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Antitrust - Price Fixing - Territorial Divisions

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ANTITRUST

ANTITRUST—PRICE FIXING—TERRITORIAL DIVISIONS

Adolph Coors Co. v. *Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974)

BY FRED C. BRIGMAN, JR.*

The only significant antitrust case decided by the Tenth Circuit during 1974 was *Adolph Coors Co. v. Federal Trade Commission.*[1] *Coors* was an appeal by the Adolph Coors Company from a cease and desist order of the Federal Trade Commission, which had found Coors in violation, as a matter of law, of section 5 of the Federal Trade Commission Act.[2] Section 5 broadly proscribes "unfair methods of competition" and "unfair or deceptive acts or practices" in interstate commerce. As in *Coors*, the section has often been interpreted to prohibit price fixing[3] and exclusive dealing arrangements.[4] The court reluctantly followed the landmark holding of the Supreme Court in *United States v. Arnold, Schwinn & Co.*,[5] which was based on section 1 of the Sherman Act,[6] but adds dictum in criticism of that opinion. The court in *Coors* suggested but does not hold that the *Schwinn* rule, under which territorial restrictions on resale are per se unlawful once a manufacturer parts with title, "should yield to situations where a unique product requires territorial restrictions to remain in business."[7] In those latter situations, the court advises, the Supreme Court should develop a rule-of-reason exception.

Coors is the fourth largest brewer in the United States. Among the nation's 70 manufacturers of beer, Coors alone ships all of its beer from one plant and employs a brewing process which

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[1] 497 F.2d 1178 (10th Cir. 1974), *petition for cert. denied*, 43 U.S.L.W. 0000 (U.S. Jan. 13, 1975)(No. 74-128).

[2] 15 U.S.C. § 45 (1970).

[3] *See, e.g.*, National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); Keasbey & Mattison Co. v. FTC, 159 F.2d 940 (6th Cir. 1947); Eugene Dietzgen Co. v. FTC, 142 F.2d 321 (7th Cir.), *cert. denied*, 323 U.S. 730 (1944); Shakespeare Co. v. FTC, 50 F.2d 758 (6th Cir. 1931).

[4] *See, e.g.*, FTC v. Brown Shoe Co., 384 U.S. 316 (1966); L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971); Mytinger & Casselberry, Inc. v. FTC 301 F.2d 534 (D.C. Cir. 1962).

[5] 388 U.S. 365 (1967).

[6] 15 U.S.C. § 1 (1970).

[7] 497 F.2d at 1187.

requires refrigerated marketing. Because of the delicacy of its product, the court found, Coors necessarily must strictly monitor refrigeration controls and expeditious marketing techniques after each shipment of beer leaves its plant. Coors employs 35 area representatives to help market its products. Area representatives are responsible for working with 166 independent distributors and one wholly-owned subsidiary distributor is assigned a territory within which to market Coors beer.

At the time of the cease and desist order, it was Coors' policy to encourage "pricing integrity," or a program of price maintenance, in the wholesaling of its products by its distributors. Although the Coors Policy Manual allowed Coors and its agents the right to suggest minimum wholesale prices only and repudiated the use of threats, coercion, or intimidation of wholesalers and retailers, the Commission examined several present and former Coors distributors who testified to the effect that Coors, its officials, and area representatives set the prices at which distributors were to sell Coors beer. Since there are about 7000 applicants for distributorships, the court found, any distributor not conforming to the pricing policy could be replaced. Coors' contracts with its distributors provided for termination by Coors on 5-days' notice for cause and 30-days' notice without cause. The Commission found that Coors had used the threat of speedy termination to force the distributors into anticompetitive price fixing. The court held that there was substantial evidence in the record to support the Commission's finding of fact.[8] Commission findings of enforced retail price fixing by Coors were similarly upheld by the court.

Equally clear to the Tenth Circuit were Coors' efforts, in violation of section 5 of the Federal Trade Commission Act, to exclude from competition other light draught beer manufacturers by requiring in fact that tavern owners purchase Coors draught beer exclusively. Coors admitted that under its distributor contracts its distributors were restricted to vertically imposed territories which Coors could alter at will. The manufacturer argued, however, that these territorial restrictions were reasonable and legal. The Commission had found vertical territorial divisions to be illegal *per se*. Based on *Schwinn*,[9] the court upheld that deter-

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[8] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[9] The Supreme Court there held that

Once the manufacturer has parted with title and risk, he has parted with mination[10] but not without some apparent dissatisfaction. Seemingly convinced that Coors' unique manufacturing process might justify reasonable territorial limitations in its distribution,[11] the court observed that

> speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would be unreasonable when applied to marketing standardized products. . . . Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason.[12]

Because both price fixing[13] and vertical and horizontal territorial divisions[14] have repeatedly been held illegal *per se* under section 1 of the Sherman Act or section 5 of the Federal Trade Commission Act, it does not appear that *Coors* is the appropriate case to appeal to the Supreme Court on the ground that a "rule of reason" should be ingrafted on those holdings. The technological problems inherent in distributing Coors' products over wider geographical areas do not appear so insurmountable as to warrant a judicial analysis of the reasonableness of Coors' territorial divisions.

The cease and desist order issued by the Federal Trade Commission contained 13 operative paragraphs. The first 11 paragraphs restrained Coors from fixing prices for distributors or retailers, from enforcing any territorial restrictions, from restricting competition between and among distributors and retailers, from

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> dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

[10] The court noted that less restrictive alternatives were available to Coors. If quality control was Coors' objective in assigning territories, "Coors may still condition its sales to distributors and others upon maintenance of procedures necessary to control the quality of the product." 497 F.2d at 1187. Violation of such conditions would thus presumably become the basis for a contract termination with cause.

[11] The court noted:

> Thus we are foreclosed from considering the reasonableness of the restriction or its business justification. We are cognizant of the unpredictability which is created in relationship to the Coors operation.

Id.

[12] *Id.*

[13] United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

[14] United States v. Arnold, Schwinn & Co., 388 U.S. 365, (1967); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

interfering with distributors or retailers handling other beers, and from cancelling or threatening to cancel any distributor's contract or refusing to sell them beer because of past or future violations of price or territorial restrictions. Paragraph "12" increased the contract periods of notice of termination to 60 days in case of termination for cause and to 180 days in case of termination without cause. Paragraph "13" ordered Coors to provide for arbitration in the city in which the distributor resided in cases of any announced termination to determine whether the termination was made in good faith.

The majority of the court affirmed the Commission's order as to the first 11 paragraphs, but overruled paragraphs "12" and "13" on the grounds that the termination provisions of Coors and its distributors were a matter of private contract. Since the Commission found that Coors used the threat of speedy termination of the contract to force its distributors into anticompetitive behavior, and since the court held that there was substantial evidence in the record to support the Commission's finding, it would seem that the Commission's wide remedial discretion[15] should have supported its entire order. As the dissenting opinion states:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices in this area of trade and commerce. See Siegel v. Federal Trade Commission, 327 U.S. 608, 611, 66 S. Ct. 758, 90 L. Ed. 88. The Courts interfere only where there is no reasonable relation between the remedy and the violation. Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357, 377, 85 S. Ct. 1498, 14 L.Ed. 2d 443. And orders affecting contractual relationships have been upheld where unlawful practices involved subtle pressures and threats of termination of dealer's licenses. Id. at 374-375. On this record and the findings I would uphold as reasonable the Commission's choice of a remedy to cope with the unlawful practices.[16]

The difficulties encountered by Coors in its attempt to enforce a lawful price-maintenance program without being found guilty of price fixing illustrate once again the continued erosion of the *Colgate* doctrine.[17] They also point up the necessity for

[15] *See* FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967); Atlantic Refining Co. v. FTC, 381 U.S. 357, *rehearing denied*, 382 U.S. 873 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); FTC v. National Lead Co., 352 U.S. 419 (1957); Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).

[16] 497 F.2d at 1190, *citing* Atlantic Refining Co. v. FTC, 381 U.S. 357, 374-75 (1965). *Cf.* Arthur Murray Studio v. FTC, 458 F.2d 622 (5th Cir. 1972). *But see* Regents v. Carroll, 338 U.S. 586, 600-02 (1950).

[17] United States v. Colgate & Co., 250 U.S. 300 (1919). An early antitrust case, *Colgate* originally stood for the broad principle that in the absence of an intent to create

manufacturers unable to avail themselves of the fair trade exceptions[18] contained in the Sherman Act and Federal Trade Commission Act to avoid any attempt to fix prices or impose territorial restrictions upon the resale of its products. *Coors* is another example of the necessity for continuous internal monitoring of anticompetitive activities. It would be surprising, given the strength of the Commission's evidence of price fixing and territorial restrictions, if *Coors* were the case that persuades the Supreme Court to overrule or limit its decisions in *United States v. Socony-Vacuum Oil Co.,*[19] *Atlantic Refining Co. v. Federal Trade Commission,*[20] and *Texaco v. Federal Trade Commission.*[21]

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or maintain a monopoly, a manufacturer may publicize expected resale prices for its goods and then refuse to deal with wholesalers and retailers which do not conform. Distinguished and criticized repeatedly since 1919, *Colgate* was cited somewhat differently in *Schwinn*, where it was said to support only the rule that "a manufacturer of product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967). For a detailed history of the *Colgate* doctrine, see United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

[18] 15 U.S.C. §§ 1, 45(a)(2) (1970).

[19] 310 U.S. 150 (1940).

[20] 381 U.S. 587 (1965).

[21] 393 U.S. 223 (1968).