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Public Law

Melvin G. Dakin

nished by a duly authorized surety company. Article 107,[24] providing for forfeiture and collection of bonds for appearances before city or juvenile courts or for preliminary examinations, is modified to eliminate the recordation requirement when the bondsman is a surety company.

In 1958[25] the nonforfeiture situations set forth in Article 109 were amended to embrace cases where the defendant was prevented from appearing because he was detained in jail or a penitentiary in another jurisdiction, or because he was in the Armed Services. Article 109 is further amended by Act 411 to provide for setting aside a judgment of forfeiture within sixty days on proof that the defendant's non-appearance resulted from the types of detention recognized in that article.

Article 110[26] is amended to authorize the discharge of a judgment of forfeiture if the defendant is surrendered, in prison or in open court, within sixty days after the rendition of the judgment. Discharge of the judgment of forfeiture upon subsequent surrender of the defendant is a justifiable relaxation of the liability imposed on the surety, but the surety should bear the costs incurred in the forfeiture proceedings. This is not specified in the amendment, but such assessment of costs should be within the court's general authority in setting aside the judgment.

PUBLIC LAW

*Melvin G. Dakin**

STATE REGULATION OF BUSINESS — THE NEW "MILK AUDIT" LAW

The last legislative session took another long step towards complete regulation of the fluid milk and ice cream and ice cream substitutes industry. The Orderly Milk Marketing Act, which was enacted in 1958 to provide minimum prices to producers and to proscribe sales below cost and other "disruptive sales practices,"[1] was amended in 1962 to provide for the fixing of minimum and maximum prices at which "milk, milk products and

24. *Id.* 15:107.
25. *Id.* 15:109 (1950), *as amended*, La. Acts 1958, No. 191.
26. LA. R.S. 15:110 (Supp. 1962).
*Professor of Law, Louisiana State University.
1. LA. R.S. 40:940.1-940.15 (Supp. 1958).

frozen desserts" are to be sold by handlers, distributors, and non-processing retailers *to any person*;[2] the act thus ushers in a period of consumer price-fixing in the dairy industry of Louisiana.

The 1958 act was upheld as a proper exercise of the police power, the Louisiana Supreme Court not being disturbed by its characterization as a price-fixing statute;[3] the court noted that the United States Supreme Court has stated that "upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."[4]

Orderly milk marketing acts have been a part of the agricultural scene since the early 1930's;[5] they have grown progressively more complex and sophisticated, keeping pace with the growing concentration of economic power in the industry and the multiplying array of economic and technological devices available for waging intensive competition.[6] Alignment of economic forces in the industry was evidenced by the way in which constitutionality of the 1958 act was precipitated. Thus, the State Commissioner of Agriculture was initially enjoined from enforcing the act by a federal district court at the suit of one of the nation's largest manufacturers, processors, and distributors.[7] Another such federal injunction was granted, pending determination of the constitutionality of the act in the state courts, at the suit of a large local supermarket.[8] The Commissioner was joined in his defense of the act by twenty-one local producers and processors of milk in the state.[9]

The 1958 act was sustained not only as to its producer price-fixing aspects but also in its licensing requirements and in its proscription of a long list of "disruptive trade practices." Among such trade practices were discrimination by larger distributors between large and small retailers in the price of products offered

2. LA. R.S. 40:940.1-940.23, 940.19 (Supp. 1962).
3. Schwegmann Bros. Giant Super Mkts. v. McCrory, 237 La. 768, 112 So.2d 606, 617 (1959).
4. United States v. Rock Royal Co-operative, 307 U.S. 533, 570 (1939).
5. Cadwallader, *Government and Its Relationship to Price Standards in the Milk Industry*, 22 MINN. L. REV. 789 (1938).
6. Hutt, *Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders*, 37 U. OF DETROIT L.J. 525 (1960).
7. Borden Co. v. McCrory, 169 F. Supp. 197 (E.D. La. 1959).
8. Schwegmann Bros. Giant Super Mkt. v. McCrory, 237 La. 768, 112 So. 2d 606 (1959).
9. *Id.* at 773, 112 So. 2d at 607.

in the same size containers and discrimination in price, for the purpose of injuring selected competitors in different parts of the state.[10] In proscribing these practices, the first type of discrimination was no doubt thought by the legislature to encourage distribution in the supermarkets at the expense of route distribution and smaller markets; the second discrimination was found to be a weapon in so-called "milk wars," the participants in which were often a major national or state processor-distributor and a local processor-distributor.[11] Additional sanction against such practices was supplied by provisions that no sales should be below cost, as prescribed by the Commissioner pursuant to procedures provided in the act.[12]

Basically, all of this regulation was deemed necessary in order to assure the local producer a minimum price which would be "beneficial to the public interest, protect the dairy industry of the state, and insure a sufficient quantity of pure and wholesome milk for inhabitants of this state." It was evidently thought that only if local producers could be protected from large competitors who discounted heavily or even resorted to sales below cost for a time, in order to get into a market and crowd others out of it, could satisfactory minimum prices to local producers be assured.[13] The large national operators argued that this was an attempt to protect "small dairies which cannot compete with twentieth century methods of production and distribution." They argued that "the so-called disruptive trade practices . . . are actually beneficial to the industry as a whole, particularly to the consuming public, that they are normal, usual and customary methods of operation practiced in the industry for years, that the purpose and effect . . . is to multiply the number of retailers who can offer milk products for sale under wholesome conditions at a competitive price, that unless these small retailers are assisted by these 'disruptive practices' . . . [they] will be unable to compete with the large supermarkets which do not require assistance from milk producers in the form of credit extension, cooling equipment and advertising display."[14] In some degree, the large operators thus maintained a position which split the small, non-processing retailer away from the small producers, in respect to economic interest; the large supermarket

10. *Id.* at 782, 112 So. 2d at 611.
11. LA. R.S. 40:940.3(1), 940.6 (Supp. 1958).
12. *Id.* 40:940.5, 940.7.
13. Act 193 of 1958, Preamble, LA. R.S. 40, Part VII, Sub-Part D.
14. 169 F. Supp. 197, 199 (E.D. La. 1959).

presumably needed only its quantity discounts to enable it to maintain its competitive position.

In the years since enactment of Act 193 of 1958 no litigation appears to have reached the appellate courts which drew in question action of the Commissioner under his power to fix minimum prices to be paid producers, a power to be exercised upon written request of 50 per cent of the dairy farmers who "regularly supply milk to a milk marketing area."[15] The Commissioner's action under the 1958 statute in fixing the cost to processors and handlers as a minimum resale price has, however, precipitated litigation, and is in part responsible for this year's new legislation. A formula was promulgated by the Commissioner, pursuant to which such cost would be "the average cost to the processor during the previous twelve months." The Commissioner's regulation further provided that a processor or handler who had been doing business for less than twelve months should be deemed to have a cost not less than the lowest "price" within his trade area.[16]

Two circuit courts of appeal have held that in setting "trade area price" as "cost" for new processors and handlers, the Commissioner exceeded his powers over litigant processors who claimed their actual costs were lower than such prices and that, since they were, the act did not preclude them from selling at such cost.[17] To compel such new producers to sell at the average twelve-month costs of others in the area was found to be engaging in "price fixing" rather than proscribing sales below cost, as the Commissioner was authorized to do by the act.[18]

The Commissioner argued quite plausibly that he could not administer the act to preclude sales below cost "unless he is given the power to regulate the prices of new businesses"; presumably this inability stemmed from lack of reasonably reliable cost figures for small dairy businesses for periods of less than a year. One appellate judge suggested that the regulation might have been redrafted to *presume* cost to be the "trade area price" until "by adequate showing before the Commissioner another unit cost is proven."[19]

15. LA. R.S. 40:940.4 (Supp. 1958).
16. La. Orderly Milk Marketing Reg., Oct. 18, 1958, § VII.
17. Smith Milk Co. v. Pearce, 129 So. 2d 525 (La. App. 1st Cir. 1961); Pearce v. Kramer, 128 So. 2d 304 (La. App. 3d Cir. 1961).
18. 129 So. 2d at 529.
19. 128 So. 2d at 309.

For whatever reasons, such suggested procedures were evidently not deemed sufficient to deal with the developing problems and Act 340 of 1962 emerged as a full-dress price-fixing measure; a new seven-man Milk Commission has been created and charged with the task of fixing the minimum and possibly maximum prices at which milk, milk products and frozen desserts may be sold "to any person."[20] Evidently, the legislature was not persuaded that free competition should be permanently abandoned, however, since it also provided that "this Commission and the law creating same shall expire on July 31, 1966."[21]

Act 193 of 1958 had delegated to the Commissioner of Agriculture the power to fix minimum producer prices upon request from producers; in the *Schwegmann* case, this was upheld as a valid delegation, the Louisiana Supreme Court noting that if the legislature declares the policy of the law and fixes the "legal principles which are to control," the administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply.[22] Since the legislature has incorporated in Act 340 of 1962 in even greater detail the factors to be taken into account by the new Commission in fixing prices, it seems clear the new delegation of power will also be upheld. The composition of the Commission seems hardly subject to due process attack since, in addition to the Commissioner, there will be three other "representatives of the public at large"; thus, any disqualifying bias in the three industry members seems satisfactorily offset.[23]

The new Commission is charged with fixing consumer minimum prices and *may* fix maximum prices for milk, milk products, and frozen desserts. The power to fix minimum prices paid to the producer is left with the Commissioner as before. The factors to be considered in fixing the consumer price consequently break down into: (1) the minimum producer price prevailing in the market area (or ingredient cost for ice cream substitutes), (2) the normal and necessary operating expenses of the handler, distributor, or non-processing retailer, (3) presumably, such additional sum, as return on capital, as will "best assure sufficient quantities of pure and wholesome milk, milk products, and frozen

20. LA. R.S. 40:940.16, 940.19(4) (Supp. 1962).
21. LA. R.S. 40:940.16 (Supp. 1962).
22. 237 La. 768, 788, 112 So. 2d 606, 613 (1959).
23. *Cf.* Plantation Anhydrous Ammonia Corp. v. Anhydrous Ammonia Comm., 234 La. 869, 101 So. 2d 699 (1958). Commented on in 19 LA. L. REV. 351, 362 (1959).

desserts to the citizens of the State."[24] The latter item of return on capital is more elaborately described for fixing minimum prices to producers, the Commissioner being charged with fixing minimums in any milk marketing area within the state which "shall be beneficial to the public interest, protect the dairy industry of the state, and insure a sufficient quantity of pure and wholesome milk for inhabitants of this state."[25]

Guided by these factors, the Commission is given the complex task of setting minimum prices for milk, milk products, and frozen desserts. Frozen desserts are included to stop up a loophole which might otherwise defeat the minimum price on milk; combinations of milk and ice cream could otherwise be offered, so arranged price-wise as to undercut minimum prices on milk through underpricing a tied-in sale of ice cream.

The Commission may establish minimum selling prices for non-processing retailers that differ from the minimums for persons making home deliveries. There is no mention, however, of setting minimum prices for the supermarket quantity seller different from those of the small convenience stores.[26] On the other hand, discounts which handlers and distributors are permitted to make from minimum selling price are to take into account quantities of the products purchased, such discounts to be "based upon a graduated scale of discounts proportionate to quantities delivered during such period of time . . . as the commission may deem appropriate." Such discount schedules may not reflect the total quantities delivered to a multiple store owner; each place of business must stand on its own bottom as to its discount entitlement.[27] But even with the discount to a multiple store owner so limited, it is obvious that a large supermarket would enjoy some substantial quantity discount over the convenience stores; presently, some part of these quantity savings are also normally passed on to consumers since they are presumably crucial to the lower prices which bring in the customers in large numbers and in turn make the quantity purchases possible. But if no differential in selling price is permitted between the small convenience store and the quantity retail seller, and the minimum is set high enough to yield a profit to the convenience seller, it is also obvious that quantity sellers will be forced to pocket quantity sav-

24. LA. R.S. 40:940.20(1) (Supp. 1962).
25. *Id.* 40:940.4.
26. *Id.* 40:940.19(7).
27. *Id.* 40:940.19(9).

ings on milk or pass them on in lower prices on other commodities. The act precludes them from passing on such savings in combination sales with frozen desserts since these must be sold at 8 percent above wholesale price, for which latter minimums are also to be fixed by the Commission;[28] other modes of passing on the savings are, however, not foreclosed to the retailer.

The small handlers and distributors are to be protected from being crowded out by the large operators by determining the quantity discounts to which a retailer is entitled, not from the quantity delivered by any one handler or distributor, but from the total quantity taken from all sellers. Thus, minimum wholesale prices which will necessarily be set high enough to keep the small handlers and distributors in business, must also be charged by the large handler or distributor for his larger quantities; he cannot increase his share of sales by passing on his quantity savings to the retailer.[29] Presumably, this will result in some amicable apportionment of markets between the small and large handlers and distributors. This, the statute states, will "assure the availability of a sufficient variety of brands to consumers in those retail stores having sufficient display space and . . . avoid injury to small independent handlers and distributors."[30]

In the experimental years to come, we shall no doubt learn whether the Commission and the Commissioner can serve the public interest in the allocation of resources to milk production and distribution better than free competition has done the job. We shall learn whether they are permitted to strike a pricing balance which will protect only the efficient and imaginative producers and distributors or whether they will feel compelled to protect also the marginal operators at the expense of the consumer and the public interest.

Recent studies have tended to show that state control of consumer prices has acted as a trade barrier, preventing or slowing down the use of new dairy technologies and new methods that competitive markets have adopted.[31] However, local markets, protected from competition between fluid milk producers and distributors also become targets for substituted competition such as that from the new sterile concentrated milk in tins, recently

28. *Id.* 40:940.19(5).
29. *Id.* 40:940.19(9).
30. *Ibid.*
31. "Trade Barriers in Milk Distribution," Dept. of Agr. Econ., Univ. of Illinois, 35 (1960).

developed. If, as has been suggested, this new tinned milk may be genuinely competitive with fresh milk, the price-fixing apparatus will have to be extended, or the new competitor kept out by artificially high sanitary requirements.[32]

Serious questions may be raised whether, if concentrated milk becomes available on a continuing and reliable basis from producing areas far removed from urban markets, there will continue to be justification for elaborate control mechanisms "designed solely to protect, encourage, or handle local seasonal surplus in areas that would otherwise be characterized as milk deficient."[33] Questions are also being raised as to whether the benefits of improved dairy technology, the fruits of intensive research often carried on at public expense, may not be denied to producers and consumers by regulation which may be designed to "protect established market relationships rather than the public's health."[34]

INSURANCE

*G. Frank Purvis, Jr.**

The 1962 legislature covered a wide variety of insurance subjects although the enactments in this field of law were relatively few.

I. ORGANIZATIONAL AND FINANCIAL REQUIREMENTS

(a) Initial Minimum Surplus

Previous legislatures had increased the capital and surplus required for the organization and operation of certain types of insurers and the 1962 legislature followed this up by making similar requirements of mutual and reciprocal insurers. Act 49 amended Section 121 of the Insurance Code to increase the initial minimum surplus required of domestic mutual insurers transacting life insurance only, health and accident insurance only, or a combination of these, from $150,000 to $200,000. Act 50

32. *Ibid.* Concentrated milk sold in hermetically sealed containers is presently exempted from the Louisiana act. LA. R.S. 40:940.1(1) (Supp. 1962).

33. *Id.* at 21.

34. *Id.* at 12.

*Executive Vice President, Pan-American Life Insurance Company; member, Louisiana Bar.