1977 WL 46009 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 21, 1977

MEMO

Re: The power of the State to impose restrictions on milk producers seeking to contract with State Agencies - Act No. 219

***1** George C. Beighley

The case of Miller v. Williams, 12 F. Supp. 236 (D. C. Md., 1935), dealt with the power of a municipality to restrict milk sales, but it was based on the idea of infringing interstate commerce. Baltimore prohibited the sale or use of cream for ice cream from dairies outside a 50 mile radius zone, except in cases of "emergency", when supplies were low. The Court held this was not a proper police power for health reasons, since the city did allow sales in that what it termed "emergencies" and since prior to this ordinance the city had allowed the use of cream from dairies outside the zone.

The Court allowed attack here by both a directly affected producer outside the zone but within the state, and by a foreign producer claiming a burden on interstate commerce. The Court stated:
Freedom of commerce between the states is the rule and not the exception. Under the Constitution it may be regulated by Congress but unless otherwise specifically so regulated, the states may exercise their police power by statute and may authorize their municipal corporations to do so by ordinances, provided the latter are reasonably adapted to the legitimate end of protecting the health, morals and welfare of the community. But when local regulations under the guise of police power are not reasonably adapted to accomplish these legitimate ends and constitute a direct problem upon interstate commerce, they must fall. . .local regulation which in effect is based rather on exclusion of competitive conditions than purely sanitary grounds cannot stand when it directly burdens interstate commerce. . .

The South Carolina Act does not totally prohibit distributors from receiving out of state products, but does impose a 50% in-state requirement for those wishing to contract with the State. As in Miller, supra, this appears to be based on "exlusion of competitive conditions."

The Court has imposed a test upon the states with regard to their power to regulate areas affecting interstate commerce. The regulations imposed must not serve to exclude or discriminate against commerce from another state. In Dean Milk Co. v. City of Madison, 340 U. S. 349 (1951), the Court struck down a municipal regulation prohibiting use of the word "pasteurized" on milk produced outside a five mile radius of the city. The Court stated that this regulation would operate to prevent out of state dairies from competing with local producers.

Although not cases on milk or food products, Bibb v. Navajo Freight Lines, 359 U. S. 520 (1959), requiring different type mud-flaps on trucks, and Buck v. Kuykendell, 267 U. S. 307 (1925), requiring interstate carriers to obtain a "certificate of public convenience" were situations where the Court felt the regulations served to discriminate against out of state competitors. There were no compelling reasons (other than to prevent competitors) for which the states could have enacted these regulations.

***2** In two milk regulation cases, the Court has held that one state may not discriminate against out of state producers. In Baldwin v. Seelig, 294 U. S. 511 (1935), a state law forbidding local sale of milk produced outside the state if it was purchased below the minimum prices the state had set locally was struck down as discriminatory toward out of state producers.

Polar Ice Cream & Creamery Co. v. Andrews, 375 U. S. 361, U. S. 378 (1964) involved a Florida regulation which required state milk distributors to purchase milk at a fixed price from designated producers in the area. A tax was also required.

The Court struck down this regulation citing Baldwin, supra, that state regulations could not be upheld:
When the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. . .

The Court further stated:
The principles of Baldwin are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market.

If the South Carolina regulation regarding milk distributors wishing to contract with state agencies was applied to all milk sales in this State, the law could be compared to the regulations in both Baldwin and Polar Ice Creamery- Co. Such a law would be viewed as an attempt to prohibit out of state distributors from competing with state distributors. As such, the regulation would not meet the test imposed by the Court and therefore could not stand.

However, there has been a distinction drawn between the State regulating businesses generally and the state placing regulations on those from whom it makes its own purchases. Therefore, a distinction is recognized between a state's exercise of its "governmental" function as opposed to its "proprietary" function.

In American Yearbook Co. v. Askew, 339 F. Supp. 719, aff'd 409 U. S. 904, (1972) the Court upheld a state statute requiring that all public printing needs of the state be done in the State. According to the Court, this proprietary function of the State could be subjected to no more limitation than the same transaction if done by a private individual or corporation. The Court stated that, "The letting of public contracts, particularly those providing for internal needs of government, is a proprietary function."

The Court in American Yearbook refused to follow the reasoning of the New Jersey Court in Garden State Dairies of Vineland, Inc. v. Sills, 46 N. J. 349, 217 A. 2d 126 (1966). The Garden State case involved a statute requiring milk producers selling to public agnecies to certify that they have purchased milk within New Jersey in an amount equal to that being sold to the agencies. The statute does require the same certification statement regarding purchases from the preceeding year.

***3** The Court in Garden State considered the reasonableness of the burden placed on interstate commerce, and found that the requirement to certify the preceeding year was probably unreasonable (case remanded on that question), but that certification requirements regarding present purchases were not unreasonable. (This question was brought to the Court again in a second case. The Court remanded to the trial court for further consideration. No further appellate record appears of record.)

The Court in American Yearbook stated that Garden State was the only case which imposed any type of test on the reasonableness of the burden resulting from a state's exercise of its proprietory function. Thus the American Yearbook line of reasoning would suggest that a State may impose its own conditions upon those whom it wishes to contract within the exercise of its proprietary function.

Because of the clear legal distinction drawn between an exercise of the State's proprietary function and its governmental function, a strong argument could be made in favor of the validity of the regulation in question. At the same time, the instant regulation could be attacked on the ground that it goes too far and imposes unreasonable requirements on foreign venders, including constructing unnecessary plants in this State. Prior to examining the individual facts of a constitutional challenge to this Section, it appears that the Statute on its face can be legally supported under the law as it now exists.

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