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The Demise of Fair Trade in Pennsylvania: A Study of Judicial Disenchantment

The fitting analogy between a drafter of wills and a patent attorney, and the hypothetical situations posed hereinabove, indicate that decisions such as *Garrison v. General Motors Corp.* properly apply the attorney-client privilege as readily to patent attorneys and their clients as to any other attorney-client relationship. This complete recognition of the attorney-client privilege in patent matters is not an extension of the privilege as patent atorneys are attorneys-at-law and thus qualify as proper subjects under any theory defining the attorney-client privileged communications doctrine. The only consideration which should be before a court in determining the applicability of the attorney-client privilege in a certain situation should be the requisities of the privilege[54] and not the label on the attorney involved.

THE DEMISE OF FAIR TRADE IN PENNSYLVANIA: A STUDY OF JUDICIAL DISENCHANTMENT*

INTRODUCTION

In a 5-2 decision handed down on March 26, 1964,[1] the Pennsylvania Supreme Court declared unconstitutional the nonsigner provision of the state's Fair Trade Act.[2] Thus Pennsylvania joins the

54. 8 WIGMORE § 2292. Set forth in the text, *supra* at note 9.

* It is not the purpose of this article to discuss the history of Fair Trade nor to define it. The reader is cited to a representative cross-section of material both pro and con. Weston, *Fair Trade, Alias "Quality Stabilization": Status, Problems and Prospects,* 22 A.B.A. ANTI-TRUST SECTION 76 (1963); Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses,* 109 U. OF PA. L. REV. 539 (1961); Herman, *Fair Trade: Origins, Purposes and Competitive Effects,* 27 GEO. WASH. LAW REV. 621 (1958); Note, *Fair Trade and The State Constitution,* 10 VAND. L. REV. 415 (1957); Van Mell, *The Case for Fair Trade,* 44 ILL. BAR J. 40 (May 1955); Fulda, *Resale Price Maintenance,* 21 U. CHI. L. REV. 175 (1954); Schachtman, *Resale Price Maintenance and the Fair Trade Laws,* 11 U. OF PITT. L. R. 562 (1950); Shulman, *The Fair Trade Acts and The Law of Restrictive Agreements Affecting Chattels,* 49 YALE L. J. 607 (1940).

1. Olin Mathieson Chemical Corp. v. White Cross Stores Inc., 414 Pa. 95, 199 A. 2d 266 (1964).

2. "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 in actionable at the suit of such vendor, buyer, or purchaser of such commodity. . . ." 73 P.S. § 8

ranks of those states repudiating fair trade.[3] Because of previous rulings to the contrary,[4] this decision may seem to be a dramatic reversal. A closer study of the most recent decisions will, however, reveal a thread weaving through the cases—a thread of judicial disenchantment with the economic effects of fair trade.

RESTRICTIONS AND LIMITATIONS IMPOSED

The purpose of fair trade was early determined by the Court to be a method of preventing predatory price cutting and cut-throat competition.[5] However, even at this early stage the Court expressed reservations about the scope of the Act.

> While it is the purpose of the Fair Trade Act to prevent cut-throat competition, it is not the purpose of the act to prevent all business competition. Competition is still the life of trade and no public policy is sound which stifles the spirit of enterprise.[6]

This observation expresses the purpose of limiting the Act's application to situations which it was designed to prevent.

Constitutionality of the nonsigner provision[7] was first questioned by the Court in *Burche Co. v. General Electric Co.*[8] The court gave the issue relatively short-shrift. It stated that these acts are generally considered valid (a statement that is not true today)[9] and that on the strength of *Old Dearborn D. Co. v. Seagram-Distillers Corp.*,[10] the act was not an unlawful delegation of legislative power.

In *Remington Arms Co. v. Gatling*,[11] a Federal District Court was called upon to enforce the act. In granting the injunction, Chief Judge Gourley observed:

> It has always been my personal conviction that the enactment of Fair Trade legislation among the different states

3. *Supra* note 1, Brief for the Appellants, Exhibit No. 1, points out that up to the time of this case, 22 state courts have declared this type of legislation violative of their respective constitutions and 7 states either did not pass or have repealed the legislation.

4. Burche Co. v. General Electric Co., 382 Pa. 370, 115 A. 2d 361 (1955).

5. Bristol-Meyers Co. v. Lit Brothers Inc., 336 Pa. 81, 6 A. 2d 843 (1939).

6. *Id.* at 89, 6 A. 2d at 847.

7. Under the nonsigner provision, once the manufacturer enters into an agreement with any distributor or retailer fixing the retail price, then all retailers are bound by the minimum price established.

8. *Supra*, note 4.

9. *Supra*, note 3.

10. 299 U. S. 183 (1936).

11. 128 F. Supp. 226 (W.D. of Pa. 1955).

> stifles competition and unduly impinges upon a free and untrammeled economy.[12]

Here again is an indication of judicial concern questioning the economic restraining force of Fair Trade.

In *Benrus Watch Co. Inc., v. Frankel,*[13] the anufacturer's fair trade agreement provided for a repurchase option period of ten days after notice by the retailer of its desire to discontinue the line of products. The Fair Trade Act expressly provided that a retailer could close out his stock at any price he so desired.[14] The Court refused to enforce the repurchase option provision against a nonsigner and commented:

> . . . Plaintiff's authority or power to so bind defendants, to an agreement which was not signed by them, is strictly statutory and is in derogation of the common law. Plaintiff must therefore be bound by all of the provisions of the statute upon which it relies for its power.[15]

Commenting of a 1956 amendment to the Pennsylvania Fair Trade Act,[16] a Federal District Court asserted:[17]

> It has been consistently recognized by courts asked to enforce fair trade laws . . . that the manufacturer is not entitled to an injunction unless he has reasonably and diligently enforced the fair trade prices specified by him.[18]

Here again was the theme of strict compliance with the Act's provisions which the Court strictly construed inasmuch as the Act was in derogation of the common law.

The Pennsylvania Act contained the usual requirement that a manufacturer must be in "fair and open competition" with manufacturers

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12. *Id.* at 228.

13. 4 Pa. D. & C. 2d 786 (1955).

14. "Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases: (a) In closing out the owners stock for the purpose of discontinuing delivering any such commodity. . . ." 73 P.S. § 7.

15. *Supra,* note 13 at 789.

16. "It shall, however, be a complete defense to such an action for the defendant to prove that the party stipulating such price, after at least seven days written notice given by the defendant prior to the commencement of such action, has failed to take reasonable and diligent steps to prevent the continuation of such advertising, offering for sale, or selling, by those in competition with the defendant, who were specified in such notice." 73 P.S. § 8.

17. General Electric Co. v. Hess Bros., Inc., 155 F. Supp 57 (E.D. of Pa. 1957).

18. *Id.* at 64.

of commodities of the same general class.[19] In this area, the Courts of the Commonwealth have severely limited the use of the Act by demanding a high degree of proof of such "fair and open competition." Thus, a manufacturer or producer selling its products competitively on the same level as the retailer could not enforce a resale price maintenance agreement while itself selling below the minimum price established.[20] An admission by the defendant that the plaintiff manufacturer was in fair and open competition was insufficient to sustain plaintiff's burden.[21] Nor was a stipulation of fair and open competition acceptable as sufficient proof by one seeking to enforce the Act.[22] Where the evidence revealed a lack of free and open competition, the manufacturer was denied the rights he would otherwise have had under the statute.[23] The stringence with which this requirement was enforced prompted one court to dismiss a manufacturer's action and comment:

> Competition to be effective and thus free and open should be competition to the extent that there is brought into play the free economic forces of the open market so that they may act upon the various manufacturers for the benefit of the concuming public. There is nothing in the record as affects the razor blade industry in the United States and in this state particularly, to indicate that the commodities of the three largest manufacturers have been subjected to the economic pressures of the market place.[24]

It should be obvious that economic considerations are cropping up with more regularity and that the courts are basing their restrictive comments on those factors.

THE POLITE INVITATION OF 1963 AND THE REQUEST FOR REVERSAL OF 1964

In 1963 two cases were decided by the Pennsylvania Supreme Court which vividly point up a changing attitude—judicial disenchantment. In *Shuman v. Bernies' Drug Concessions, Inc.*,[25] Mr. Justice Cohen

19. Gillette Co. v. Masters, 408 Pa. 202, 182 A. 2d 734 (1962); Gulf Oil Corp. v. Mays, 401 Pa. 443, 164 A. 2d 656 (1960).

20. Sinclair Refining Co. v. Blight Bros., 20 Pa. D. & C. 2d 794 (1959).

21. Gulf Oil v. Mays, *supra*, note 19.

22. Mead Johnson & Co. v. Breggar, 410 Pa. 408, 189 A. 2d 866 (1963).

23. Gillette Co. v. White Cross Discount Centers, 29 Pa. D. & C. 2d 756, (1962).

24. *Id.* at 770.

25. 409 Pa. 539, 187 A. 2d 660 (1963).

speaking for a unanimous Court invited a reappraisal of the Fair Trade Act's constitutionality:

> On a broader plain, counsel for appellee also draws into question the ultimate constitutional validity of the non-signer provision. In accordance with the familiar principle that a court will not decide a constitutional question unless it is absolutely required to do so, we refrain . . . However, we cannot fail to observe increasing objection to the legality of the non-signer provision in particular, *and to the economic soundness of fair trade laws in general.* (Citing Authorities) Changing patterns of merchandising and distribution require a reappraisal of the underlying premise of fair trade legislation.[26] (Emphasis Supplied.)

Following on the heels of *Schuman* in another 1963 indicator of change wherein Mr. Justice Musmanno, speaking for the majority of the Court, observed:

> Price fixing is at its best a drastic curtailment of competitive free enterprise, one of the main pillars of support in the entire American economic structure. At its worst, it can be a straight jacket on initiative in business . . .
>
> The very idea that a commercial entity may hold . . . all businessmen vending a certain product . . . offends against the elementary concept of a free and independent society. The Fair Trade Act is not only in derogation of the common law, it is in defiance of principles which the Federal Government has on countless occasions enunciated in its anti-trust legislation and litigation.[28]

Thus the Supreme Court, less than nine years after declaring the Act constitutional, evidenced by its unsolicited dicta a discontent with the economic effects of "Fair Trade" legislation.

An occasion for reappraisal of the constitutional question of the nonsigner provision presented itself when Olin Mathison Chemical Corporation sought to enjoin White Cross Incorporated, a discount retailer of health and beauty aids, from selling below fair trade prices. The nonsigner attacked the constitutionalty of the Act. The Chancellor made findings of fact and law in favor of the manufacturer and accordingly made permanent the injunction. The Chancellor in his opinion examined the legislation in both its historical and present day

26. *Id.* at 545, 187 A. 2d at 664.

27. *Supra,* note 22.

28. *Supra,* note 22 at 413, 415, 189 A. 2d at 869.

application.[29] While convinced of the economic unsoundness of Fair Trade, the Chancellor considers himself in an unfortunate situation bound by the 1955 decision in *Burche*. Constrained to follow precedent, the Chancellor laments:

> . . . although being in full accord with the defendants position, I must with great reluctance decide in favor of the plaintiff. I am so constrained because our Supreme Court has held the Pennsylvania Act to be constitutional. Burche Co. v. General Electric Co., 382 Pa. 370, 115 A. 2d 316. (1955) Although the act was not critically examined in that case, as to this date, it is the law, and we are bound by it. However, we cannot fail to note that recently our highest Court has shown a positive inclination to reappraise the underlying economic and legal principles supporting Fair Trade. (Citing Cases)[30]

Having found himself bound by precedent, Judge Weiss did, nevertheless, invite the defendants to take an appeal and expressed his desire that his holding would be reversed.

> I would certainly hope that the Defendants accept the invitation by filing an appeal. Perhaps, when that reappraisal is made, this lengthy opinion will be affirmed, and the decision rendered herein will be reversed.
>
> In the opinion of Your Chancellor Fair Trade was born out of a depression—and the high pressure lobbies were driving a speat at the juglar vein of trade and sound economic practices. We cannot see the wisdom of a State permitting "price-fixing" as economically and logically sound . . .[31]

With the two 1963 decisions by the Supreme Court of Pennsylvania, the opinion of the Chancellor and the marked judicial disenchantment with the economic feasibility of fair trade, the defendant, White Cross appealed.

THE REAPPRAISAL IS MADE: THE ACT IS DEAD

On appeal, the Pennsylvania Supreme Court declared the nonsigner provision of the Fair Trade Act violative of the State Constitution as an unlawful delegation of legislative power.[32] The court's

29. Record for Appellants, Olin Mathieson Chemical Corp. v. White Cross Stores, Inc., 414 Pa. 95, 199 A. 2d 266 (1964).

30. *Id.* at 74a.

31. *Id.* at 75a.

32. Art. II, Sec. 1, was the provision of the Pennsylvania Constitution which was violated. It states that the Legislative power of the Commonwealth is in the General Assembly.

first task was to deal with the nine-year-old *Burche* case[33] which had upheld the constitutionality of the nonsigner provision. *Burche* relied on the famous *Old Dearborn* case in sustaining the constitutionalty of the nonsigner provision under the State Constitution. As the court pointed out, a study of *Old Dearborn* reveals that the case stands for the proposition that the nonsigner provision is not violative of the Federal Constitution,[34] and therefore, it is not a basis for sustaining the validity of the provision under the State Constitution. The court did not consider the argument that since the provision is valid under the Federal Constitution, it could also be valid under the Pennsylvania Constitution for the same reason, to wit, the protection of the manufacturer's trademark as a valid property interest. Quaere, whether this reason would be sufficient to sustain the nonsigner provision's constitutionalty. However, is the absence of any consideration of this argument in the *Olin Mathieson* case a further indication of the court's distaste for the economic wisdom of Fair Trade?

With precedent removed, the court then considered price regulation as a function of the legislature and any attempt to regulate prices must be done in compliance with statutory guilelines. The mere giving of the ability to fix prices to private individuals, binding upon all persons in the state, without proper guides as to the price fixed, area affected and products needing protection was deemed improper. The court rejected the argument that the retailer, having notice of the established price, is under no obligation to sell the article. It is submitted that this rejection was on the economic ground that a retailer, in order to please and maintain his customers, must deal in certain commodities and, therefore, is subjected to the control of the statute even if he does not want to fair trade the merchandise.

Mr. Chief Justice Bell and Mr. Justice Jones dissented in separate opinions.

Mr. Justice Jones' dissent took the position that the *Burche* case was properly decided and that the only reasons for reversal were economic in nature[35] and, therefore, were questions for the legislature.

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33. Burche Co. v. General Electric Co., *supra* note 4.

34. *Supra,* note 10. This case dealt with the Illinois Fair Trade Act. The Court considered the Act with respect to the Federal Constitution. It held that the manufacturer had a valid property interest to protect in his trademark and, therefore, a proper basis existed for the Act. The Court did not consider the Act with respect to state constitutions.

35. This position was probably reached since both sides submitted economic data for their respective positions. Economic Brief for the Appellants, and Brief for Appellees, Appendix A, Olin Mathieson Chemical Corp. v. White Cross Stores Inc., 414 Pa. 95, 199 A. 2d 266 (1964).

The Chief Justice strongly dissented, not because he was in sympathy with the Fair Trade Act, but on the ground that the previous decision, *Burche,* should be allowed to stand in deference to stare decisis. He did not address the majority's position that the *Burche* case was erroniously decided but stated that he felt the only reason for reversal was a change in personnel of the court.

CONCLUSION

Thus, since the days of the enactment of Fair Trade, the judicial branch of our government has limited the Act's application. The frequency with which todays highest state courts are eliminating the Act indicates a definite dislike of the economic effects of such legislation. In Pennsylvania, since the Act was first declared constitutional, the courts have continued to limit its use citing for their reason the economic unsoundness of imposing restrictions on competition. Whether the legislature will attempt to pass another version of the Act remains to be seen. However, one cannot help but observe the significance of the court's present statements, requiring governmental agencies as the only proper method to regulate price, as a warning not to attempt to give the manufacturer the unlimited power to control the resale price.