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Price Fixing Agreements and the Sherman Act

TRADE REGULATION

PRICE FIXING AGREEMENTS AND THE SHERMAN ACT

United States v *Socony Vacuum Oil Co.*[1] reaffirms the hostile attitude of the United States Supreme Court toward any combination tampering with competitive prices. The Court pronounced illegal per

[1] 310 U.S. 150 (1940).

se cooperative efforts of several major oil companies, distributing over eighty per cent of all gasoline in the indictment area, to remove distress gasoline[2] accumulated due to adverse economic conditions in the oil industry. The oil companies had agreed informally to purchase surplus gasoline from independent refiners on the spot market at the fair market price. Such a buying program made possible the control of retail and tank car prices of gasoline which followed the spot market quotations.

A literal application of the Sherman Act[3] supported by the reasoning of early cases would clearly outlaw the oil companies buying program since *every* combination in restraint of trade would be illegal.[4] But *Standard Oil Co. v. United States*,[5] an integrated-combination[6] injunction case, abandoned this illegal at law approach.[7] An illegal in fact[8] concept of reasonableness of restraint was there declared the true basis of legality. Later, in a criminal prosecution, an express agreement directly fixing prices was found unreasonable as a matter of law and declared illegal per se in *United States* v *Trenton Potteries Co.*[9] It was concluded that criminal liability should not turn upon

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[2] Gasoline which the refiners could not store, for which they had no regular sales outlet and which therefore had to be sold for whatever price it would bring. Such sales drove the market down. June 1, 1933, the price of crude oil was 25 cents a barrel; the tank car price of regular gasoline was 2 5/8 cents per gallon.

[3] 26 STAT 209 (1890), 15 U.S.C. § 1 (1934): (1) "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal."

[4] United States v Trans-Missouri Freight Association, 166 U.S. 290 (1897); United States v Joint Traffic Association, 171 U.S. 505 (1898).

[5] 221 U.S. 1 (1911) (Combination was by stock ownership through a holding company). *Accord*, United States v American Tobacco Co., 221 U.S. 106 (1911); Nash v United States, 229 U.S. 373 (1913). In the *Standard Oil* case, White, C. J. concludes that only unreasonable restraints were illegal at common law. The accepted view is contrary. Addyston Pipe and Steel Co. v United States, 175 U.S. 211 (1899); Buckelew v Martens, 108 N.J. 339, 156 Atl. 436 (1931). For a general discussion of price-fixing and an argument for application of the rule of reasonableness see, Jaffee & Tobriner, *The Legality of Price-Fixing Agreements* (1932) 45 Harv. L. Rev. 1164.

[6] By integrated combinations is meant those where restraint of commerce is from possession or acquisition of property rights. Mergers, consolidations, and acquisition of stock or assets are examples. In contrast are loose combinations which embrace all instances where concerns not linked together by common property interests agree to suppress competition among themselves or agree to unite in imposing restrictions upon activities of third persons.

[7] Illegal at law means issue of reasonableness is an *issue of law* to be decided by the court and not the jury.

[8] Illegal in fact means issue of reasonableness is an *issue of fact* to be decided by jury or by court if jury trial waived.

[9] 273 U.S. 392, 50 A.L.R. 989, 1000 (1927) (Eighty-two percent of the pottery manufacturers and distributors had agreed upon a definite sale price). *Cf.* Chicago Board of Trade v United States, 246

so uncertain a test as the reasonableness of prices. In *Appalachian Coals, Inc.* v *United States*,[10] however, where an exclusive selling agency was created with power to negotiate selling prices but without power to exact monopoly prices no unreasonable restraint was found. The existence of distress coal [11] and the presence in the industry of demoralizing and injurious practices influenced the court's decision. The two latter cases were the basis of the rival contentions of the opposing parties in the *Socony Vacuum* case.

With these and other authorities available the Supreme Court chose to rely upon the *Trenton Potteries* case to declare illegal the oil companies buying program. Thus the same principle of law is extended to combinations having the purpose and power to raise prices even though the means by which control is obtained is other than an express agreement to fix uniform prices.[12] Prior decisions indicated that where capital is risked in combination such centralized control will be permitted.[13] But in the *Socony Vacuum* case capital was risked by cooperating in the purchase of surplus gasoline in the spot market, yet the court applied the same illegal per se rule as where the combination controlled price without the risk of capital. An activity now seems to constitute price-fixing whenever an agreement to interfere with market forces is successful.[14] That retail and tank car prices

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U.S. 231 (1918) (The court concludes that the test of illegality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it suppresses or destroys it).

[10] 288 U.S. 344 (1933) (Prices were fixed by officers of the company but the Court concluded that the mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. It was deemed necessary to consider economic conditions peculiar to the coal industry and consequences of the plan). *Cf.* Sugar Institute Inc. v United States, 297 U.S. 553 (1936) (The basic agreement of sugar refiners was to sell only upon prices and terms openly announced. There was an advance announcement of prices with "moves." The Court did not dissolve the Institute but restrained it from carrying out its open price plan so as to compel uniform prices). Handler, *The Sugar Institute Case and the Present Status of the Anti-Trust Laws* (1936) 36 Col.L.Rev. 1.

[11] Coal shipped to the market which was unsold at the time of delivery and therefore dumped on the market irrespective of demand.

[12] This extension was anticipated. Weston, *The Application of the Sherman Act to Integrated and Loose Industrial Combinations* (1940) 7 Law & Contemp. Prob. 42. It had been pointed out in *Appalachian Coal* case that the antitrust law aims as substance rather than form.

[13] Integrated and loose industrial combinations have received different treatment by the courts. See Weston, *supra* note 12, at 42.

[14] The Court in the *Socony Vacuum* case states that "prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are uniform, or if by various formulae they are related to the market prices." *Cf.* the statement in the *Appalachian Coals* case that "mere fact that the

depended upon competitive prices in the spot market is expressly denied as a defense.[15] The buying program is apparently considered direct price-fixing.[16] The means are declared immaterial.

It is well established that the purpose of the Sherman Act is to preserve competition.[17] But the aim and result of every effective price-fixing combination is to eliminate one form of competition.[18] The power to fix prices, whether reasonably exercised or not, is said to involve power to control the market.[19] This is especially true in gasoline since it is a highly standardized product, refined and sold by octane rating. All substantial competition in gasoline sales is in price variations and to sanction the oil companies buying program would as a practical matter remove that competition.[20] Such competition must exist if fair competition is to endure.[21]

The fact that prosecution is during a period of falling prices was thought important since the *Appalachian Coals* case.[22] But the sweeping words of the *Socony Vacuum* case that "any combination tampering with price structures is engaged in an unlawful activity" now indicates a contrary view.[23] Nor is the fact that combination was to eliminate competitive evils a defense.[24]

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parties to an agreement eliminate competition between themselves is not enough to condemn it."

[15] United States v Socony Vacuum Oil Co., 310 U.S. 150, 220 (1940). Such a conclusion seems contra to that of *Appalachian Coals* case where it is emphasized that competitive opportunities will still exist in all markets.

[16] Mr. Chief Justice Hughes dissenting in Apex Hosiery Co. v Leader, 310 U.S. 469, 514 (1940) indicates that *Socony Vacuum* case was considered by the Court to involve direct price-fixing.

[17] United States v American Linseed Oil Co., 262 U.S. 371 (1923); United States v Mac Andrews Forbes Co., 149 Fed 823 (C.C.S.D.N.Y. 1906); Jaffe & Tobriner *supra* note 5, at 1164.

[18] This was emphasized in the *Trenton Potteries* case.

[19] United States v Trenton Potteries Co., 273 U.S. 392 (1927). The validity of this assumption has been challenged. See Jaffe & Tobriner *supra* note 5, at 1164.

[20] In *Sugar Institute* case it was recognized that standardization of sugar made sales depend almost entirely upon prices, terms, and conditions.

[21] Sugar Institute Inc. v United States, 297 U.S. 553 (1936) (The court recognized that competition in sugar was in price rather than brand).

[22] That Applachian Coals Inc. was formed in a period of falling prices is suggested as a rationale to partially account for the difference in decision between *Applachian Coals* case and *Sugar Institute* case where the illegal combination operated in a period of rising prices. See Weston, *supra* note 12, at 42.

[23] United States v Socony Vacuum Oil Co., 310 U.S. 150, 221 (1940).

[24] United States v Socony Vacuum Oil Co., 310 U.S. 150, 220 (1940). *Cf.* Applachian Coals Inc. v United States, 288 U.S. 344 (1933); National Association of Window Glass Mfgrs. v United States, 263 U.S. 403 (1923) (no unreasonable restraint of trade was found where arrangements were made to meet the short supply of men).

The *Socony Vacuum* decision preserves the form of the *Standard Oil* case and the "rule of reason", but gets the result of the earlier cases.[25] The dictum of the case is stronger. It denies that the "rule of reason" was ever applicable to price-fixing combinations.[26] In those price-fixing cases where its application was attempted, efforts were to test the reasonableness of specific prices.[27] Reasonableness should not, however, be determined by such a test, but by whether the entire restraint is reasonable.[28] It is settled that restraint is not reasonable where there is substantial interference with competition and since price-fixing directly affects competition, that type of conduct can be singled out as illegal per se without violence to prior holdings.[29]

The *Socony Vacuum* decision crystallizes and simplifies a portion of the antitrust law. In fact the Court has done what it has heretofore refrained from doing and that is to single out one element—intentional price-fixing—as determinative of illegality. As a practical matter it is too much to impose upon the jury the onerous burden of determining the reasonableness of prices in such a complicated setup as is here presented.[30] Besides it is futile since the reasonable price one day may be unreasonable the next.[31] To demand the "rule

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[25] The earlier cases such as United States v Trans-Missouri Freight Association, 166 U.S. 290 (1897) and United States v Joint Traffic Association, 171 U.S. 505 (1898) would declare all combinations illegal. That all price fixing is unreasonable merely adds a few more words to every opinion. The same result is reached either way.

[26] The opinion relies upon *Trenton Potteries* case which would mean that the "rule of reason" yet prevails in the law and that price fixing is merely unreasonable. But the Court states that "for over forty years this Court has constantly and without deviation adhered to the principle that price fixing agreements are unlawful per se . . ." Also in conducting that the rule of reason cases are not apposite the Court states that "*American Tobacco* and *Standard Oil* cases have no application to combinations operating directly on prices or price structures." *Cf.* Mr. Chief Justice Hughes dissenting in Apex Hosiery v Leader, 310 U.S. 469, 514 (1940) where the opinion seems to indicate that the *Socony Vacuum* case overrules the "rule of reason."

[27] See United States v Trenton Potteries Co., 273 U.S. 392 (1927); United States v Socony Vacuum Oil Co., 310 U.S. 150 (1940) (Argument for defendants).

[28] See Mr. Justice Roberts dissenting in United States v Socony Vacuum Oil Co., 310 U.S. 150, 254 (1940).

[29] The Supreme Court in *Trenton Potteries* and *Socony Vacuum* cases seem to reach this conclusion. In both cases the Court expressly denies that any prior opinions are overruled. See Jaffe & Tobriner *supra* note 5, 1164.

[30] The trial court record consisted of more than 12,000 pages, in addition to over 1,000 exhibits. The trial lasted four months, during all of which time the jury was kept sequestered and in the custody of United States Marshall. Even then the trial court gave no consideration to the question of reasonableness of prices.

[31] "The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures." United States v Socony Vacuum Oil Co., 310 U.S. 150, 221 (1940).

of reason" would emasculate the Sherman Act. The decision reaffirms in strong words the qualification of the *Trenton Potteries* case. It seems proper to restrain private groups in their efforts to fix prices when there is yet constitutional doubt as to the extent of the government's ability to do the same.

A judicial expansion of the price-fixing concept shrinks the area of application of the "rule of reason." Rather than decide the troublesome question of reasonableness involving economic valuations and effect, the court can pronounce an activity price-fixing and automically apply the per se illegal rule. This is significant since the primary aim of most combination is to better economic returns. For over a decade no integrated combination case has come before the Supreme Court.[32] But if the dicta of the *Socony Vacuum* case indicates future law the traditional distinction between integrated and loose industrial combinations is discredited.[33] The Court states that the "machinery employed by a combination for price-fixing purposes is immaterial"[34] and that any "combination which tampers with price structures is engaged in an unlawful activity."[35]

Thus a finding that consolidation or merger was for price-fixing purposes would indicate illegality per se. As an economic matter, however, will not the invalidation of such cooperative efforts as those engaged in by the oil companies here invite integration through consolidation and merger? The principle of *United States* v *U.S. Steel Corp*[36] and *United States* v *International Harvester Co.*[37] that integration of properties is legal has not as yet been overruled. But the next step in antitrust development is to extend the illegal per se concept of price-fixing to integrated combination cases involving indirect price fixing.[38] H. R. H.

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[32] Weston *supra* note 12, at 42. A possible exception is that found in *Sugar Institute* case.

[33] For a discussion of the leading cases on integrated and loose combinations see Weston *supra* note 7, at 42.

[34] United States v Socony Vacuum Oil Co., 310 U.S. 150, 223 (1940).

[35] United States v Socony Vacuum Oil Co., 310 U.S. 150, 221 (1940L).

[36] 251 U.S. 417 (1920). For a discussion of the Steel case see Handler, *Industrial Mergers and the Anti-Trust Laws* (1932) 32 Col.L.Rev. 179.

[37] 274 U.S. 693 (1927).

[38] Suits to force the oil companies to divest themselves of certain types of properties, such as pipe lines and tankers and marketing facilities, and to disintegrate companies so as to separate transportation and marketing from that of oil have apparently been deferred because of national defense. See Dep't of Justice Press Release, August 1, 1940.

It has been pointed out that clear cut decisions are not found in view of the complicated set-up of antitrust cases. Many variables of unequal importance must be appraised by the court in each case. The changing attitude of the country toward the trust problem and the changes in courts personnel has been reflected in the decisions. See Handler *supra* note 36, at 179.