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Resale Price Maintenance

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RESALE PRICE MAINTENANCE

In a number of recent cases, arising under section 5 of the Federal Trade Commission Act,[1] involving the determination of what constitutes "unfair methods of competition," the Federal Courts have had to determine whether a manufacturer may legally retain or reinstate upon his list of customers wholesalers and retailers who have cut the manufacturer's suggested resale prices, upon receiving from the offending dealers assurances that thereafter the manufacturer's resale prices will be observed.

In prosecutions under the Sherman Act,[2] it is well settled that, in the absence of any purpose to create or maintain a monopoly, a manufacturer is not violating the terms of the Act, who exercises his own independent discretion as to the parties with whom he will deal and refuses to sell to those who will not resell his products at the prices which he fixes for their resale.[3]

In the *Beechnut* decision[4] which arose under section 5 of the Federal Trade Commission Act, and from the facts of which it did not appear that the Beechnut Company had any kind of monopoly in the kind of products it manufactured, the majority opinion of the Court written by Mr. Justice Day stated that a manufacturer might not, consistently with the law "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."[5]

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[1] Act of Sept. 26, 1914, Ch. 311 (38 Stat. at L. 719). Section 5 provides in part: "Unfair methods of competition are hereby declared illegal." "The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, from using unfair methods of competition."

[2] Act of July 2, 1890, Ch. 648 (26 Stat. at L. 209).

[3] *United States* v. *Colgate & Co.* (1919), 250 U. S. 300, 39 Sup. Ct. 465, and cases therein cited. See (1922) comments, 31 Yale Law Journal 651.

[4] *Federal Trade Commission* v. *Beechnut Packing Co.* (1922), 257 U. S. 441, 42 Sup. Ct. 150. See 35 Harv. L. Rev. 772.

[5] *Federal Trade Commission* v. *Beechnut Packing Co.*, supra, 257 U. S. at p. 453. The precise holding of the case was that the commission under section 5 of the Federal Trade Comission Act might properly require the Beechnut Company to cease and desist "from carrying into effect its so-called Beechnut policy by cooperative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it: (a) By the practice of reporting the names of dealers who do not observe such resale prices; (b) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be

As a corollary of the first principle it follows that a manufacturer may make known generally to the trade the prices at which he desires the goods resold, and may say to the price-cutter: "I have struck you off my list and will sell you no more."[6] If, however, the price-cutter replies: "I will cease cutting your prices, if you will retain or reinstate me on your list," may a contract to maintain prices be implied from the assurance so given, which is illegal under the definition of the law contained in the prevailing opinion in the *Beechnut* case?

As one Court has observed: "There seems to be no reason why this exclusion must be permanent, nor is it obvious that any principle of public policy requires the price-cutter to be forever barred from handling these goods. Yet the difference between his express promise to observe the price hereafter and the implied promise which he quite obviously makes to the same effect, if he asks the acceptance of a further order, is not a sharp distinction."[7]

In six cases[8] in the lower Federal Courts since the *Beechnut* decision, in one of which a writ or certiorari was denied by the

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supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (c) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders to dealers who sell at less than such prices; (d) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of dealers who sell the company's products at less than such prices in order to prevent such dealers from obtaining the products of the company; or (e) by utilizing any equivalent cooperative means of accomplishing the maintenance of prices fixed by the company." 257 U. S. at pp. 455-456. Of this holding of the Supreme Court it is said in *Toledo Pipe-Threading Machine Co.* v. *Federal Trade Commission* (1926, C. C. A. 6th Cir.), 11 Fed. 2d. Series 337 at p. 341: "Whether it intended its condemnation to go to any one of the elements separately, or only to the combination of them all, may not be clear, though the use of the disjunctive 'or' would indicate the former." See *Dunn Resale Price Maintenance* (1923), 32 Yale Law Journal at pp. 702-705, and 40 Harv. L. Rev. 139.

[6] *United States* v. *Colgate & Co.*, supra, 250 U. S. at p. 307

[7] Circuit Judge Denison in *Toledo Pipe-Threading Machine Co.* v. *Federal Trade Commission*, supra, Note 4, 11 Fed. 2d Series at p. 342.

[8] *Hills Bros.* v. *Federal Trade Commission* (1926, C. C. A. 9th Cir.), 9 Fed. 2d Series 481, writ of certiorari denied by Supreme Court (1926), 70 L. Ed. 539; *Cream of Wheat Co.* v. *Federal Trade Commission* (C. C. A. 8th Cir. 1926), 14 Fed. 2d Series 40; *Q. R. S. Music Co.* v. *Federal Trade Commission* (1926 C. C. A. 7th Cir.), 12 Fed. 2d Series 730; *Moir* v. *Federal Trade Commission* (1926 C. C. A., 1st Cir.), 12 Fed. 2d Series 22; *Toledo Pipe-Threading Machine Co.* v. *Federal Trade Commission*, supra, Note 5; *Oppenheim, Oberndorf & Co., Inc.* v. *Federal Trade Commission* (1925 C. C. A., 4th Cir.), 5 Fed. 2d Series 574. See also *Butterick*

Supreme Court without opinion, systems of resale price maintenance found in various degrees to be similar to the so-called *Beechnut* plan, have been condemned as unfair methods of competition. These cases have not involved the element of monopoly or of intent to monopolize, but in each, among a complex of other circumstances, the facts disclosed that it was the manufacturer's usual practice to investigate reported instances of price-cutting and only retain or reinstate the alleged price-cutter on his list of customers upon satisfactory assurances from the price-cutter that thereafter he would maintain resale prices.

A contrary result was reached in two cases recently decided by the Circuit Court of Appeals for the Second Circuit. *American Tobacco Co.* v. *Federal Trade Commission*[9] and *H. H. Ayer Inc.* v. *Federal Trade Commission*.[10] In the *Ayer* case the manufacturer in a few instances reinstated offending price-cutters upon his list upon assurances to maintain prices, but the Court held that these instances were only occasional deviations from the defendant's general merchandising practice, and consequently did not constitute an unfair method of competition within the meaning of section 5 of the Federal Trade Commission Act.

The Supreme Court has defined "unfair method of competition" as used in the Federal Trade Commission Act as not to include anything not already regarded as unlawful at the time of

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Co. v. *Federal Trade Commission* (C. C. A. 2d Cir. 1925), 4 Fed. 2d Series 910; and *A. H. Grebe & Co.* v. *Siegel* (D. C. R. I. 1926), 14 Fed. 2d Series 175.

[9] (1925 C. C. A. 2d Cir.) 9 Fed. 2d Series 570, writ of certiorari granted by Supreme Court without opinion (1926), 70 L. Ed. 395. This case, which is mentioned only for the reference, need not be noticed further, as it does not appear from the court's opinion, delivered by Circuit Judge Rogers, that there was any proof that the defendant, the American Tobacco Company sought or obtained asurances from offending price-cutters to maintain resale prices.

[10] (1926, C. C. A. 2d Cir.) 15 Fed. 2d 274. From the opinion of court, it would appear in only a few instances had the manufacturer actually received assurances from price-cutters that they would offend no more. Circuit Judge Rogers in delivering the opinion of the court stated: "No court has gone so far as to hold that an occasional instance in the business career of a firm as where an agent has solicited or urged a retailer not to cut prices, amounts to an unfair business policy or constitutes a method of merchandising which is condemned by the act." "Out of thousands of sales made with some eight thousand customers, but a few are referred to as instances to eliminate the price-cutting. In doing this, we think the petitioner did no more than it might lawfully do in selecting its customers whom it considered desirable." 15 Fed. 2d. Series at pp. 277 and 278.

the passage of the Act.[11] While practices may be "unfair methods of competition" as "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly" the term was left purposely indefinite in the statute so as to cover other practices not forbidden under the Anti-Trust Laws,[12] but regarded as opposed to good morals, "because characterized by deception, bad faith, fraud or oppression."[13]

As the cases on price maintenance have not involved monopoly or the intent to monopolize, except such monopoly of his own goods as the manufacturer has with full assent of the law, viz.: that no other manufacturer may legally put out similar articles bearing the same brand, and as the elements of deception, bad faith and fraud are not involved, it would appear that the practice is an unfair method of competition either because (a) it tends unduly to hinder competition or (b) involves coercion.

As was pointed out by Mr. Justice Holmes in his dissenting opinion in the Beechnut[14] case, maintenance of resale prices does not hinder competition between a manufacturer and his competitors. The only competition affected is competition between the various jobbers and dealers who handle the manufacturer's products. Whether it is in the public interest that this sort of competition be free and untrammeled is an economic question.[15]

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[11] *Federal Trade Commission* v. *Gratz* (1920), 253 U. S. 421.

[12] This term is defined in section 1 of the Clayton Act to include both the Sherman Act and the Supplementary Clayton Act (Act of Oct. 15, 1914, 38 Stat. at L. 730).

[13] *Federal Trade Commission* v. *Gratz*, supra, at p. 427. See *Federal Trade Commission* v. *Winsted Hosiery Company* (1922), 258 U. S. 483. See also on the general subject *Haines Efforts to Define Unfair Competition* (1919), 29 Yale Law Journal 1, and 35 Harv. L. Rev. at pp. 830-833.

[14] See 257 U. S. at p. 457: "So far as the Sherman Act is concerned I had supposed that its policy was aimed against attempts to create a monopoly in the doers of the condemned act or to hinder competition with them. Of course there can be nothing of that sort here. The respondent already has the monopoly of its own goods with the full assent of the law, and no one can compete with regard to those goods, which are the only ones concerned. . . . I cannot see how it is unfair competition to say to those to whom the respondent sells and to the world, you can have my goods only on the terms that I propose, when the existence of any competition in dealing with them depends upon the respondent's will."

[15] See (1922) 31 Comments, Yale Law Journal 652, and the authorities there cited for arguments on both sides of the question, viz.: *Murchison Resale Price Maintenance* (1919), *Columbia University Studies in Political Science*, Vol. 82, No. 2; *Gleick, Price Maintenance* (1917), 24 *Case & Comment*, 193.

It must, however, be regarded as well settled that a manufacturer may not maintain resale prices by a system of express contracts with jobbers and dealers who trade in his products.[16] In other words, the manufacturer may not legally acquire a *right* against the buyer that he shall not resell at other than the price fixed by the manufacturer.

In the *Beechnut* case the plan of merchandising of the Beechnut Company was held an unfair method of competition, because in the absence of "agreements express or implied," to maintain resale prices it was quite as effectual to accomplish the same purpose.[17] In other words, the manufacturer's course of dealing was illegal even though the buyer had a legal *privilege* to cut prices.

The rule of the *Beechnut* case must now be considered as fairly well settled.[18] The *Ayer* case may be distinguished from the *Beechnut* case on the ground that the isolated instances, in which it appeared in that case buyers from the manufacturer tacitly agreed to maintain resale prices, did not evidence a general merchandising policy on the part of the manufacturer such as was condemned in the *Beechnut* case.[19] Accordingly, applying the definition of unfair methods of competition adopted by the Supreme Court, the *Ayer* case can be sustained on the ground that the isolated acts complained of in the *Ayer* case did not tend

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[16] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.* (1911), 220 U. S. 373, 31 Sup. Ct. 376. See also *United States* v. *A. Schrader's Sons, Inc.* (1920), 252 U. S. 85; 40 Sup. Ct. 251.

[17] *Beechnut Packing Co.* v. *Federal Trade Commission*, supra, Note 4. In *Frey & on v. Cudahy Packing Co.* (1921), 256 U. S. 208, the Supreme Court had previously stated, "the essential agreement, combination or conspiracy 'to maintain resale prices might be implied' from a course of dealing or other circumstances." 256 U. S. at p. 210. In the net result, the Supreme Court would appear to regard price maintenance by contracts or by tacit understandings as a difference merely of method. Accordingly the presence or absence of "contracts" or "agreements" is immaterial. See (1922) Comments, 31 Yale Law Journal 653-654.

[18] The Supreme Court has denied writs of certiorari to the Circuit Court of Appeals of the Seventh and Ninth Circuits in two cases in which the lower court found and condemned practices "substantially" identical with the facts in the *Beechnut* case. *Mishawake Woolen Manufacturers Company* v. *Federal Trade Commission* (1923), 260 U. S. 748 (percuriam decision), and *Hills Bros* v. *Federal Trade Commission*, supra, Note 9. In the latter case the opinion of the circuit court said: "The case differs in degree and not in kind from the *Beechnut* case. . . ." 9 Fed. 2d Series, at p. 485.

[19] The court so distinguishes the *Beechnut* case, stressing also the lack of coercive or cooperative means to maintain prices used by the *Ayer* concern.

unduly to hinder competition between the various jobbers and retailers.

However, an inconsistency occurs. If in occasional instances a manufacturer may retain or reinstate a price-cutter upon his list of customers upon receiving assurance from the price-cutter that he will thereafter maintain resale prices, it would seem that he should be permitted to accomplish the same result in occasional instances by express contracts. Yet, apart from whether a public interest is involved, such contracts are generally unenforcible because they constitute illegal restraints on alienation, by attempting to retain certain of the muniments of title in the seller after title has passed to the buyer.[20]

Assuming the rule of the *Ayer* case to be sound, it would appear that in the absence of express contracts a manufacturer may, in the occasional instance at least, and in the absence of a settled course of dealing, retain or reinstate upon his list reformed price-cutters. In other words, that in determining whether a particular policy towards price-cutters is an unfair method of competition within the meaning of section 5 of the Federal Trade Commission Act, the courts will invoke a principle familiar in cases arising under the Sherman Act[21]—the rule of reason.[22]

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[20] See *Dunn Resale Price Maintenance* (1923), 32 Yale Law Journal, at p. 679. For an explanation of the rule of reason see the leading case of *United States* v. *American Tobacco Co.* (1911), 221 U. S. 106, 55 L. Ed. 663.

[21] In this connection it is interesting to note that in *United States* v. *Hudnut* (D. C. S. N. Y. 1925), 8 Fed. 2d Series 1010, a bill in equity was brought by the government under the Sherman Act to restrain the defendant, a manufacturer of toilet articles, from maintaining resale prices. The facts were not unlike those of the Ayer case. District Judge Hand in dismissing the bill, expressed doubt as to its reasonableness.

[22] The wary manufacturer, however, will need to keep in mind the words of the Supreme Court in *Eastern States Retail Lumber Dealers' Association* v. *United States* (1914), 234 U. S. 600, 58 L. Ed. 1490; "It is elementary, however, that conspiracies (to maintain prices) are seldom capable of proof by direct testimony and may be inferred from things done . . ." i e., that isolated instances of selling to reformed price-cutters, such as failed of condemnation in the principal case, are admissible, and, in the absence of better, may be considered as evidential of a general combination or conspiracy between the manufacturer and those who deal in his products.