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Maryland Fair Trade Laws Do Not Prohibit Advertising in Maryland of Goods to Be Sold Elsewhere - Bissell Carpet Sweeper Co. v. Master Mail Order Co

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Maryland Fair Trade Laws Do Not Prohibit Advertising In Maryland Of Goods To Be Sold Elsewhere

Bissell Carpet Sweeper Co. v. Master Mail Order Co.[1]

Plaintiff manufacturer had established minimum retail prices for his products in Maryland pursuant to contracts with Maryland dealers in conformity with the Maryland Fair Trade Act.[2] Defendant operated a retail store in the District of Columbia, a free trade jurisdiction, with about one-third of its sales consummated by mail order. Plaintiff sought to enjoin defendant from "willfully and knowingly advertising and offering for sale"[3] in Maryland plaintiff's products at prices lower than the aforesaid valid fair trade prices in effect in Maryland. None of defendant's sales took place in Maryland; all sales were directly to consumers; and all advertising emanated from the District of Columbia. The district court denied the injunction,[4] and on appeal, was affirmed. "Since the prohibition against selling (in Sec. 107 of the Maryland Act) is of necessity confined to Maryland sales, the associated acts of advertising or offering for sale must likewise be concerned with sales within the State",[5] and the McGuire Act[6] does not broaden the scope and purpose of the Maryland statute.[7]

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[1] 240 F. 2d 684 (4th Cir., 1957).

[2] Md. Code (1951) Art. 83, Secs. 102-110.

[3] *Ibid*, Sec. 107, is the basis for plaintiff's cause of action:

"Willfully 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 Sections 102-110, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[4] 140 F. Supp. 165 (D. C. Md., 1956).

[5] *Supra*, n. 1, 687-8.

[6] 15 U. S. C. A. (1956), Sec. 45(a)(1)-(5). In substance the Act renders lawful contracts prescribing minimum prices for the resale of certain trademarked commodities, provided such contracts are lawful by statute in a state "in which such resale is to be made, or to which the commodity is to be transported for such resale". Also permitted is "any right of action created by any statute . . . which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price" prescribed in such fair trade contracts is unfair competition. Further, the making of such contracts or enforcement of the aforesaid rights of action shall not be a burden on interstate commerce.

[7] *Supra*, n. 1, 688.

The Court's attention was focused primarily on the intended meaning and scope of the Maryland Act. The result reached is based on two concepts: (1) That the Maryland Act must be strictly construed for it is in derogation of the common law;[8] and (2) the doubt as to the constitutionality of a state statute which attempts to control interstate commerce.

The application of these concepts to this situation seem to the writer to be unsound. As to the first, such a narrow interpretation contradicts the purpose of fair trade legislation — which is to protect the good will and name of the product.[9] Fair trade legislation permits a producer to establish and maintain a minimum retail price for his product. By so doing, the producer is able to establish in the public mind that his trademark represents a certain standard of quality and value.[10] If, however, the public is led to believe that the product can be bought for less than the price nationally advertised, the good will which fair trade legislation protects is adversely affected.[11] This is not to say that the Maryland statute should be construed to prohibit advertising at less than Maryland fair trade prices *anywhere*,[12] but only to prohibit such advertising within the borders of Maryland. A "strict" statutory construction should also be fair and reasonable.[13] A fair and reasonable interpretation is not one which tends unnecessarily to defeat the purpose for which a statute was enacted.

The Court's disinclination to enjoin defendant's advertising in Maryland was also due to the thought that a state statute regulating interstate commerce might be unconstitutional. There is ample authority that this fear is unnecessary. No doubt advertising from the District of Columbia into Maryland is a form of interstate commerce.[14] However, the Supreme Court has repeatedly held that a state may prohibit a certain activity where Congress has removed the bar of the commerce clause so that the state law may stand even though it would otherwise fail as interfer-

[8] Venable v. J. Engel & Co., Inc., 193 Md. 544, 549, 69 A. 2d 493 (1949).

[9] Schill v. Remington Putnam Co., 179 Md. 83, 89, 17 A. 2d 175 (1941).

[10] See Sunbeam Corp. v. MacMillan, 110 F. Supp. 836, 837 (D. C. Md., 1953), for the Court's consideration of the effect advertising has on the formation of the good will of the trademark.

[11] Krupsaw v. Luskin, CCH Trade Reg. Rep. 10th Ed., par. 68,228, p. 71,293 (Cir. Ct. of Balto. City, 1956).

[12] Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 240 F. 2d 684 (4th Cir., 1957). Also for the lower court decision, *supra*, n. 4, 174. The Court apparently felt that plaintiff was contending for such an interpretation.

[13] Garrity v. District of Columbia, 86 F. 2d 207, 214 (D. C. Cir., 1936).

[14] Lorain Journal v. United States, 342 U. S. 143, 151 (1951).

ing with interstate commerce.[15] As stated by the Supreme Court, Congress can "permit the states to regulate the (interstate) commerce in a manner which would otherwise not be permissible".[16] Congress, through the McGuire Act, has permitted state fair trade statutes "to apply to . . . activities in or affecting interstate . . . commerce".[17] That Maryland has the power to enjoin defendant's advertising within its borders, if given Congressional sanction, seems undeniable.

But the Court refers[18] to the case of *Miller Bros. v. Maryland*,[19] which held invalid a Maryland statute requiring out-of-state vendors to collect and remit to the state a use tax on articles sold outside the state, where said articles are to be used in Maryland. The statute was held to violate the Fourteenth Amendment because there was no sufficient link between the state and the vendor to meet the due process test of reasonableness of the tax collecting burden placed on the vendor. The *Miller Bros.* case stated that ". . . due process requires . . . some minimum connection between a state and . . . the property . . . it seeks to tax".[20] Here, defendant's advertising activities are operative within Maryland. Their being part of interstate commerce has significance only if the McGuire Act has not removed the bar of the commerce clause.

Prior to the enactment of the McGuire Act in 1952, state Fair Trade Laws offered immunity from the federal laws prohibiting contracts in restraint of trade only to the extent provided by the Miller-Tydings Act.[21] In 1951, the Court of Appeals for the Third Circuit held in *Sunbeam Corp. v. Wentling*[22] that the Miller-Tydings Act did not give the states the power to provide such immunity with respect to interstate sales; therefore, the Pennsylvania Fair Trade Act (substantially the same as the Maryland Act) was not intended to apply to sales and advertisements made from Pennsylvania into other states. The next year the McGuire Act was passed, Section 4 of which provides that the making and enforcing of fair trade contracts ("law-

[15] In re Rahrer, 140 U. S. 545 (1891); Adams Express Co. v. Kentucky, 238 U. S. 190 (1915); Clark Distilling Co. v. West'n Md. Ry. Co., 242 U. S. 311 (1917); Whitfield v. Ohio, 297 U. S. 431 (1936); Ky. Whip & Collar Co. v. I. C. R. Co., 299 U. S. 334 (1937); Prudential Ins. Co. v. Benjamin, 328 U. S. 408 (1946).

[16] Southern Pac. Co. v. Arizona, 325 U. S. 761, 769 (1945).

[17] 15 U. S. C. A. (1956), Sec. 45(a), note, "Purpose of Act".

[18] *Supra*, n. 12, 688.

[19] 347 U. S. 340 (1954), noted, 14 Md. L. Rev. 376 (1954).

[20] *Ibid*, 344-5.

[21] 15 U. S. C. A. (1951), Sec. 1. This statute is substantially identical to the first two paragraphs of the McGuire Act.

[22] 185 F. 2d 903 (3rd Cir., 1950).

ful as applied to intrastate transactions") "shall (not) constitute an unlawful burden or restraint upon, or interfere with, commerce". Consequently, in 1953, the District Court in Maryland did enjoin a Maryland vendor from selling to a Delaware vendee at less than the established fair trade price in Maryland.[23] Judge Chesnut stated, "The language of subsection 4 (of the McGuire Act) seems very clearly to indicate that . . . Congress was expressing its public policy to the contrary of the Wentling decision on that point".[24] The *Wentling* decision proceeded on the assumption that since the states had no power to regulate such interstate sales, the state statute did not intend to reach them. On the other hand, once Congress supplied the power in the McGuire Act, Judge Chesnut assumed that the state statute was intended to reach these sales (even though the state statute antedates the federal by about 15 years). The question still remains, however, whether section 4 of the McGuire Act also works in reverse, *i.e.,* in the fact situation presented by the instant case, wherein the advertisements are made *from* a non-fair trade into a fair trade jurisdiction. This question, too, was presented to Judge Chesnut in *Revere Camera Company v. Masters Mail Order Company,*[25] and there he decided that ". . . the McGuire Act does not of itself relate to the subject matter of the sale of goods from a non fair trade jurisdiction into another jurisdiction . . ."[26] Similarly, in the instant case, Judge Watkins in the District Court stated that ". . . the McGuire Act intended only to permit any State that so desired to authorize the making of contracts fixing minimum resale prices with respect to goods *resold* in that State, or transported into such State for *resale*".[27] In the instant case, the Circuit Court goes no further than to construe the Maryland statute as not applicable to the facts.

Ample practical justification for the result may lie in a reasonable statutory interpretation of the intended scope of the McGuire Act itself. While it is a difficult problem to discover the Maryland legislature's intent regarding the Maryland Act, it is clearly possible to reason that Congress did not intend to give the states such vast control over interstate advertising as would have resulted if the *Bissell*

[23] Sunbeam Corp. v. MacMillan, 110 F. Supp. 836 (D. C. Md., 1953).

[24] *Ibid,* 842. In addition the House Committee Report in regard to the McGuire Act is quoted therein to the same effect.

[25] 128 F. Supp. 457 (D. C. Md., 1955).

[26] *Ibid,* 462.

[27] Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 140 F. Supp. 165, 178 (D. C. Md., 1956). The Court pointed out that the word "resale" was interchangeable with the word "sale". Italics supplied.

case had reached the opposite conclusion and accepted the plaintiff's contention. It has been held that Congress gave to the states at least the power to control sales and advertising from their own states elsewhere.[28] To conclude that the states can also control sales and advertising *into* their jurisdictions might lead to more serious complications. For example, District of Columbia newspapers enjoy a wide circulation in nearby Maryland communities. Moreover, several Washington radio and television stations can easily be heard in Baltimore. To uphold plaintiff's contentions would necessarily mean that any Washington newspaper or radio or television station advertising products below Maryland fair trade prices could be prevented from so doing, because said advertising is within Maryland. These consequences are not peculiar to Washington alone. In the Fourth Circuit there are three free trade states,[29] and the number of fair trade states in the country is rapidly decreasing.[30] Further, the mail order business is an integral part of the country's economy.[31] Consider also the implications of an opposite decision if defendant advertised in a national magazine at less than Maryland Fair Trade prices. These problems not only raise a question of Congressional intent to bestow such broad powers upon the state without express grant, but also require consideration of the difficulty of controlling the spillage of communications into fair trade states.

It is possible that fair trade statutes of other states may be construed to apply to advertising *into* its jurisdiction. In that event, the question of the full meaning of Section 4 of the McGuire Act will have to be met. A more binding interpretation of the extent of this federal act is still wanting.

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[28] *Supra*, n. 23.

[29] District of Columbia, Virginia, and South Carolina. The District of Columbia never had a fair trade statute. The fair trade statutes of the other two jurisdictions were declared unconstitutional by the highest courts of their respective states. CCH Trade Reg. Rep. Vol. I, par. 3003, p. 4031-32.

[30] By 1957, there were 32 states whose fair trade laws were applicable to nonsigners. Observe, however, that in 1955-56 twelve other states had held unconstitutional or invalidated their entire acts or the sections binding nonsigners. Florida had done the same in 1954; Michigan, in 1952. CCH Trade Reg. Rep. Vol. II, par. 10,202.03 *et seq.*, p. 20,201 *et seq.*

[31] For an excellent article on the position of mail order houses in America's economy, see Spielvogel, *More Stores Join Mail Order Field, New York Times*, November 18, 1956. It is pointed out that there are 15,000 mail order concerns in the nation, and the estimated sales volume this year of the major companies alone will be 3½ billion dollars.