Case Western Reserve Law Review

Volume 12 | Issue 3

1961

Trade Regulation

Maurice S. Culp

cost was not to exceed eight hundred dollars. With reference to the *Oakwood Club* decision, should the farmer fare better than the urbanite under this "rural" doctrine where he is afforded less leeway in dealing with the problem?[66]

CONCLUSION

Tort law generally is in need of serious re-examination and in certain areas some measure of codification. The law cannot expect laymen to regulate their lives by guide lines so elusive that lawyers and trial and appellate judges differ as to the consequences imputable to a specific act. Nor is the enormity of the task an acceptable excuse for inaction. Many of the accepted fixtures of our legal system have grown out of experimentation, particularly at a state level.

The cases covered in this article have pointed up the need to refine legal-medical terminology and the pitfalls of contributory negligence. In the area of water rights unprecedented opportunities have been indicated for the formation of dynamic policies in coping with the resource problems allied with our projected national growth. In all of these areas there continues to be a need for progressive experimentation in tort law which will provide practical as well as equitable solutions. This can only be achieved through a sensitive interplay of forces; the mutual contributions of advocate and judge.

JUSTIN C. SMITH

TRADE REGULATION

The first Ohio Fair Trade Act was enacted in 1936.[1] Section four of that law,[2] as applied to a non-signer, was held invalid by the Ohio Supreme Court in 1958.[3] The decision was based upon three grounds: (1) that the legislation represented an unauthorized exercise of the police power in a matter unrelated to the public safety, morals, or general welfare, (2) that it delegated legislative power to private persons, and (3) that it unconstitutionally denied the owner of property the right to sell it on terms of his own choosing.

The Ohio legislature in 1959 enacted an elaborate trade practices statute to replace the 1936 statute which had been substantially invalidated by the 1958 supreme court decision. This new statute[4] has a detailed purpose and policy statement in support of its authorization of minimum resale price fixing by a proprietor or a person to whom he has

66. See reference to "urban rule" and "rural rule" in case cited note 63 *supra*.

granted the sole authority to establish minimum resale prices within the state. It has a more sophisticated solution for the problem presented by the non-signer. The term "contract" is so broadly defined that any person who, "with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum prices stipulated therefor by such proprietor."[5] The authorized methods of giving actual notice are numerous,[6] including notice by letter, through advertising, and by a statement attached to the article, its container or dispenser. A person who has actual notice of any applicable minimum resale price is charged with notice that such a price is subject to change. It is lawful to establish minimum resale prices by notice or by contract and equally lawful to change them thereafter by written notice to any distributor who has acquired the trade-mark or trade name commodity with notice of any established minimum resale price.[7] The proprietor's resale pricing program may, at his option, extend to all levels of distribution; he may, by contract or notice, require all distributors to observe this minimum resale pricing program.[8] The statute declares it to be unlawful and an act of unfair competition for any distributor, with notice that a proprietor has established a stipulated minimum resale price for a commodity, to sell, offer to sell, or advertise such a commodity for sale at a price lower than the stipulated minimum resale price.[9] Any person suffering or reasonably anticipating damage as a result of a violation may bring suit to enforce the statute. Damages as well as injunctive relief may be awarded, and the successful plaintiff may recover the costs of suit, including reasonable attorney fees, regardless of whether monetary damages are established.[10] A distributor may, however, avoid the effect of these provisions

---

1. 116 Ohio Laws Pt. 2, 185 (1936).

2. *Id.* at 186. OHIO REV. CODE § 1333.07, providing that any person who knowingly and wilfully advertises, offers for sale or sells any commodity at less than the minimum price stipulated in any contract entered into under section 3 (OHIO REV. CODE § 1333.06), whether a party to the contract or not, is engaged in unfair competition and unfair trade practices and is liable to any person damaged thereby.

3. Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958). See also discussion in *Equity* section, p. 515 *supra.* See recent decision comment in 9 WEST. RES. L. REV. 509 (1958). It is interesting that the decision of the court of appeals which was reversed by the supreme court was not reported until 1960. See Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 163 N.E.2d 404 (Ohio Ct. App. 1956).

4. OHIO REV. CODE § 1333.27.

5. OHIO REV. CODE § 1333.28(I).

6. OHIO REV. CODE § 1333.30.

7. OHIO REV. CODE § 1333.29(A).

8. OHIO REV. CODE § 1333.29(B).

9. OHIO REV. CODE § 1333.32(A).

10. OHIO REV. CODE § 1333.32(B).

if, after receiving notice that a minimum resale price has been established, he removes all trace of the identifying trade-mark or trade name. The proprietor retains a statutory proprietary interest in a commodity so long as it continues to be identified by his trade-mark or trade name.[11]

The constitutionality of this 1959 statute was raised in at least three reported cases during 1960. Two of these were suits in the Common Pleas Court of Cuyahoga County. The third action was brought in the Court of Common Pleas of Hamilton County. The Cuyahoga County cases were heard separately but decided and reported together. The same plaintiff in both suits sought a declaratory judgment against the constitutionality of the new statute. The defendants sought by cross petitions, to enjoin the plaintiff from selling their respective products at less than the fair trade price.[12]

The opinion of the trial judge questions whether the new legislation cured the defects in the former "non-signer" section which had been held unconstitutional. It compared the provisions of the old and the new and concluded that the new statute did not correct the infirmity of the old, particularly on the matter of delegation of legislative authority to a private person. Having determined that this infirmity existed in the new statute, the court relied upon the supreme court's decision in *Union Carbide & Carbon Corporation v. Bargain Fair, Incorporated*,[13] and declined to discuss any of the other questions of constitutionality raised in the briefs.[14] Eli Lilly & Company has appealed from this adverse decision.[15]

In the Hamilton County suit a manufacturer sought injunctive relief under the new Fair Trade Law[16] against a local distributor. The decision was upon a demurrer to the petition, raising the question of constitutionality. The trial judge concluded that the new statute had all of the defects of the old law and found that some additional restrictions upon individual property owners were also unlawful and unconstitutional. In holding the entire 1959 statute unconstitutional, the trial court found

11. OHIO REV. CODE § 1333.31.

12. Hudson Dist., Inc. v. Upjohn Co., TRADE REG. REP. (1960 Trade Cas.) ¶ 69,778 (Ohio C.P. July 28, 1960).

13. 167 Ohio St. 182, 147 N.E.2d 481 (1958).

14. While the court felt bound by the *Union Carbide* case, it noted additional support for its position in a number of other jurisdictions which have held that similar statutes establishing the right to set a minimum price without reference to any standard unlawfully delegate legislative power (recognizing that there is substantial federal and state authority contrary to its position). Some of the cases on which it relies are: Olin Mathieson Chemical Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Bissell Carpet Sweeper Co. v. Shane, 237 Ind. 188, 143 N.E.2d 415 (1957); Quality Oil Co. v. E. I. Dupont DeNemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); and Remington Arms Co. v. G.E.M. of St. Louis, Inc., 102 N.W.2d 528 (Minn. 1960).

15. Cleveland Press, p. 7, col. 4, Jan. 18, 1961.

16. Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distributors Co., 167 N.E.2d 687 (Ohio C.P. 1960). See also discussion in *Constitutional Law* section, p. 472 *supra*.