Michigan Law Review

Volume 41 | Issue 4

1943

# TRADE RESTRAINTS - RESALE PRICE MAINTENANCE - USE OF COMPETITORS AS AGENTS

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Antitrust and Trade Regulation Commons, and the Intellectual Property Law Commons

Recommended Citation
Michigan Law Review, *TRADE RESTRAINTS - RESALE PRICE MAINTENANCE - USE OF COMPETITORS AS AGENTS*, 41 MICH. L. REV. 744 (1943).
Available at: https://repository.law.umich.edu/mlr/vol41/iss4/19

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

TRADE RESTRAINTS — RESALE PRICE MAINTENANCE — USE OF COMPETITORS AS AGENTS — Masonite Corporation, the principal defendant, manufactured and sold for construction purposes a patented wood product known as "hardboard." The other defendants sold, and many of them manufactured, building materials, several having patents that competed with Masonite. After a short period of patent litigation between Masonite and one of its chief competitors, a plan was devised and gradually extended to the other defendants, by which the latter were constituted the *del credere* agents of Masonite to sell its product at prices and according to terms which it should establish. The agents were not to use the trademarks of Masonite; and the manufacturer undertook, on the request of any agent, to mark the product consigned to it with the agent's name or trademark. In a suit instituted by the United States to restrain the parties from an alleged violation of sections one and two of the Sherman Act,[1] an injunction was denied by the district court.[2] *Held*, the defendants were unlawfully combined in restraint of trade, and the injunction should issue. *United States v. Masonite Corporation*, 316 U. S. 265, 62 S. Ct. 1070 (1942), rehearing denied June 8, 1942, 316 U. S. 713, 62 S. Ct. 1302.

While it at first appeared that the manufacturer of a patented product had the right to dictate its resale price as an incident of his exclusive privilege to "make, use and vend" it,[3] the Supreme Court early decreed that such a right was without the scope of the patent monopoly.[4] The patentee was thus forced to rely, like the producers of unpatented articles, on contracts with jobbers and retailers to maintain prices.[5] From the first, however, the right to maintain resale prices by contract was subject to the limitation that the resulting elimination of competition among retailers should not constitute an unreasonable re-

[1] 26 Stat. L. 209 (1890), as amended, 15 U. S. C. (1940), §§ 1, 2.

[2] United States v. Masonite Corp., (D. C. N. Y. 1941) 40 F. Supp. 852, noted 28 VA. L. REV. 411 (1942).

[3] 46 Stat. L. 376 (1930), 35 U. S. C. (1940), § 40. The familiar phrase defining the patent monopoly has been unchanged since 1870. Early decisions in the lower federal courts interpreted this statutory provision as exempting the patentee from the common-law rule which condemned as a "restraint upon alienation" any condition imposed by a vendor, in an otherwise absolute sale, by which he sought to control the price at which his vendee could resell. The classic American expression of the common-law rule is the decision of Judge Lurton in John D. Park & Sons v. Hartman, (C. C. A. 6th, 1907) 153 F. 24. Accordingly it was held that a patentee could maintain the selling price of his product by so little as affixing a notice stating the desired retail price. "Within his domain, the patentee is czar. The people must take the invention on the terms he dictates or let it alone for 17 years." Victor Talking Mach. Co. v. The Fair, (C. C. A. 7th, 1903) 123 F. 424 at 426. 7 A. L. R. 449 at 477 (1920).

[4] Bauer & Cie v. O'Donnell, 229 U. S. 1, 33 S. Ct. 616 (1912).

[5] For some time the validity of price maintenance contracts hung in doubt. They had been held invalid, except as to patented articles, in John D. Park & Sons v. Hartman, (C. C. A. 6th, 1907) 153 F. 24. But such contracts generally were termed valid where they did not result in an unreasonable restraint of trade. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1910); and price maintenance contracts relating to patented articles were still lawful in 1915. United States v. Keystone Watch Case Co., (D. C. Pa. 1915) 218 F. 502. See Waite, "Validity of Conditions in Patent Licenses," 41 MICH. L. REV. 419 (1942).

straint on trade.[6] Subsequent decisions held such contracts illegal in themselves, apart from their influence on the retail market.[7] Resale price maintenance thus remained possible only by the agency method,[8] employed in the principal case, by which the manufacturer purports to sell to the public directly through authorized agents, retaining title and hence the right to fix prices until the product is actually in the hands of the consumer. Though fair trade acts, adopted by most of the states and by the federal government, have since legalized price maintenance contracts in the marketing of certain classes of goods,[9] these enactments have not changed the law applicable to the facts of the principal case.[10] The theory of agency affords a sound legal basis for resale price maintenance, and the cases involving the legality of maintaining prices by this method have turned solely upon the question whether the particular arrangement was one of agency in fact or was a blind for ordinary sales transactions.[11]

[6] Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1910).

[7] Boston Store of Chicago v. American Graphophone Co., 246 U. S. 8, 38 S. Ct. 257 (1918).

[8] SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE, 64 (1932). The agency method, that is, remained the only way in which resale price maintenance could be enforced by direct legal action. An informal price maintenance plan, by which the producer merely refused to sell to price cutters, was held valid in United States v. Colgate & Co., 250 U. S. 300, 39 S. Ct. 465 (1919).

[9] The California Fair Trade Act of 1931, Cal. Gen. Laws (Deering, 1937), Act 8782, initiated a series of such acts, now found in forty-four states, which legalize contracts to maintain the resale price on branded or trade-marked goods marketed in competition with other products of the same class. 125 A. L. R. 1335 (1940). On the general subject of state legislation, see GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939). The Miller-Tydings amendment to the Sherman Act, 50 Stat. L. 693 (1937), 15 U. S. C. (1940), § 1, removes, in the terms of the Fair Trade Acts, the prohibition of the antitrust law as to resale price maintenance contracts where such contracts are valid by the local law of the place of resale.

[10] The application of the Miller-Tydings act is limited to branded or trade-marked goods in competition with goods of the same general class, and it neither appears that there were products similar to the Masonite hardboard in competition with it nor that the hardboard distributed through the agents bore Masonite's name or trade-mark.

[11] For example, contracts which purported to be agency agreements were given this effect in Ford Motor Co. v. Benjamin E. Boone, Inc., (C. C. A. 9th, 1917) 244 F. 335, Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210 (1923), and United States v. General Electric Co., 272 U. S. 476, 47 S. Ct. 192 (1926), but were declared absolute sales in Ford Motor Co. v. Union Motor Sales, (C. C. A. 6th, 1917) 244 F. 156, and Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 42 S. Ct. 360 (1922). For a discussion of what the courts have required for a valid agency agreement by way of terms and conditions defining the relationship between the contracting parties, see SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE 471 et seq. (1932). The thesis of an article by Klaus, "Sale, Agency and Price Maintenance," published in two parts, 28 COL. L. REV. 312 and 441 (1928), is that there is no distinction in fact between contracts which the courts have termed agency agreements and those which have been called sales.

The principal case is significant in that the Court does not treat the question whether there was a bona fide agency as controlling. The Court is willing to "assume" that the other defendants were *del credere* agents of Masonite. But the Court concluded that the plan was one for fixing prices in the sale of an article in interstate commerce, and that neither the special privileges accorded a patentee, nor the use of the agency device in effecting the scheme, saved it from the prohibitions of the Sherman Act.[12] The decision should not be understood, however, to overrule the previous cases which have upheld the right to maintain resale prices by marketing through agents. The opinion indicates that the criticism of the Court is not directed at the elimination of price competition in the distribution of the product in question—at resale price maintenance, as such—but rather at what was conceived to be the effect of resale price maintenance in suppressing the production of competing hardboard, as a result of the particular circumstance that Masonite's agency contracts embraced its competitors in the construction materials field. The lower court could see nothing in the position of the other defendants as selling agents of Masonite inconsistent with their seeking to develop and market a noninfringing hardboard of their own;[13] but the Supreme Court felt that the plan released "subtle and incalculable" forces operating to restrain competition, and suggested specifically that profitable sales of the Masonite hardboard at fixed prices would discourage the agents from marketing products of their own in competition with it.[14] Except where affected by the fair trade acts, therefore, the legality of maintaining resale prices in interstate commerce, in the ordinary case, would still seem to depend upon the form in which the particular marketing plan is cast. If the relationship of producer and distributor is one of vendor and purchaser, price maintenance is unlawful; but if the relationship can be made to pass as one of

[12] Principal case, 316 U. S. at 278.

[13] ". . . the evidence shows that a number of the defendants have been active since then in trying to find a substitute for the patented hardboard that would not infringe." United States v. Masonite Corp., (D. C. N. Y. 1941) 40 F. Supp. 852 at 859.

[14] Principal case, 316 U. S. at 281. "Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . . This kind of marketing device thus, actually or potentially, throttles or suppresses competing and non-infringing products. . . ." That resale price maintenance may become the basis for an unlawful system of horizontal price maintenance between independent producers was recognized in the recent case of Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 60 S. Ct. 618 (1940), where the Court condemned resale price maintenance for this purpose, effectuated by discrimination in the licensing of jobbers to handle the patented product. There is authority for the proposition that effective resale price maintenance both requires and facilitates horizontal price fixing. See the memorandum by Corwin Edwards of the Department of Justice, filed with the Temporary National Economic Committee, urging repeal of the Miller-Tydings act. TEMPORARY NATIONAL ECONOMIC COMMITTEE, FINAL REPORT AND RECOMMENDATIONS IN INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER 232 (1941) (S. Doc. 35, 77th Cong., 1st sess.).

agency, the same marketing policy will escape the censure of the court.[15] As it stands, the decision in the principal case simply serves to warn that resale price maintenance by the agency method may have the added result of restraining competition between independent producers and thus fall within the prohibitions of the Sherman Act.

[15] Though the Fair Trade Acts have probably much simplified the legal problems surrounding resale price maintenance in the field of restraints of trade, it is unfortunate that, where these enactments do not apply, the lawfulnes of vertical price maintenance in interstate commerce should still depend on a choice between marketing methods. This is the great point made by Klaus, "Sale, Agency and Price Maintenance: II" 28 COL. L. REV. 441 (1928). The Court in the principal case cites Mr. Klaus and states very positively that "however useful it [*del credere* agency] may be in allocating risks between the parties and determining their rights inter se, its terms do not necessarily control when the rights of others intervene, whether they be creditors or the sovereign." Principal case, 316 U. S. at 276-277. It seems clear, however, that the Masonite price maintenance plan would have been upheld had it not been for the choice of competitors as agents, for this factor was the sole ground relied on by the court for distinguishing the principal case from United States v. General Electric Co., 272 U. S. 476, 47 S. Ct. 192 (1926), where the agency plan was found lawful under the antitrust law. "In this case [i. e the principal case], the price regulation was based on mutual agreement among the distributors of competing products, some of whom had competing patents, as we have noted." Principal case, 316 U. S. at 280.