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PUBLIC CONTROL OF BUSINESS

UNFAIR TRADE PRACTICES

Following the action of the Supreme Court of the United States in sustaining as constitutional the Illinois Fair Trade Act,¹ similar acts were adopted by the majority of the states, including the State of Oklahoma.² In general, such acts permit the producer of a commodity which bears his trademark, brand or name, to require his purchasers to agree not to resell the commodity below a minimum price stipulated by the producer, and it is an act of unfair competition for any person, whether a party to the agreement or not, knowingly and willfully to sell such commodity at less than the stipulated minimum price.

Several states have enacted legislation complementary to their fair trade laws designed to make it a misdemeanor for a person to sell merchandise or render services below cost for the purpose of injuring competitors, destroying competition, or inducing purchasers to buy other merchandise or services. California was a leader in adopting such legislation.³ The constitutionality of the California law was attacked on the ground that it deprived an individual of his right to dispose of his property at whatever price he chose, and on the ground that the act was an unlawful exercise of the state's police power because the means adopted did not bear a reasonable relation to the purpose of the act. However, the Supreme Court of California upheld the law.⁴ A similar act adopted in Oklahoma in 1941⁵ was declared unconstitutional by the Supreme Court of Oklahoma in 1949 in the case of *Englebrecht v. Day*.⁶

¹Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183 (1936).

²78 OKLA. STAT. ANN. (Perm. Ed.) §§ 41-45.

³Cal. Stats. 1935, c. 477, § 3.

⁴Wholesale Tobacco Dealers Bureau of Southern Cal. v. National Candy and Tobacco Co., 11 Cal. 2d. 634, 82 P. 2d. 3 (1938); Mering v. Yolo Grocer & Meat Market, 127 P. 2d. 985 (Cal. Dist. Ct. of App. 1942).

⁵15 OKLA. STAT. ANN. (Perm. Ed.) §§ 591-597.

⁶———Okla.———, 208 P. 2d. 538 (1949).

The Oklahoma act, known as the Unfair Sales Act, declared the public policy of the state to be against the advertising or offering for sale or selling of merchandise by wholesalers or retailers at less than cost *with the intent or effect* of inducing the purchase of other merchandise or unfairly diverting trade from or otherwise injuring a competitor or injuring the public welfare, where the result would be to deceive a purchaser, unreasonably restrain trade, substantially lessen competition or create a monopoly. Violation of this policy was made a misdemeanor, and injunctive relief was provided for any person damaged or threatened with loss because of a violation.

In *Englebrecht v. Day* the constitutionality of the Unfair Sales Act was attacked as violating the due process clauses of the Federal and State Constitutions. In a 5 to 4 decision the entire act was declared unconstitutional. The court noted that similar acts adopted by other states had been held unconstitutional as an unlawful restriction of the right of a person to sell his property at whatever price he can get, or because the business regulated was "not affected with a public interest."⁷ But these grounds were dismissed as a basis for holding the Oklahoma act unconstitutional in view of a recent decision of the Supreme Court of the United States holding that there is no closed category of businesses "affected with a public interest" and that a court's function under the due process amendments is to determine in each case whether the regulation is a reasonable exercise of governmental regulatory power.⁸

The Oklahoma court invalidated the Oklahoma act because under the wording of the statute it felt that the possibility existed that a person whose below-cost sales merely had the effect of injuring a competitor or lessening competition might be convicted even though he did not have intent of injuring a competitor or lessening competition. The court stated that enactments similar to the Oklahoma act had been held unconstitutional where they

⁷ 208 P. 2d. at p. 541.

⁸ *Nebbia v. People of the State of New York*, 391 U. S. 502 (1934); see annotation in 89 A.L.R. 1469 (1934).

contained words such as "with intent or effect" or "with the intent, effect or result." Thus, a Maryland court held unconstitutional a statute which was in almost the same words as the Oklahoma act, although the holding seems to have been based on grounds of uncertainty and unreasonableness.⁹ The Nebraska court invalidated a statute prohibiting sales below cost where the effect "may lessen" competition, no intent or guilty knowledge being required, for the reason that the act contained no definition of criminal intent or guilty knowledge and was too uncertain.¹⁰ On the other hand, the Minnesota court upheld a statute which prohibited sales at less than cost for the purpose or with the effect of injuring competitors or destroying competition, saying:

"Intent to injure is not essential to a violation. This is not fatal to the act. Sales below cost which have the effect of injuring competition may be prohibited regardless of intent."¹¹

Contrary to the Minnesota decision the Supreme Court of Oklahoma held that the words "or effect" used in the Oklahoma statute rendered that portion of the law invalid. The court further concluded that this portion of the law having been found to be unconstitutional, the entire act would have to be voided in spite of the saving clause, since the policy of the act would be altered by striking the words "or effect" and the rest of the act would not be a sufficient statement of the Legislature's purpose in enacting the statute. The court also held invalid as too uncertain a provision of the act that costs of purchases which could not be justified under existing market conditions in the state could not be used in determining the cost of goods under the act.

As a result of the decision in this case the Unfair Sales Act has been repealed in its entirety by the Oklahoma Legislature and a new act adopted as emergency legislation.¹² The new act elimi-

⁹ *Daniel Loughran Co., Inc. v. Lord Baltimore Candy and Tobacco Co.*, 178 Md. 38, 12 A. 2d. 201, 204 (1940).

¹⁰ *State ex rel. English v. Ruback*, 135 Neb. 335, 281 N. W. 607, 609 (1938).

¹¹ *McElhone v. Geror*, 207 Minn. 580, 292 N. W. 414, 417 (1940).

¹² Okla. Laws 1949, p. 106, §§ 1-11; 15 OKLA. STAT. ANN. (Perm. Ed.) §§ 598.1-598.11.