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Trade Regulation

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a holder in due course. The Massachusetts amendment provides what seems to be a needed compromise in that it offers protection to the buyer, yet does not destroy the negotiability of the note. It perhaps would have been desirable under the Massachusetts statute to allow for some cut off of the buyer's defenses rather than to allow them to continue indefinitely. It would seem that the ultimate effect of this amendment upon the seller-finance company relationship would be that the finance companies must be more careful in selecting those "sellers" with whom they will deal. Assuming that some cut off of the buyer's defenses as against the assignee is not read into the statute, the Massachusetts approach would seem to be the better approach in that it does not impair the free flow of negotiable instruments.[19]

DAVID W. CURTIS

TRADE REGULATION

Since the last issue of the REVIEW there has been limited federal legislation in the field of Trade Regulation. A recently enacted amendment to the Shipping Act[1] has clearly established the legal position of the so-called dual rate contracts employed in maritime shipping. Under the dual rate system, shippers who agree to exclusive patronage of a shipping conference are accorded a lower rate. The need for clarifying the legal position of such contracts was raised by the decision of the Supreme Court in *Federal Maritime Board v. Isbrandsten Co.*,[2] where dual contracts were held to be a "competitive measure to offset the effect of non-conference competition",[3] and prohibited by Section 14 of the Shipping Act.[4] The Court limited its decision to instances where the contracts were used as "predatory devices". But since by their very operation dual contracts tend to cause non-conference lines either to join the conference using the contract or to leave the trade entirely,[5] it was feared that all dual contracts would be outlawed by implication.[6]

The new amendment to the Shipping Act allows dual rate contracts upon approval by the Federal Maritime Commission. The Commission may not approve if the contract is (1) detrimental to the commerce of the United States, (2) contrary to the public interest, or (3) unjustly discriminatory or unfair. Previously, any discrimination would have invalidated the

19 For a general discussion of protections afforded instalment buyers see Willier, supra note 18.

1 Act of Oct. 3, 1961, P.L. 87-346, 75 Stat. 762, amending 46 U.S.C. § 813.

2 356 U.S. 481 (1958).

3 Id. at 493.

4 Section 14 had prohibited retaliation "against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

5 S. Rep. No. 860, 87th Cong., 1st Sess. (1961), 1961 U.S. Code Cong. & Ad. News 4816.

6 Mr. Justice Frankfurter (dissenting) in Federal Maritime Board v. Isbrandsten, 356 U.S. 481, 500 (1958).

contract, and thus the validity of all dual contracts was held in serious doubt.[7] Recognizing the value of the shipping conferences' ability to carry on commerce on a regular, dependable, yet non-discriminatory basis, rather than having to resort to rate wars which would involve serious damage (mostly to American lines),[8] the amendment makes illegal only those contracts which are unjustly discriminatory. Since the main purpose of the amendment is to allow dual rate contracts, and since these are per se discriminatory, the Commission is, of necessity, given considerable latitude by the term, "unjustly".

The state legislatures have been somewhat more active in this field. Both Maine[9] and California[10] have recently enacted statutes depriving witnesses of the privilege against self-incrimination in restraint of trade proceedings. Coerced witnesses, however, are given immunity from prosecution for any transaction, matter, or thing concerning which they may testify. Such statutes are justified on grounds of public policy as aiding the investigation and prosecution of crime. They are usually invoked to force minor violators to testify, in hopes of obtaining judgment against the major violator.[11] Since a prosecutor's promise not to prosecute is not binding,[12] and since important witnesses in restraint of trade actions are frequently agents or competitors, and more than likely violators themselves, such legislation seems necessary and highly desirable.

The California legislature has provided an additional deterrent to monopoly and unfair competition by prohibiting as unlawful any sale which is conditioned upon a collateral contract or agreement not to deal with a competitor of the seller.[13] Previously only the collateral contract or agreement had been illegal.[14] Although at common law contracts with an illegal and indivisible promise as consideration are totally unenforceable,[15] where the consideration is divisible and partly legal, and the corresponding legal promise can be apportioned to the legal section of the partly illegal consideration, the legal part of the contract is upheld.[16] The California legislature seems to have effectively eliminated an apparent loophole by which a series of interdependent contracts might be made in restraint of trade, and only those contracts voided for illegality would be unenforceable.

Two legislative attempts of Virginia and Ohio to overcome fatal deficiencies in non-signer provisions of state fair trade acts have recently been ruled upon. Under the usual non-signer provision it is "unfair competition"

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7 Note, Dual Rate Shipping Contracts, 58 Colum. L. Rev. 1074 (1958).

8 S. Rep. No. 860, 87th Cong., 1st Sess. (1961), 1961 U.S. Code Cong. & Ad. News 4805.

9 Me. Rev. Stat. Ann., c. 137, § 44-A (Supp. 1961).

10 Calif. Bus. & Prof. Code § 17087.

11 Wigmore, Evidence § 2282 (3d ed. 1940).

12 Ingram v. Prescott, 111 Fla. 350, 149 So. 369 (1933); Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934).

13 Calif. Bus. & Prof. Code § 16727.

14 Calif. Bus. & Prof. Code § 16722.

15 Frank v. Blumberg, 78 F. Supp. 671 (E.D. Pa. 1948); Campbell v. Procter, 64 Wyo. 293, 191 P.2d 160 (1948).

16 Foote v. Nickerson, 70 N.H. 496, 48 Atl. 1088 (1901); Restatement, Contracts, § 607 (1932).

for any dealer knowingly to sell below the price stipulated by the manufacturer, irrespective of whether the particular dealer is a party to the price-stipulating contract.[17] An increasing number of state courts, including Ohio, have invalidated such non-signer provisions on constitutional grounds as being violative of due process and/or unlawful delegations of legislative power.[18] The Virginia court did not deny constitutional approbation to its non-signer clause, but held it to be in conflict with the state anti-monopoly act.[19] The corrective measures in Ohio[20] and Virginia[21] similarly provide that in accepting the goods with notice of the manufacturer's stipulations the dealer is deemed to have assented to the fair trade terms, and to have entered into an implied contract pursuant to those terms. The Virginia court sustained the new legislation as, in the court's opinion, it permitted only a "voluntary agreement" between the manufacturer and the dealer embodying the restriction as to the minimum resale price.[22] The defendant's contention that "the term 'contract' as defined by the act is no contract, but merely a stipulation by the seller made a 'contract' by legislative fiat regardless of assent by the buyer"[23] was rejected.

Several recent Ohio decisions had limited the effect of such legislation to situations where the manufacturer made the fair trade stipulation an express condition of its contract with the dealer.[24] The Court of Common Pleas had held that mere notice to the dealer of the intent to fair-trade the commodity cannot be incorporated by implication into the offer to sell, and that acceptance of the offer does not necessarily involve acceptance of the minimum resale price stipulation. Thus the legislative attempt to alter the form and retain the substance of the previously invalidated fair trade act by an artificial appellation of voluntary agreement where none in fact existed was nullified. A subsequent Ohio appellate decision, in holding the new legislation constitutional, adopted the reasoning of the Virginia court—that by notice given to the dealer an implied "contract" is formed and the constitutional pitfalls are avoided.[25] It is submitted that the Ohio Supreme Court which, unlike the Virginia court, had expressly ruled the non-signer clause unconstitutional, would be less likely to reverse its previous rationale in deference to such a fictitious change.

To complement its statute forbidding sales below cost for the purpose

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[17] Chafee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945 (1928).

[18] Union Carbide & Carbon Corp. v. Bargain Fair, 161 Ohio St. 182, 147 N.E.2d 481 (1958). See Chart, Trade Reg. Rep. ¶ 6041, listing twenty states where non-signer clauses have been upheld, and eighteen states where such clauses have been denied validity. Note, 3 B.C. Ind. & Com. L. Rev. 278 (1962).

[19] Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S.E.2d 384 (1956).

[20] Ohio Rev. Code Ann. §§ 1333.27 to 1333.34 (Baldwin 1961).

[21] Va. Code Ann. §§ 59-8.1 to 59-8.9 (Supp. 1960).

[22] Standard Drug Co. v. General Electric Co., 202 Va. 367, 117 S.E.2d 289 (1961), appeal dismissed for want of a substantial federal question, 368 U.S. 4 (1961).

[23] Id. at 382, 117 S.E.2d at 298 (1961).

[24] Bulova Watch Co. v. Ontario Store of Columbus, 176 N.E.2d 527 (Ohio C.P., 1961); Helena Rubenstein v. Cincinnati Vitamin & Cosmetic Distribs. Co., 167 N.E.2d 687 (Ohio C.P., 1960).

[25] Hudson Distribs., Inc. v. Upjohn Co., 176 N.E.2d 236 (Ohio App. 1961). Note, 3 B.C. Ind. & Com. L. Rev. 278 (1962).

of injuring competitors or destroying competition,[26] California has recently provided that any sale by a retailer below its invoice or replacement cost shall raise a presumption of an intent to injure competitors or destroy competition.[27] Similar statutes have been open to attack for being unconstitutionally vague in not clearly indicating which sales are "sales below cost".[28] Additional constitutional questions are raised when, as here, the statute provides that sales below cost constitute prima facie evidence of an intent to destroy competition. In the most recent judicial consideration of such a provision, the Connecticut court held that the shifting of the burden of proof was unconstitutional as a denial of due process.[29]

Since any statute simply forbidding below-cost sales would be faced with questions of unconstitutionality as an infringement on freedom of contract,[30] most state statutes in this area forbid below-cost sales only when there is an intent to destroy competition or when an injurious effect on competition is shown.[31] Any legislation which creates an inference of such intent from a given act must satisfy two constitutional requirements:

(1) The fact presumed must be fairly inferred from the fact proved.[32] Considering the numerous valid motivations which are frequently behind below-cost sales,[33] it would seem that any presumption of intent to destroy competition would be unreasonable.

(2) The shifting of the burden must not subject the accused to "unreasonable" hardship or oppression. As a practical matter, it would be extremely difficult to rebut convincingly the presumption by proof of what are in most cases subjective motivations.[34]

With these two requirements in mind, it would seem that the California statute is subject to the same criticism levelled at the recently invalidated Connecticut statute.

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[26] Calif. Bus. & Prof. Code § 17043.

[27] Calif. Bus. & Prof. Code § 17071.5.

[28] State v. Walgreen Drug Co., 57 Ariz. 308, 113 P.2d 650 (1941).

[29] Matt's Super Market, Inc. v. Frassinelli, 148 Conn. 481, 172 A.2d 381 (1961).

[30] Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927); Gilbert v. Matthews, 186 Kan. 651, 352 P.2d 66 (1960). But see White House Milk Co. v. Reynolds, 12 Wis.2d 147, 106 N.W.2d 443 (1960).

[31] Calif. Bus. & Prof. Code § 17071 provides that proof of below-cost sales, together with proof of injurious effect on competition, is presumptive evidence of intent to destroy competition. Unlike the new California legislation (supra note 27) which is applicable only to retailers, this section applies to all sales.

[32] It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.

Mr. Justice Holmes in MacFarland v. American Sugar Co., 241 U.S. 79, 86 (1916).

[33] Wiley v. Sampson-Ripley Co., 151 Me. 400, 120 A.2d 289 (1956) (intent "to make friends and create good will"); Matt's Super Market v. Frassinelli, supra note 29 ("intent to attract immediate patronage to the store in the ordinary course of business").

[34] Great Atlantic & Pacific Tea Co. v. Ervin, 23 F. Supp. 70 (D. Minn. 1938).