Tulsa Law Review

Volume 3 | Issue 1 Article 15

1966

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related topic of the right of the accused to refuse to answer questions it has been said: "the county attorney . . . should always caution a prisoner that any statement he might make could be used against him."[18]

On the other hand, the Oklahoma courts have stated on several occasions that the fact the defendant was under arrest and in jail, and was not warned that any statement made by him might be used against him, will not affect the admissibility of any voluntary statement made by him, which would othewise be competent.[19]

From these statements it appears that the feeling of the Oklahoma courts on this subject is fairly indefinite. However, if they follow the present trend to a more liberal interpretation of an accused's rights prior to trial, they will probably arrive at a decision similar to the California courts in the cases previously cited.

The overall effect of these new liberal decisions cannot be determined immediately. Whether other states will follow the lead of the California courts is another question which can only be answered in time. It should be recognized, however, that California has long played a dominant role in American jurisprudence, and it would not be surprising to see other states beginning to conform to these decisions.

Police officers and prosecuting attorneys will be forced to watch their actions more carefully at all times to avoid mistakes which might be interpreted as violations of the defendant's rights.

Liberal interpretations of these rights are needed to insure that due process will be followed and to eliminate the danger of a police state. The courts should, however, adopt a position which is reasonable enough to assure that the process of criminal investigation and prosecution will not be too greatly entangled in procedural requirements which must be met and satisfied in the enforcement of our law. We must keep in mind that if the courts are overly protective of the rights of one person or class of persons they are slighting the rights of another.

Casey Cooper

ANTITRUST: LIMITATIONS ON A COMPANY'S CONTROL OVER ITS DEALERS

The decision of the United States Supreme Court in *Atlantic Refining Co. v. FTC*[1] invalidated the sales-commission agreements that are so common between oil marketers and manufacturers of tires, batteries and accessory equipment (TBA). The sales-commission agreement of Good-

[18] Sholes v. State, 97 Okla. Cr. 158, 163, 260 P.2d 440, 446 (1953).

[19] Prather v. State, 76 Okla. Cr. 385, 137 P.2d 249 (1943); Mays v. State, 19 Okla. Cr. 102, 197 P. 1064 (1920); Anderson v. State, 8 Okla. Cr. 90, 126 P. 840 (1912).

[1] 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed. 443 (1965).

year Tire and Rubber Co. and Atlantic was found to be an unfair method of competition in violation of section 5 of the Federal Trade Commission Act.[2] Under a typical sales-commission plan, the oil company sponsors the sale of the TBA manufacturer's products to its wholesale and retail outlets and receives a commission on all sponsored TBA items sold through its outlets. The TBA manufacturer sells directly to the oil marketer's wholesalers and dealers for resale; it bears all the cost of distribution through its warehouses, stores, and other supply points. The oil company and TBA company carry on a joint sales promotion program.

In the initial proceeding of this case, the FTC hearing examiner enjoined the use of direct methods of coercion on the part of Atlantic toward its dealers in the promotion of the sales-commission plan with Goodyear,[3] but the Commission went much further. The Commission stressed the evidence showing that Atlantic used coercive practices such as orally advising dealers that they would place their status as Atlantic dealers and lessees in jeopardy if they failed to purchase sufficient quantities of sponsored TBA products.[4] Considering the coercive practices to be symptomatic of a more fundamental restraint of trade, the Commission found the sales-commission plan illegal in itself as "a classic example of the use of economic power in one market . . . to destroy competition in another market . . ."[5] The Commission found that two restraints on competition flowed from the sales-commission contract itself. Wholesalers and manufacturers of competing brands of TBA were foreclosed from the Atlantic market. Goodyear and Firestone Tire and Rubber Co., with whom At-

[2] Federal Trade Commission Act § 5, 38 Stat. 719, 15 U.S.C. § 45 (1964) provides in pertinent part:

"(a) (1) Unfair methods of competition in commerce, and unfair . . . acts on practices in commerce, are declared unlawful.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair . . . acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair . . . act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint . . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by (this Act), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice . . . . After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . ."

[3] Goodyear Tire & Rubber Co., 58 F.T.C. 309, 322 (1961).

[4] *Id.* at 342.

[5] *Id.* at 367.

lantic also had sales-commission agreements, were excluded from selling to Atlantic's dealers in each other's territories.

The order of the Commission, which was approved by the Seventh Circuit Court of Appeals and the Supreme Court, prohibited Atlantic from participating in any such commission arrangement and forbade Goodyear from continuing the arrangement with Atlantic or any other oil company.[6] In the first paragraph of the majority opinion, delivered by Mr. Justice Clark, the Supreme Court seems to be agreeing with the Commission that the sales-commission plan is inherently illegal and, if this is so, the Court has either given birth to another per se offense[7] in the field of antitrust law or broadened an existing category. But, in the last paragraph of the majority opinion, the Court said that Goodyear was not necessarily prohibited from making contracts with companies not possessed of economic power over their dealers. If the Court meant to imply that resort to economic statistics must be had to show economic power over dealers before a sales-commission plan amounts to an unfair method of competition, then it stopped short of holding such plans to be illegal per se. In *Northern Pacific R.R. Co. v. United States,*[8] which was a tying arrangement case, the Court pointed out that where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item, any restraint of trade would obviously be insignificant. The Court expressly stated that the Goodyear-Atlantic contract was not a tying arrangement, but it found that the central competitive characteristic was the same, namely, the utilization of economic power in one market to curtail competition in another. If the Court was invoking the quantitative substantiality[9] test by requiring a showing of economic power, then under the rationale of the *Northern Pacific* case, sales-commission plans are illegal per se. Since the Court found that tying arrangements and sales-commission plans have the

[6] For the complete text of the Commission's order see *Id.* at 369, or see footnotes 2 and 3 of the principal case, 381 U.S. at ——, 85 S.Ct. at 1502, 14 L.Ed.2d at 488.

[7] In Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), the Court declared the rule of reason to be the standard for determining whether a particular act unduly restrains competition in violation of the Sherman Act. The Court said the prior cases of United States v. Trans-Missouri Freight Association, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed 1007 (1897), and United States v. Joint Traffic Association, 171 U.S. 505, 19 S.Ct. 25, 43 L. Ed. 259 (1898), were correctly decided even though the rule of reason was not applied. Both prior cases involved formal agreements among railroads of dominant regional importance calling for the fixing of rates, the setting of joint rates and rate divisions. The Court said the nature and character of the contracts created a conclusive presumption which brought them within the Sherman Act, and they could not be taken out of that category by resort to the rule of reason. Those acts which are conclusively presumed to unreasonably restrain competition are the so-called unreasonable per se offenses. The Court in the principal case considered the Commission's use of recognized violations of the antitrust laws as a guideline to be entirely appropriate.

[8] 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

[9] For a discussion of the quantitative substantiality test see Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

same competitive characteristics it seems reasonable to consider that the rule holding tying arrangements to be illegal per se has been broadened to include arrangements having the same competitive characteristics as tying arrangements.

Exactly what constitutes economic power over dealers was not stated by the Court. However, three indicia of economic power were listed; namely, (1) lease and equipment loan contracts with their cancellation and short term provisions, (2) control of the supply of gasoline and oil to the wholesalers and dealers, and (3) extensive control of advertising on the premises of dealers. In *Simpson v. Union Oil Co.*,[10] the Court stressed the economic power inherent in short term leases subject to termination by either party because the oil company stands to be damaged less by a lease cancellation than does the dealer who would be put out of business. In *Osborn v. Sinclair Refining Co.*,[11] the Court of Appeals considered a sales-commission plan to be a tying arrangement and said that if the seller is of sufficient size to exert some power and the amount of commerce restrained is not insignificant, the standard of illegality is met.

It would appear reasonable to conclude that any petroleum marketer with more than a few dealers is precluded from entering into or maintaining a sales-commission plan with any TBA manufacturer or supplier.[12] Where more than a few dealers are involved there is a "not insubstantial" amount of commerce involved[13] and some economic power will be found to exist[14] so that illegality results under the rationale of the *Atlantic* case.

The hearing examiner found, as a matter of fact, that it is to the mutual interest of the oil marketer and the dealer to have the dealer engaged in the sale of TBA because it builds a stronger dealer organization and increases the sale of gasoline.[15] This being so, oil marketers can be expected to seek some acceptable plan to sponsor TBA purchasing by their dealers to increase the profits of both the dealer and the oil company. Some oil marketers are still using the purchase-resale plan that Atlantic used prior to adoption of the sales-commission plan. Companies using the purchase-resale plan purchase TBA items from the manufacturers, warehouse them, and resell them to their wholesalers and dealers.

It cannot be stated with certainty whether the Commission will at-

10 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed. 98 (1964).

11 286 F.2d 832 (4th Cir. 1960).

12 Not all observers agree on this point. See OIL AND GAS JOURNAL, Vol. 63, No. 23, p. 77; OIL AND GAS JOURNAL, Vol. 63, No. 24, p. 72 (two articles). But see National Petroleum Refiners Association, Washington Bulletin No. 65-17, October 6, 1965, p. 11.

13 In Northern Pacific R.R. Co. v. United States, 365 U.S. at 6, 78 S.Ct. at 519, 2 L.Ed.2d at 550, the Court pointed out by way of illustration that it is not concerned with de minimis restraints on competition.

14 The Court said, "They (Atlantic and its dealers) simply do not bargain as equals." 381 U.S. at ——, 85 S.Ct. at 1505, 14 L.Ed. at 452. This seems to suggest that showing disproportionate size of the marketer with respect to his dealers is enough to show economic power of the marketer.

15 Goodyear Tire & Rubber Co., 58 F.T.C. at 313.

tack purchase-resale plans under section 5. Mr. Justice Goldberg in his dissenting opinion took the position that the Commission enjoined Atlantic from using any sales-commission plan but expressly excepted from the injunction the use by Atlantic of a purchase-resale arrangement. Atlantic also took the position that the Commission's order permitted the reinstitution of the purchase-resale plan. The majority of the Court felt that this position flowed from the language of the order which prohibits Atlantic's receipt of anything of value in connection with the sale of TBA by any marketer other than Atlantic. However, the Court expressly declined to pass on the merits of the purchase-resale plan because the merits of that plan were not before the Commission.

The sales-commission plan was found to be illegal in itself as a classic example of the use of economic power in one market to destroy competition in another market. The purchase-resale plan might be regarded as a near-classic example since both plans have some of the same anticompetitive effects. For example, an oil marketer has at least some economic power over its dealers whether a sales-commission or purchase-resale plan is used for marketing TBA. An oil marketer has a pecuniary interest in the sale of TBA by its dealers whether the TBA is sold to the dealer by the marketer or sold to the dealer by the manufacturer who pays the marketer a commission. Under either plan, the dealer will or should realize that good relations with the oil company depend at least to some extent on the profits the oil company receives from the dealer's TBA sales. This is a simple fact of business life and actual coercion is not necessary to impress it on the dealer's mind.

Mr. Justice Stewart rationalized in his dissenting opinion that the Commission's order could be understood as a measure to prevent the exclusion of competition in TBA marketing by taking a step toward the total elimination of Atlantic from the marketing of tires, batteries and accessories. If the sales-commission plans disappear and purchase-resale plans again become prevalent, an attack directed at purchase-resale plans by the Commission would lend credence to Justice Stewart's view.

The full impact of this decision on the marketer-dealer relationship may be more discernible when the Supreme Court renders a decision in the appeal of *Brown Shoe Co. v. FTC.*[16] The *Brown Shoe* case may be part of an apparent trend to severely limit the control of a company over its dealers; a trend that started with *Simpson v. Union Oil Co.*[17] In the *Simpson* case the Court struck down a consignment agreement by which Union Oil Company controlled the retail prices of gasoline sold by its dealers. The Court stated that the consignment agreement, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy.[18] In the *Brown Shoe* case, the Eighth Circuit Court of Appeals set aside the Commission order that enjoined Brown Shoe Company from using its franchise plan to foreclose competitors from

[16] 339 F.2d 45 (8th Cir. 1964).
[17] Simpson v. Union Oil Co., *supra* note 10.
[18] Id. at 18, 84 S.Ct. at 1055, 12 L.Ed. at 103.