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Montana Milk Control Board v. Community Creamery Co., 366 P.2d 151 (Mont. 1961)

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There have been no cases in Montana pertaining to the question of whether or not the attorney-client privilege includes agents within the attorney-client relationship. The Montana statute which defines the attorney-client privilege makes no reference to the attorney's agents.[29] However, it was settled at common law that the agents of the attorney were within the privilege.[30] Further, at least twenty-two states have adopted statutes which are similar to the Montana statute in not expressly including agents of the attorney,[31] and the uniform construction of these statutes has been to include such agents.[32] In view of these factors, it may be expected that Montana will adopt a similar construction.

It is not surprising that the question has not been presented in Montana concerning accountants as agents, for the problem seems to arise most frequently in federal tax litigation. However, the problem could easily arise in other areas of litigation, and if it does, the instant case provides a sound guide for its solution.

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REGULATIONS ADOPTED BY MILK BOARD TO BE VALID MUST BE WITHIN AUTHORITY DELEGATED BY STATUTE.—The Milk Control Board charged that defendant had furnished milk dispensers to fraternities free of charge, thus violating fair-trade practices established by an official order of the Board issued in 1959. The district court sustained general demurrers to the plaintiff's complaint on the basis that the complaint failed to state a cause of action. On appeal to the Montana Supreme Court, *held,* affirmed. The regulations as to unfair trade practices adopted by the Board in 1959 are invalid as they did not cover all of the five provisions required by statute to be included in the regulations. *Montana Milk Control Board v. Community Creamery Co.,* 366 P.2d 151 (Mont. 1961).

The statute[1] under which the Milk Board enacted its 1959 order governing fair-trade practices states:

[29]"An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." REVISED CODES OF MONTANA, 1947, § 93-701.4.

[30]See, *e.g.,* Madame Due Barré v. Livette, Peake 108, 170 Eng. Rep. 96 (N.P. 1791); Jackson *ex dem.* Haverly v. French, 3 Wend. (N.Y.) 337, 20 Am. Dec. 699 (1829); State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 458 (1896).

[31]ALASKA COMP. LAWS ANN. § 58-6-4 (1949); ARK. STAT. ANN. § 28-601 (1947); IDAHO CODE ANN. § 9-203 (1948); IND. ANN. STAT. § 2-1714 (1946); KAN. GEN. STAT. ANN. § 60-2805 (1949); KY. REV. STAT. § 421.210 (1959); LA. REV. STAT. ANN. § 15:475 (1951); MICH. STAT. ANN § 28.945 (1) (1954); MO. ANN. STAT § 491.161 (1952); NEB. REV. STAT. § 25-1201 (1956); N.D. REV. CODE § 31-0106 (1943); OHIO REV. CODE ANN. § 2317.12 (Page, 1954); OKLA. STAT. ANN. tit. 12, § 385 (Supp. 1959); ORE. REV. STAT. § 44.040(1)(b) (1957); PA. STAT. ANN. tit. 28, § 321 (1958); S.D. CODE § 37.0101 (1939); TENN. CODE ANN. § 29-305 1955); TEX. CODE CRIM. PROC. ANN. art. 713 (1941) (applies to both civil and criminal proceedings); WASH. REV. CODE § 5.60.060 (1958); W. VA. CODE ANN. § 4992 (1955); WIS. STAT. ANN. § 325.22 (1958); WYO. STAT. ANN. § 3-2602 (1945)

[32]See, *e.g.,* Jayne v. Bateman, 191 Okla. 272, 129 P.2d 188 (1942); Foley v. Poschke, 137 Ohio St. 593, 31 N.E.2d 845 (1941). It should be noted, however, that not all of the states referred to *supra* note 31 have passed on the question.

[1]Revised Codes of Montana, 1947, 27-414, as amended, Laws of Mont. 1959, ch. 192, § 8. (Hereinafter REVISED CODES OF MONTANA will be cited R.C.M.)

> In addition to the general and special powers heretofore set forth, the board shall have the power to make and formulate reasonable rules and regulations governing fair-trade practices as they pertain to the transaction of business among licensees under this act and among licenses and the general public. Such reasonable rules and regulations governing fair-trade practices shall contain, but shall not be limited to, provisions regarding the following methods of doing business which are hereby declared unfair, unlawful, and not in the public interest: . . .

Following this section are five distinct subsections or provisions relating to unfair trade practices.[3] The Milk Board's 1959 order[6] did not contain specifically all five of these provisions, although the order did contain some of the provisions, including the one which the defendant was charged with violating. The court, however, reasoned that inasmuch as the Board's 1959 regulation did not contain specifically all five of the provisions, that therefore, none of the provisions in the regulation were valid.[4] The court reached its decision[5] by construing the words "shall contain" in the enabling statute, as indicating that the statute was not intended to stand independently, but rather as a mere mandatory guide for the Milk Board in preparing its regulations.

In considering the entire language of the enabling statute, this reasoning of the court is questionable. The enabling statute expressly provides that the rules and regulations of the Board *shall contain* the five distinct provisions set out. However, the statute does not stop here; it also states that the five distinct provisions governing fair trade practices *are hereby declared unfair, unlawful, and not in the public interest.*[6] This language of the statute that the "following methods of doing business are hereby declared unfair, unlawful, and not in the public interest" appears to indicate an intent on the part of the Legislature that the statute be self-executing. In other words, it appears that it was he legislative intent that a violation of any one of the specifically declared unfair trade practices would lead to liability, irrespective of whether or not the Milk Board had included

[2]The five distinct provisions set out in R.C.M. 1947, § 27-414 as amended by Laws of Mont. 1959, ch. 192, § 8 are:

(a) The payment, allowance, or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

(b) The giving of any milk, cream, dairy products, services, or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream business of any customer.

(c) The extension to certain customers of special prices or services not available to all customers who purchase milk of like quantity under like terms and conditions.

(d) The purchasing, processing, bottling, packaging, transporting, delivering or otherwise handling in any marketing area of any milk which is to be or is sold or otherwise disposed of at less than the minimum wholesale and minimum retail prices established by the board pursuant to this act.

(e) The payment of a less price than the applicable producer price established by the obard pursuant to this act by a distributor to any producer for milk which is distributed to any person, including agencies of the federal, state or local government.

[3]Instant case at 154.

[4]Instant case at 153-54.

[5]Instant cast 153.

[6]See supra note 1.

such practice within its regulations. This reasoning appears even more plausible when statutes in other jurisdictions are examined.

An Idaho statute[7] regulating unfair trade practices in the dairy industry states:

> In the marketing of milk, cream and dairy products the following methods of doing business or trade practices are hereby daclared unfair and unlawful: . . .

The various trade practices which this Idaho statute lists as as unlawful are similar to those which the Montana statute sets out. Violations of the Idaho statute would be punishable[8] irrespective of whether or not authority to regulate the same fair trade practices was delegated to an administrative board. Thus, this Idaho statute is a good example of a statute which was intended to be self-executing. It should be noted that the language of the Idaho statute which states, "the following methods of doing business are hereby declared unfair and unlawful," is almost identical to the language which is used in the Montana statute in the instant case.

Nevada[9] has a statute which expressly sets out various trade practices which are declared unlawful. This statute expressly provides that the unfair practices of doing business which are set out therein are unlawful irrespective of whether or not a marketing or stabilization plan is in effect. This statute is a good example of one which was expressly intended to be self-executing. Had there been a similar provision in the Montana statute in the instant case, that the specific unfair trade practices are unlawful whether or not contained in the Milk Board's regulations, the problem that confronted the court would have never arisen.

Another example of an act which was intended to be self-executing is the Robinson-Patman Act.[10] Each provision of the Act begins with the words "It shall be unlawful" and then declares what particular trade practice is unlawful. Authority to prosecute violations of the trade practices declared unlawful under the act is given to appropriate boards or commissions irrespective of whether or not any such boards or commission has included such trade practices within its regulations.[11]

Thus, in looking at the language of these various statutes and acts and by drawing an analogy with the language used by the legislature in the statute in the instant case, it is arguable that the statute was intended to be self-executing. Thus, a violation of one of the provisions of the statute should lead to liability[12] irrespective of whether or not the Milk Board's regulation contained all of the provisions.

[7] IDAHO CODE ANN. § 37-1003(b) (1948).
[8] IDAHO CODE ANN. § 37-1004 (1948).
[9] NEVADA REVISED STATUTES § 584-570 (Supp. 1959).
[10] 49 Stat. 1526-28 (1936); 15 U.S.C. §§ 13, 13a (1958).
[11] 15 U.S.C. § 21 (1958).
[12] R.C.M. 1947, § 27-422 states in part: ". . . A violation of any provision of this act or of any lawful rule or order of the board, including a failure to answer a subpoena or to testify before the board, shall be deemed a misdemeanor. . . ." R.C.M. 1947, § 27-424 states in part: "The board or its authorized agent may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this act or to enforce compliance with any order, rule or regulation, of the board pursuant to the provisions of this act. . . ." These statutes appear to

A careful reading of the statute would result in an interpretation clearly called for by the language and intent of the legislature. The power to make regulations in this statute is permissive and not mandatory. The statute merely provides that "the board shall have the power to make and formulate reasonable rules and regulations."[13] Clearly, this is permissive and not mandatory. In fact, the recently published *Bill Drafting Manual for the Montana Legislative Assembly*[14] suggests that the word "may" should be used in lieu of the words "shall have the power to." Recognizing that the power to make regulations is permissive, and, further, that there are words which ordinarily mean that the act described is unlawful without further action by the legislature or any other body, there is no question that in the absence of any other provision, these provisions are self-executing. The court, however, was disturbed and, it is submitted, led astray by the word "shall" in the second sentence of the provision which states:[15] "Such reasonable rules and regulations governing fair-trade practices *shall contain*. . . ." The court was faced with the word "shall" which on the face of it is mandatory, but which appears with respect to regulations which need not be promulgated at all. The court chose to rely on this one word "shall" to give meaning to, and to change the obvious meaning of, the other words in the section when viewed in the light of its purpose and the clear meaning of the other words. Perhaps the section is not as clearly drafted as it should be, but if this be the case, the court should give meaning to the words which are consistent with its purpose and which give meaning to every clause in the section.

However, even if it was found that the statute in the instant case was not intended to be self-executing, still the position of the court that the words "shall contain" required the Board's 1959 regulation to include specifically all five of the unfair trade provisions, is questionable.

As a general rule the word "shall" when used in a statute is mandatory or imperative.[16] However, the word "shall" when used in a statute does not always import that its provisions are mandatory. Depending upon the legislative intent, the surrounding circumstances, and the objects to be accomplished, "shall" may be construed as directory or permissive.[17] According to some authority, when the object of the statute is to subserve some public purpose, the provisions may be held directory or mandatory as will best accomplish that purpose.[18] If this principle is applied to the instant case one might argue that "shall contain" should have been construed as permissive since this would best serve the public purpose. If the statute were construed as permissive in the instant case, a conviction of

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indicate that a violation of any one of the five specific provisions of section 27-414 would be a misdemenor and would allow the board to institute proceedings for such violation, irrespective of whether or not such provision was included within the regulation of the Milk Board.

[13]See *supra* note 1.

[14]*Bill Drafting Manual of the Montana Legislative Council* at 16. (1962).

[15]See *supra* note 1.

[16]State *ex. rel.* McCabe v. DistrictCourt, 106 Mont. 272, 76 P.2d 634 (1938); Thomas v. Ramberg, 245 Minn. 474, 73 N.W.2d 195 (1955); 82 C.J.S. *Statutes* § 380.

[17]Carter v. Seaboard Finance Co., 33 Cal. 2d 564, 203 P.2d 758 (1949); People v. Municipal Court of Oxnard, 145 Cal. App. 2d 767, 303 P.2d 375 (1957); 82 C.J.S. *Statutes* § 380.

[18]Pulcifer v. Alamedia County, 29 Cal. 2d 258, 175 P.2d 1 (1946).

the defendant might have resulted, and, as a consequence, the consuming public would have been protected from unfair trade practices.

Determining the legislative intent is the important factor in deciding whether the terms "shall contain" are mandatory or permissive.[19] The court in the instant case,[20] although not specifically discussing the question of whether the terms of the statute were mandatory or permissive, holds that they were mandatory. How the court arrived at the conclusion that the terms of the statute were mandatory is uncertain. The court did not specifically discuss the possible legislative intent in placing the terms in the enabling statute. Thus, whether the court did consider the possible legislative intent in arriving at its decision, or whether it engaged in judicial legislation of its own is not apparent from the court's opinion.

Further, even if the terms were clearly mandatory, the question remains as to whether the alleged dereliction by the Board in not including specifically all five of the required provisions would invalidate those provisions of the Board's regulation which were enacted within the authority of, and which served the purpose of, the enabling statute. The court in the instant case relied on the principle that for a regulation of an administrative body to be valid, it must be within the authority delegated by statute.[21] How the court could rely on this general principle of law and yet hold those provisions of the statute invalid which were enacted within the authority of the enabling statute is far from clear. Those provisions of the Board's regulation which were enacted within the authority of the enabling statute should be valid. Apparently, the court was relying on the fact that all five provisions followed the empowering clause in the same section. Does this mean that if each area of regulation, in the instant case, had been set forth in a separate subdivision or in a separate act by the legislature, the court would have refused to uphold those regulations which were enacted within the authority of the separate acts, sections, or subdivisions of the act? To state the question reveals the answer. Would the court say that all acts of the Board are invalid because it failed to perform one act? The court cites no authority or sound reason which will explain why those provisions, which were enacted within the authority of the enabling statute, should not be valid.

The court's decision holding invalid those provisions enacted within the statutory mandate also appears to be contrary to the general purpose of the legislature in regulating the milk industry. By statute, that purpose "is to protect and promote public welfare and to eliminate unfair and demoralizing trade practices."[22] The court's decision cannot be said to have promoted the public welfare or to have been a step forward in eliminating unfair and demoralizing trade practices. The decision of the court may well result in a general demoralization of the fluid milk industry, eventually causing irresparable harm to the consuming public.

The action of the court in the instant case will certainly need further clarification in the future. The court appears to require regulations of

[19]See *supra* note 16.
[20]Instant case at 153-54.
[21]Instant case at 154.
[22]R.C.M. 1947, § 27-402.

administrative boards to be strictly within the enabling statute. The court emphasized this desire by holding invalid even those provisions which were enacted within the statutory mandate. Should the court again be confronted with an issue similar to the instant case, a comprehensive consideration of the legislative intent and all of the statutory lanuage should be undertaken. Whether the legislature intended the enabling statute to be self-executing, and the words "shall contain" to be mandatory or permissive, are the questions which the court clearly will must consider. In the meantime, however, administrative boards in promolgating regulations should do so with an eye toward the possibility that all their regulations will be declared invalid if they do not conform strictly to the enabling statute by doing everything which they might possibly be required to do or, perhaps, authorized to do.

LEO J. KOTTAS, JR.

VOLUNTARY PAYMENTS MADE TO PROTECT ATTORNEY'S BUSINESS REPUTATION ARE ORDINARY AND NECESSARY BUSINESS EXPENSES FOR FEDERAL TAX PURPOSES.—A firm of New York attorneys often acted as intermediaries in financing new businesses and going concerns. To secure money for a business the attorneys solicited clients and business associates who loaned their money on the recommendation of these attorneys. The business involved in this case, which appeared on reasonable inspection by the attorneys to be operating successfully, was really a fiction devised by a swindler. The persons solicited by the attorneys found themselves holding worthless claims for the money they advanced to the swindler. Although the attorneys had no legal obligation to repay the lost loan funds, they undertook to do so in order to protect their good will and reputation as attorneys. After repaying the loans, the attorneys deducted the amounts of such payments as business expenses under the "ordinary and necessary" clause of section 162 of the Internal Revenue Code in 1954. The Commissioner brought an action to recover additional taxes on the grounds that these were not properly deductible business expenses under that section. The United States Tax Court held that these payments were ordinary and necessary business expenses and that the deductions should have been allowed. *Pepper v. Commissioner*, 36 T.C. ....., no. 88 (1961).

The court in the principal case was confronted with the task of construing the broad terms of section 162 of the Internal Revenue Code of 1954 which states: "In computing net income there shall be allowed as deductions . . . all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."[1]

To facilitate discussion of section 162 its requirements may be broken down into and raise three general questions: 1) Was the expenses incurred in carrying on any trade or business? 2) Was the expense necessary?

[1]Section 23(a)(1)(A), 1939 Internal Revenue Code. (Similar to 1954 Code Section 162(a)).