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CASE NOTES

ANTITRUST—RESTRAINT OF TRADE—CONSIGNMENT CONTRACT BETWEEN OIL COMPANY AND FILLING STATION OPERATOR: IS IT ILLEGAL AS AGREE- MENT FOR RESALE PRICE MAINTENANCE?

Union Oil Company subleased a service station in Fresno, California, to Richard S. Simpson for a period of one year subject to termination by the lessee with 30 days' notice. Concurrently with the signing of the lease, Simpson and Union Oil executed a written Retail Dealer Consignment Agreement, terminable by either party at the end of any year and ceasing on any termination of lessee's right to occupy the service station. Under the terms of the consignment agreement, Union Oil retained legal title to the gasoline until it was sold by consignee at prices established by consignor: Simpson did not pay for gasoline as delivered but accounted for the proceeds of any gasoline sales; Union Oil paid all property taxes on the consigned gasoline; Simpson was required to account for all products lost through his negligence and to carry personal liability and property damage insurance; and Simpson received a commission which changed with any fluctuation in retail price but which was never less than a fixed minimum. The lease and consignment agreements were executed on May 23, 1956, and in 1957 Union Oil gave Simpson a new one-year lease ending, by its express terms, on May 22, 1958. In March of 1958, a price war developed in the Fresno area, and gasoline prices dropped from 34.9 to 27.9 cents per gallon. Despite the company's demand that he adhere to an authorized price of 29.9 cents, Simpson sold at 27.9. In April, 1958, Union notified Simpson that when his current lease expired on May 22 it would not be renewed. On May 21, 1958, Simpson brought action under sections 4 and 16 of the Clayton Act¹ and obtained a temporary restraining order preventing Union Oil from taking possession of the station. But on June 3, 1958, the court denied an interlocutory injunction, holding that the lease and consignment agreement had expired, *Simpson v. Union Oil Co.*²

Union then obtained judgment for unlawful detainer in a state court and

¹ Clayton Act, 15 U.S. Code §§ 15, 26 (1958).

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained. . . ."

"Section 16. That any person . . . shall be entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . ."

² 162 F. Supp. 746 (1962).

regained possession of the station. Simpson next amended his complaint to obtain damages in lieu of equitable relief, alleging violation of sections 1 and 2 of the Sherman Act³ and obtained summary judgment after prolonged pre-trial conferences. The Court of Appeals affirmed, and plaintiff brought certiorari.⁴ The Supreme Court, with three justices dissenting, reversed on the question of liability and remanded for hearing on other issues including extent of damages. In holding for plaintiff the court said, in part, "resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws." *Simpson v. Union Oil Company*, 377 U.S. 13 (1964).

Agreements for resale price maintenance have long been held illegal, as have unilateral refusals to deal by a supplier to force a retailer to follow the suppliers "recommended" retail prices.⁵ Consignment marketing through an agent has been a recognized method permitting a supplier to control market prices. The *Union Oil* case is an extension of previous law, since it holds that a consignment agreement, enforced by a unilateral refusal to deal, constitutes an agreement for resale price maintenance. The purpose of this note is to show how the *Union Oil* case fits into the spectrum of the law of resale price maintenance.

Today, agreements for the purpose of resale price maintenance are unquestionably illegal. One who sells goods cannot control the price at which the purchaser resells it. As early as 1911, contracts seeking to control resale prices were held to violate the Sherman Act in *Dr. Miles Co. v. John D. Park & Son*.⁶ Cases such as *United States v. Colgate & Co.*⁷ and *Federal Trade Commission v. Beech Nut Packing Co.*⁸ made it clear that even in the absence of a formal contract the supplier does not have complete freedom to exert pressure on the retailer to coerce adherence to recommended pricing policies. With the case of *United States v. Parke, Davis & Co.*,⁹ in 1960, the concept of an agreement for resale price maintenance completed its evolution from the formal contract required in the *Dr. Miles*

³ Sherman Act, 15 U.S. Code §§ 1, 2 (1958).

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

⁴ 311 F.2d 764 (1963).

⁵ For a thorough discussion of resale price maintenance, see Levi, *The Parke-Davis-Colgate Doctrine: The Ban of Resale Price Maintenance*, in *THE SUPREME COURT REVIEW* 258 (1960 Edition).

⁶ 220 U.S. 373 (1911).

⁸ 257 U.S. 441 (1922).

⁷ 250 U.S. 300 (1919).

⁹ 362 U.S. 29 (1960).

case to an implied contract to be inferred from the conduct of the parties.¹⁰

Although the *Colgate* case expressly provided that a simple refusal to deal was not illegal, the *Parke-Davis* case so limited the doctrine as to make it questionable if a supplier may enforce retail price policies by refusing to do business with violators.¹¹ If a threatened refusal to deal is successful, a strong argument can be made that an "agreement" for resale price maintenance has been formed.¹² If the threat goes unheeded and the refusal becomes a reality, then a suit by the retailer against the supplier will probably be upheld.¹³ In the absence of a fair trade law,¹⁴ vertical agreements respecting resale prices are illegal. Of course, any horizontal agreement to fix prices is also illegal.

Resale price maintenance would seem to demand a sale by the supplier and a resale by the purchaser. Thus consignments, whereby an agent sells goods of his principal at prices fixed by him, with title passing directly from producer to consumer have been held not to constitute resale price maintenance, in the case of *United States v. General Electric*.¹⁵ In this case, after carefully examining General Electric's consignment agree-

¹⁰ The Court also emphasized that Parke-Davis used the willingness of one major retailer to maintain prices as a lever to induce the acquiescence of the other retailers. In effect then, Parke-Davis acted as an information clearing house to coordinate agreements (albeit sometimes unwilling agreement) between its various wholesale and retail outlets to maintain the same schedule of retail prices. Parke-Davis was to establish the prices to be charged and was to police the agreements by cutting off supply to any violator. With these facts, a Sherman Act violation could probably be found on the conspiracy theory.

¹¹ Even before the *Parke-Davis* decision, the Report of the Attorney General's National Committee to Study the Anti-trust Laws noted at pages 132-37: "Viewed in the larger business setting, even individually conceived refusals to deal may become an integral element in a violation of § 1 of the Sherman Act. Thus, enforcement of a resale price policy against resourceful price-cutting dealers may invite joint policing efforts, tantamount to agreement, between the seller and distributors willing to adhere to his resale price. . . . In the absence of an operative Fair Trade exemption, every plan to control resale prices by withholding goods from price-cutters may flounder as an unfair method of competition if involving an understanding beyond a naked refusal to deal."

¹² See Comment, 30 U. CHI. L. REV. 766 (1963).

¹³ See *Klein v. American Luggage Works*, 206 F. Supp. 924 (1962). This is a case where not only the supplier but all retailers who adhered to the supplier's suggested prices were held liable in a treble damages suit brought by a retailer who was cut off by the supplier for failure to follow dictated prices.

¹⁴ The McGuire Act provides that agreements for resale price maintenance are not a violation of federal antitrust laws if permitted by a state fair trade law, provided said agreements are between supplier and retailers. See 15 U.S.C. § 45 (1958) for the text of the McGuire Act. Horizontal agreements (between competitors) as distinguished from vertical agreements are still a violation of the Sherman Act.

¹⁵ 272 U.S. 476 (1926). The General Electric Company had established a nationwide system to distribute electric light bulbs through "agents." The agents could sell

ments,¹⁶ the Court found nothing inconsistent with the agency relationship claimed by the company. The Court concluded,

. . . there is nothing as a matter of principle or in the authorities which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violation of the Anti-trust Act. The owner of an article patented or otherwise is not violating the common law or the Anti-trust Law by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such customer.¹⁷

Although consignment contracts permit the supplier to fix retail prices, the courts have carefully scrutinized such agreements to be sure that the relationship is one of agency in substance as well as form. Thus, in *Standard Fashion Co. v. Magrane-Houston Co.*,¹⁸ an agreement which purported to be one for an agency was found to be one of sale since it contained provisions that the "agent" would "purchase" a minimum quantity of patterns. Where several competitors having conflicting patents agreed to honor Masonite's patents in return for an "agency" to sell at prices to be established by Masonite as principal, a violation of the Sherman Act was established by the case of *United States v. Masonite*.¹⁹

The petroleum industry, in an effort to stabilize market prices, has been quick to avail itself of the price-fixing umbrella afforded by consignment marketing. Like the courts, the Federal Trade Commission has looked with disfavor on such arrangements and whenever possible has found them

only at prices set by General Electric. Indeed, the evidence indicated that the purpose of the consignment program was to circumvent the antitrust prohibition against manufacturer's control of resale prices.

¹⁶ To determine if General Electric's contracts with its purported agents were true agency agreements or just a ruse for resale price maintenance, the Court took particular cognizance of the method of payment for the goods; risk of loss; right to return unsold goods; language of the agreement; and the duty to carry insurance. The Court found nothing to make the so-called "agents" anything more than genuine agents of the company or the delivery of the stock to each agent anything more than a consignment to the agent for his custody and sale as such.

¹⁷ 272 U.S. at 488.

¹⁸ 258 U.S. 346 (1922). In this same case, 259 Fed. 793, 794-95 (1919), the Court of Appeals for the First Circuit said, "We may test the question whether the defendant was the plaintiff's agent engaged in selling the plaintiff's goods or a vendor selling its own goods, by querying whether the plaintiff could be held liable in tort for the defendant's material and false misrepresentations made to a customer. . . . Obviously, if the defendant was the plaintiff's agents, its misrepresentations would bind the plaintiff." Although this comment misses the distinction between master-servant and principal-agent, it is of passing interest since in *Gonzalez v. Derrington*, 10 Cal. Repr. 700 (Cal. App. 1961), a tort case involving the negligence of a service station employee at one of Union Oil's stations which was under the consignment program identical with the Simpson agreement, the Court said at page 712, "Union argues that under said consignment agreement, it may not be held liable for . . . Derrington because the latter was: (1) an independant contractor. . . ."

¹⁹ 316 U.S. 265 (1942).

illegal. Being bound by judicial precedent to the *General Electric* doctrine, the FTC has nevertheless invalidated service station consignment agreements because they were entered into as a ruse to promote a horizontal conspiracy between dealers,²⁰ or because they were not a good faith marketing program established in the regular course of business.²¹ In both instances, the *General Electric* doctrine was discussed and distinguished.

Thus, it has been the policy of the courts to view with suspicion consignment agreements fixing retail prices and to enforce the warning voiced in *Masonite* that "so far as the Sherman Act is concerned the result must turn not on the skill with which counsel has manipulated the concepts of sale and agency but on the significance of the business practices in terms of restraint of trade."²²

Union Oil met the FTC criteria by negotiating unilateral consignment agreements with each of its retail station operators individually, as part of its regular course of doing business. The agreements were modeled after the one approved in the *General Electric* case, and it was neither alleged nor concluded that Union Oil's consignment agreements were a sham, the court making no express finding as to whether or not Simpson was in reality an agent of Union Oil. Whereas, *General Electric's* system was upheld, Union Oil's consignment program was deemed illegal,²³ but the exact basis for the finding was left unclear. To be sure, Union's purpose was to control the retail price of gasoline, but heretofore it was believed that this could be accomplished by a bona fide agency.²⁴

In an opinion characterized by Mr. Justice Stewart's dissent as being

²⁰ The FTC found Sun Oil to be guilty of resale price maintenance when Sun sponsored joint meetings between its service station dealers to encourage all of them to enter a consignment agreement under which Sun would set uniform retail prices to be charged by its "agents." "Sun unlike *United States v. General Electric Co.*, 272 U.S. 476 (1921) did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements." *Sun Oil Company*. F.T.C. DKT. 6934 (1963), in C. C. H. Trade Reg. Rep. 16418.

²¹ Atlantic Refining negotiated unilateral vertical agreements of consignment with its dealers (individually as opposed to Sun's joint meetings) which were illegal because, "Unlike *General Electric*, the agency distribution program was not respondent's regular method of selling its products. . . . The temporary nature of the program and the shifting back and forth of customers from dealer status to so-called "agency" status emphasizes that the consignment plan is a device to fix and stabilize prices, rather than a good faith marketing method." *Atlantic Refining Co.*, F.T.C. DKT. 7471 (1963), in C. C. H. Trade Reg. Rep. 16422.

²² *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1942).

²³ *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

²⁴ In the *General Electric* case, the Court noted: "The plan was of course devised for the purpose of enabling the company to deal directly with consumers and purchasers and doubtless was intended to avoid selling the lamps owned by the company to jobbers or dealers and prevent sale by these middle men to consumers at different and competing prices." 272 U.S. 476, 483 (1926).

"unwarranted, unnecessary, and premature,"²⁵ the Supreme Court held Union Oil liable in civil action for having violated the Sherman Act. The Court concluded, "there was an agreement for resale price maintenance, coercively employed"²⁶ and that "we hold only that resale price maintenance through the present, coercive type of 'consignment' is illegal under the antitrust laws."²⁷ The Court distinguished the *General Electric* holding on the rather slim ground that General Electric was seeking to control the retail price of patented articles on which price fixing was condoned, and "whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here." This sharply limits the scope of the *General Electric* doctrine since, as observed by Mr. Justice Stewart in his dissent, "so far as the record now before us discloses, the two agreements are virtually indistinguishable."²⁸ As noted above, the Court, in the *General Electric* decision, stated that the consignment marketer could control prices of articles "patented or otherwise."

The *Union Oil* decision seems to be motivated by a desire of the Court to strike down any marketing practice that permits the supplier to control retail prices.²⁹ At least two theories could have been employed by the Court to reach this decision: refusal to renew a one-year lease constitutes coercion within the prohibition of the *Parke-Davis* case; and a series of vertical agreements forms a conspiracy to fix retail prices.

Unfortunately, the Court did little to explain its decision, but repeatedly referred to Union's marketing program as a "coercive consignment device," and as such found it to be illegal. Presumably, the coercion referred to is Union Oil's threat to not renew the leases of service station operators who violate the consignment pricing terms. It is at least questionable that a supplier can ever coerce a retailer into following a prescribed course of conduct by threatening to discontinue dealing. One interpretation of the *Union Oil* decision is that it represents a simple extension of the *Dr. Miles* and *Parke-Davis* cases prohibiting use of a refusal to deal to enforce pricing practices. This interpretation is strengthened by the Court's repeated emphasis on the vulnerable position of the lessee-consignee e.g., "We made it clear in *United States v. Parke-Davis Co.* [citations omitted] that a supplier may not use coercion on its retail outlets

²⁵ *Simpson v. Union Oil*, 377 U.S. 13, 26 (1964).

²⁶ *Id.* at 24.

²⁷ *Ibid.*

²⁸ *Id.* at 26.

²⁹ Thus the Court speculated, at page 17, that the present consignment agreement "promises to be equally if not more effective in maintaining gasoline prices than were the *Parke-Davis* techniques in fixing monopoly prices on drugs." Again, at pages 21-22, it noted: "When however, a 'consignment' device is used to cover a vast gasoline distribution system fixing prices through many retail outlets, the antitrust laws prevent calling the consignment an agency. . . . The present coercive 'consignment' device, if successful against challenge under the antitrust laws, furnished a wooden formula for administering prices on a vast scale."

to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is."³⁰ Mr. Justice Goldberg's dissent in the *Union Oil* case³¹ tacitly assumes that a coercive type of consignment agreement is illegal, but doesn't decide if this agreement is coercive.

The *General Electric* doctrine (*i.e.* bona fide consignments are legal) was established in an action brought by the Justice Department, with no allegation that coercive pressure was being exerted on dealers to enforce the agreements. The use by Union Oil of one-year service station leases to enforce its consignment agreements is a significant modification of the conduct approved by the *General Electric* decision and could be the logical basis for the Court's decision, rather than a blanket holding that consignments constitute resale price maintenance. Thus, consignment marketing may be legal in the absence of leases or, possibly, when the lease is of more than one-year duration.³²

Perhaps Union's conduct could be found illegal on yet another basis. The consignment marketing program was established by Union Oil to permit it to designate retail gasoline prices. Certainly each of the dealers who signed consignment agreements understood that the same type of agreement would be required of all other dealers and that Union Oil would designate the same retail price at all stations at least in a given area. There is some basis for concluding, as was done in the *Sun Oil* case, that the consignment program constituted a conspiracy to maintain prices. In the *Masonite* case the Court noted:

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.³³

Under either the coercion or conspiracy rationales, Union Oil's conduct may be found to be a violation of the antitrust acts. Since the *General*

³⁰ *Id.* at 17.

³¹ *Id.* at 31.

³² In *United States v. Standard Oil Co. of California*, 1959 Trade Cases ¶69399, a consent decree was entered against the seven largest west coast oil companies charged with violation of Antitrust Acts. Union Oil was one of the seven defendants and as part of the decree it was agreed that henceforth service station lease agreements would be for at least three years if the lessee so desired. The Justice Department did not object to a consignment program per se, but short-term leases, such as one-year lease in the *Simpson* case, were prohibited. This decree was handed down over a year after Simpson ceased to be a dealer of Union Oil; and, therefore, that agreement did not violate the consent decree. However, this does point out that using the short-term lease as a club to enforce the consignment constitutes a violation of the Sherman Act, not the consignment itself.

³³ *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942).

Electric case did not involve coercion,³⁴ the *Union Oil* decision does not necessarily indicate a complete change of judicial thinking on consignment marketing. Further clarification of this area awaits future litigation, at which time it is hoped the Court will clearly enunciate a theory on resale price maintenance.³⁵

George Spindler

³⁴ In *United States v. General Electric*, 82 F. Supp. 753 (1949), the Justice Department again challenged General Electric's distribution system of agents and consignment contracts but the Court again found the relationship of the parties to be consistent with true agencies. Of course, Union exerted far more pressure on its dealers than General Electric, since by cancelling service station leases Union could put them out of business. All General Electric could do was to quit supplying light bulbs, but since most of its agents were general merchants, this would injure only one line of products marketed by them, not their entire business.

³⁵ It is believed that the present case will eventually be disposed of by the application of the McGuire Act and the California Fair Trade Law in favor of Union Oil. The CAL. BUS. & P. CODE § 16902 (1964) provides that contracts for resale price maintenance are not illegal as long as the parties do not compete. Since Union Oil did not operate any retail outlets in the Fresno, California area, it should not be prevented from forming a valid fair-trade agreement with Simpson. Such an agreement, being legal in California, would not violate the Sherman Act because of the provision of the McGuire Act. Thus, if Union's "consignments" were really resale price agreements, as the Court thought, they would be legal. It is perplexing why the Court did not itself apply the Fair Trade statutes instead of ignoring them and finding the marketing practices of Union to be illegal, but apparently the Court was anxious to go on record as being opposed to retail prices which are established through consignment agreements enforced by the threat of possible loss of business franchise. The Court in remanding, provided that the Fair Trade Acts should be considered.

COMMERCIAL LAW—SUBROGATION AND PRIORITY OF LIENS ON CHATTELS UNDER THE UNI- FORM COMMERCIAL CODE

French Lumber Company, the purchaser, brought a bill in equity to determine the ownership of certain funds derived from the sale of a 1959 Cadillac automobile at public auction. The purchaser had financed its purchase of the vehicle through Ware Trust Company (the first lienor) in February of 1959, and entered into a Uniform Commercial Code security agreement as security for its note. This agreement was duly recorded. Five months later, the purchaser pledged its existing equity in the automobile, along with certain other security, to Commercial Realty & Finance Company (the second lienor). With knowledge that its rights were subordinated to those of the first lienor, Commercial duly filed its lien on the automobile. The automobile was subsequently repossessed by the first lienor when the purchaser defaulted in its payments on the note. The purchaser thereupon arranged with Associates Discount Corporation