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Resale Price Maintenance—Consignment Agreements—*Simpson v. Union Oil Co.*, 377 U.S. 13 (1964)

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RESALE PRICE MAINTENANCE—CONSIGNMENT AGREEMENTS—Simpson v. Union Oil Co., 377 U.S. 13 (1964).

Simpson leased a gasoline service station for a twelve-month period from Union Oil Company and was required by the company to sign a consignment agreement. Under the agreement, Union Oil not only retained title to all consigned gasoline until it was sold, but also reserved the power to establish the retail price. Simpson sold gasoline below the set price in order to meet local competition, and Union Oil thereupon refused to renew the lease on the ground that Simpson had violated the consignment agreement. Simpson sued for treble damages under section 4 of the Clayton Act[1] on the ground that the consignment-lease agreement was in violation of sections 1 and 2 of the Sherman Act.[2] Union Oil was granted summary judgment by the district court,[3] and this decision was affirmed by the court of appeals.[4] The United States Supreme Court reversed,[5] holding that the consignment-lease agreement was used as a coercive price fixing device in violation of the Sherman Act.

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1 Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

2 Section 1 of the Sherman Act provides: "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 . . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958).

3 Simpson v. Union Oil Co., TRADE REG. REP. (1961 Trade Cas.) ¶ 69936, at 77693 (N.D. Cal. 1960).

4 Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963). The court of appeals declined to rule on the legality of the consignment agreement, holding that no actionable damage had been shown even if the agreement were assumed to be unlawful.

5 Simpson v. Union Oil Co., 377 U.S. 13 (1964). With respect to damages, the Court said: "We disagree with the Court of Appeals that there is no actionable wrong or damage if a Sherman Act violation is assumed. If the 'consignment' agreement achieves resale price main-

I. RESALE PRICE MAINTENANCE

In 1911, the Supreme Court held, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[6] that a resale price maintenance agreement between a supplier and his distributor was an unlawful restraint of trade in violation of section 1 of the Sherman Act. Although Congress has since exempted such vertical price fixing agreements[7] from the antitrust laws in states where they are authorized by fair trade laws,[8] resale price maintenance agreements continue to be unlawful in those states not having such a statute.[9] In the absence of a fair trade act, or where difficulty is encountered in enforcing resale price maintenance agreements

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tenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce . . . ." *Id.* at 16. The Court remanded the case for a hearing, *inter alia,* on the issue of damages, but expressed no opinion on what the measure of damages should be. Simpson apparently asked only for damages caused by Union Oil's refusal to renew his lease. He did not claim damages which might have accrued as a result of his inability to set retail prices during the time the consignment-lease agreement was in effect, possibly because such damages would have been difficult to prove in view of the fact that he had established his own retail prices in spite of the agreement. In Osborn v. Sinclair Ref. Co., 324 F.2d 566 (4th Cir. 1963), which also involved an unlawful refusal to renew a service station lease, it was held that the lessee could recover both for damages incurred during the operation of the unlawful agreement and for damages caused by the cancellation of his lease: "There is no justification in antitrust law or in the general law of damages for limiting recovery to losses sustained before the break in business relations." *Id.* at 573.

6 220 U.S. 373 (1911).

7 A resale price maintenance agreement between a manufacturer or supplier and his distributors or dealers is generally referred to as "vertical" price fixing as distinguished from "horizontal" price fixing, which involves an agreement between competitors to fix prices.

8 Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958), amending 26 Stat. 209 (1890); McGuire Act, 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958), amending 38 Stat. 719 (1914).

9 Although only six states do not have a fair trade law (Alaska, Kansas, Missouri, Nebraska, Texas, and Vermont), four of the acts of the remaining forty-four states have been declared unconstitutional in general and an additional nineteen have been held unconstitutional as applied to nonsigners. The "nonsigner" provision contained in most fair trade acts makes it unlawful for any person to knowingly resell a fair trade commodity below the resale price established in any fair trade contract or agreement whether that person is a party to such agreement or not. Thus, the producer or vendor may bind all of his customers, within the jurisdiction of a particular fair trade act, to observe the established resale price by merely getting one of those customers to sign a formal agreement and giving notice to the rest.

under such a law,[10] some producers have attempted various arrangements designed to control retail prices without the aid of fair trade legislation. Two arrangements which have met with some success in avoiding the restrictions of the antitrust laws are: (1) the refusal to deal; and (2) the agency or consignment agreement.

A. Refusal To Deal

In the classic case of *United States v. Colgate & Co.*,[11] the Supreme Court upheld the right of a manufacturer to select customers on his own terms by allowing him to refuse to deal with distributors who would not resell his product at a specified price. In answer to the government's contention that this was an unlawful price-fixing device, the Court said:

> The purpose of the Sherman Act is to prohibit *monopolies, contracts and combinations* which probably would unduly interfere with . . . freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[12]

The *Colgate* case arose, however, on the issue of the sufficiency of the government's complaint, which the Court read as assuming that no agreement, either express or implied, was involved. Such an assumption, of course, made impossible any finding that trade had been restrained by contract, combination, or conspiracy. Subsequent decisions, however, have made it clear that where an agreement, combination, or conspiracy can be found, either express or implied from a course of dealing or other circumstances, then the refusal to deal comes within the proscription of the antitrust laws.[13]

In *Simpson,* Union Oil Company argued that it could properly decline to renew Simpson's lease on the ground that he had failed

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[10] For a discussion of resale price maintenance under fair trade laws, see Fulda, *Resale Price Maintenance,* 21 U. Chi. L. Rev. 175 (1954).

[11] 250 U.S. 300 (1919).

[12] *Id.* at 307. (Emphasis added.)

[13] United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).

to adhere to the specified prices, because such a course of action was a simple refusal to deal.[14] The Supreme Court disagreed, however, on the grounds that Union Oil's control over the retail price was expressly provided in the consignment agreement and that the agreement was used coercively. Union Oil did not merely decline to deal further with Simpson because he had not adhered to the suggested resale price, but rather because Simpson had not honored his *agreement* to adhere to that price. The Court here viewed the company's refusal to deal as an attempt to enforce an unlawful price-fixing agreement and thus distinguishable from that in *Colgate,* where no agreement, either express or implied, was charged. In addition, the Court found that coercion was used by Union Oil to force the consignment-lease agreements upon independent service station operators. By so doing, the company went beyond the mere right to choose customers on its own terms in order to form agreements in restraint of trade. Therefore, the Court concluded that Union Oil could not lawfully refuse to renew Simpson's lease merely because Simpson had violated the consignment agreement which he had been coerced to sign.

B. Agency or Consignment Agreement

Prior to *Simpson,* retail price maintenance through the use of a consignment agreement was upheld in *United States v. General Elec. Co.*[15] Although that case involved the consignment of a patented product by the owner of the patent, the Court apparently did not restrict its ruling to patented articles.[16] Describing the use of agents as a legitimate marketing practice by a manufacturer who desires to sell his product directly to the consumer, the Court 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.[17]

This rather broad language indicates that price-fixing by consignment does not violate the antitrust laws as long as the consignment is bona fide. Such a conclusion is substantiated by comparing *General Electric* with *Dr. Miles Medical Co.* In the latter

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[14] The district court upheld this contention. Simpson v. Union Oil Co., Trade Reg. Rep. (1961 Trade Cas.) ¶ 69936, at 77696 (N.D. Cal. 1960).

[15] 272 U.S. 476 (1926).

[16] See Klaus, *Sale, Agency and Price Maintenance,* 28 Colum. L. Rev. 312 (1928).

[17] 272 U.S. at 488.

decision, agency agreements covering the transactions involved were held to be a sham, and hence the "consignment" was really a "sale" subject to a resale price maintenance agreement. Also, the legitimacy of consignment price maintenance as a lawful marketing practice is supported by the fact that General Electric's agency agreements were again sustained some twenty-three years after the Supreme Court decision, even though the patents had expired and certain modifications had been made in the operation of the agencies.[18] Prior to *Simpson,* therefore, it appeared that business could generally rely on the consignment device as a means of controlling prices vertically without violating the antitrust laws and without resorting to fair trade laws.

Although the consignment agreements used by Union Oil differed slightly from those used by General Electric,[19] the Court in *Simpson* did not consider this difference to be significant. Instead, the Court merely pointed out that *General Electric* involved the consignment of a patented article and then declined to extend the holding of that case beyond its facts. The dissent in *Simpson* did not agree that *General Electric* could be distinguished solely on the existence of a patent and concluded: "It is clear . . . that the Court today overrules *General Electric.*"[20]

This conclusion has merit in view of the fact that the majority opinion relied principally on the argument that the controlling consideration in *General Electric* was the proposition that "the patent laws . . . are *in pari materia* with the antitrust laws and modify them *pro tanto.*"[21] While the owner of a patent has an exclusive right to make, use, or sell the patented article,[22] pre-

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[18] United States v. General Elec. Co., 82 F. Supp. 753, 817-27 (D.N.J. 1949).

[19] In *General Electric,* the consignee was responsible for lost, damaged, or missing items from the stock in his possession, while the consignor assumed all risks of fire, flood, and obsolescence. In *Simpson,* the consignee was responsible for all gasoline lost or damaged, while the consignor assumed the risks of earthquake, lightning, flood, fire, or explosion not caused by the consignee's negligence.

In *General Electric,* the consignees were regular wholesale or retail merchants of other merchandise, while in *Simpson* the consignees dealt exclusively in the consignor's gasoline. The consignor in *General Electric* paid all taxes assessed on the stock of lamps and carried insurance thereon, while the consignor in *Simpson* paid only property taxes and apparently was not obligated to carry any insurance on the consigned gasoline. See 377 U.S. at 23 n.10.

[20] *Id.* at 29 (Stewart, J., dissenting). See also Handler, *Recent Antitrust Developments—1964,* 63 MICH. L. REV. 59, 60-67 (1964).

[21] *Id.* at 24.

[22] See 35 U.S.C. § 154 (1958).

sumably the manufacturer of a nonpatented product also has a right, although not an exclusive one, to make, use, and sell his product. A fair construction of the patent monopoly with respect to the antitrust laws should not allow the owner of a patent to extend his monopoly beyond the express limits of his patent. Therefore, the manufacturer of a patented product should not be allowed to attach restrictions to the resale of that product which unreasonably restrain trade while the manufacturer of a nonpatented product may not do so.[23] Indeed, it seems fair to conclude that the majority in *Simpson* merely saw in the existence of the patent an opportunity to exercise judicial self-restraint to avoid broadly overruling a prior decision.[24] Although the Court was careful to defer a discussion of the issues in *General Electric* until a similar case is presented, the principles under which the consignment agreement in *Simpson* was held invalid appear to be equally applicable to consignment price maintenance of a patented article.

II. ANTITRUST POLICY

In *Simpson*, the consignment agreement was held unlawful, not because it did not establish a valid agency relationship, but merely because the antitrust policy of the government would not allow the resulting vertical price control. The Court considered the consignment agreement to be an attempt by Union Oil to validate an otherwise unlawful vertical price control scheme:

> When . . . a "consignment" device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the "consignment" an agency . . . . The present, coercive "consignment" device, if successful against challenge under the antitrust laws, furnishes a wooden formula for administering prices on a vast scale.[25]

Thus, even though the use of a consignment agreement was within the right of Union Oil to sell directly to the consumer,

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[23] Boston Store v. American Graphophone Co., 246 U.S. 8 (1918); Straus v. Victor Talking Mach. Co., 243 U.S. 490 (1917); Bauer & Cie v. O'Donnell, 229 U.S. 1 (1913).

[24] Apparently conceding that general reliance may have been placed on *General Electric*, the Court stated: "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." 377 U.S. at 24-25. Such prospective application of the rule in *Simpson* has been allowed by a district court. Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526 (S.D.N.Y. 1964).

[25] 377 U.S. at 21-22.

the Court held that the resulting vertical price control could not be tolerated under the general policy of the Sherman Act. Antitrust policy overrides even the right of a producer or supplier to determine the price at which his product will be sold where the result is retail price fixing: "[A] consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy."[26]

This limitation on the use of agents exemplifies the broad power available to the Court under the Sherman Act to prevent circumvention of the antitrust laws under the guise of basic private rights.[27] Indeed, under *Simpson* the principal test for determining the legality of a consignment agreement appears to be whether such an agreement is used as an indirect method of controlling retail prices. This test, based on result rather than form, was used earlier in *United States v. Masonite Corp.*,[28] where agency agreements were not allowed to extend the statutory grant of monopoly received under a patent. The Court made it clear that it had "quite consistently refused to allow the form into which the parties chose to cast the transaction to govern,"[29] and then went on to say: "So far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade."[30]

The holding in *Simpson* clearly indicates that the Supreme Court considers vertical price control, even in the form of consignment price maintenance, to be contrary to the policy of the antitrust laws, despite the fact that resale price maintenance apparently has been thought by some to have enough redeeming virtue to warrant exemption from the antitrust laws in the form of state fair trade acts. Arguably, such a broad construction of antitrust policy to prevent resale price maintenance may result in a greater concentration of economic power, because firms will be driven to vertical integration in order to gain some control over

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26 *Id.* at 18.

27 Use of the consignment agreement has also been held to be an unfair method of competition under § 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1958). Sun Oil Co., TRADE REG. REP. ¶ 16418 (FTC 1963); Atlantic Ref. Co., TRADE REG. REP. ¶ 16422 (FTC 1963).

28 316 U.S. 265 (1942).

29 *Id.* at 278.

30 *Id.* at 280.

resale prices.[31] If manufacturers are not allowed to control resale prices, even by using consignment agreements, some may resort to ownership of retail outlets as a means of controlling retail price competition. Vertical integration, however, is subject to the monopoly and merger limitations of the antitrust laws.[32] In addition, most producers probably would not find it economically desirable to own their retail outlets because of the large capital investment which would be required and because of the administrative problems involved in controlling a diverse distribution system. In any event, these speculations should not outweigh the fact that, if methods such as consignment selling are allowed to circumvent the antitrust laws, the result is vertical control by the producer of what would otherwise be a freely competitive distribution system. To prevent this stifling of competition on the retail level, the Court in *Simpson* interpreted the Sherman Act as a statement by Congress of a general antitrust policy, rather than a proscription of certain specific business practices, and found consignment price maintenance to be contrary to that antitrust policy.

With the possible exception of *Masonite, Simpson* appears to be the first case in which the Supreme Court has looked solely to the result rather than to the form of a business practice used to control retail prices. In both *Dr. Miles Medical Co.* and *General Electric,* the principal question was whether a bona fide agency relationship had been established,[33] the right of a manufacturer to

[31] "The economic theories which the Court has read into the Anti-Trust Laws have favored rather than discouraged monopoly. As a result . . . big business has become bigger and bigger. Monopoly has flourished. Cartels have increased their hold on the nation. The trusts wax strong. There is less and less place for the independent." Standard Oil Co. v. United States, 337 U.S. 293, 315 (1949) (Douglas, J., dissenting).

[32] Section 2 of the Sherman Act, note 2 *supra,* prohibits monopolization. Section 7 of the Clayton Act provides in part: "No corporation engaged in [federally regulated] commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

[33] Cases involving agency agreements under § 3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958) (prohibiting a sale or agreement not to use the goods of a competitor), have also been concerned primarily with the validity of the agency, not the result obtained by

set the price at which his bona fide agents would sell his product being assumed. In *Simpson,* however, the authenticity of the agency was not even considered. Instead, the fact that the resulting price control was contrary to the policy of the antitrust laws was deemed sufficient to find a violation of the Sherman Act. This approach to resale price maintenance could also be extended to other methods of vertical control, such as the refusal to deal.[34] If a simple unilateral refusal to deal is used successfully by a supplier to maintain resale prices, a violation of the Sherman Act could presumably be found because the result is contrary to antitrust policy. Even though the means used is the right of a private business entity to select its own customers, the antitrust policy of the government, under the rationale of *Simpson,* would prevent the use of that right to achieve vertical control of prices.

III. COERCIVE PRICE CONTROL

One factor which may limit the holding in *Simpson* is the element of coercion which the court found Union Oil used to impose the consignment agreements on previously independent service station operators. By using coercion, Union Oil went beyond the mere right to engage agents to sell directly to consumers and thereby put together a combination unreasonably restraining trade. Under this interpretation, *Simpson* only places a restriction on the consignment agreement similar to that already placed on the refusal to deal, *viz.,* coercion may not be used under the Sherman Act to achieve resale price maintenance.[35] In addi-

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its use. FTC v. Curtis Publishing Co., 260 U.S. 568 (1923); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

[34] In addition to resale price maintenance, the refusal to deal has also been involved in cases arising under § 3 of the Clayton Act, note 33 *supra,* and under the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (Supp. V, 1963), amending 38 Stat. 730 (1914) (prohibiting price discrimination). Timken Roller Bearing Co. v. FTC, 299 F.2d 839 (6th Cir. 1962), *cert. denied,* 371 U.S. 861 (1962); House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962); McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953); Johnson v. J. H. Yost Lumber Co., 117 F.2d 53 (8th Cir. 1941); Ben B. Schwartz & Sons, Inc. v. Sunkist Growers, Inc., 203 F. Supp. 92 (E.D. Mich. 1962). Presumably, the rationale of *Simpson* could also be extended to refusals to deal arising under these statutes in order to prevent results which are contrary to antitrust policy. *But see* C.B.S. Business Equip. Corp. v. Underwood Corp., TRADE REG. REP. ¶ 71341 (S.D.N.Y. Dec. 30, 1964).

[35] "When the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other

tion, *Simpson* can be distinguished from *General Electric* on this ground, lending support to the contention that *General Electric* has not been overruled.

Although the agency device was coercively employed to achieve resale price maintenance in *Simpson,* such a method of circumventing the antitrust laws should not be tolerated even if used with the willing compliance of all the agents. Even without coercion, the fact remains that prices for an entire distribution system may be administered by a single manufacturer through the use of consignment agreements. Therefore, the result in terms of restraint of trade is not significantly different from that which may be attained through regular resale price maintenance. Consignment price maintenance may still be proper in some cases, but where it is used to restrict free competition among a vast number of retailers, the policy of preserving free competition, as it is embodied in the antitrust laws, outweighs the right of a single producer to fix the price of goods sold on consignment.

IV. CONCLUSION

Although theoretically both the consignment or agency agreement and the refusal to deal are within the legal right of a manufacturer to choose a method of distributing his product, neither should be allowed to accomplish a result contrary to the policy of preserving free competition as expressed in the Sherman Act. Principles are defined in *Simpson* which may effectively place such a restriction on the consignment agreement and an opportunity is provided for similarly limiting refusals to deal. Such a course is in conformity with the trend of previous limitations on resale price maintenance as shown by the fact that the refusal to deal is already so restricted as to be of little use as an effective price maintenance device in the majority of modern business transactions.[36] In view of these broad restrictions under the antitrust laws, it appears that in the future the producer or supplier will have to look principally to fair trade legislation for control of resale prices.

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means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act." United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960).

[36] See Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance,* 1960 SUP. CT. REV. 258.