

**In the
Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 60 Original
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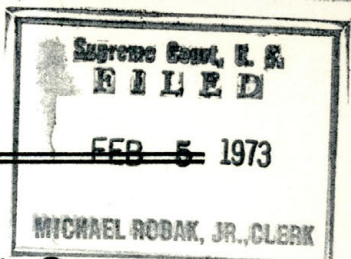
COMMONWEALTH OF PENNSYLVANIA,
PLAINTIFF,

v.

STATE OF NEW YORK et al.,
DEFENDANTS.

—
BRIEF FOR DEFENDANT
COMMONWEALTH OF MASSACHUSETTS
IN OPPOSITION TO MOTION FOR
LEAVE TO FILE COMPLAINT
—

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Jurisdiction

The plaintiff invokes the original jurisdiction of this Court evidently under Article III, Section 2 of the Constitution of the United States and under 28 U.S.C. Sec. 1251(a)(1) and requests a declaratory judgment that the Liquor Affirmation policy of the defendant and other States named as defendant be determined to be unconstitutional. For the reasons stated herein the defendant, Commonwealth of Massachusetts denies that any controversy exists

between it and the plaintiff, and asserts that this Court lacks original jurisdiction under 28 U.S.C., Sec. 1251. The defendant Massachusetts, further asserts that the plaintiff has not stated a claim upon which relief can be granted.

Questions Presented

1. Whether the Complaint sets forth a case or controversy of which this Court has original jurisdiction.
2. Whether the Complaint sets forth a claim upon which relief can be granted.

Constitutional and Statutory Provisions Involved

United States Constitution, Article III, Sec. 2:

“The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—*to Controversies between two or more States*;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

“In all Cases affecting the Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction” (Emphasis supplied)

28 U.S.C., Sec. 1251

“(a) The Supreme Court shall have original and exclusive jurisdiction of:

“(1) All Controversies between two or more States...”

Mass. Gen. Laws., Chapter 138, Sec. 25D.

The pertinent provisions of the Massachusetts Liquor Affirmation Law are set forth in the Appendix.

Statement

The plaintiff, Commonwealth of Pennsylvania, seeks leave to file this complaint in order to have the Liquor Affirmation Policy of the defendant, Commonwealth of Massachusetts, as set forth in its statutes, namely, Mass. Gen. Laws, Chapter 138, Sec. 25D and that of other defendant states declared by the Court to be unconstitutional and in violation of the Commerce clause of the Constitution. The plaintiff alleges that the requirement that vendors not sell alcoholic beverages in the defendant states “unless the vendor affirms, warrants and represents that the price of each unit of alcoholic liquor or beverage is no higher than the lowest price at which said unit is sold elsewhere in the United States” (Complaint, p. 7) has “an extra-territorial effect so as to raise the price of alcoholic liquor and beverages in Pennsylvania and to preclude Pennsylvania from bargaining with vendors of alcoholic liquor and beverages for discounts including quantity and prompt-pay discounts.” (Complaint, p. 8.) The plaintiff seeks injunctive relief and a decree that would permit Pennsylvania to bargain for quantity discounts despite the defendant states’ Liquor Affirmation Policy. (Complaint, pp. 8 & 9).

Argument

I. THIS COURT DOES NOT HAVE ORIGINAL JURISDICTION UNDER ARTICLE III OF THE CONSTITUTION SINCE THE PLAINTIFF HAS NOT STATED A JUSTICIABLE CONTROVERSY BETWEEN ITSELF AND THE COMMONWEALTH OF MASSACHUSETTS.

Where original jurisdiction is claimed under Article III of the Constitution, this Court should assert its jurisdiction sparingly and only when absolutely necessary to terminate a constitutional controversy between states. *Ohio v. Helvering*, 292 U.S. 360, 371; *Utah v. United States*, 394 U.S. 89, 95; *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493.

This court should not involve itself in a controversy between states merely because one state wishes to make itself party to a suit with another state and argue on behalf of other parties who are the real parties in interests. *Louisiana v. Texas*, 176 U.S. 1; *Oklahoma v. Atcheson, T. & S. F. R. Co.*, 220 U.S. 277, 288-289.

From a close review of the plaintiff's statement in support of the complaint and the complaint it is clear that the plaintiff's controversy is not with the Commonwealth of Massachusetts or any of the other defendant states, but with the vendors within Pennsylvania who refuse to bargain with the plaintiff for quantity and prompt-pay discounts.

The plaintiff has not alleged nor attempted to establish that any of these vendors actually sell or intend to sell alcoholic liquor or beverages within Massachusetts or any of the other defendant states which have Liquor Affirmation laws. Nor has the plaintiff alleged that in fact any of such vendors are barred in any manner from selling liquor or alcoholic products within any of the defendant states, or are for that matter prohibited from selling their products in non-Liquor Affirmation states.

It thus is highly speculative at best, as to what direct or for that matter indirect role, if any, the present liquor

affirmation law in Massachusetts, namely, Mass. Gen. Laws, c. 138, § 25D, or that of any of the other defendant states has with the bargaining power of the plaintiff dealing with liquor vendors doing business in Pennsylvania obtaining maximum quantity and prompt-pay discounts.

Upon the facts stated in the plaintiff's complaint, it is submitted that the plaintiff has failed to clearly state an actual controversy between itself and the Commonwealth of Massachusetts or any of the other defendant states. *Aetna Life Insur. Co. v. Haworth*, 300 U.S. 227, 240-241; *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273; *Golden v. Zwickler*, 394 U.S. 103, 108.

Furthermore, the plaintiff's claim appears to be multifarious and not suited for an adjudication in this Court, particularly in view of the multiple independent causes of action involved and the variances in the different state Liquor Affirmation Laws to be construed. *Alabama v. Arizona*, 291 U.S. 286, 290-291. Upon the broad and indefinite allegations made, not supported in any depth by a convincing statement of claim, the Court should not intervene. As Mr. Justice Hughes so aptly stated in *Missouri v. Illinois*, 200 U.S. 496, 521, "Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side." *New York v. New Jersey*, 256 U.S. 296, 309; *Colorado v. Kansas*, 320 U.S. 383, 393.

II. THE PLAINTIFF HAS FAILED TO ESTABLISH THAT THE LIQUOR AFFIRMATION LAWS OF MASSACHUSETTS ARE CONTRARY TO THE TWENTY-FIRST AMENDMENT OR VIOLATIVE OF THE COMMERCE CLAUSE OF THE CONSTITUTION.

When this Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43, had the opportunity to review

the constitutionality of the New York Affirmation Law, a law very similar to the Massachusetts law, it upheld its constitutionality and found it not violative of the Commerce Clause of the Constitution and stated:

“The mere fact that §9 is geared to appellants’ pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of §9 are largely matters of conjecture. It is by no means clear, for instance, that §9 must inevitably produce higher prices in other States, as claimed by appellants’, rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of §9 when a case arises that clearly presents them.”

The facts alleged in the plaintiff’s complaint and statement in support of complaint do not show that the Liquor Affirmation Laws of the defendant states inevitably or in any direct way produce higher liquor prices in the plaintiff’s state. It is submitted that this is not the type of case where it has been shown that the Liquor Affirmation Laws of the defendant states have in any way an extra-territorial effect on the prices charged the plaintiff by vendors selling liquor and alcoholic products to it in Pennsylvania.

Upon the facts alleged it is difficult to envision how the Liquor Affirmation Policy of the defendant states is in any way different or more restrictive than the Liquor Affir-

mation Policy existing in the plaintiff's state which requires any distiller doing business in Pennsylvania to warrant the price charged Pennsylvania is no higher than the prices charged by the distillers in other states. *Joseph Seagram & Sons, Inc. v. Hostetter, supra*, 43-45.

Upon the general allegations made, there has been no showing that the Liquor Affirmation Policy of any of the defendant states is contrary to the state's power under the Twenty-first Amendment, *California v. LaRue*, 41 LW 4039, 4041, or contrary to the Commerce Clause of the Constitution. *Joseph Seagram & Sons, Inc. v. Hostetter, supra*, 43-45; *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324.

Conclusion

For the foregoing reasons the defendant Commonwealth of Massachusetts moves that the plaintiff's motion for leave to file complaint be denied.

Respectfully submitted,

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APPENDIX

MASSACHUSETTS GENERAL LAWS, CHAPTER 138, SECTION 25D:

§ 25D. *Price discrimination*

(a) There shall be filed with, and when filed shall be deemed part of, the schedule filed for a brand of alcoholic beverage pursuant to section twenty-five B an affirmation duly verified by the owner of such brand of alcoholic beverage, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of alcoholic beverage is not licensed by the commission, that the bottle and case price of alcoholic beverages to wholesalers set forth in such schedule is no higher than the lowest price at which such item of alcoholic beverage was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail alcoholic beverage stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph, the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of alcoholic beverages purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.

(b) There shall be filed with, and when filed shall be deemed part of, any other schedule filed for a brand of alcoholic beverage pursuant to section twenty-five B an affirmation duly verified by the person filing such schedule

that the bottle and case price of alcoholic beverages to wholesalers set forth in such schedule is no higher than the lowest price at which such item of alcoholic beverage was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail alcoholic beverage stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.

(c) In the event an affirmation with respect to any item of alcoholic beverage is not filed within the time provided by section twenty-five B, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of alcoholic beverage, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule; provided however that the commission, in writing, may, for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as it may deem necessary, allow any schedule which is otherwise sufficient to be deemed valid with respect to items of alcoholic beverage for which no affirmation has been filed, as provided by this section.

(d) In determining the lowest price for which any item of alcoholic beverage was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail alcoholic beverage stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, or state (or state agency), as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in subsections (a) and (b) shall prevent differentials in price

which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this subsection, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon the gallon of alcoholic beverages, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(e) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to subsections (a) or (b) shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment. Every affirmation made and filed pursuant to subsections (a) or (b) shall be deemed to have been made in each county of the commonwealth in which the brand of alcoholic beverage is offered for sale under the terms of said schedule.

(f) Upon final judgment of conviction of any person for violation of subsection (e), the commission may refuse to accept from such person for any period of months, not exceeding three calendar months, any affirmation required to be filed by him.

(g) The commission is hereby authorized and empowered to carry on such investigations and to audit the books and accounts of such licensees under this chapter as it may deem necessary for clarifying, carrying out, enforcing and preventing violation of all and any provisions of this section.

(h) The commission may make such rules and regulations as shall be appropriate to carry out the purposes of this section. For the purpose of this section alcoholic beverages shall include wines and malt beverages.
