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Constitutional Law--Fair Trade Law Ruled Unconstitutional

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Recent Decisions

CONSTITUTIONAL LAW — FAIR TRADE LAW RULED UNCONSTITUTIONAL

Appellants were enjoined by the lower courts from selling Prestone anti-freeze at less than the minimum price stipulated by the manufacturer in an agreement with another distributor.¹ The question before the Court concerned the so-called "nonsigner" clause of the Ohio Fair Trade Act.² Should a statute be permitted to stand which provides that a minimum resale price agreement between a manufacturer and a distributor binds all other distributors of the commodity, whether or not they are parties to the contract?

Following almost nationwide enactment of fair trade laws³ came *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*,⁴ in which the United States Supreme Court provided the authority and classic reasoning invariably utilized thereafter by state courts to buttress decisions upholding "nonsigner" provisions in fair trade laws. The good will in a trademarked commodity is valuable property owned by the producer.⁵ The primary purpose of fair trade laws is to protect the manufacturer's property right, price restriction serving as appropriate means to that end.⁶ Because the distributor does not own the good will, it follows that preventing its destruction by prohibiting resale below established prices cannot constitute denial of due process on arbitrary grounds. Nor do fair trade laws deny equal protection, because the legislative classification bears substantial relation to the object of the legislation.⁷ If a purchaser wishes to resell at a price of his own choosing, there is nothing to prevent his removing the trademark from the commodity. Furthermore, "evidence is voluminous" to the effect that price-cutting is injurious to the public.⁸

¹ *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958).

² OHIO REV. CODE § 1333.07. "Whoever knowingly and wilfully . . . offers for sale, or sells any commodity at less than the minimum price stipulated in any contract entered into under § 1333.06 . . . whether said person . . . 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." § 1333.08 provides that suit may be brought for injunction against such practice.

³ *Dr. G. H. Tichenor Antiseptic Co. v. Schwegman Bros.*, 231 La. 51, 90 So.2d 343 (1956).

⁴ 299 U.S. 183 (1936).

⁵ *Id.* at 195.

⁶ *Id.* at 193.

⁷ *Id.* at 195.

⁸ *Id.* at 197.

Armed with the *Old Dearborn* case, the courts continued to stave off attacks upon the constitutionality of fair trade laws until a series of adverse decisions, beginning in 1952, heralded a re-evaluation.⁹ Reversal of the trend found those courts which hold against "nonsigner" clauses pursuing a universal pattern of reasoning. Public welfare is not so appreciably affected as to justify exercise of the police power to deprive retailers and distributors of freedom to dispose of their property. At least one court has asserted that protection is, if anything, injurious to the public welfare, in that it restricts competition and benefits a few manufacturers at the expense of the public welfare.¹⁰ The concept of good will as a "property right," entitled to protection in the area of fair trade, has suffered harsh criticism.¹¹ Furthermore, it is in violation of the due process clause of state constitutions to render the distributor's right to dispose of his property subordinate to the producer's good will.¹² Other courts have assaulted "nonsigner" clauses on the ground that they constitute delegation of legislative power to private persons.¹³

In deciding fair trade cases, nearly all courts appear to recognize two mutually exclusive property rights: the interest of the producer in the good will, developed at great expense and symbolized by the trademark on his product; and the right of the distributor to dispose of his property. The final determinant as to which shall prevail lies in a searching appraisal of the impact which denial of the former and recognition of the latter would have upon the economy.

Without indicating that it had undertaken such an appraisal, the Supreme Court of Ohio announced that the "nonsigner" clause bears no substantial relation to the public welfare, and consequently is an unauthorized exercise of the police power.¹⁴ The Court further held that the

⁹ See note 3, *supra*. Between 1952 and 1956, fair trade laws were held unconstitutional in 12 states; during the same period constitutionality of such laws was upheld by 9 states. In 1957, New Mexico also declared its fair trade laws to be unconstitutional. *Skaggs Drug Center v. General Electric Co.*, 315 P.2d 967 (N.M. 1957).

¹⁰ *Olin Mathieson Chemical Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956); *Union Carbide and Carbon Corp. v. White River Distributors*, 224 Ark. 558, 275 S.W.2d 455 (1955).

¹¹ The function of the trade name is simply to designate the manufacturer of the commodity. *Shakespeare v. Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952). Chafee questions the applicability of the doctrine of equitable servitudes to commodities. Note, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 1013 (1928). Thus relief against trademark infringement is based more upon protection against tortious interference with trade expectancies than exclusive ownership of the good will as an object of property. Schulman, *Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L.J. 607 (1940).

¹² *Cox v. General Electric Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955).

¹³ See note 3, *supra* at 64, 90 S.2d at 347.

¹⁴ See note 1, *supra* at 184. The Court chose not to comment upon the accuracy of a determinative conclusion of the Court of Appeals: