . . It is the further purpose of this Act to permit such statutes . . . to apply to commodities, contracts, agreements and activities in or affecting interstate or foreign commerce."

[10] General Electric Co. v. Masters Mail Order Co., of Washington, D.C., (D.C. N.Y. 1954) 122 F. Supp. 797.

[11] 19 N.Y. Consol. Laws (McKinney, 1941) §§369-a, 369-b. The language of the report of the House Committee on Interstate and Foreign Commerce seems to give further support to the New York court's view. H. Rep. 1437, 82d Cong., 2d sess., p. 2 (1952).

[12] 98 CONG. REC. 4952-4954 (1952).

[13] See the remarks of Congressman Harris, 98 CONG. REC. 4954 (1952).

[14] See the remarks of Congressman Patman, 98 CONG. REC. 4953 (1952). It should be noted that an amicus curiae brief submitted by the Department of Justice in Sunbeam Corp. v. Missouri Petroleum Products Co., (D.C. Mo. Civil Action No. 9778) supported the position that the legislative history of the McGuire Act shows that it was not intended to apply to mail order sales from a non-fair trade jurisdiction into a fair trade state. See principal case at 463.

such resale is to be made." Although paragraph 3 contains no such limiting words, the same restriction must have been intended to apply to actions for violation of these contracts. This latter paragraph must, therefore, be read as allowing an action for violation of a fair trade contract only if such a suit is lawful in the state in which the resale is to be made.[15] Common law rules on where title passes should not be applied because the legislative history shows that Congress intended the seller's state to be able to apply its fair trade law to these transactions.[16] Such an intention was found by the courts in two recent cases[17] where relief was granted on the ground that the interstate sales involved were violations of the fair trade laws of the *reseller's* state. Therefore, if the statute be construed to allow only one state's law to apply to each resale, congressional intent, bolstered by recent court decisions, requires the conclusion that it is the law of the reseller's state which must be applied.

Even if it is found that the McGuire Act does allow the buyer's state to apply its law to these transactions, a court may find, as did the court in the principal case, that the state law itself was not intended to reach these sales. With two such hurdles to overcome, it will prove very difficult for fair traders to persuade the courts to enjoin mail order sales which emanate in non-fair trade jurisdictions.

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[15] This result would be reached by applying the "whole act" interpretation, since Congress' purpose was to permit each state to determine its own internal policy with regard to fair trade.

[16] This intention is apparent when it is noted that one of the purposes of the McGuire Act was to remedy the result of Sunbeam Corp. v. Wentling, note 7 supra. Involved in that case was an attempt to apply the fair trade law of the reseller's state to an interstate transaction.

[17] Sunbeam Corp. v. MacMillan, (D.C. Md. 1953) 110 F. Supp. 836; Raxor Corp. v. Goody, 307 N.Y. 229, 120 N.E. (2d) 802 (1954), cert. den. 348 U.S. 863, 75 S.Ct. 88 (1954).