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REGULATION OF BUSINESS--ROBINSON-PATMAN ACT--DEFENSES OF IN PARI DELICTO AND CHANGED MARKET CONDITIONS

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REGULATION OF BUSINESS—ROBINSON-PATMAN ACT—DEFENSES OF IN PARI DELICTO AND CHANGED MARKET CONDITIONS—A group of businessmen in Santa Rosa, New Mexico, organized a boycott against all bread except that baked by plaintiff, the sole baker in Santa Rosa, to induce him not to move his bakery out of town; plaintiff agreed to this plan. Defendant, who sold in interstate commerce, thereupon halved his bread prices in Santa Rosa while maintaining them in other towns, in order to defeat the boycott and preserve the town as a market. Plaintiff brought an action for treble damages under section 2(a) of the Robinson-Patman Act[1] for injuries suffered from this price discrimination. The federal

[1] ". . . it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13(a).

district court gave judgment for defendant on the ground that plaintiff was in pari delicto, and was affirmed by the court of appeals.[2] On certiorari, the Supreme Court remanded[3] to the court of appeals for reconsideration in the light of the *Kiefer-Stewart* case,[4] which had recently held, on different facts, that a plaintiff's "equal fault" under the Sherman Act is not a defense. *Held,* defendant has no defenses; remanded for a new trial to ascertain whether there was the requisite lessening of competition. The *Kiefer-Stewart* case is controlling to deny the defense of in pari delicto even where plaintiff's wrong induced defendant's violation. Furthermore, a boycott participated in by a plaintiff is not a "changed condition affecting the market" of the kind which may justify a price discrimination. *Moore v. Mead Service Co.,* (10th Cir. 1951) 190 F. (2d) 540.[5]

That a plaintiff who is a party to an agreement illegal under the anti-trust laws is in pari delicto and can have no action arising out of that agreement is now settled law.[6] The *Kiefer-Stewart* case, which the court was ordered to follow in the principal case, makes it clear that a plaintiff's independent violation, on the other hand, is not a defense to a private action under the Sherman Act. It is perhaps arguable that where a plaintiff's wrong causes defendant's violation, as in the principal case, the *Kiefer-Stewart* doctrine should be distinguished and plaintiff should be denied recovery under the concept of in pari delicto. The present Supreme Court, however, is likely to restrict in pari delicto as a defense, since it inevitably works to curb the private sanction against price discriminations and other illegalities under the anti-trust laws.[7] The court in the principal case also considered a defense which has apparently never been adjudicated before: the "changed market conditions" proviso of Robinson-Patman Act, section 2(a).[8] Defendant had argued that plaintiff's boycott constituted such a change in his Santa Rosa market as would justify his cutting prices there, but the court construed the language of the proviso as permitting price changes only for specific lots of goods which must be disposed of at reduced prices from their own nature.[9] This is certainly a reasonable interpretation in view of the examples given of conditions which will justify a discrimination. It is submitted,

[2] Moore v. Mead Service Co., (10th Cir. 1950) 184 F. (2d) 338; noted in 51 COL. L. REV. 523 (1951).

[3] 340 U.S. 944, 71 S.Ct. 528 (1951).

[4] Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S.Ct. 259 (1951).

[5] Certiorari was denied, 342 U.S. 902, 72 S.Ct. 290 (1952). The principal case is also noted in 65 HARV. L. REV. 524 (1952).

[6] Eastman Kodak Co. v. Blackmore, (2d Cir. 1921) 277 F. 694; Bluefield S.S. Co. v. United Fruit Co., (3d Cir. 1917) 243 F. 1. See note and cases cited, 51 COL. L. REV. 523 (1951).

[7] Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra note 4; Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 71 S.Ct. 240 (1951).

[8] ". . . nothing herein contained shall prevent price changes from time to time . . . in response to changing conditions affecting the market for . . . the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13(a).

[9] Principal case at 541.

however, that the language "such as but not limited to" these specific conditions indicates that Congress may have intended to leave room for courts to allow other justifiable discriminations in market situations unforeseen by the drafters of the statute.[10] It might also be argued that the instant situation is analogous to the perishable goods "condition"; defendant had to cut his price in order to sell his bread in this market just as a fruit-grower might have to cut prices to sell his goods when they are in danger of spoiling. These possible arguments in favor of the defense are perhaps not as convincing as the policy behind them; if section 2(a) can be construed to allow it, a seller should be permitted the self-help remedy of reducing prices in good faith[11] to combat an illegal boycott which has ousted him from his market, and should not be compelled to seek an injunction or sue for damages under a state or federal anti-trust statute, risking the concomitant delay of such an action. In permitting sellers to enter and compete in as many markets as possible, and thus giving consumers a greater number of sellers to choose from, even where this involves a price discrimination, the court would be furthering the basic goal of the act.[12]

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[10] It is not clear just what Congress intended the limits of this proviso to be. Rep. Utterback, in explaining this section, said only that it could not be used "as a cloak for price discriminations contrary to the spirit and purpose of this bill." 80 CONG. REC. 9418 (1936). Defendant's defensive efforts to restore competition in bread to the Santa Rosa market by breaking his competitor's boycott may well be deemed to come within the spirit of the statute, in view of §13(b) of the act, which specifically permits meeting competition defensively in the context of a competitor's price reduction. See Berger and Goldstein, "Meeting Competition under the Robinson-Patman Act," 44 ILL. L. REV. 315 (1949).

[11] The proviso does not specify good faith, but that requirement is implicit in the whole act.

[12] Judge Phillips' special concurring opinion favored permitting the defense on these facts. "If we deny . . . [it]," he said at 542, "the statute, instead of fostering competition and preventing monopoly, will become an instrument to destroy competition and foster monopoly."