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Fair Trade Acts: Constitutionality of the Non-Signer Clause

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interpretation to the provision, it is easier to find cases from other jurisdictions supporting the finding in the principal case.

The result obtained in the principal case and by Mr. Loy’s reasoning is a desirable one in terms of public and social policy. In regard to the community in which the educational institution is located, the presence of such an institution has a tendency to raise property values, which would offset the loss to the city or county caused by exempting the property of the school. It has, also, always been the policy in California to encourage educational institutions through the medium of tax exemption, since they are very much in the interest of the state.

The most realistic and authoritatively founded approach to reach this result is obtained by interpreting the constitutional provision on exemption of educational institutions from taxation in such a way as to conclude that the exemption encompasses all property owned by educational institutions and applying the “used exclusively” clause only to income, which would have to be so used to exempt it from taxation.

Ralph L. Coffman

FAIR TRADE ACTS: CONSTITUTIONALITY OF THE NON-SIGNER CLAUSE

Fair Trade Acts in general state that a manufacturer of a commodity bearing a trade mark may legally contract with retailers to set a minimum retail price without violating state anti-monopoly or anti-trust laws. There is a provision in these acts, referred to as the non-signer clause, that binds all retailers selling this commodity to the price set by these contracts whether or not they are a party to the contract, so long as they have notice of them.

In Rogers-Kent, Inc. v. General Electric Co., a South Carolina retail dealer in electrical appliances sought to have the constitutionality of the state Fair Trade Act determined in an action for a declaratory judgment. The defendant was a manufacturer of electric appliances which bore his trade mark and were sold to distributors and retailers on a national basis. Pursuant to the South Carolina Fair Trade Act this manufacturer had entered into written agreements with a number of retailers, under which the minimum prices were established. The plaintiff was not a party to any of these agreements, but according to the Fair Trade Act he was bound to the same price control as the retailers signing such agreements.

Although noting that a majority of state supreme courts and the United States Supreme Court have held Fair Trade Acts constitutional, the South Carolina Supreme Court declared the statute was void in so far as it applied to non-signers as being a deprivation of property without due process of law in violation of the state constitution.

Fair Trade Acts had their birth during the depression following 1929. The purpose of these acts was to eliminate the devastating price-cutting wars which were being waged by retail merchants. The effect of these price wars on the market was to eliminate small retailers and injure the manufacturer’s sales. In order to coun-

2 CODE OF LAWS OF SOUTH CAROLINA §§ 66-91 to -95 (1952).
3 Ibid.
4 Id. at § 66-94.
6 Supra note 1.
teract these marketing evils California passed the first Fair Trade Act in 1931. However, many retailers refused to sign a price-fixing contract with manufacturers, fearing that they would be left holding the bag unless their competitors became signers. Therefore, in order to make Fair Trade legislation effective there was added a non-signer clause in 1933, which bound all retailers having notice of the stipulated price whether they had signed price contracts or not. Since 1933 forty-five states have adopted a Fair Trade Act modeled after the California statute. Among the forty-five states, the highest courts of twenty-six have considered the constitutional questions raised by the act. Fifteen of these have held them constitutional, while eleven states have struck them down. The box score results seem to place the “weight of authority” in favor of upholding the constitutionality of Fair Trade Acts. However, it must be noted that since 1952, of the jurisdictions considering the problem for the first time, only four states have upheld them, while nine have found them unconstitutional. This seems to indicate a recent trend away from the “weight of authority.”

The constitutionality of Fair Trade Acts have been attacked on several grounds, but the predominate one has been that they violate the due process clause of state constitutions. Since all Fair Trade Acts are identical, for all practical purposes, and almost every state constitution has a due process of law provision similar to the Fifth and Fourteenth Amendments to the Federal Constitution, it seems strange that these decisions are so divergent.

The Supreme Court of South Carolina said that the Fair Trade Act, in so far as it applies to non-signers, is unconstitutional as a deprivation of property without due process of law. The line of reasoning of the court was that the right of an owner to fix the price at which he will sell his property is an inherent attribute of property itself. That is, when the manufacturer sells the commodity to the retailer, the property passes completely and unconditionally to the buyer. Thus, assuming that the retailer has a right to set the price at which he will sell his own property, how can the state deny this right? The only justification would be that this act is a reasonable and proper exercise of the state's police power. In order to fall within the scope of the police power, the Fair Trade Act would have to bear some relationship to the health, safety, morals or general welfare of the people. However, the court noted that the act applies to all trade marked commodities whether or not they affect public interest, and its operation is controlled solely by the manufacturer without giving any voice to non-signing retailers. For these reasons the court takes the position that this legislation is not within the scope of

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7 CAL. BUS. & PROF. CODE §§ 16900-05.
8 Id. at § 16904.
9 The three states not adopting Fair Trade legislation are Missouri, Texas and Vermont. See 19 A.L.R.2d 1139 (1951).
10 Supra note 7.
11 For compilation of cases see Rogers-Kent, Inc. v. General Electric Co., supra note 1 at 668.
14 Del., Mass., Pa., and Wis.
16 19 A.L.R.2d 1140 (1951).
17 16A C.J.S., Constitutional Law § 568 (1956).
18 Supra note 1.
19 Id. at 681.
the state's police power, and, therefore its effect is to deprive the non-signing re-
tailers of their property without due process of law. This position is ably summed
up by the Supreme Court of Georgia in Cox v. General Electric Co.:

"The scheme ... permits a manufacturer, under the guise of protecting his property
in a trade name or trade mark, to control the price of his product down through the
channels of trade into the hands of the ultimate consumer, and into the hands of a
person with whom he has no contractual relations whatever. This statute clearly vi-
lates the provisions of the due process clause of the Constitution of the State of
Georgia."20

In the leading case of Max Factor v. Kunsman,21 the California Supreme
Court took the opposite view and held that the Fair Trade Act does not violate
the due process clause of the California Constitution. It is admitted that the statute
permits the manufacturer to fix the minimum resale price without giving the retailer a voice. However, the manufacturer can not arbitrarily set the price. The act specifies that it applies only to commodities which are in "fair and open" com-
petition with commodities of the same general class produced by others.22 Therefore, the price is still controlled by the ordinary conditions of a free market. The court, apparently, felt that a manufacturer who spends money building up his trade name has such an interest in his commodity that it is worthy of protection. This protection is given where his interest is most vulnerable, that is, at the retail level. There the large retailers, those dealing in many commodities, will cut the price of a brand name item in order to attract customers into their stores to sell other commodities. Therefore, the small retailers, those dealing in only a few com-
modities, are forced to lower their price on the manufacturer's item in order to compete with the large retailers. The result of this price cutting is that the margin of profit earned by all retailers is so small that they will not "push" these com-
modities. Obviously, this damages the manufacturer's overall sales and eliminates many small dealers. The court said:

"The statute ... is aimed at protecting those valuable property and contract rights of
the manufacturer or producer-rights just as valuable and just as much entitled to
protection as the rights of the retailer who is attempting, by exercising his claimed
right of freedom of action, to injure the property and contract rights of the manu-
facturer or producer."23

As to the objection that the act applies to commodities not affected with public
interest, the court finds that the purpose of the act is not to fix prices of certain
commodities on the retail level. Instead it is designed to prevent certain marketing
practises which the legislature feels is harmful to the general welfare of the public.
Granting that the public interest may not be affected by the price of a particular
make of washing machine, it is affected if the conditions under which that washing
machine is sold will injure the manufacturer and many small retailers. On this
point the court said:

"The basic theory on which this concept rests is that, from a social standpoint, price
cutting, in the long run adversely affects the public interest ..."24

22 Supra note 7.
23 Supra note 21 at 464, 55 P.2d at 185.
24 Id. at 460, 55 P.2d at 181.