Supreme Court of the United States

October Term, 1972

No. 60 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

v.

STATE OF NEW YORK, ET ALS.,
Defendants.

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

ANDREW P. MILLER
Attorney General

VANN H. LEFCOE
WILLIAM P. BAGWELL, JR.
Assistant Attorneys General

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitution

Supreme Court of the United States

October Term, 1972

No. 60 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

v.

STATE OF NEW YORK, ET ALS.,
Defendants.

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

QUESTION PRESENTED

The question presented is whether this Court, in the exercise of its discretion, should refuse to assume jurisdiction of an action by Pennsylvania against New York, Virginia, and 23 other states alleging that certain statutes, regulations, and policies of the defendant states violate the Commerce Clause since

(1) The Complaint as drawn fails to state a claim upon which relief can be granted; and

(2) The narrow issue presented by Pennsylvania in her Complaint and supporting papers has already been decided by this Court in the recent past.

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania has moved for leave to institute an original action against 25 states, all of whom like Pennsylvania require distillers of alcoholic liquors to warrant that sales of their products to wholesalers or retailers within those states are made at prices no higher than those in effect for the same brands anywhere else in the United States. Pennsylvania asserts that the effect of these requirements is to preclude her, as the largest single purchaser of liquor, from obtaining quantity and prompt-pay discounts from distillers.

Pennsylvania, like Virginia and 16 other states, is a "control" or "monopoly" State where the affirmation policy is a resolution of its Alcoholic Beverage Control (ABC) Board. (New York and 7 other defendant States are "licensee" States where liquor is sold by private concerns and where the affirmation requirements are statutory.) The control States generally report the prices of alcoholic beverages sold to them by distillers, and through these reports other control States can ascertain the lowest prices being offered. This information is available only from the other control States and from the three licensee States (New York, Maryland and Kansas) who voluntarily report their prices to the control States. Thus there are some 30 States who do not make such reports.

Pennsylvania seeks a declaratory judgment declaring the statutes, regulations and practices of the defendant States void, or alternatively declaring that they do not preclude Pennsylvania from bargaining for discounts, together with an injunction restraining defendants from enforcing their statutes and regulations in such a way as to preclude Pennsylvania from bargaining for discounts.

ARGUMENT

Pennsylvania's complaint in this case can be summed up in 15 words: the affirmation policies of the defendants have an "extraterritorial effect" that violates the Commerce Clause. Pennsylvania does not say *how* these policies violate the Commerce Clause, nor is any authority offered in her Statement In Support Of Motion for this proposition, but it is fair to assume from the tone of the Complaint that Pennsylvania would like to obtain discounts from her liquor suppliers and believes herself unable to do so, and that she believes that this situation must be somehow violative of the Commerce Clause. It is apparent that Pennsylvania's *sole* authority in support of her Complaint is this Court's intimation in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 43, 86 S.Ct. 1254, 1260 (1966) that a case might come along which would be a proper vehicle for an assessment of the "extraterritorial effects" of a Liquor Affirmation Statute.

The *Seagram* case, of course, was a challenge by a large distillery to the requirements of New York's Alcoholic Beverage Control Law that any seller of liquor to wholesalers and retailers in New York affirm that the price was no higher than the lowest price at which sales were made anywhere in the United States during the previous month. This Court rejected all challenges to that requirement, holding *inter alia* that its provisions on their face placed *no unconstitutional burden on interstate commerce.* 384 U.S. at 45, 86 S.Ct. at 1261. The Court noted that it had only recently held that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 330, 84 S.Ct. 1293,

1297 (1964). This statement was quoted with approval both in the *Seagram* case and in *California* v. *LaRue,* ..... U.S. ....., 93 S.Ct. 390, 395 (Dec. 5, 1972), which, although admittedly involving different issues, was decided only three days before the institution of proceedings herein and which must be considered as a continuing recognition of the broad authority of the States in control of their liquor industries. In *California* v. *LaRue,* the Court again quoted the *Idlewild* case with emphasis on the State's authority in liquor control vis-a-vis the Commerce Clause:

> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 93 S.Ct. at 395.

Considering, therefore, the issues and interests at stake in the instant case, one finds that the interests of the plaintiff and the defendants, or at least this defendant, are markedly different from the interests envisioned by the Court in the *Seagram* and *Idlewild* cases which might be cognizable in the "different case" referred to in the language in *Seagram* on which Pennsylvania relies. Immediately prior to the language quoted on page 4 of the Statement In Support Of Motion is found the following:

> "Unlike *Idlewild,* the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulations invalid under the Commerce Clause. (Cit-

> ing case.) No such situation is presented in this case. 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." 384 U.S. at 42, 86 S.Ct. at 1259.

Analysis of this paragraph illustrates the issues presented by Pennsylvania's Complaint and demonstrates their similarity to the issues already disposed of by this Court in the *Seagram* case:

(1) Like *Seagram* and unlike *Idlewild,* the present case concerns liquor destined for distribution and consumption in Virginia. If New York could constitutionally insist on a "no higher than the lowest price" requirement, as this Court said it could, then Virginia can do the same.

(2) Like *Seagram,* this case would not make it necessary to decide whether a State's mode of regulation could constitute so grave an interference with a *company's* operations as to run afoul of the Commerce Clause. The "different case" intimated by the Court in the language on which Pennsylvania relies was one in which a *manufacturer* which might be feeling the pinch, not a State. Indeed, Pennsylvania does not even allege in her Complaint that any distillery company is willing to give her discounts if the affirmation requirements were removed, let alone that she has attempted to bargain for such discounts and been rebuffed by reason of these requirements. Pennsylvania alleges only that she is precluded from bargaining for quantity and prompt-pay discounts, yet nowhere does the Complaint allege that such bargaining is prohibited by the affirmation policies of Virginia or any of the other defend-

ant States, which, of course, it is not. Pennsylvania can bargain for and receive any discounts a distillery wants to give her.

What the case comes down to, then, is not found in any part of the Complaint but in footnote 4 of Pennsylvania's Statement In Support Of Motion: Pennsylvania feels that her *right* to receive discounts has been sullied. This position is untenable in several ways, the most obvious being that regardless of any right to *bargain* Pennsylvania has no right to *receive* discounts if the seller doesn't want to give them. It may well be that distillers are quite pleased *not* to give discounts to a buyer as large as Pennsylvania claims to be, since no discounts means more income; or it may be that distillers do not wish to give the same discounts in other States. In the absence of any allegation that Pennsylvania has attempted to bargain for such discounts and been refused, however, these and other reasons are simply speculation. In any event the Statement In Support Of Motion is not the Complaint. Cf. *Roe* v. *Wade,* No. 70-18 (Jan. 22, 1973), Slip. op. p. 12, fn. 7.

Furthermore, Pennsylvania can hardly be said to seek relief in this Court with clean hands. This Court noted in footnote 14 of *Seagram* the effect of Pennsylvania's own affirmation policy which had been in effect "for some time" back in 1966. As outlined in the Statement of the Case, *supra,* Pennsylvania is a "control" or "monopoly" State where the affirmation policy is only a resolution of its Alcoholic Beverage Control Board which could be revoked at any time by resolution of the Board. As further noted, there are some 30 States in which the distillers may be offering all sorts of discounts or price differentials and in which the control States have no means of verifying the distillers' warranties. If Pennsylvania genuinely feels put upon by the affirmation policies of other States, therefore,

there are alternatives available to her to relieve her difficulties including revocation of her affirmation policy or refusal to report her prices to other States. It will be noted that none of these alternatives require invoking the original jurisdiction of this Court.

Virginia submits, finally, that there is an important factor to be considered which, "in the context of the interests at stake" as urged by *Idlewild* and *LaRue,* militates against the exercise of original jurisdiction over Pennsylvania's complaint. This factor is the nature of a control State's ABC law itself. In the *Seagram* case, the New York statute offered economic protection to the consumer as well as to the retailer by guaranteeing the lowest possible price. New York, however, is a licensee State where liquor is retailed by private concerns commonly known as "package stores." Virginia, like the other control or monopoly States, obtains the same economic protection for her consumers, but Virginia differs from New York in that Virginia, through her ABC Board, is not merely the licensor of private retailers but is herself the retailer. In this capacity, however, Virginia does not have the same profit motive or sales technique as does a private chain of package stores in a licensee State. Virginia does not have, nor should she be required to have, buyers or similar agents to travel the country in search of the best deal from liquor distillers. Virginia does not choose to, nor should she be required to, raise or lower prices at her ABC stores every other week to reflect changing market conditions. Virginia does choose to obtain the best prices for her citizens in her *parens patriae* capacity and to at the same time conduct the business of her ABC Board in an efficient manner. She has chosen to accomplish these ends by the adoption of a policy requiring sellers of alcoholic liquor to affirm that Virginia is not being charged a higher price for liquor "destined for use, distribu-

tion, or consumption within [her] borders" than that prevailing for the same liquor in any other State. The Twenty-first Amendment says she may do this; this Court has said she may do this. Whatever ancillary "extraterritorial effect" this action may have on Pennsylvania does not rise to constitutional dimensions, and does not justify Pennsylvania's demand for the exercise of original jurisdiction by this Court.

CONCLUSION

This case is wholly inappropriate for the assertion of this Court's original jurisdiction and plaintiff's motion should, therefore, be denied.

COMMONWEALTH OF VIRGINIA

By: ANDREW P. MILLER
Attorney General

VANN H. LEFCOE
WILLIAM P. BAGWELL, JR.
Assistant Attorneys General

Supreme Court Building
Richmond Virginia 23219

February 6, 1973