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Antitrust Laws: Tying Agreements: Newspaper Unit Advertising Contracts

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NOTES

CASES

Antitrust Laws: Tying Agreements: Newspaper Unit Advertising Contracts *Times-Picayune Pub. Co. v. United States, 345 U. S. 594 (1953).* Times-Picayune Publishing Company owns and publishes the morning *Times-Picayune* and the evening *States* in New Orleans. Its sole competitor is the evening *Item.* Purchasers of classified and general advertising space from the Publishing Company were able to purchase only combined insertions appearing in both the morning and evening paper and not in either separately.[1] Civil action was brought by the United States challenging these unit contracts as unreasonable restraints of interstate trade banned by section 1 of the Sherman Act[2] and as an attempt to monopolize a segment of interstate commerce in violation of section 2.[3] The district court found that the leverage exerted by the morning Times Picayune through the unit plan caused a substantial rise in classified and general advertising in the *States* enabling it to enhance its competitive position toward the *Item,* and enjoined further use of such contracts.[4]

The Supreme Court of the United States reversed the holding of the district court in a 5-4 decision. In so doing, however, it recognized and approved the increasing tendency to apply the antitrust laws to local situations,[5] holding that contracts for newspaper advertising were in interstate commerce,[6] and that freedom of the press did not preclude Sherman Act applicability.[7] With these obstacles removed, the Court considered whether the defendant's conduct constituted a Sherman Act violation.

Tying Cases

A tying agreement is a requirement imposed by the vendor (or lessor) of a product that the purchaser (or lessee) can obtain the product he desires only on the condition that an additional product be purchased. Certain recognizable types of tying contracts have been tested by the courts. Primarily, the cases have dealt with "closed end" agreements, whereby the consumer is required to purchase *all* his requirements of the "tied" product from the vendor. In *United States v. International Salt Co.,*[8] lessees of defendant's patented salt dispensing machines were required to purchase from the lessor all salt used in connection

1 One hundred eighty other publishers had instituted such plans by 1950. 345 U.S. at 623.

2 Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal. 15 U.S.C. § 1 (1946).

3 "Every person who shall monopolize, or attempt to monopolize, or conspire to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a misdemeanor." 15 U.S.C. § 2 (1946).

4 United States v. Times-Picayune Pub. Co., 105 F. Supp. 670 (E. D. La. 1952).

5 This tendency was begun with Indiana Farmer's Guide Pub. Co. v. Prairie Farmer's Guide, 293 U.S. 268 (1934) (mid-west farm journals) and reached its culmination in Gamco, Inc. v. Providence Fruit & Produce Exchange, Inc., 194 F.2d 484 (1st Cir. 1952) (refusal to renew lease in local market building enjoined).

6 Lorain Journal v. United States, 342 U.S. 436 (1951) in effect overruling Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436 (1920).

7 Associated Press v. United States, 326 U.S. 1, 7 (1945).

8 332 U.S. 392 (1947).

with these machines.[9] Where the effect of such an agreement "may be to substantially lessen competition" it violates the explicit statutory prohibitions of section 3 of the Clayton Act.[10] The Court, carrying out the broad policy of the Clayton law, went beyond the words of the statute and refused to inquire into the actual effect on competitors. The Court inferred a tendency to lessen competition since the lessees were prevented from buying salt on the open market.[11] The Court also found this conduct to violate section 1 of the Sherman Act, it being "unreasonable per se to foreclose competitors from any substantial market." Thus the Court added tying agreements which deprive competitors of any substantial market to the ever-widening category of specific practices which per se constitute violations of the Sherman and Clayton Acts.[12] This case has been interpreted to have been based on the public policy against misusing a lawful patent monopoly as a lever to compel the lessee to purchase additional products.[13] The Court, however, in applying the *International Salt* decision to the facts of *Standard Oil of California v. United States*[14] held that the exclusive dealing agreement there involved was per se a Clayton Act violation despite the absence of a patent.[15]

In reconstructing the doctrine of these and other tying cases, the Court in the Times-Picayune case laid down the following rule:

> When a seller enjoys a monopolistic position in the market for the tying product; *or* if a substantial volume of commerce in the "tied" product is restrained, a tying agreement violates the narrower standards of the Clayton Act. However, a tying arrangement is banned by section 1 of the Sherman Act whenever *both* conditions are met. (Court's italics.)[16]

It is submitted that there are two difficulties with this rule. First, the Court purports to weave the doctrines of all the tying cases into this pattern. However, important decisions fall outside the rule. Secondly, it was incorrectly applied

9 See also International Business Machines v. United States, 298 U.S. 131 (1936) (patented business machines tied to sales of cards used with the machines).

10 It shall be unlawful for any person engaged in commerce in the course of such commerce, to lease or make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in goods, wares, merchandise, machinery supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce. 15 U.S.C. § 14 (1946).

11 Summary judgment for the United States was granted under section 3 without consideration of proffered evidence that competitors were not injured.

12 United States v. Masonite, 316 U.S. 265 (1942) (market division and price fixing); Fashion Originator's Guild v. F.T.C., 312 U.S. 457 (1941) (group boycott); United States v. Trenton Potteries, 273 U.S. 392 (1927) (price fixing).

13 See Note, 57 Yale L. J. 1298 (1948).

14 337 U.S. 293 (1949).

15 Id. at 306. The district court also found a Sherman Act violation. Evidence proffered by defendant that its market control was declining, rather than increasing was held immaterial under either law. 78 F. Supp. 850 (S.D. Cal. 1948). However, the Supreme Court felt it unnecessary to consider the Sherman Act.

16 345 U.S. at 608.

to the facts of the principal case. The rule does not include the doctrine announced in *United States v. Paramount Pictures*.[17] There the Court held as violative of section 1 of the Sherman Act the practice of "block-booking" whereby a distributor would release one film on the condition that the exhibitor also accept another film or group of films. The basis of the Court's reasoning was the misuse of the copyright attached to the films, but as the later *Standard Oil of California*[18] case points out, a misuse of copyright or patent is not essential for a tying contract to be unlawful. The gravamen of the offense in "block-booking" was the distributor's dictation to the exhibitor that he accept additional products in order to get the product he desired. Nowhere in the *Paramount* decision does the Court discuss whether a substantial amount of the "tied" product is restrained. Rather, the Court held that the practice deprived the exhibitor of the right to choose in an open market; such a right of choice is a necessary corollary to a system of free competition.[19]

Another unlawful tying agreement is not included in the rule. In *United States v. General Electric*,[20] lamp base sales, conditioned on signing a waiver of defenses in patent infringement suits which might arise, were held unlawful. The forced waiver did not affect competition; instead the offense was the imposition of onerous burdens on the purchaser.[21] It was in this light that the four dissenting justices in the *Times-Picayune* case saw the problem:

> Compulsory combination advertising makes payment for, and publication of, classified and general advertising in its own evening paper an inescapable part of the price of access to the all-important columns of the single morning paper.[22]

The dissenters consider the unit plan a burden on the consumer, and would not require proof of the economic burden on the competing evening *Item*. By analogy to previous cases where the practice banned by the Court was considered detrimental per se to the consumer, the reasonableness of the unit price should be immaterial, and proof of the effect on competitors should not be necessary.[23]

As we have seen, the Court in summarizing the law of tying cases, neglected some important types of tying agreements previously held illegal. This alone would not have proved fatal to the government's case, if the Court had applied the rule properly. However, the Court found that since the morning *Times-Picayune* controlled only 40 per cent of the New Orleans newspaper advertising

17 334 U. S. 131, 156-159 (1948).

18 337 U.S. 293 (1949).

19 International Salt v. United States, 332 U.S. 388, 397 (1947) (A provision that lessee of defendant's machinery could buy salt elsewhere if lessor could not meet the market price was held to be no less a restraint of trade.)

20 82 F. Supp. 753 (D. N. J. 1949).

21 See Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948), which holds that the Sherman Act "does not confine its protection. . . , protecting all who are made victims of the forbidden practices."

22 345 U.S. at 628.

23 A per se violation is one whose inherent character is conclusively presumed to obstruct the free course of trade. Thus, in a price fixing case the Court will not inquire into "whether a particular price is reasonable or unreasonable." United States v. Trenton Potteries, 273 U.S. 392 at 397 (1927); see notes 11 and 15 supra.

market, it was not sufficiently dominant to satisfy the first requisite of the rule. This does not stand up under analysis. If the morning newspaper space is to be regarded as a different commodity than the afternoon space,[24] the issue of the market dominance of the morning paper must be considered in the light of the morning market alone, of which it had 100% control. The Court read into the rule its alternate finding that the morning medium and the afternoon medium did not sell distinct commodities. Instead, it felt that the advertisements in both papers were directed at "fungible customer potential."[25]

Under the assumption that the two newspapers market the same commodity the tying rule announced by the Court cannot apply; however, the rule of *United States v. Paramount Pictures* is applicable. That decision, as we have seen, does not fit into the Court's reconstruction of the elements needed for Sherman Act violation in tying cases. In the *Paramount* case, as in the principal case, the consumer was required to purchase an additional form of the *same* commodity. Such an imposed agreement was in that case a per se violation of the Sherman Act. The *Paramount* situation is comparable to the newspaper unit contract. From the figures supplied by the Court it is evident that the *Times-Picayune* was the more desired advertising medium and was used to draw advertising to the *States*.[26] The Court's failure to follow the *Paramount* case may be indicative of a more lenient policy toward tying agreements.

OTHER CRITERIA OF UNREASONABLE RESTRAINTS

The Supreme Court has dealt with antitrust cases in two ways. They have branded certain practices as "unlawful per se." In such cases mere proof that the defendant has maintained these practices is sufficient for conviction. Collateral proof of adverse effect on the market, unreasonableness of prices maintained, effect on competitors, etc., is immaterial.[27] On the other hand a sizeable number of cases follow the Court's "rule of reason" as laid down in 1910 in *Standard Oil v. United States*.[28] These decisions continue the practice of considering all factors from a statistical or quantitative point of view. In these cases the Court attempts to analyze the actual effect of the defendant's practices on the market involved.[29] The difficulty with this latter approach is cogently expressed by Justice Frankfurter in the *Standard Oil of California* case:

Moreover, to demand that bare inference be supported by evidence as

24 If the rule is to be applied the two must be regarded as distinct commodities since the rule presupposes a "tying" and a "tied" commodity.

25 345 U.S. at 613. The court also stated at page 613, "Nothing in the record suggests that advertisers viewed the city's newspaper readers . . . as other than fungible customer potential." Contrast this with the direct testimony of the advertisers in the lower court opinion, 105 F. Supp. at 674-675.

26 Compare United States v. Paramount Pictures, 334 U.S. 131 at 158 (1948) "Each (film) stands not on its own footing but in whole or in part on the appeal another film may have." In the principal case the Court attempts to distinguish the Paramount decision declaring that in that case competitors were foreclosed from a substantial market. However, a close reading of the "block-booking" portion of that decision reveals no mention of effect on competitors.

27 See notes 11, 12, 15 and 22 supra.

28 221 U.S. 1 (1910).

29 Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 Mich. L. R. 1139 (1952).

> to what would have happened but for the adoption of the practice that was in fact adopted . . . would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.[30]

In the face of this difficulty, the Court in the principal case chose to base its decision on statistical analysis of what might have occurred had the unit plan not been instituted. It reached the conclusion that the revenue loss of the competing *Item* may well not have exceeded 1 per cent. This revenue loss alone might have constituted a section 1 violation.[31] Moreover, the Court indicates that this figure is uncertain.[32] As Justice Frankfurter had pointed out, many factors cannot be weighed statistically, especially by courts.[33] It is submitted that the Court took a backward step by attempting to analyze these speculative problems. The Sherman Act sets down only vague criteria for conviction. The Court must set more definite standards of disapproved behavior if expensive anti-trust litigation is to be avoided and if industry is to have a guide for conduct. Such a guide can be provided if the Court continues to specify the kinds of conduct which are prohibited.[34]

Sufficient reasons exist for holding that this type of unit contract is unlawful per se. In the principal case advertisers had to use the columns of the *States* or be refused access to the columns of the only morning newspapers in New Orleans. In a "closed end" tying contract the purchaser has contracted himself out of the right to buy from competitors of the vendor. Under the unit contract the purchaser is free to buy from the competing *Item,* but his financial resources may not permit such additional purchases. Nor does this "open end" feature make the burden less onerous on the advertiser who must allocate additional funds if he wishes to continue using the competing *Item.* It is not necessary that a contract involve "bold, relentless, predatory commercial behavior" to be banned; less blatant restraints are also forbidden.[35]

APPLICABILITY OF THE ALCOA DOCTRINE

Under the rule of *United States v. Aluminum Company of America*[36] the act of monopolizing in violation of section 2 of the Sherman Act is complete when the defendant has obtained control of over 64 per cent of the market, provided that the market control was not thrust upon him. Unlawful methods and practices need not be proved to secure conviction.[37] The Supreme Court

30 337 U.S. 293, 310 (1949).

31 United States v. Standard Oil Co. of California, 337 U.S. 293 (1949) (defendant controlled 6.7 per cent of total market, thus loss to competitors was far less than 6.7 per cent); FTC v. Morton Salt, 334 U.S. 37 (1948) (price differential affecting 1/10 of 1 per cent of defendant's sales enjoined).

32 345 U.S. at 621. "But we must take the record as we find it and hack through the jungle as best we can."

33 E.g., the court did not consider the fact that local display lineage of the Item is still twice that of the States. This is the only type of advertising not covered by the unit plan.

34 Contra: Oppenheim, supra note 29.

35 But cf. Lorain Journal v. United States, 342 U.S. 143, 149 (1951).

36 148 F.2d 416 (2d Cir. 1945) [issued in lieu of decision by the Supreme Court because of absence of a quorum on the Court. 15 U.S.C. § 29 (1946), 58 Stat. 272 (1944), as amended, 62 Stat. 963 (1948), 28 U.S.C. § 2109 (Supp. 1952)].

37 Id. at 431. Such unlawful practices as were found were only considered for purposes of framing the decree.

approved the *Alcoa* doctrine in *United States v. American Tobacco Co.*[38] However, under the facts in the *Tobacco* case, the Court could have disposed of the case without reference to the *Alcoa* decision. In a recent case[39] the District Court for the District of Massachusetts has squarely based its holding on the *Alcoa* case, recognizing it as a new departure in antitrust law interpretation. That court interprets the doctrine as follows:

> Any enterprise which has exercised power to control a defined market violates section 2 if that power is to any substantial extent the result of barriers erected by its own business methods (even though not predatory, immoral or restraining trade in violation of section 1 of the Sherman Act) unless the enterprise shows that the barriers are *exclusively* the result of superior skill. (Court's italics.)[40]

In the principal case the combined general display and classified lineage of the two unit contracts ranged from 75 per cent to 80 per cent of the New Orleans market. Admittedly, a great deal of the lineage sold by the *States* was sold because of the unit plan and was not "exclusively" the result of any legitimate superiority of that paper. Clearly, this percentage of market control created in part by the unit plan is outlawed under the rule of the *Alcoa* case. However, the issue was not raised by the government, nor was it considered by the Court. If that doctrine is adopted *in toto* by the Supreme Court the antitrust statutes will attain a new vigor more in accord with the original congressional intention.

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Arbitration: Contracts: Equity: Limitation of Actions: Exercise of Discretionary Powers in Specific Performance of Arbitration Contracts: ***Reconstruction Finance Corporation v. Harrisons & Crosfield, 204 F.2d 366 (2d Cir. 1953).***—Should a court compel arbitration of a claim barred by the statute of limitations? In 1941, the Rubber Reserve Company, a corporation wholly owned by the United States, made five contracts with Pagel Horten & Co., Inc., for the purchase of various quantities of crude rubber to be shipped to the United States from the Netherlands East Indies. Harrisons & Crosfield, though not a party to the contract, was the actual shipper of the rubber. Payment for the rubber was to be made to Harrisons & Crosfield by letter of credit to be furnished in its favor by the Rubber Reserve Company. There was a provision in the contract that Rubber Reserve Company would place war risk and marine insurance on various shipments. This was not done, and a quantity of rubber was destroyed by enemy action while in transit in 1942.

Each contract contained the following clause:

> 10. Failing amicable settlement, all claims, disputes or controversies arising under or in relation to this contract shall be determined by arbitration. . . .[1]

Failing "amicable settlement," on September 14, 1951, Harrisons & Crosfield

[38] 328 U.S. 781 (1946).

[39] United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

[40] Id. at 297.

[1] Application of Reconstruction Finance Corp., 106 F. Supp. 358 (S.D.N.Y. 1952).