

CHAPTER 3D.
VERTICAL PRICE FIXING CONTINUED

Price Fixing by any Other Name

In recent years, a number of national accounts programs have been challenged by terminated dealers as constituting vertical price fixing. We have already referred to Greene,¹ but several other cases, along with White Motor also relate to this issue.

In White Motor,² the Supreme Court noted in passing that "there was price-fixing here..." The Court added that one method of White Motor's price-fixing involved a requirement that "all distributors and dealers give `national accounts,' `fleet accounts,' and governmental agencies the same discount on parts and accessories as White gave them."³

In defending this requirement, White Motor argued that:

...The purpose of this provision is so that [White Motor] may be assured the `national accounts...', which are classes of customers with respect to which defendant is in especially severe competition with the manufacturers of other makes of trucks and which are likely to have a continuing volume of orders to place, shall not be deprived of their appropriate discounts on their purchases of repair parts and accessories from any distributor or dealer, with the result of becoming discontented with the White Motor

¹Wm S. Greene v. General Foods Corp. 517 F. 2d 635 (5th Cir. 1975), cert. denied, 424 U.S. 942 (1976).

² White Motor Co. v. United States, 732 U.S. 253 (1963).

³ White Motor Co. v. United States, 732 U.S. 253, 260 (1963).

Company...It is common knowledge that probably nothing will make the owner of a motor vehicle so peeved as to be overcharged for repair parts and accessories. ⁴

In spite of this argument, the trial court found this requirement to charge "national account" prices to be vertical price fixing, and a per se violation of the Sherman Act. White did not appeal this judgement against its national accounts programs, so it was not fully considered by the Supreme Court.

In Capital Temporaries,⁵ a franchised temporary employment agency also claimed that a "national accounts" clause in the franchise agreement was vertical price -fixing. The trial court held:

...the crux of the [plaintiff's] case lies in the alleged 'take -it-or-leave-it' character of Olsten's offers which foreclosed them from independent negotiation and rate making with respect to these national accounts...[P]laintiffs are, therefore, complaining that Olsten is imposing a ceiling on the rate they can charge each national account. ⁶

The Court concluded that the defendant's motion for summary judgement could not be granted because, under the plaintiff's analysis, a mandatory national accounts program "clearly would be an illegal price- fixing agreement." ⁷

In the Greene case,⁸ a terminated coffee distributor based his antitrust claim on the fact that General

⁴194 F. Supp. 562 (N.D. Ohio 1961).

⁵Capital Temporaries of Hartford, Inc. v. Olsten Corp., 383 F.Supp. 902 (D. Conn. 1974).

⁶Id., at 909.

⁷Id., at p. 911.

⁸Wm S. Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975).

Foods had engaged in vertical price -fixing through its program for dictating distributor's prices to Multiple Food Service Accounts (MFSA's), who were "large institutional buyers". Under its plan, General Foods set the price for the national account, instructed the customer to make payment directly to General Foods,, provided its own guarantee of the goods, and assumed the risk of default on credit sales, and was responsible for the collection of the accounts receivable generated in this fashion. The role of the distributor was seen by General Foods to be merely that of a "delivery agent" who is permitted a delivery allowance on General Food's sales to MFSA's.

In point of fact, however, Greene, performed "all those activities in the distribution process undertaken to procure a definite order for delivery of a specified quantity at a time certain." ⁹ That is to say, Greene actually delivered products to the MFSA's from his own stocks which he had previously purchased from General Foods. There was also testimony that Greene accorded the MFSA's the same treatment as regular accounts in every respect save that of billing. The same solicitation on the part of Greene's sales staff was necessary to procure orders from MFSA's as from regular accounts, the same promotional and other expenses were involved and the same risks were incurred up to the point the goods were actually delivered. For his role in the transaction, Greene received a "delivery allowance" that varied with the size of the order, and a credit against his indebtedness to General Foods for the cost of the goods delivered.

General Foods argued that it had adopted its MFSA/national accounts policy because large buyers "tend to make more centralized buying decisions" and the policy "allow[ed] it to compete effectively with other large national coffee roasters..., and so that it could negotiate directly with these buyers." ¹⁰

General Foods further asserted that had it not chosen this method of dealing with these MFSA accounts, it would either have had to establish branch warehouses to service these accounts directly with

⁹Id., at 641.

¹⁰ Cite Green page

the consequent elimination of the distributor's delivery charge on such sales and the distributor's complete elimination from the MFSA picture, or else, it would have had to forfeit the MFSA business to its direct selling competitors. Notwithstanding these arguments, this arrangement was found to be per se illegal vertical price fixing.

In a more recent case, the Fourth Circuit reviewed Michelin Tire's national accounts program and again found a national accounts program to be illegal vertical price fixing.¹¹

Under Michelin's program, "various large -volume purchasers designated 'national accounts' were billed and their accounts collected centrally through Michelin, while distributors such as Bostick continued to perform the actual selling and delivery of tires for which they were paid a commission."¹² Michelin dictated the price charged to national accounts customers.

The Fourth Circuit reversed a directed verdict for Michelin on Bostick's claim that Michelin's national account program constituted vertical price -fixing. In its decision, the Court of Appeals emphasized that although the program was nominally a voluntary one, there was some evidence that it was "enforced" and made mandatory by Michelin.¹³ The Court of Appeals also held that even though Bostick had figured a way to turn the program to its own advantage, its eventual termination might well be found to be a "last resort by Michelin to bring a maverick into line and make the National Accounts program as enforced an effective barrier to dealer price competition."¹⁴

¹¹Bostick Oil Co. v. Michelin Tire Corp. 702 F. 2d 1207 (4th Cir. 1983).

¹²Id. at 1212.

¹³Id. at 1217.

¹⁴Id. Emphasis in the original.

Even more recently, in Ryko Manufacturing Co. v. Eden Services,¹⁵ the issue of when a national accounts program properly is to be viewed as vertical price fixing was again raised in connection with the termination of an automatic carwash distributor for not adhering to the manufacturer's national accounts policy. In this decision, the Eighth Circuit seems to be backing away from Greene and to be using Simpson as a way of limiting the scope of Greene.

In this case, the decision turned on whether the distributor was an truly an agent as Ryko argued, or an independent entrepreneur as the distributor argued.

Simpson does not mean that legitimate agency or consignment arrangements can give rise to antitrust liability. An owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner, because a sales agent when acting within the scope of his agency, is incapable of engaging in an antitrust conspiracy with his corporate principal.¹⁶

Under Simpson we are directed to examine the various substantive "indicia of entrepreneur[ship]" and the allocation of business risks, rather than the mere form of the agreement, in evaluating the economic substance of an agency or consignment. If a distributor deals with his supplier as an "independent businessman" who bears most or all of the risks on transactions with purchasers, then an agency or consignment agreement is ineffective to insulate the manufacturer from antitrust liability for fixing resale prices. However, where the manufacturer bears the financial risk of the transactions with the customers and continues to retain "title, dominion and control over its goods," then it is likely that the distributor is merely an agent for the manufacturer.¹⁷

¹⁵ Civil No. 83-70-E (S.D. Iowa, 1985).

¹⁶ Eden Services v. Ryko Manufacturing Co., (1987) p. 13a.

¹⁷ Eden Services v. Ryko Manufacturing Co., (1987) p. 13a.

Ryko, the leading manufacturer of automatic roll-over car washers, marketed its car washers through independent distributors in certain territories and directly through its own sales operations to final customers in other territories. In the distributorship agreement between Ryko and its independent distributors, section IV(E) declared that the "Pricing structure for all major oil companies and national accounts shall be determined by Ryko." Other sections provided that the purchase order for a machine to be installed in a national account location such as a dealer operated service station owned by a major oil company is to be issued in the name of Ryko Manufacturing using a specified national account price. Ryko in turn invoices the major oil company upon shipment and disperses a commission to the distributor upon receipt of payment in full from the national account. The major oil company then bills their lessee-dealer for the cost of the machine, subject in certain cases to a cost-sharing incentive plan. The machine, however is actually sold to and ultimately owned by the lessee-dealer.

Ryko defended its practice, as had White Motor and General Foods before it, on the grounds that the policy was necessary to meet competition and to improve its position in the market place and to insure a uniform price policy with respect to important customers. Moreover, as Union had in Simpson v. Union Oil, Ryko claimed that the policy was not illegal price-fixing because under the distributorship agreement, "Ryko was to make sales to national account customers, and those customers are exclusively Ryko's." ¹⁸ For example, in describing a hypothetical sale made to Gulf Oil, Ryko argued that "the sale is made by Ryko to Gulf Oil; the title is passed directly from Ryko to Gulf, Ryko assumes the risk of any loss until title passes, and Ryko finances the cost of the machinery from the time Ryko receives the purchase order until payment is received." ¹⁹

In distinguishing Ryko from Greene, the Court said:

¹⁸Ryko Memorandum, pp.24 -25.

¹⁹Id. p. 26.

....The situation here, where selling responsibility is divided among Ryko's central management, its regional sales representatives, and its local distributors, is far different from the situation in Greene, where "the actual ~selling--the solicitation of orders, the moving of merchandise, most of the risk of loss, and the day -to-day task of creating and maintaining customer satisfaction --[was] performed by Greene...and not by some selling staff of General foods." Greene, 517 F.2d at 657-58. Where the evidence shows that the distributor is not solely responsible for making sales, we believe the distributor must produce more substantial evidence of its independence under Simpson to justify submitting a resale maintenance claim to a jury.²⁰

Thus, to establish a case of resale price maintenance by a manufacturer using a national accounts program, the antitrust plaintiff must demonstrate that (1) the manufacturer has contracted, combined, or conspired (2) with a separate economic entity (3) to set the price at which the products are resold (4) in an independent commercial transaction with a subsequent purchaser. ²¹

Thus, for a manufacturer to operate a national account program that does not represent an illegal price-fixing scheme, it must make absolutely sure that distributors are bona fide sales agents with respect to national account transactions, and that the relationship does not rest on "meaningless technicalities" or "clever draftsmanship." That is to say, the role of the distributor in the national account sale is to be based on the substance of the economic relationship, and not exclusively on the terms that the parties used to characterize the distributor's role. ²²

²⁰ Eden Services v. Ryko Manufacturing Co., (1987) p. 19a.

²¹ Eden Services v. Ryko Manufacturing Co., (1987) p. 12a.

²² Eden Services v. Ryko Manufacturing Co., (1987) p. 14a-15a. Citing Simpson, 377 U.S. at 21-22.

Moreover, participation in the national accounts program cannot be mandatory. In the Bostick case,²³ the Fourth Circuit held that while a central billing program by a manufacturer is not per se illegal under the Sherman Act, the establishment of a National Accounts Billing program that involves review of a dealer's price lists, and the setting of uniform prices to all participating customers, provides the potential for insulation of the dealer from the customer in pricing matters. It also provides the opportunity for monitoring the dealer's sales tactics and policies in greater depth and places the manufacturer in the role of regulating the horizontal competition among otherwise legally distinct dealerships selling tires they legally own.

In Capital Temporaries,²⁴ the decision turned on a slightly different point. There, the Court found that Olsten's policy foreclosed Capital from independent negotiation and rate making with respect to the national accounts and that this amounted to an imposition of a ceiling on the rate that Capital could charge each national account. And of course, in a series of decisions from Kiefer-Stewart to Albrecht, the Court has held that price ceilings are just as illegal as are price floors.²⁵

Also, in Ohio-Sealy,²⁶ discussed earlier, the Seventh Circuit held that the national account program was legal because it was wholly voluntary. Any licensee, they said, was free to participate or not, and to negotiate directly with the national account customer in an attempt to supply all or part of the customer's needs. However, as long as the licensee was in the national accounts program it was obliged to supply the national account's outlets in its territory with the specified products at the agreed price.

²³702 F.2d 1207 at 1216 (1983).

²⁴Capital Temporaries of Hartford, Inc. v. Olsten Corp., 383 F. Supp. 902 (D Conn. 1974).

²⁵Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951) and Albrecht v. Herald Co., 390 U.S. 145 (1968).

²⁶Ohio-Sealy mattress Manufacturing Co. et al. v. Sealy, Inc. et al. 10/26/78 ATRR .

The Court tended to see Sealy's national account program as similar to the joint selling agency that was at issue in Appalachian Coals, Inc. v. United States.²⁷ There the Supreme Court approved an arrangement by which 12% of the coal suppliers in a given region sold all their coal to all buyers through a joint agent.

In Ohio-Sealy, the Court said:

...The case before us would appear to follow a fortiori from Appalachian Coals. Here the joint sales agreement applies only to a limited type of customer, no licensee is foreclosed from competing for the business independently....Sealy's success with Ward's, in fact, appears to reflect an increase in interbrand competition with no diminution of intrabrand competition because Sealy licensees could not have competed effectively for the business without combining to offer a single source of supply. In 2361 State Corporation v. Sealy Inc. 402 F. 2d 370, 374 (7th Cir. 1968) this court had occasion to consider Sealy's national accounts program. We indicated at that time that the Rule of Reason should be applied to the program.²⁸

The peculiar nature of Sealy, which licenses its trademarks to fifteen independent manufacturers such as Ohio-Sealy, and which is in turn 98% owned by these licensees, makes the generalization of this rule of reason approach to national accounts arrangements quite unlikely. Still it is a view that is consistent with the emerging opinion that vertical price fixing should be regarded as a Rule of Reason matter. In any event, it is clear that national accounts programs, like consignment, can be used to fix resale prices for important market segments, and that the Courts will look behind the "clever draftsmanship of such arrangements to find vertical price fixing wherever it exists.

...the courts in enforcing the antitrust laws must look to the effect a particular business practice has upon competition and not to the legal form in which it is cast in assessing its

²⁷ 288 U.S. 344 (1933).

²⁸ 10/26/78, p. E-9.

validity.²⁹

In arriving at their opposition to national account systems, except in Ryko, the lower courts seem to be drawing an analogy between these national accounts programs, and the Supreme Court's reasoning in the Bausch & Lomb case discussed earlier.³⁰

In fact in the Green case, the Fifth Circuit explicitly held that General Food's national accounts program bore a significant resemblance to Bausch & Lomb :

In the present case, the MFSA formset is the functional equivalent of the "protection certificate" used to trace sales to unlicensed retailers in Bausch & Lomb. Whatever else might be said of it, the MFSA invoice formset is a device by which General Foods keeps itself informed of the volume of sales and the prices charged. It is perhaps the most effective means that could be devised to monitor the independent distributor's pricing to MFSA's, for payment is made directly to General Foods, with a corresponding credit to the distributor's account.³¹

.....

...The MFSA invoice formset, like the "protection certificate" in Bausch & Lomb, was a device for policing the conduct of distributors.³²

Also, the fact that a national accounts system is economically necessary or desirable to the manufacturer is no defense. The key fact in Greene was that General Foods had segregated buyers of institutional food above a certain level of annual demand and number of retail outlets, and had determined the prices for these buyers. Merely calling a program by another name, or trying to justify it on grounds of economic or competitive necessity will not work. Since Simpson, the courts now look to the substance, not the form of the arrangement, and if the distributor is not acting exclusively as a selling agent, it is

²⁹Greene, Ibid. p. 9191.

³⁰United States v. Bausch & Lomb, 321 U.S. 805 (1944).

³¹Greene, p. 7192.

³²Greene, p. 7193.

quite likely that the arrangement should and will be seen as vertical price fixing.

This is as it should be, since otherwise a manufacturer could arbitrarily declare his distributor's accounts national accounts and then dictate the prices at which the distributor would be allowed to sell these accounts. The Eighth Circuit's decision notwithstanding, this is more or less what Ryko did, since the overwhelming share of all direct and indirect Ryko-brand sales were to locations owned or franchised by oil companies or other national accounts. This strategy has also been used to block sales by distributors to discount channels. If these discount outlets are declared national accounts, then the manufacturer can control the price at which discounters acquire his product for resale. For example, if K-Mart is selling motor oil at deeply discounted prices, the refiner can designate K-Mart a national account and prevent any of his jobbers from selling the refiner's branded motor oil to K-Mart at prices which permit these deep discounts.

Bona fide customer reservation plans are, and should be legal. But when national account plans are used as a scheme for fixing prices to customers actually being sold and/or serviced by distributors, they should be struck down, irrespective of "meaningless technicalities or clever draftsmanship." Otherwise national account plans represent a loophole in the per se ban on vertical price fixing big enough to drive a White truck through. And unless one would make price-fixing legal, national account plans should be seen for what they often are --cleverly designed schemes for vertical price fixing.

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End Notes

