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Antitrust: Legal Status of Consignment Agreements

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NOTES AND COMMENTS

ANTITRUST: LEGAL STATUS OF CONSIGNMENT AGREEMENTS

In the recent case of *Richard S. Simpson v. Union Oil Company of California,* 377 U.S. 13 (1964) the United States Supreme Court under the federal antitrust laws[1] dealt harshly with arrangements under a "consignment" agreement which allegedly were used to police retail prices.

Union Oil is a producer, refiner, and marketer of gasoline.[2] In May,

[1] The principal antitrust laws dealt with in this decision were Sec. 3 of the Clayton Act and Sec. 1 of the Sherman Antitrust Act.

Clayton Act § 3, 38 STAT. 731 (1914), 15 U.S.C. § 14 (1958). "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Sherman Act § 1, 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1952) as amended. 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 declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be for an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[2] Union Oil supplies gasoline to retail stations in the eight western states of Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington.

1956, Richard S. Simpson subleased from Union Oil a station for a term of one year. The parties executed a written Retail Dealer Consignment Agreement, terminable by either party at the end of any year and ceasing upon any termination of Simpson's right to occupy the station. When Simpson sought to be a lessee, "consignment" was the only way in which Union Oil would deal.[3] Under the consignment method of marketing, Union Oil retained title to the gasoline until sold by the "consignee." Under this arrangement it determined the price at which the gasoline was to be sold. Although Simpson agreed to sell "consignor's gasoline" at prices authorized by it he proceeded to set his own prices for gasoline from March, 1958, to the end of the lease when competitors lowered their price. He was told that if he did not comply with their suggested prices, his lease would not be renewed. Simpson was notified that at the end of the lease the consignment agreement was being terminated.[4] Because of his violation of the "consignment agreement" and his refusal to comply Union Oil refused to renew the lease.

After the District Court had concluded that "all factual disputes" had been eliminated Union Oil moved for a summary judgment. Simpson moved for a partial summary judgment — that the consignment lease program is in violation of § 1 and 2 of the Sherman Act. The Court of Appeals affirmed[5] the District Court's granting of the Company's motion and denial of Simpson's, holding that he had not established a violation of the Sherman Act or suffered any actionable damage. The case went to the Supreme Court on a writ of certiorari.

Mr. Justice Douglas, in delivering the opinion for the Supreme Court, held that ". . . a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy. Thus a consignment is not allowed to be used as a cloak to avoid § 3 of the Clayton Act.[6] Nor does § 1 of the Sherman Act[7] tolerate agreements for retail price maintenance." From the Court's opinion we are forced to assume that a true agency relationship existed in the form of a valid consignment agreement. Nevertheless, the Court held that the agreement violated the federal antitrust laws.[8] The Court uses the word "coercive" in certain instances when describing the Retail Dealer Consignment, however, the question of whether the agreement was coercively entered into did not appear to be a factor in finding the

[3] Of the 4,133 retail stations supplied by Union Oil at December 31, 1957, 2,003 were owned or leased by Union Oil and in turn, leased or subleased to an independent retailer; 14 were company-operated training stations; and the remaining 2,116 stations were owned by the retailer or leased by him from third persons. Union had "consignment" agreements with 99% of the lessee-retailers and 63% of the nonlessee-retailers.

[4] Union Oil stipulated in the trial court that when Simpson's lease expired it was not renewed because of his violation of the "consignment agreement."

[5] 311 F.2d 764.

[6] Here the Court cited Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 353-356; cf. Stauss v. Victor Talking Mach. Co., 243 U.S. 490, 500-501.

[7] Citing United States v Socony Vacuum Oil Co., 310 U.S. 150, 221-222; United States v. Parke, Davis & Co., 326 U.S. 29.

[8] We must assume this because the court failed to rule that the consignment agreement was not valid as a matter of private contract law.

"consignment" to be a violation of the federal antitrust policy.[9]

Businessmen have been under the assumption that the case of the *United States v. General Electric*[10] clearly set out the federal antitrust policy and explained the law dealing with consignments. Chief Justice Taft, in writing the opinion for a unanimous court in the *General Electric* decision said "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 article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."[11] It is assumed that the court in *General Electric* meant by the word "otherwise" a consignment valid as a matter of private contract law.

The court, however, in *Union Oil* says:

> But whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here. The court in that case particularly relied on the fact that patent rights have long included licenses "to make, use, and vend" the patented article "for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure. . . ." The patent laws which give a 17-year monopoly on "making, using, or selling the invention" are *in pari materia* with the antitrust laws and modify them *pro tanto*. That was the *ratio decidendi* of the *General Electric* case. . . . We decline the invitation to extend it.[12]

It appears that the holding in *General Electric* has already extended this idea and several decisions have been handed down based upon the same logical reasoning.[13]

The court in *Dr. Miles Medical Co. v. Parke & Sons*,[14] decided prior to the *General Electric* case, led many to believe that had the agreement in that case created a bona fide agency, the consignment would have been valid under the antitrust laws. This decision is in accordance with the reasoning handed down in *General Electric*.

The end result of the *Union Oil* decision is not what this writer is concerned with, but rather the means in achieving that end. This opinion leaves many who have justifiably entered into similar agreements in reliance on *General Electric* in a state of confusion. Prior to *Union Oil* the court first looked to see whether a true agency relationship existed or if in fact was it a contract for sale.

In deciding the issue of whether the agency relationship was a real

[9] Although the Court concluded its opinion with the following: "we hold only that resale price maintenance through the present coercive type of 'consignment' agreement is illegal under the antitrust laws" nowhere in the body of the decision could it be construed so as to lead one to believe that this was the basis for the result attained. I make reference to the memorandum of Mr. Justice Goldberg: "without the benefit of a trial of the question whether this is a "coercive type of consignment agreement. . . ."

[10] 272 U.S. 476, (1926).

[11] *Id.* at 488.

[12] 377 U.S. at 23-24.

[13] Butterick Co. v. FTC, 4 F.2nd 910, (2d Cir. 1925); Edgewood Shoe Factories v. Stewart, 107 F.2nd 123, (5th Cir. 1939).

[14] 220 U.S. 373 (1911).