Boston College Law Review

Volume 7 | Issue 1 Article 15

10-1-1965

Trade Regulation—Imitation Foods—Effect of Labeling.—Coffee-Rich, Inc. v. Commissioner of Pub. Health

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advantage."[51] The union's interest in keeping service markets competitive, says Goldberg, is based on their desire for job security. Certainly, then, the union's benefit from imposing an operating-hours restriction on Jewel Tea, if Jewel Tea would not use union men after six, is indirect. Goldberg's expansive interpretation of the union's "direct interest" could just as easily lead to the conclusion that a union has the right to impose a similar restriction on a store that does not even sell meat simply because it might competitively affect their employers. Such a viewpoint is a dangerous enlargement of labor strength.[52]

Writing for the three dissenters, Mr. Justice Douglas focuses on establishing a conspiracy against Jewel Tea.[53] Then he passes to a brief disagreement with Goldberg's argument, apparently implying that he would agree with Mr. Justice White's view that the union can only impose demands on employers for whom they work.[54] Yet his treatment of this subject is so short and vague as to leave the Court without any real authoritative position on this important issue.

The *Pennington* and *Jewel Tea* cases represent new limitations on the union's exemption from Sherman Act prosecution. The *Pennington* doctrine is far more expansive and significant since it limits "what a union or an employer may offer or extract in the name of wages."[55] *Jewel Tea* merely restates the relationship which must exist between a labor union and an employer group before the former can impose demands on the latter. Assuming the dissenters would agree with Mr. Justice White in a subsequent case, it might be said that *Jewel Tea* defines the circumstances in which negotiators may enjoy the privilege of unrestricted collective bargaining, and *Pennington* establishes what the Court really means by "unrestricted." This redefinition of terms could very likely signify that labor unions have grown to a stage when their lawful activities might once again be judicially evaluated as "economically and socially objectionable."[56]

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Trade Regulation—Imitation Foods—Effect of Labeling.—***Coffee-Rich, Inc. v. Commissioner of Pub. Health.***[1]**—Coffee-Rich, a non-dairy product conspicuously labeled as such, is used primarily to enrich and sweeten coffee. Sold at retail from frozen food chests, it is a wholesome, vegetable product. Under Chapter 94, Section 187 of the Massachusetts General Laws,[2] a food product is misbranded if it is "in imitation or semblance of any other food," unless it is conspicuously labeled an imitation. The statute is even more strict with regard to foods for which statutory standards have been

51 Id. at 1624.
52 See note 49 supra.
53 See text accompanying notes 41-43 supra.
54 See the last paragraph of Mr. Justice Douglas' dissent, supra note 2, at 1607.
55 Supra note 1, at 1591.
56 Duplex Printing Press Co. v. Deering, supra note 12, at 486.

1 1965 Mass. Adv. Sh. 155, 204 N.E.2d 281.
2 Mass. Gen. Laws ch. 94, § 187 (1932), as amended, St. 1948, ch. 598, § 2.

set, permitting no imitation of these,[3] regardless of labeling, with certain exceptions not applicable here.[4]

The Director of the Division of Food and Drugs of the Department of Public Health notified Coffee-Rich of his intention to proceed against it under the provisions of chapter 94.[5] Coffee-Rich withdrew voluntarily from the institutional market[6] but continued to sell through retail stores, and brought this action to enjoin the Director from enforcing the statute. The case was reserved and reported to the Supreme Judicial Court. HELD: The Director is enjoined from enforcing the statute against the sale of Coffee-Rich in retail stores.

The court reasoned that while Coffee-Rich is in imitation of cream under the statute, the purpose of the statute is to prevent consumer confusion.[7] Since Coffee-Rich is honestly and distinctively labeled and sold in a frozen state, there is no significant danger of consumer confusion at the retail level and, therefore, the application of section 187 to Coffee-Rich cannot be rationally justified. Furthermore, since it is admittedly wholesome and nutritious, the prohibition of its sale cannot be upheld as an effort to protect public health or safety under the state's police power. In the absence of the danger which the statute is intended to prevent, its application to petitioner was held to violate the Massachusetts Constitution.[8]

The court apparently felt itself bound by its earlier decision in *Aeration Processes, Inc. v. Commissioner of Pub. Health*,[9] where it had ruled that the presence of a labeling provision in the statute precluded it from considering the veracity or effect of food product labeling in determining whether a product is an imitation.[10] Thus the court felt obliged to exclude any consideration of the labeling of Coffee-Rich in determining that it was in imitation of cream.

In *Aeration*, the court had established a three-element criterion of imitation. The product in question, Instantblend, was found to be

> an imitation within § 187 because (1) it resembles cream but does not conform to the statutory standards therefor, (2) apart from information supplied by labeling, there is a likelihood that an

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[3] In Brief for Petitioner, pp. 57-64, it is argued that section 187 does not prohibit the imitation of standardized food products. The fact that section 187 "shall not be construed to permit the imitation of any food for which a standard has been established by law . . ." is insufficient, in petitioner's opinion, to constitute a prohibition of such imitation in the absence of more explicit prohibitory language. The court apparently rejected this construction.

[4] Mass. Gen. Laws ch. 94, § 49 (1932) (oleomargarine); Mass. Gen. Laws ch. 94, § 50 (1932) (imitation cheese). No exception from section 187 is made for cream.

[5] Mass. Gen. Laws ch. 94, § 12 (1932) establishes the statutory standards for cream. Mass. Gen. Laws Ann. ch. 94, § 189A (1958) and Mass. Gen. Laws ch. 94, § 191 (1932) provide for enforcement procedures and penalties.

[6] This term embraces those sales where it is unlikely that the ultimate consumer sees the original labels.

[7] Supra note 1, at 163, 204 N.E.2d at 287, citing Aeration Processes, Inc. v. Commissioner of Pub. Health, 346 Mass. 546, 550, 194 N.E.2d 838, 841 (1963).

[8] Mass. Const., Declaration of Rights, arts. 1, 10, 12; pt. II, ch. 1, § 1, art. 4.

[9] Aeration Processes, Inc. v. Commissioner of Pub. Health, supra note 7.

[10] Id. at 551, 194 N.E.2d at 842.

> average consumer, aware of Instantblend's intended use, will confuse it with cream, and (3) there is no showing that Instantblend and cream are so differentiated in the mind of the average consumer interested in the distinction that, by making reasonable effort, he would discover with which product he is confronted.[11]

The court unequivocally asserted that "Coffee-Rich unmistakenly falls within the proscription of section 187, as did Instantblend in the Aeration case, as 'in imitation or semblance' of cream."[12]

Coffee-Rich offered the court alternative definitions of "imitation"[13] in the hope that it could avoid application to it of section 187. Even if the court had accepted one of these definitions, however, it still would have been forced to find that Coffee-Rich fell within the meaning of the statute because of the presence of the language, "or semblance," in the statute. In making its finding of imitation, the court emphasized the following factors: (1) Coffee-Rich is not cream; (2) it is intended to be used as a substitute for cream; (3) it looks like cream; and (4) it tastes like cream when mixed with coffee.[14]

The court rejected the concept of "semblance" offered in *Carey v. Instantwhip Schenectady, Inc.*[15] In that case, the Appellate Division of the New York Supreme Court concluded that while Instantwhip Topping resembled whipped cream in general appearance, the resemblance was due to the "inherent characteristics of the ingredients of the topping,"[16] and not to any attempt by its manufacturers to simulate whipped cream. Without an attempt to mislead, which is "implicit in the phrase 'in the semblance of',"[17] the New York court refused to find that Instantwhip Topping was in imitation or semblance of whipped cream. Superficially, this case seems to be in direct conflict with the instant case. However, the basic difference lies not in the definitions given to "semblance," but rather in the different purposes of the two statutes involved. The Massachusetts statute is intended to prevent consumer confusion, whereas the New York statute is designed to prevent fraud or deception of the consumer by the producer or vendor.[18] In light of this distinction, the New York courts must give "semblance" a more restricted meaning than does the Massachusetts court.

Having thus found that Coffee-Rich violated the statute, the court examined its constitutionality as applied to Coffee-Rich. In *Aeration*, it had not considered the constitutionality of section 187 because the record

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[11] Id. at 553-54, 194 N.E.2d at 843.

[12] Supra note 1, at 159, 204 N.E.2d at 285.

[13] E.g., Coffee-Rich, Inc. v. Kansas State Bd. of Health, 192 Kan. 431, 437, 388 P.2d 582, 587 (1964) (inferiority or watering down of the original is required); Dairy Queen, Inc. v. McDowell, 260 Wis. 471, 476-78, 51 N.W.2d 34, 37-38 (1952) (resemblance alone is insufficient to constitute imitation in view of the manner of sale, advertising and labeling). For a summary of definitions offered, see Brief for Petitioner, pp. 50-51.

[14] Supra note 1, at 159, 204 N.E.2d at 285.

[15] 14 App. Div. 2d 467, 217 N.Y.S.2d 253 (1961).

[16] Id. at 468, 217 N.Y.S.2d at 254.

[17] Id. at 468, 217 N.Y.S.2d at 255.

[18] Id. at 468, 217 N.Y.S.2d at 254. See also People v. Guiton, 210 N.Y. 1, 103 N.E. 773 (1913); People v. Arensberg, 105 N.Y. 123, 11 N.E. 277 (1887).

> [did] not raise the issue whether such prohibition may be imposed under the State Constitution notwithstanding a showing that substantial confusion could not result because the product was distinctively labeled.[19]

There, sales were made to the institutional market and the ultimate consumer was not likely to see the product's label. Now, in *Coffee-Rich*, the court was confronted with precisely this issue. To sustain the validity of the statute under the Massachusetts constitution, it had to be established that it "bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare."[20] The validity of the statute's application depended upon whether it was, under the circumstances, a reasonable method of achieving the intended result—the avoidance of consumer confusion. To resolve *this* issue, the court finally considered packaging and labeling, which it had ignored in determining imitation. Since these factors would prevent the average user, the retail purchaser, from buying Coffee-Rich under the mistaken impression that it was cream, there was no likelihood of confusion to justify the prohibition of its retail sale. For this reason, the court found the statute to be unconstitutional as applied to Coffee-Rich.

The approach taken by the courts of California and Wisconsin has yielded a preferable result. The California Court of Appeals in *Midget Prods., Inc. v. Jacobsen*[21] considered conspicuous and truthful labeling of an allegedly imitation food product to be an element which would prevent consumer confusion. Where the possibility of such confusion was absent, the court refused to find imitation. Similarly, the Circuit Court of Wisconsin, in *Coffee-Rich, Inc. v. McDowell*,[22] said that

> mere resemblance in color, taste and texture does not make a product an imitation within the meaning of the statute when it is clearly labeled and identifiable by its frozen state as being a different product.[23]

The use of this approach in the instant case would have resulted in the court's placing Coffee-Rich within the statute solely on a finding of semblance. The court would then be limited to determining the constitutionality of totally prohibiting a wholesome food product because of mere resemblance to another food. This could possibly have led to the eventual striking of "semblance" from the statute and the formulation of a more workable concept of imitation.

The basic flaw in *Aeration* was the formulation of the unnecessarily broad rule that section 187 precludes any consideration of truthful and distinctive labeling in determining the issue of imitation. Instantblend, honestly labeled,

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[19] Aeration Processes, Inc. v. Commissioner of Pub. Health, supra note 7, at 554, 194 N.E.2d at 843.

[20] Supra note 1, at 162, 204 N.E.2d at 287, citing Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life, 307 Mass. 408, 418, 30 N.E.2d 269, 275 (1940).

[21] 140 Cal. App. 2d 517, 295 P.2d 542 (1956).

[22] CCH FDC L. Rep. ¶ 40,047 (1963).

[23] Id. at 40,137.

was being sold in bulk to institutions and was being dispensed with coffee to their customers. It is highly unlikely that these consumers ever saw the Instantblend label. The honest labeling may have prevented the middlemen from being confused, but it had no effect on the ultimate consumer who relied solely on Instantblend's appearance. Therefore, the court should have excluded the consideration of Instantblend's labeling as a factor irrelevant to confusion of the ultimate consumer because of the circumstances, not on the basis of an immutable construction of the statute.

The court's construction of section 187 is based on an erroneous interpretation in *Aeration* of *United States v. Chil-Zert*.[24] Despite its honest and conspicuous labeling, Chil-Zert was found to be an imitation ice-cream, subject to the labeling provisions of the statute. The Massachusetts court construed this to mean that whenever a statute contains a provision for the labeling of imitation foods, the veracity or effect of the food's labeling cannot be considered in making the initial determination whether imitation exists. Since the federal court in *Chil-Zert* used a test of the composite effect of many factors[25] in determining that Chil-Zert was an imitation ice-cream and since nowhere in its decision did it say that the honesty, distinctiveness and conspicuousness of labeling could not constitute elements contributing to this composite effect, *Chil-Zert* should more properly be used as authority for the proposition that, once imitation has been established as a fact, honest labeling will not exempt the imitation product from the labeling provisions of the statute.

In *Coffee-Rich*, the court could have distinguished the cases and qualified or even abandoned the broad rule without upsetting the result in *Aeration*. But the court instead carried the rule intact over to the facts of *Coffee-Rich*.

Such an approach to labeling in this case has resulted in a construction of section 187 probably not intended nor even contemplated by the legislature. Now, cream, a product heretofore subject to the strictest scrutiny, may be imitated so long as consumer confusion is avoided. Imitation fruit flavorings, on the other hand, are subject to what appears to be a stricter standard in that they must display the word "imitation" on their labels.[26]

The court's decision may, however, have the fortuitous result of forcing the legislature to adopt a clearer and more comprehensive statute regulating imitation food products.[27] Such legislative standards become increasingly necessary as modern technology develops more synthetic food products.[28]

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[24] 114 F. Supp. 430 (N.D.N.Y. 1953).

[25] Id. at 432:

> It is plain that no all-inclusive test of imitation can be prescribed. . . . Chil-Zert is identical with ice cream in its method of manufacture, packaging and sale. It is similar in taste, appearance, color, texture, body and melting qualities. It has identical uses; its composition differs only from ice cream in the substitution of a cheaper ingredient; namely, vegetable oil in place of milk products.

[26] See Mass. Gen. Laws ch. 94, § 187 (1932), as amended, St. 1948, ch. 598, § 2.

[27] This result may not be entirely fortuitous. A hint of the court's possible dissatisfaction with the present statute is contained in Aeration Processes, Inc. v. Commissioner of Pub. Health, supra note 7, at 554 n.8, 194 N.E.2d at 843 n.8.

[28] Mr. Justice Spiegel, as Single Justice, determined the details of the injunction