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Regulation of Business - Sherman Act - Expansion of Per Se Doctrine Over Tying Agreements

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REGULATION OF BUSINESS—SHERMAN ACT—EXPANSION OF PER SE DOCTRINE OVER TYING AGREEMENTS—Through congressional grant defendant's predecessor acquired approximately forty million acres of land, consisting of every alternate section in a twenty to forty mile wide belt on each side of its railroad track from Lake Superior to Puget Sound. Defendant sold about thirty-seven million acres of its holdings and leased the balance. Many of the sales contracts and most of the leases, together covering several million acres of land, contained "preferential routing" clauses[1] which compelled the grantee or lessee to ship all commodities produced or manufactured on the land over defendant's lines, unless competitors' rates were lower or, in some instances, unless their services were better.[2] In an action for injunctive relief by the government, charging that defendant's "preferential routing," or tying, agreements were unlawful as unreasonable restraints of trade in violation of section 1 of the Sherman Act,[3] the district court granted the government's motion for summary

1 As of 1949 "preferential routing" clauses were contained in over 103 contracts for the sale of timber and timberland covering 1,344,722 acres, over 64 mineral leases covering more than 147,071 acres and over 1,000 grazing leases covering more than 1,000,000 acres.

2 Some of the mineral leases required such shipment only if defendant's rates, service and facilities were equal to those of any competing line.

3 26 Stat. 209 (1890), 15 U.S.C. (1952) §1. The dissenting opinion points out that tied transportation would not be covered by §3 of the Clayton Act which relates only to "goods, wares, merchandise, machinery, supplies, or other commodities. . . ." 38 Stat. 731 (1914), 15 U.S.C. (1952) §14.

judgment. On appeal, *held,* affirmed, three justices dissenting and one justice not sitting. Tying agreements are per se unreasonable whenever a party has sufficient economic power with respect to the tying product (land) to restrain appreciably free competition in the market for the tied product (transportation) and a not insubstantial amount of interstate commerce is affected. *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1 (1958).

Traditionally courts have confined the sweeping language of section 1 of the Sherman Act to those contracts or combinations which unreasonably restrain trade.[4] However, since early common law such restrictive practices as price-fixing,[5] division of markets[6] and group boycotts[7] have been condemned as per se illegal, without reference to the quantity of commerce affected, because of the extremely anticompetitive nature or character of these restraints.[8] Until 1947 the status of tying agreements[9] appears to have fluctuated between these two extremes.[10] At that time the tying of $500,000 worth of business in an unpatented product to leases of more than nine hundred patented machines was struck down by summary judgment in *International Salt Co. v. United States*[11] on the theory that it was unreasonable, per se, to foreclose competitors from any substantial market. Six years later impressive dicta in *Times-Picayune Publishing Co. v. United States*[12] elaborated and pointed out that the gravamen of the Sherman Act offense is the supplier's enjoyment of a monopolistic or dominant position in the market for the tying product coupled with the restraint of a substantial volume of commerce in the tied product. Thus a cleavage developed in the law. Tying arrangements are per se unreasonable only when there is domination in a market and a substantial volume of commerce is restrained, but for no other violation of section 1 of the Sherman Act is it necessary to establish either of these elements.[13]

4 E.g., Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911).

5 E.g., United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

6 E.g., United States v. Addyston Pipe and Steel Co., (6th Cir. 1898) 85 F. 271, mod. and affd. 175 U.S. 211 (1899).

7 E.g., Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

8 See Schueller, "The New Antitrust Illegality Per Se: Forestalling and Patent Misuse," 50 COL. L. REV. 170 at 172 (1950).

9 Lockhart and Sacks, "The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act," 65 HARV. L. REV. 913 at 944 (1952), define a tying contract as an arrangement whereby a supplier furnishes a product over which he usually has some degree of market control on condition that the user or dealer also purchases a tied product that would otherwise be available from the supplier's competitors.

10 See 48 COL. L. REV. 733 (1948), for the history of tying arrangements at common law and under the Sherman, Clayton and Federal Trade Commission Acts.

11 332 U.S. 392 at 396 (1947).

12 345 U.S. 594 (1953).

13 See Handler, "Recent Antitrust Developments," 9 N.Y.C. BAR ASSN. REC. 171 at 178 (1954).

This gap was significantly narrowed by the Court in the principal case through substituting a showing of "sufficient economic power to impose an appreciable restraint on free competition in the tied product"[14] for the former dual requisites of a per se violation. The Court, however, expressly approves the earlier approach and feels its decision adds to, and does not overrule, prior law.[15] Contrary to the dissenting opinion,[16] interpretations of former decisions[17] and writers,[18] the Court concluded that *International Salt* did not treat a patent as the equivalent of proof of the necessary market control over the tying product, but condemned tying arrangements "*despite* the fact that the tying item was patented, not because of it."[19] To accept this conclusion and to rule out any theory that analogizes the particular tract of land involved in each purchase or lease to a patent on the basis that such land is so unique that it constitutes the relevant market,[20] renders it difficult to determine how the government has established the necessary market control over the tying product in both the principal case and previous patent cases. Such a finding here would seem necessarily to involve some inquiry into the relative land market,[21] but the summary disposition of the case precluded such an inquiry. The new test as applied to the facts of the principal case, however, can be justified on the theory that a tying agreement would be ineffective unless the supplier possesses substantial market power over the tying product.[22]

The real economic advantages that can accompany exclusive dealing and requirements contracts, as opposed to tying agreements,[23] indicate that the new "sufficient economic power" test will be limited to tying agreements. Conversely, the growing reluctance of the courts to engage in ex-

14 Principal case at 11.

15 Id. at 8-11.

16 Id. at 17 and 18.

17 See Standard Oil Co. of California v. United States, 337 U.S. 293 (1949).

18 See 57 YALE L. J. 1298 at 1300 (1948).

19 Principal case at 9.

20 Justice Harlan, in the dissenting opinion in the principal case, at 18 and 19, interprets the majority opinion as rejecting the common law fiction of the uniqueness of land. But see 9 STAN. L. REV. 539 at 543 (1957), for the position that the district court accepted this fiction.

21 The dissenting opinion in the principal case, at 15 and 16, calls for evidence of both the strength of defendant's landholdings relative to that of others in the appropriate land market and the uniqueness of defendant's holdings in terms of quality or use, in addition to any other circumstances that put defendant in a strategic position as against other sellers and lessors of land.

22 If this market power were absent, consumers or dealers could have merely purchased the tying product from suppliers who did not extract a tying agreement. See Lockhart and Sacks, "The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act," 65 HARV. L. REV. 913 at 944 (1952), and Bowman, "Tying Arrangements and the Leverage Problem," 67 YALE L. J. 19 at 31 (1957).

23 See Standard Oil Co. of California v. United States, note 17 supra, at 305.

tensive economic inquiry,[24] and the arguable position that such inquiry is not required to establish per se violations of section 1 of the Sherman Act,[25] tend to indicate that the new test will not be so confined. If the Court is attempting to bridge the division between former decisions dealing with tying arrangements and all other types of per se violations, its language, coupled with its approval of the summary disposition of the case, will leave courts and lawyers in grave doubt as to the proper standards for judging tying clauses under section 1 of the Sherman Act.[26]

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[24] Id. at 308, and the dissenting opinion at 322; principal case at 4-6.
[25] See 55 COL. L. REV. 561 at 563 (1955).
[26] See the dissenting opinion in the principal case at 19.