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I. Legality of Cash Discount in Lieu of Trading Stamps as Good Faith Meeting of Competition Under the Dairy Law

In *Hogue v. Kroger*,[1] a retail grocer sought a declaratory judgment, under the Dairy Law of 1961, of his right to reduce the selling price of his milk (ex-trading stamps) below the statutory price by the amount of the cost of the trading stamps to a stamp-dispensing competitor. The commissioner of agriculture opposed this practice. Being responsible under the statute[2] for enforcing compliance with the statutory price, the commissioner answered, coupling with his answer a cross-bill seeking to enjoin further sales by Hogue at the reduced cash price. The supreme court affirmed a denial of the commissioner's injunction and remanded the matter to the chancellor for "any proceedings necessary."[3] In so doing, Justice Burnett provided guidelines for the resolution of the troublesome issue of handling trading stamps under the Dairy Act.

At issue is the appropriate economic characterization of trading stamps under a "sale below cost" statute, a matter which has proven difficult in other jurisdictions.[4] The several state fair pricing statutes have adopted different characterizations of trading stamps. One state has expressly prohibited the giving of trading stamps under a fair

*Professor of Law, Vanderbilt University.

1. 356 S.W.2d 267 (Tenn. 1962).
2. Tenn. Code Ann. § 52-332 (Supp. 1961).
3. 356 S.W.2d at 271.
4. Annot., 70 A.L.R.2d 1080 (1960); Note, 3 Ariz. L. Rev. 299 (1961); Note, *Trading Stamps*, 37 N.Y.U.L. Rev. 1090, 1110 (1962); Note, 24 Tenn. L. Rev. 557 (1956); Note, *Trading Stamps: A Challenge to Regulation of Price Competition*, 105 U. Pa. L. Rev. 242 (1956). See also Clark, *Statutory Restrictions on Selling Below Cost*, 11 Vand. L. Rev. 105 (1957).

trade statute;[5] some seventeen others have forbidden the giving of concessions, rebates, and coupons, without expressly referring to trading stamps.[6] Two states have expressly provided that trading stamps may be given without violating the fair trade statute.[7] Judicial treatment of trading stamps under these fair trade and unfair pricing statutes has been no less divergent. Some courts have avoided the problem either on a *de minimis* theory or by characterizing trading stamps as equivalent to furnishing free parking or free delivery service.[8] Other courts have accepted the view, urged by the trading stamp companies, that the giving of stamps represents a discount given to the consumer in return for his prompt cash payment.[9] Under this view, the trading stamps are payment-related rather than cost-related elements and are outside the statutory bar of (a fair trade and) a "sales below cost statute" such as the Dairy Act.

Although no trend is apparent in other jurisdictions where the courts have considered trading stamps under such statutes, some courts have rejected the cash discount characterization.[10] This view recognizes that trading stamps are unlike a cash discount insofar as the effective price reduction occurs, if at all, at a time much later than payment, that is, when the trading stamps are redeemed.[11] A better characterization would take account of both the price-adjusting and cost aspects of the trading stamp. The receipt of trading stamps by the consumer may be viewed as a price concession sufficient to induce the purchase at the time of purchase, while from the point of

5. WIS. STAT. ANN. § 100.15(2) (1957).

6. ALA. CODE tit. 57, § 79 (1958); CONN. GEN. STAT. REV. § 42-106 (1958); DEL. CODE ANN. tit. 6, § 1903 (1953); FLA. STAT. ANN. § 541.04 (1962); GA. CODE ANN. § 106-405 (1953); HAWAII REV. LAWS § 205-22 (1955); IDAHO CODE ANN. § 48-303 (1949); MONT. REV. CODES ANN. § 85-203 (1947); OHIO REV. CODE § 1333.-31(A) (Baldwin Supp. 1962); ORE. REV. STAT. § 646.360 (1955); S.D. CODE § 54.0403 (1939); VA. CODE ANN. § 59-4 (1950); W. VA. CODE ch. 47, art. 11, § 4678(3) (1961); WIS. STAT. ANN. § 100.15(2) (1957); WYO. STAT. ANN. § 40-11 (1957).

7. OHIO REV. CODE § 1333.32(A) (Baldwin Supp. 1962) (but limited to three percent of the fair trade price); VA. CODE ANN. §§ 59-4 (1950) aud 59-8.4 (Supp. 1962).

8. Dart Drug Corp. v. Eli Lilly & Co., 216 Md. 20, 139 A.2d 272 (1958); Sperry & Hutchinson Co. v. Kent, 287 Mich. 555, 283 N.W. 686 (1939); Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956); Bristol-Myers Co. v. Lit Bros., Inc., 336 Pa. 81, 91, 6 A.2d 843, 848 (1939).

9. Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334 (1959) (dictum); Food & Grocery Bureau, Inc. v. Garfield, 20 Cal. 2d 228, 125 P.2d 3 (1942); Corning Glass Works v. Max Dichter Co., 102 N.H. 505, 161 A.2d 569 (1960); Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954).

10. Shuster & Co. v. Steffes, 237 Wis. 41, 295 N.W. 737 (1941) (upholding the constitutionality of a statute barring the giving of trading stamps on fair trade items); see note 5 *supra*.

11. See generally Charvat, *The Economics of Trading Stamps*, 7 J. PUB. L. 450 (1958). An assessment of the validity of the thesis that fair trade and unfair price statutes are either necessary or desirable is beyond the scope of this comment. See generally REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 149-55 (1955).

view of the stamp-dispensing retailer, it is an item of cost. The Tennessee Dairy Act takes account of both factors by providing that among other cost items:

> [The] cost of doing business of a retailer includes the fair value of any concession of any kind whatever which has the effect of reducing the actual sales price or increasing the cost of the goods delivered for the price stated in the invoice, including but not limited to the cost to the retailer of trading stamps or redeemable coupons.[12]

In his opinion, Judge Burnett has rejected the cash discount characterization and stressed the express statutory reference to trading stamps as a cost element. Accordingly, this opinion stands for the proposition that an injunction will not lie against a retailer who reduces his price by the cost of the trading stamps to his competitor and can colorably claim a good faith meeting of competition.[13]

II. Refusal To Test by an Industry Testing Laboratory as a Restraint of Trade Under Section 1 of the Sherman Act

In *Roofire Alarm Co. v. Royal Indemnity Co.* the District Court for the Eastern District of Tennessee by summary judgment dismissed

12. Tenn. Code Ann. § 52-331(n) (Supp. 1961).

There is statistical evidence to validate this characterization of the trading stamp as an added element of cost to the retailer. See United States Department of Agriculture, Agricultural Marketing Service, Market Research Division Report No. 295, *Trading Stamps and Their Impact on Food Prices*, 17 (1958). Moreover, this study suggests that the cost of the stamps, $2.25 per thousand on the average, is often passed on to the consumer in the higher prices of the food sold. In a survey in 21 cities of 42 stamp and 53 non-stamp retail grocers from November, 1953, to March, 1957, the Marketing Research Division found that in two cities the average price increase in stamp stores after the introduction of stamp programs, was at least 3% greater than the increase in non-stamp stores. In eight cities, prices in the stores that added stamps showed price declines in relation to their non-stamp competitors. In the remaining eleven cities, prices in the stamp stores rose by not more than 2% in relation to stores not dispensing stamps. *Id.* at 20.

A study conducted under the direction of Professor F. M. Westfield of the Department of Economics and Business Administration at Vanderbilt University confirms these findings. In four different areas of Nashville, a comparison of the items of a standard market basket between similar and adjacent stamp and non-stamp markets showed a sample mean difference for all items in the market basket of plus .015474 for the stamp-dispensing stores. A copy of this study is on file in the Vanderbilt Law Library.

13. Tenn. Code Ann. § 52-334(7) (Supp. 1961), provides for an exception from the general bar against sales below the statutory price where: "the price of such items is made in good faith to meet competition, provided that such prices shall not be cut more than once, nor in any event cut below the price of competition."

The concept of a good faith meeting of competition has proven troublesome under § 2 of the Clayton Act, 38 Stat. 730 (1936), as amended, 15 U.S.C. § 13a (1958). See Rowe, Price Discrimination Under the Robinson-Patman Act 248-54 (1962) for a discussion of the difficulties which the "good faith" defense has posed for federal tribunals under § 2(b) of the Clayton Act.

an action, under section 1 of the Sherman Act, which had alleged unlawful concerted action between the defendant fire insurance company and the industry testing laboratory manifested by the latter's refusal to test the plaintiff's alarm device.[14] In seeking an injunction and a declaratory judgment of the duty of the Underwriter's Laboratory to test and publish results, the plaintiff sought to show a restraint of trade evidenced by the limitations on sales and on access to advertising media which the absence of the testing laboratory's (Underwriters') seal imposed. The court appropriately dismissed plaintiff's complaint. Despite a substantial array of affidavits, admissions, and depositions, no more than adherence by the testing laboratory to its announced standards was shown.

The court based its disposition of this matter on the broad construction of section 1 of the Sherman Act which bars only unreasonable restraints of trade, citing the famous *Standard Oil* opinion of 1911.[15] It is respectfully suggested that this complaint might have been more appropriately dismissed on the narrower ground of the *Radiant Burners* opinion which this court does not cite.[16] In *Radiant Burners* the Supreme Court announced a principle governing the adequacy of a complaint to state a cause of action by refusal to test under section 1 of the Sherman Act. Within the meaning of the *Radiant Burners* opinion, there are apparently two necessary and sufficient conditions required to state a cause of action as a restraint of trade under section 1 of the Sherman Act. First, the effect of the refusal to test must involve a restraint in the trade of a complementary product used with the tested item. Second, the membership of the testing agency must consist of some sellers competing with the plaintiff in the sale of the device itself.[17] Insofar as the present case did not contain allegations

14. 202 F. Supp. 166 (E.D. Tenn. 1962).

15. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

16. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

Here the Supreme Court reversed the lower court's dismissal of the appellant's complaint alleging a violation of § 1 by its refusal as a testing agency to approve gas burners and by the refusal of the testing association's membership to sell gas to users of plaintiff's unapproved appliances. As the court viewed it, the allegation of a conspiratorial refusal to furnish gas coupled with the presence among the membership of the testing laboratory of competitors of plaintiff, was necessary to state a cause of action under § 1. The court stated: "The conspiratorial refusal 'to provide gas for use in the plaintiff's Radiant Burner[s] [because they] are not approved by AGA' therefore falls within one of the 'classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by . . . statute. . . .' The alleged conspiratorial refusal to provide gas for use in plaintiff's Radiant Burners 'interferes with the natural flow of interstate commerce. . . .' Therefore, to state a claim upon which relief can be granted under . . . [§ 1] allegations adequate to show a violation . . . are all the law requires." *Id.* at 659-60.

[Of the composition of the testing ageney the court noted:] "Its tests are not based on 'objective standards,' but are influenced by respondents, some of whom are in competition with petitioner." *Id.* at 658.

17. See note 18 *infra.*

sufficient to meet this test, the complaint might have been dismissed by reference to the *Radiant Burners* opinion rather than the wider "rule of reason" test of section 1. That the broader doctrinal ground of the rule of reason may serve to embolden other plaintiffs to bring such an action is suggested by the history of this very case.[18]

III. Price Fixing Under Section 1—Attempts To Monopolize, Combinations or Conspiracies To Monopolize, and Monopolization Under Section 2—Discriminatory Pricing Under Section 2 of the Clayton Act

In *Volasco Products v. Fry,* the Court of Appeals for the Sixth Circuit considered on cross-appeals three consolidated treble damage actions arising from pricing and other practices in the sale of roofing materials within a relevant market area defined by a radius of 200 miles around the city of Knoxville.[19] The plaintiffs, two affiliated, vertically-integrated corporations engaged in the manufacture of asphalt and asphalt roofing materials, had made three allegations involving the defendant corporation which at the time of action was the largest manufacturer of asphalt roofing products in the United States. The plaintiffs alleged that the defendant had: (1) conspired with other sellers to fix prices in the relevant market; (2) monopolized or had attempted to monopolize the sale of asphalt roofing products; and (3) pursued a policy of discriminating in price between purchasers of roofing products in the market area. On the trial, the jury returned a verdict in favor of plaintiff Volasco, the roofing manufacturer, and awarded damages which the district judge duly trebled; from this judgment and from the injunction against further violations, the defendant appealed. The district judge had dismissed the claim of Volunteer, the integrated asphalt manufacturer; from this judgment, plaintiff appealed. The Court of Appeals for the Sixth Circuit affirmed the dismissal of Volunteer's claim, but reversed the judgment for damages to Volasco and remanded the case to the district court for a new trial. The basis for reversal was twofold: (1) the insufficiency of the evidence of monopoly, under section 2 of the Sherman Act, coupled with an erroneous instruction to the jury relating to this

18. This same plaintiff had sought a declaratory judgment in an earlier suit, of the testing agency's right to refuse testing as an arbitrary and tortious denial. The testing laboratory justified its refusal to test this device by its established rule that any device offered for testing and approval must sound a continuous warning for at least three minutes at full intensity. The offered device gave only an instantaneous warning in the form of a single loud report. The district court granted defendant's motion for summary judgment, noting the clear failure of the plaintiff to meet reasonable standards set by the testing laboratory. See Roofire Alarm Co. v. Underwriters' Lab., Inc., 188 F. Supp. 753, 754 (E.D. Tenn. 1959), *aff'd,* 284 F.2d 360 (6th Cir. 1960).

19. Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962).

section; and (2) failure to use the proper measure of damages under section 1. On its review of the record in this case, the appellate court found that the evidence was sufficient to take the case to the jury on the conspiracy to fix prices and that the trial judge's instruction to the jury was correct on that issue.[20] The grounds for reversal were the errors relating to section 2 and the fallacious method of computing damages. By refusing to apply the so-called two issue rule, the court considered itself bound to reverse the judgment in toto.

It is respectfully suggested that the complete reversal of the judgment on both the section 1 and section 2 branches of the case is neither desirable nor required. As a proposition of substantive law, section 2 of the Sherman Act is recognized as being violated by conduct and circumstances independent of acts which will violate section 1, although conduct illegal under section 1 is among the classes of illegal conduct which may violate section 2. As this relationship between section 2 and section 1 has been characterized:

> Situations of monopoly [under section 2] may arise or be maintained in various ways. . . . Monopoly may develop . . . from the absorption of competitors in violation of Section 7 of the Clayton Act, or Section 1 of the Sherman Act or both. Or monopoly can emerge and be preserved by driving competitors out of business, by putting deliberate business impediments in their path, or by combining or conspiring with competitors . . . .[21]

Thus, as a matter of substantive law, a section 1 violation may also constitute a violation of section 2, but the relationship is not reversible. A violation of section 1 by fixing prices does not take any of its illegality from section 2. Indeed, a long line of Supreme Court opinions has underscored the independent (and illegal) nature of price-fixing under section 1 by characterizing price-fixing as illegal per se under the first section of the Sherman Act.[22]

Given this independent substantive relationship between the two statutory provisions it seems perverse to allow the deficiencies in the section 2 branch of the case to be combined with the error in the computation of damages, and thus to undercut a verdict based upon a clear showing of price-fixing. It would have been better to remand this case for a proper computation of damages, without disturbing the judgment on the section 1 violation.

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20. *Id.* at 389.

21. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 55-56 (1955).

22. FTC v. Cement Institute, 333 U.S. 683 (1948); United States v. Socony Vacuum Oil Co., Inc., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).