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Fair Trade—Non-Signer Clauses—Standing to Sue: Contract or Tort—Gillette Co. v. Master

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inspection where the stockholder cannot demonstrate his purpose to be proper.

However, it is submitted that even in a jurisdiction having a restrictive-type statute, assuming conditions precedent fulfilled, the result would be the same, for clearly a stockholder has the right to take a side, seek the support of other stockholders and express his views to the corporation, though they are in conflict with those of management.

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Fair Trade—Non-Signer Clauses—Standing to Sue: Contract or Tort. —***Gillette Co. v. Master.***[1]—Gillette brought an action to enjoin Master from selling Gillette's products at prices below those set out in fair trade minimum price contracts[2] between Gillette and other retailers. Defendant questioned the ability of the plaintiff to bring suit arguing that the alleged violation sounded in contract, and that because of this Gillette was precluded from bringing the action since it had neither registered for a Certificate of Authority,[3] nor paid the $250 penalty fee.[4] Gillette argued that since the action was based on tort[5] its standing to sue was unaffected by the fact that it had not obtained a Certificate of Authority. Each party based its argument on its interpretation of Section 2 of the Pennsylvania Fair Trade Act.[6] The parties stipulated that should the court find that Gillette had standing

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[1] 408 Pa. 202, 182 A.2d 734 (1962).

[2] See Pa. Stat. Ann. tit. 73, § 7 (1960). Section 7 provides in part:

> No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:
>
> (a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.
>
> (b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

[3] Pa. Stat. Ann. tit. 15, § 2852-1001 (1958).

[4] Pa. Stat. Ann. tit. 15, § 2852-1014 (1958).

[5] Brief for Appellant, p. 13.

[6] Pa. Stat. Ann. tit. 73, § 8 contains the relevant portion of section 2, Act of 1935, P.L. 266:

> Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity.

Gillette stressed that part of the statute which stated that the offense *"is unfair competition* and is actionable," while Master stressed *"in any contract* entered into . . . whether the person . . . is, or is not, a party *to such contract*, . . . is actionable." (Emphasis supplied.)

to sue, it could enter a preliminary injunction without hearing further proof. Included in this stipulation was an agreement that Gillette's products were in "fair and open" competition. The court below found that Gillette had standing to sue, but could not enter a preliminary injunction because of the rule in *Gulf Oil Corp. v. Mays*.[7] The Supreme Court of Pennsylvania affirmed. HELD: Standing to sue for the violation of the "non-signer" provision of Pennsylvania fair trade laws is based on the tort of unfair competition; but parties may not stipulate a waiver of the statutory requirement of proof of "fair and open" competition.

There is a split of authority on the question of whether standing to sue is based on contract[8] or tort.[9] Those courts holding that the action is one on contract reason that the "wilfull knowing" sale of goods below prices set out in fair trade contracts constitutes an implied contract between the manufacturer and the non-signer.[10] The court in *Downs v. Benatar's Cut Rate Drug Stores*[11] implied a contract between the retailer and manufacturer. The court reasoned that although the retailer did not sign the fair trade contract offered to him, notice of these contracts with other retailers and knowledge of the minimum prices set forth, together with acceptance of invoices, constituted an implied contract between the parties.

In *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*[12] it was unnecessary for the court to decide the question because of a "retaliatory" statute in New Jersey[13] imposing on foreign corporations the same obligations that are imposed on New Jersey corporations by the foreign state.[14] In this case it was Indiana which forbade actions on contract and tort by an unlicensed corporation doing business in that state.[15] However, the court also decided that assuming the nonexistence of the retaliatory statute, the action was based on contract and not tort.[16]

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[7] 401 Pa. 413, 164 A.2d 656 (1960). Parties may not stipulate that a product is in "fair and open" competition in Pennsylvania as a matter of statutory compliance. For an extensive treatment of *Gulf Oil* see Note, 2 B.C. Ind. & Com. L. Rev. 415 (1960).

[8] Downs v. Benatar's Cut Rate Drug Stores, 75 Cal. App. 2d 61, 170 P.2d 88 (1946); Eli Lilly & Co. v. Sav-On-Drugs, Inc., 57 N.J. Super. 291, 154 A.2d 650 (1959), aff'd per curiam, 31 N.J. 591, 158 A.2d 528 (1960), aff'd on other grounds, 366 U.S. 276 (1961); Standard Drug Co. v. General Elec. Co., 202 Va. 367, 117 S.E.2d 289 (1960).

[9] Sunbeam Corp. v. Gem Jewelry Co., 157 F. Supp. 838 (D. Haw. 1957); Iowa Pharmaceutical Ass'n v. May's Drug Stores, Inc., 229 Iowa 554, 294 N.W. 756 (1940); Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc., 281 N.Y. 101, 22 N.E.2d 253 (1939); Borden Co. v. Schreder, 182 Ore. 34, 185 P.2d 581 (1947); Weco Prods. Co. v. Reed Drug Co., 225 Wis. 474, 274 N.W. 426 (1937).

[10] Downs v. Benatar's Cut Rate Drug Stores, supra note 8.

[11] Ibid.

[12] Eli Lilly & Co. v. Sav-On-Drugs, Inc., supra note 8.

[13] N.J. Stat. Ann § 14:15-5 (1940).

[14] Brief for Appellant, p. 17.

[15] Ind. Ann. Stat. § 25-314 (1960).

[16] Supra note 8, at 305, 154 A.2d at 658.

It would seem, however, that the action is one on contract because, while the defendant is a non-signer of a fair trade contract, it is liable under the statute since other persons have signed such contracts. Non-signers have been held to be bound to the same degree as signers.

The Virginia Supreme Court of Appeals in *Benrus Watch Co. v. Kirsch*[17] found it unnecessary to rule on a lower court's specific finding that the non-signer clause was unconstitutional.[18] The legislature, fearing that the non-signer clause might be declared unconstitutional, expressly made the violation of this clause a contract action by statute.[19] It was held constitutional in *Standard Drug Co. v. General Elec. Co.*[20] The court stated that the statute changed the "compulsion" of the non-signer clause to a "voluntary contractual restriction."[21] It reasoned that the chief constitutional objection had been met since it did not *compel* one to abide by the minimum prices, but *permitted* him to enter into fair trade contracts or not, as he saw fit.[22] This election, as defined by the court, amounted to the mere choice of either purchasing or refusing the fair trade goods.

This Virginia example has been followed by Ohio. The Ohio non-signer clause was held unconstitutional in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*[23] The legislature in the same year enacted a clause[24] patterned after that of Virginia. However, while the Court of Common Pleas has held it unconstitutional,[25] the Court of Appeals has held it constitutional.[26] With the Supreme Court of Ohio having not yet ruled on the question, the constitutionality of the clause is still doubtful.

Faced for the first time with the exact question concerning the nature of the action, Pennsylvania has joined the majority in finding that the action is a tort of unfair competition. These "tort" jurisdictions[27] rely on the landmark case of *Old Dearborn Co. v. Seagram Corp.*[28] or, in turn, rely on cases

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[17] 198 Va. 94, 92 S.E.2d 384 (1956).

[18] Law and Equity Court of the City of Richmond (1955).

[19] Va. Code Ann. § 59-8.2(10) (Supp. 1960).

[20] Supra note 8. Acceptance of manufacturer's trademarked fair traded articles with actual notice of minimum fair trade prices constitutes a contract within section 59-8.9 of the Virginia Code.

[21] Supra note 8, at 375, 117 S.E.2d at 295.

[22] Id. at 376, 117 S.E.2d at 295.

[23] 167 Ohio St. 182, 147 N.W.2d 481 (1958).

[24] Ohio Rev. Code § 1333.28(I) (1962) provides in part:

> Any distributor [whether he acquires such commodity directly from the proprietor or otherwise] who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such *shall thereby have entered into an agreement with such proprietor* not to resell such commodity at less than the minimum price stipulated therefor by such proprietor. (Emphasis supplied.)

[25] Bulova Watch Co. v. Ontario Store, 18 Ohio Op. 2d 221, 176 N.E.2d 527 (1961).

[26] Hudson Distrib., Inc. v. Upjohn Co., 18 Ohio Op. 2d 182, 176 N.E.2d 246 (1961).

[27] Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc., supra note 9; Borden Co. v. Schreder, supra note 9; Weco Prods. Co. v. Reed Drug Co., supra note 9.

[28] 299 U.S. 183, 195 (1936).

> The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 [non-signer clause] of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the

which cite *Old Dearborn*.[29] Massachusetts[30] and Connecticut,[31] while not having decided the issue, indicate from their reasoning in holding the non-signer clause constitutional that the action is one of tort. It should also be noted that the question of tort or contract is now moot in Iowa and Oregon since each of these states has declared its non-signer clause unconstitutional.[32] The new New York Business Corporation Law removes any significance of tort or contract in standing to sue since an unregistered corporation shall not maintain *any action* unless authorized to do business and has paid its taxes.[33]

The court in *Gillette* states that "it will not be denied that unfair competition is a branch of the law of torts. It consists of the traditional torts plus those which inflict some peculiar injury upon competitors."[34] This finding is consistent with the prior analysis of the Pennsylvania Fair Trade Act in that the court finds:[35]

> Appellees' tortious conduct is three-fold: (1) by selling below the fair trade price they assaulted the property interest—namely the good will—of the producer which the latter still possesses notwithstanding the conveyance of the item to the retailer . . .[36] (2) by tending to coerce venders of commodities bound by fair trade contracts to lower their prices, thereby breaching their contracts with the producer, in order to become competitive with the price cutter . . .[37] (3) by committing a tort per se since their knowing and willing violation of an express statutory proscription against price-cutting was contrary to the legislatively designated public policy of the Commonwealth. . . .[38] (Footnotes added.)

Considering Pennsylvania holdings that the purpose of its Fair Trade Act is to protect the good will of the original manufacturer,[39] as well as to prevent

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statute denominates 'unfair competition.'

Id. at 195.

[29] Sunbeam Corp. v. Gem Jewelry Co., supra note 9; Iowa Pharmaceutical Ass'n v. May's Drug Stores, Inc., supra note 9.

[30] General Elec. Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 677, 132 N.E.2d 652, 658 (1956):

> Trademarks, trade names, and the good will in connection with them, which has frequently been acquired at considerable expense by various means of advertising, had been recognized before the adoption of the fair trade law here as valuable property rights which the owner is entitled to have protected from those who would wrongfully impair their value.

[31] Bulova Watch Co., Inc. v. Family Fair, Inc., 23 Conn. Supp. 263, 272, 181 A.2d 268, 272 (1962): "The defendant has actively participated in damaging the good will of the plaintiff created, by its trade name, with the purchasing public."

[32] Bulova Watch Co. v. Robinson Wholesale Co., 252 Iowa 740, 108 N.W.2d 365 (1961); General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956).

[33] N.Y. Con. Laws, Ch. 855, § 1312, effective Apr. 1, 1963.

[34] Supra note 1, at 739, citing 1 Callmann, Unfair Competition and Trademarks § 6.1, p. 105 (2d ed. 1950).

[35] Supra note 1, at 739-40.

[36] Remington Arms v. Gatling, 128 F. Supp. 226 (W.D. Pa. 1955).

[37] Puritron Corp. v. Silo, Inc., 179 F. Supp. 287 (E.D. Pa. 1959).

[38] See cases cited supra note 9.

[39] Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523, 13 A.2d 12 (1940).

price-cutting[40] and cutthroat competition,[41] and that a violation of the non-signer clause constitutes an assault upon the good will[42] of the manufacturer causing him to suffer irreparable harm,[43] it seems that Pennsylvania has always regarded the action to be one of tort although never having decided the point.

The effect of this decision is to enable a foreign corporation to bring an action for the violation of the non-signer clause of the Pennsylvania Fair Trade Act without having to obtain a Certificate of Authority to do business in the state. If Gillette had registered with the state, or paid the statutory penalty of $250 and obtained the Certificate of Authority, the question of standing to sue would not have arisen. In order to realize the effect of this decision, it is necessary to consider the effect of registration of foreign corporations as to standing to sue on contract and as to tax liability. If Gillette had not registered and was not actually doing business within the Commonwealth there would be no bar to an action on contract.[44] In order to be subjected to a franchise tax,[45] a foreign corporation must be both registered[46] and doing business[47] within Pennsylvania. Since the action was found to be based on tort, the required element of registration for tax purposes is not necessary to maintain this type of action. As a result, the foreign corporation avoids certain tax liability even if it were doing business within the Commonwealth. In view of this, it is clear that the foreign corporation which is doing business in Pennsylvania will receive a definite tax advantage and still retain the power to enforce the non-signatory clause of the Pennsylvania Fair Trade Act.

The decision in the *Gillette* case appears to be correct. It is in line with what this writer feels is the stronger and more reasonable view. The nature of the conduct, which the statute sets out as a violation of the non-signer clause, seems to fit more readily into the elements of tort than those of implied contract. However, this writer also agrees with the attitude expressed by Chief Judge Gourley in *Remington Arms v. Gatling*.[48]

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[40] Bristol-Myers v. Lit Bros., Inc., 336 Pa. 81, 6 A.2d 843 (1939).

[41] Gulf Oil Corp. v. Mays, supra note 7.

[42] Olin Mathieson Chem. Corp. v. L. & H. Stores, Inc., 392 Pa. 225, 139 A.2d 897 (1958).

[43] Sinclair Ref. Co. v. Schwartz, 398 Pa. 60, 157 A.2d 63 (1959).

[44] Pharmaceuticals, Inc. v. Hess Bros., Inc., Trade Reg. Rep. (1961 Trade Cas.) ¶ 70096, at 78,402 (Pa. C.P. Lehigh County 1960). Unregistered corporation had standing to sue for enforcement of fair trade contract since it was not "doing business" within the state.

[45] Pa. Stat. Ann. tit. 72, Sec. 1871(b) (Supp. 1961).

[46] Hoffman Constr. Co. v. Erwin, 331 Pa. 384, 386, 200 Atl. 579, 580 (1938). "The purpose of the [Business Corporation] Act of 1933 . . . is also to bring such [foreign] corporations within our tax laws."

[47] Commonwealth v. American Sugar Ref. Co., 47 Pa. D. & C. 273, 53 Dauph. 219 (1943). The fact that a foreign corporation is registered to do business in Pennsylvania does not of itself subject it to the Pennsylvania foreign franchise tax; a registered corporation must also be doing business.

[48] Supra note 36, at 228: "It has always been my personal conviction that the enactment of Fair Trade legislation among the different states stifles competition and unduly impinges upon a free and untrammeled economy. But the constitutionality of state fair trade legislation is established."