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Bruce D. Varner

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Rather, the Act provides that any person who fails to comply or any person who acquires a contract with knowledge of any noncompliance will lose all rights to any charges other than the original sale price.³¹ That is to say, that the contract is not unenforceable but will be enforceable only at the sale price. The buyer in return can recover any other charges which have been made in connection with the contract.

Under this provision, the buyer seems to have the right to the goods and the right to make deferred payments without any charge for making them. Thus the seller is obligated to extend credit without being compensated.

However, as previously mentioned, this penalty will not be invoked if the seller or holder makes the necessary changes in order that the contract will comply with the statute. Therefore, if the seller or holder wants to retain the right to any of the charges in excess of the original sale price he must comply with the standard set by the legislature as to what is sound credit. This result is precisely what the legislature intended. The economy and public will not be deprived of the benefits of a credit sale and will, at the same time, be insured that this credit is "sound," *i.e.* as interpreted by the legislature. "The enactment of this proposed bill will serve as a challenge to those engaged in the administration of installment credit to improve the quality of the credit they accept."³²

R. J. Engel^o

³¹ CAL. CIV. CODE § 1812.7.

³² PRELIMINARY REPORT 17.

^o Member, Second Year class.

PRICE REGULATION: Authority to Fix Different Minimums For Milk Distributors and Retailers

The California Agricultural Code gives the Director of Agriculture the authority to establish marketing areas within the state and to fix minimum wholesale and retail prices of fluid milk for each marketing area.¹ The Code also sets out the procedure for the director to follow in determining these minimum prices.² But does the Agricultural Code give authority to the Director to fix a minimum retail price for milk sold f.o.b. the distributor's plant below the minimum retail store carry out price?

In *Misasi v. Jacobsen*³ the Director of Agriculture had established, for a certain marketing area, a lower minimum retail price for fluid milk sold to consumers f.o.b. the distributor's plant than for fluid milk sold at retail stores. The plaintiffs, operators of retail stores, sought to have this order of the Director declared void, as exceeding his statutory authority. The district court of appeal held, affirming the decision of the superior court, that the statute gave the Director the power to make such a provision, and since it was not contended that the Director had not followed the statutory

¹ CAL. AGR. CODE §§ 4200-20.

² CAL. AGR. CODE §§ 4350-63.

³ 3 Cal. Rptr. 849 (1960), *hearing granted* June 8, 1960.

procedure, or that the proof did not support his determinations, the order was valid.

At a glance, the result in *Misasi v. Jacobsen* might seem unjust. However, considering the nature of the milk industry, the background and purpose of the Milk Control Act,⁴ the provisions of the Act authorizing the fixing of minimum prices, and the function of the court, the decision in *Misasi* seems sound.

The milk industry has long been subject to regulation by the federal and state governments because of its importance to the public health, and its peculiar susceptibility to contamination and adulteration.⁵ However, legislation regulating the prices at which milk is bought and sold has been a comparatively recent development.⁶ California recognized the need for such regulation of the milk industry, and in 1935 the legislature enacted its first Milk Stabilization Act.⁷ This Act, among other things, authorized the Director of Agriculture to fix minimum wholesale and retail prices for fluid milk and provided certain procedures for him to follow in exercising this power.⁸ Many states had already enacted similar statutes, and now, most states have passed some sort of Milk Control Act creating a board or agency with certain regulatory power including the power to fix minimum prices for milk.⁹ In the majority of states where such statutes have been enacted, the courts have held valid at least their general provisions.¹⁰ A few states have held the whole act or its main features unconstitutional.¹¹

In the two well known cases of *Jersey Milk Products Company v. Brock*¹² and *Ray v. Parker*,¹³ the California Supreme Court upheld the constitutionality of the original Milk Stabilization Act including the provision authorizing the Director to fix minimum prices. In these decisions the court held that the milk industry was so vital to the public health, and bears such a relation to those dependent upon it, that it is affected with a public interest, and therefore, subject to regulation under the police power of the state. And in the *Jersey* case, the court held that the Act provided a reasonably definite standard to guide the Director in fixing minimum prices, so that it was not void as an improper delegation of legislative authority.¹⁴ In *Jersey*

⁴ CAL. AGR. CODE §§ 4200-20.

⁵ See e.g., *Johnson v. Simonton*, 43 Cal. 242 (1872) (Board of Health delegated authority to pass regulations concerning quality of milk); see generally Annot., 80 A.L.R. 1225 (1944).

⁶ See Annot., 149 A.L.R. 1208 (1944).

⁷ Cal. Stat. 1935, ch. 241, p. 922 (now CAL. AGR. CODE §§ 4400-20).

⁸ See Balter, *High Courts Uphold Milk Regulations Through Administrative Agencies*, 14 CAL. S. BAR J. 220 (1939); Carey, *Practical Application of Milk Regulation Through Administrative Agencies*, 14 CAL. S. BAR J. 262 (1939).

⁹ See Annot., 155 A.L.R. 1383 (1945).

¹⁰ *Ibid.*

¹¹ See *Gwynette v. Myers*, — S.C. —, 115 S.E.2d 673 (1960) (not affected with a public interest); *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951) (not affected with a public interest); *Rowell v. State Board of Agriculture*, 98 Utah 353, 99 P.2d 1 (1940) (unconstitutional delegation of legislative authority).

¹² 13 Cal. 2d 620, 91 P.2d 577 (1939); Note 27 CALIF. L. REV. 757 (1939).

¹³ 15 Cal. 2d 275, 101 P.2d 665 (1940).

¹⁴ See discussion of this in CAL. JUR. 2d *Food* § 4 (1955); *contra*, Note, 34 TUL. L. REV. 209 (1959).

the court cited and followed the decision of the United States Supreme Court in the landmark case of *Nebbia v. New York*.¹⁵

In the *Nebbia* case the Supreme Court upheld the constitutionality of the New York Milk Control Act.¹⁶ In doing so, the Court held that the regulation of the milk industry was a proper exercise of the police power and that this power to regulate extended to and included the power to fix the price at which milk might be sold. As the court in *Nebbia* stated, there is nothing "peculiarly sacrosanct about a price that one may charge for what he makes or sells"¹⁷ that will exempt it from regulation. Price control is unconstitutional only if arbitrary, discriminatory, or irrelevant to the policy the legislature is free to adopt.¹⁸ Therefore, it has been held that if the industry is such that it can be properly regulated by the state, this regulatory power includes price control.¹⁹ Also, in *Nebbia*, the court held that a difference in price fixed for the sale of milk to consumers by a grocer, and the price fixed for sale of milk to consumers by a distributor is based on a valid distinction between the two types of merchants and, therefore, does not deny equal protection of the law. Most states, including California, have followed the *Nebbia* case.²⁰

It is of interest to note that statutes fixing the prices of milk, but making a differential in favor of cooperatives, have been upheld in several states.²¹ However, in California the courts have held that cooperatives are distributors for their members, and are, therefore, subject to the operation of the Milk Control Act.²²

The California Agricultural Code, sections 4200-20 authorize the Director to fix minimum wholesale and retail prices for milk within a marketing area. Sections 4350-63 contain the specific provisions covering minimum wholesale and retail prices. Since, the California courts have held the Act constitutional,²³ and as it was not contended that the Director had not followed the established procedures, the question in *Misasi v. Jacobsen* was whether he had the authority to fix a lower minimum retail price for distributors selling fluid milk directly to consumers. As before stated, the court upheld the validity of the Director's order, and considering the language of the legislation authorizing the Director to fix prices of milk in the light of the purposes and background of the Act, and the tendency of the courts to broadly construe the Act, it seems the court reached a proper decision.

¹⁵ 291 U.S. 502 (1934).

¹⁶ See discussion of this in Note, 8 So. CAL. L. REV. 165 (1935).

¹⁷ *Supra* note 15 at 532.

¹⁸ *Supra* note 15 at 539.

¹⁹ *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937); *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934); *Nebbia v. New York*, *supra* note 15.

²⁰ See *e.g.*, *Jersey Maid Milk Products Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939); Note 27 CAL. L. REV. 757 (1939); Annot., 155 A.L.R. 1383 (1945). See also *Brooks, Pricing of Milk*, 26 GEO. WASH. L. REV. 181 (1928) (federal milk pricing).

²¹ Cases discussed in Annot., 149 A.L.R. 1208, 1211 (1944); see also *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939).

²² *United Milk Producers v. Cecil*, 47 Cal. App. 2d 758, 118 P.2d 830 (1941).

²³ *Ray v. Parker*, 15 Cal. 2d 275, 101 P.2d 665 (1940); *Jersey Maid Milk Products Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939).

In section 4200 (all sections referred to hereinafter are of the California Agricultural Code) the legislature declared that the milk industry is one of public interest and that it is subject to regulation by the police power. Section 4202 states that one of the purposes of the Act is to bring about reasonable stability in the milk industry. The California courts have held the purposes of the Act are to eliminate economic disturbances and unfair trade practices in the milk industry and to insure an adequate supply of wholesome fluid milk to the consumer.²⁴ The court in *Challenge Cream and Butter Ass'n v. Parker* stated:²⁵

[W]ithout such restrictions, when one sells milk at amounts less than that at which many of his competitors can profitably do business, in an effort to meet reduced prices, they will be forced out of business, leaving the public without an adequate supply of milk.

And although this statement may be questionable, the courts have recognized that "cut throat" competition and unfair trade practices within the milk industry do affect the quality and purity of milk, and that health regulations are not sufficient safeguards. Affording the producers economic security tends to encourage compliance with the health standards.²⁶

Section 4205 provides that the Act is to be *liberally construed* to insure an adequate and continuous supply of pure and wholesome milk to the consumer at fair and reasonable prices. (Emphasis added.) And accordingly, the California courts have held the Act should not be emasculated by unnecessary technical construction.²⁷

The Act classifies those engaged in the production and marketing of milk into "producers," "distributors," and "retail stores." Section 4216 defines a distributor as ". . . any person . . . who purchases or handles . . . fluid milk . . . for sale This definition shall not include any retail store that is not engaged in processing and packaging fluid milk" Section 4218 defines a retail store as ". . . any person . . . owning or operating a retail grocery store . . . or other similar business where fluid milk . . . is sold to the general public for consumption off the premises." Thus, the legislature has recognized a difference in the operation of retail stores and distributors and has classified them into two distinct groups. The California courts have held that this was a proper classification for the legislature to make, and have upheld the validity of provisions in the code based on this difference.²⁸

In section 4353 of the Act the legislature states that minimum retail prices concerning fluid milk mean minimum prices at which fluid milk should be sold by distributors and retail stores to consumers. Section 4360 of the code establishes a basis for fixing the minimum prices. It requires the Director to establish minimum wholesale and retail prices for distributors, and minimum retail prices for retail stores within a marketing area.

²⁴ See *e.g.*, *Knudsen Creamery Co. v. Brock*, 37 Cal. 2d 485, 234 P.2d 26 (1951).

²⁵ 23 Cal. 2d 137, 142 P.2d 737 (1943).

²⁶ See *e.g.*, *In re Willing*, 12 Cal. 2d 591, 594, 86 P.2d 663, 664 (1939).

²⁷ See *e.g.*, *United Milk Producers v. Cecil*, 47 Cal. App. 2d 758, 118 P.2d 830 (1941).

²⁸ *Ray v. Parker*, 15 Cal. 2d 275, 101 P.2d 665 (1940); *In re Willing*, 12 Cal. 2d 591, 86 P.2d 663 (1939); CAL. JUR. 2d *Administrative Law* § 76 (1952).

And it provides that the established prices shall be “. . . sufficient but not more than reasonably sufficient, to cover costs, as such costs are described in section 4355 of this code, *according to method of distribution*, and reasonable return upon necessary capital investment.” (Emphasis added.) It should be noted here that the purpose of the Act in tying minimum prices to costs was part of the plan to stabilize the milk industry which had been disastrously affected by economic disturbances and below cost selling.²⁹

In providing the basis for the Director to determine costs, section 4355 states that the cost to distributors shall be the reasonably necessary costs incurred by distributors in their operations, including hauling, processing, selling, delivering, and a reasonable return on necessary capital investment for each of the various *methods of distribution* used in that area. (Emphasis added.) Costs not reasonably necessary are excluded. Costs to retail stores are the necessary costs incurred by the retailers in handling the milk. Section 4355 also provides the methods for the Director to determine these costs. Thus, the Act provides for the minimum prices to reflect the costs incurred by distributors and retailers, including “methods of distribution” as a factor in determining the costs. The phrase “methods of distribution” is not defined, but taking it in its ordinary meaning, it would include the different methods used in getting the milk to the consumer.

So, in *Misasi*, as the court held, the distributor and retailer were involved in two different “methods of distribution.” The distributor, on one hand buying the milk from producers, hauling and processing it, and selling it directly to consumers, and retailers on the other, buying the milk from distributors and selling to consumers. The Director’s order simply reflected the difference in cost between these two methods, as he determined them following the statutory procedure. This would seem to be the fair interpretation of the Act, and it seems fair to have a price differential based on the method of service. The consumer must pay more than the retail store price for milk delivered to his home, and so it seems he should be able to buy it at a lesser rate if he chooses to go to the distributor’s plant and purchase it there. These prices may vary from time to time, as the costs change; thus, in the future the Director may find that he must set a higher minimum price for distributors and a lower minimum price for retailers.

The result in *Misasi* is in harmony with the tendency of the courts to follow section 4205 calling for liberal construction and allowing the Director a wide discretion in performing his duties under the Act.³⁰ It should be added here that the court will not substitute its judgment for that of the Director or go into the reasonableness of the Director’s order, unless it is clearly shown that it exceeded his authority, or is so unreasonable that it is arbitrary or capricious.³¹

But in *Misasi* the plaintiffs (appellants) had contended that even if the Director’s order was held valid, the defendant distributors could not bring themselves under it, since they became retailers by selling milk to consumers at their plant. The court properly rejected this contention, since under the

²⁹ See *Challenge Creamery and Butter Ass’n v. Parker*, 23 Cal. 2d 137, 142 P.2d 737 (1943).

³⁰ See *Sentell v. Jacobsen*, 163 Cal. App. 2d 748, 329 P.2d 932 (1958).

³¹ See *e.g.*, *Rible v. Hughes*, 24 Cal. 2d 437, 455, 150 P.2d 455, 459 (1949); CAL. JUR. 2d *Administrative Law* § 72 (1952).