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Constitutional Law—State Registration Statutes—Sales Promotion as Intrastate Business.—Eli Lilly and Company v. Say-On-Drugs, Inc.

Walter F. Weldon Jr

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plication of these sections is to ignore the reality that the property was sold. Gaither had nothing. Section 60 of the Bankruptcy Act²⁴ avails the trustee nothing also. It concerns preferential treatment of creditors while insolvent, and its pivotal date is four months before bankruptcy. This section further stipulates that a proof of insolvency or reason to believe it must be shown. In the *Wethered* case the equity court below held that there was no proof of Gaither's apparent insolvency before bankruptcy and this finding was affirmed.²⁵

It is submitted that while the opinion skillfully and accurately treats the legal questions involved the broad scope of the opinion is unnecessary and tends to obfuscate the central holding.

PAUL T. O'GRADY

Constitutional Law—State Registration Statutes—Sales Promotion as Intrastate Business.—*Eli Lilly and Company v. Sav-On-Drugs, Inc.*¹

—Eli Lilly and Company, an Indiana pharmaceutical corporation which sold to wholesalers in New Jersey, maintained an office in Newark. Out of this office eighteen detailmen were engaged in acquainting retailers, hospitals, and physicians with the company's products, examining and making recommendations with respect to retailers' stock inventories, and giving advertising and promotional materials to retailers. Occasionally, they would receive an order for transmittal to a wholesaler.

In a suit by Lilly to enforce its Fair Trade prices against a nonsigning druggist,² the defendant contended that Lilly had not complied with a New Jersey statute denying access to its courts to any foreign corporation doing business in the state which had not filed with the Secretary of State.³ The Supreme Court of New Jersey affirmed the action of the trial court in granting the motion to dismiss, finding that Lilly was doing business in the state and, therefore, subject to the statute. On appeal, the Supreme Court of the United States affirmed. HELD: 1) a manufacturer that sells only interstate to wholesalers, but promotes sales from wholesalers to retailers within a foreign state is engaged in intrastate business in that state and can be licensed by it; 2) a license which prevents a foreign corporation, engaged

including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him or otherwise seized, impounded, or sequestered. . . ."

²⁴ Bankruptcy Act, § 60, 11 U.S.C. § 96 (1958). While the critical date for this section is four months prior to bankruptcy, *Corn Exchange National Bank v. Klauer*, 318 U.S. 434 (1943) and *In re Vardaman Shoe Co.*, 52 F. Supp. 562 (D. Mo. 1943) both held that when security instruments were never recorded they are to be construed as if they had been filed on the date of bankruptcy.

²⁵ *Wethered v. Alban Tractor Co.*, 168 A.2d at 369.

¹ *Eli Lilly and Company v. Sav-On-Drugs, Inc.*, 81 Sup. Ct. 1316 (1961).

² Lilly had contracts with other druggists to sell at prices established by Lilly, which prices were obligatory on the defendant under the nonsigner provision of the New Jersey Act.

³ N.J. Stat. Ann. § 14:15-4 (1937).

CASE NOTES

in some intrastate activity, from suing to enforce its Fair Trade prices against a nonsigner is a valid one, because it does not infringe upon the interstate aspects of the foreign corporation's business, insofar as the suit is "separable from any particular interstate transaction."

Although a state may to some extent prohibit or license the intrastate business of a foreign corporation,⁴ any attempt by a state to prohibit or condition the doing of interstate business, as by a license fee or registration requirement, is void as a direct burden upon interstate commerce.⁵ A sale of goods which are to be shipped from outside the state is a sale in interstate commerce and, thus, protected,⁶ but a sale by a branch of a corporation of goods already in the state is generally regarded as intrastate business and, therefore, subject to licensing statutes.⁷

The Supreme Court has not allowed this principle of protection for interstate commerce to be diluted by the presence in the state of some local incident of the interstate transaction. If the local incidents are elements of one unitary interstate transaction and not economically distinct, they are protected. Thus, the solicitation of an interstate sale is protected as well as the sale itself,⁸ and this is true even though a local office may be provided for the convenience of the soliciting agent.⁹ Where a seller contracts to install an article sold in interstate commerce, the entire transaction is protected if the installation is essential or at least appropriate to the sale,¹⁰ as in the case of a complex machine which the producer's mechanics are best trained to install.

The instant case reiterates the rule invalidating even a mere qualification statute, which might require only registration and a small fee to defray expenses, where the corporation affected is doing only interstate business. Although the rule against such statutes was first enunciated in the last century¹¹ and has been well established by numerous Supreme Court and state court decisions,¹² qualification statutes have not been discussed by the Supreme Court for eighteen years.¹³ Prior to *Lilly*, at least one writer had expressed doubt as to whether they would at present be found invalid.¹⁴

⁴ The extent of such control is a question of the relation of the state police power to interstate commerce.

⁵ *Dalmke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Crutcher v. Kentucky*, 141 U.S. 47 (1891).

⁶ *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914); *Caldwell v. North Carolina*, 187 U.S. 622 (1902).

⁷ *Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304 (1914).

⁸ *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1886).

⁹ *Cheney Bros. v. Massachusetts*, 246 U.S. 147 (1917).

¹⁰ Compare *Browning v. City of Waycross*, 233 U.S. 16 (1913) with *York Mfg. Co. v. Colley*, 247 U.S. 21 (1917).

¹¹ *Crutcher v. Kentucky*, *supra* note 5.

¹² *E. G. Furst v. Brewer*, 282 U.S. 493 (1931); *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 339 Mass. 131, 158 N.E.2d 134 (1959); *International Text Book Co. v. Tone*, 220 N.Y. 313, 115 N.E. 914 (1917).

¹³ *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1943).

¹⁴ 17 *Fletcher, Corporations*, para. 8422, p. 387.

This doubt is certainly understandable in light of the recent trend toward increased state control in the fields of taxation¹⁵ and service of process.¹⁶

An argument can be made that the state interest in being notified of the presence of foreign corporations outweighs the minor burden it may impose upon interstate commerce. Indeed, the Supreme Court in the last decision involving a qualification statute recognized such as a "conventional means of assuring fair dealing on the part of foreign corporations coming into a state."¹⁷ However, this argument ignores the traditional approach that all direct burdens on interstate commerce are invalid, without any weighing of the state interest involved. In the *Lilly* case, the Court solidly lines up in support of this traditional approach, although Mr. Justice Harlan in a concurring opinion reserved decision on the question.¹⁸

Although the Court is almost unanimous on this point, it is split sharply, five to four, in its decision that Lilly's activities are local and that it therefore can be licensed by New Jersey. The problem of distinguishing interstate and intrastate commerce has been the source of many tenuous distinctions and much confusion and disagreement. It is an area where each particular fact situation is of paramount concern. The present case lies in the gray area of dispute, as the closeness of the decision attests.

However, it is submitted that, although technically the sales which are being solicited by Lilly's agents take place entirely within the state of New Jersey, it would be preferable to regard Lilly's activities as a part of its interstate business and thus within the scope of the ban against licensing. The Court's decisions, as noted above, have always sought to protect all those activities which are so intrinsically connected with an interstate sale as to be regarded as necessary elements of it. The distinction in the present case between the customary manner of directly soliciting sales by contacting the party with whom the seller desires to contract and what may be called indirect solicitation, in which only the ultimate market is contacted in the hope of boosting the seller's sales to the middleman, seems unwarranted, at least in the case of those manufacturers for which the best or, possibly, the only financially feasible marketing plan is through the media of wholesalers. Since many companies do not have the extensive marketing facilities necessary to make sales direct to the public or to retailers and, thus, must use a wholesaler to market their products, they can bring attention to their product only through some form of "indirect" solicitation, whether it be detailmen or salesmen, as in the instant case, or some form of advertising campaign. The

¹⁵ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *McGoldrick v. Berwind-White Coal Mining Comp.*, 309 U.S. 33 (1940); see also *Spector Motor Service v. O'Connor* 340 U.S. 602, 609 (1951).

¹⁶ *International Shoe Co. v. Washington*, 326 U.S. 310 (1946).

¹⁷ *Supra* note 13, at 208. This case, however, concerned a foreign corporation which was held to be engaged in intrastate commerce, and, therefore, the question involved was whether the state was indirectly burdening commerce by its exercise of police powers.

¹⁸ *Supra* note 1, at 1321, n. 1.

policy consideration protecting direct solicitation would seem to apply equally here.

The same fundamental problem again is confronted in connection with the Court's finding that Lilly's suit to enforce its Fair Trade prices against a nonsigner is separable from the interstate sales of Lilly and, therefore, subject to licensing. In suits upon the interstate contracts themselves, a state cannot deny a foreign corporation access to its courts until compliance with a registration statute.¹⁹ However, in the action brought by Lilly, it can be argued that the suit is to fix the price of a product sold by a local retailer. This would seem to make it a matter of purely local concern, which could be barred by New Jersey's qualification statute.²⁰

However, it seems difficult to segregate the interstate sales of certain products and a suit to fix the price at which those products are ultimately resold. The purpose of the suit is to protect the good will of the manufacturer,²¹ which is represented by the trademark on the goods sold interstate. The protection of Lilly's good will by means of Fair Trade prices is an inherent part of the marketing arrangement for the interstate goods.²² Furthermore, the fixing of prices in New Jersey is part of a nationwide plan and is thus related to the commerce that Lilly does in other states.²³ Although, again, it is a very difficult line to draw, it seems that there is a sufficient nexus between the suit and Lilly's interstate activity so that it should not be barred.

The *Lilly* case is illustrative of the difficulties inherent in this particular area of constitutional law. It would also seem to have broad application. In particular, a foreign corporation which does not have its own retail outlets must now consider the licensing statutes of foreign states if it wishes to send agents into those states to conduct any sort of promotional or advertising campaign aimed at the public.

WALTER F. WELDON, JR.

Constitutional Law—Taxation—State Application of Allocation Formulas to a Multi-State Public Utility.—*Virginia Electric and Power Co. v. Currie*.¹—Virginia Electric and Power Company (VEPCO) is a Virginia corporation generating electricity primarily in Virginia and distributing it throughout much of Virginia and parts of North Carolina and West Virginia. In April, 1954, VEPCO filed its 1953 North Carolina income tax return computing it with reference to the state statutory allocation formula

¹⁹ *International Text Book Co. v. Pigg*, 217 U.S. 91 (1910); *Sioux Remedy Co. v. Cope*, supra note 6.

²⁰ Supra note 3.

²¹ *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936).

²² *Remington Arms Co. v. Lechmere Tire and Sales Co.*, supra note 12.

²³ *Schweggman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *Weco Products Co. v. G.E.M. Inc.*, 1960 C.C.H. Trade Co. par. 69, 639 (Minn. Dist. Ct.).

¹ 254 N.C. 17, 118 S.E.2d 155 (1961), cert. denied, 81 S.C. 1919 (1961).