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Trade Regulation—Section 5 of the Federal Trade Commission Act—TBA Sales Commission Plans an Unfair Method of Competition.—Texaco, Inc. v. FTC

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and thus should be able to leave questions of special circumstances to the NMB.

The *Ruby* case presents a possible exception to the proposed rule, regardless of whether the NMB has as yet made its determination whether to hold an election. When the carrier has clear and reliable evidence that one union enjoys majority support, then for the sake of stability it should be allowed to bargain with that union. In *Ruby*, however, the evidence upon which the airline relied was authorization cards,[47] which the NLRB has held are not reliable due to the possibility of duplications.[48] This unreliability was assuaged in *Ruby* by the fact that 90 percent of the employees had authorized one of the unions, since, even if some employees authorized both unions, it is unlikely that 40 percent would sign two cards. Unless there is this overwhelming percentage, however, authorization cards should not be relied upon as an accurate indication of the support that a union enjoys.

LAWRENCE T. BENCH

Trade Regulation—Section 5 of the Federal Trade Commission Act—TBA Sales Commission Plans an Unfair Method of Competition.—*Texaco, Inc. v. FTC*.[1]—In 1956 the Federal Trade Commission (FTC) instituted three separate proceedings against several major oil companies and rubber companies[2] alleging that their sales commission method of distributing tires, batteries and accessories (TBA) was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.[3] Under the sales commission plans, the rubber companies paid commissions to the oil companies on sales of the rubber companies' TBA to the oil companies' dealers. One of the proceedings paired Texaco, Inc. with B.F. Goodrich Company. The Texaco distribution system was composed of some 30,000 dealers constituting 16.5 percent of all the service stations in the United States. Texaco controlled the supply of oil and gas to its dealers and bore the heavy cost of constructing and maintaining the service stations through the use of loans, short term leases and equipment financing. Texaco's policy with regard to TBA sales was to require its salesmen to become familiar with the sponsored product, yet at the same time to "render equal assistance to all dealers . . . regardless of the brand of merchandise handled."[4] Its policy statement provided: "Our dealers, consignees and distributors are independent businessmen, and instructions that no undue influence is to be

47 323 F.2d at 252.

48 See note 38 supra; see generally 1966-1967 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771, 801-08 (1967).

1 383 F.2d 942 (D.C. Cir. 1967), cert. granted, 390 U.S. 979 (1968).

2 B.F. Goodrich Co., No. 6485 (FTC Jan. 11, 1956); Goodyear Tire & Rubber Co., No. 6486 (FTC Jan. 11, 1956); Firestone Tire & Rubber Co., No. 6487 (FTC Jan. 11, 1956).

3 15 U.S.C. § 45 (1964). Section 5 provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

4 Texaco, Inc. v. FTC, 383 F.2d 942, 948 n.12 (D.C. Cir. 1967).

used to interfere with their free and independent judgment remain unchanged."[5]

In 1961 the FTC rendered decisions in each of the three TBA cases.[6] Two of the three cases, Atlantic-Goodyear and Shell-Firestone yielded findings of coercion, unlawful tie-ins, and adverse competitive effects resulting from the sales commission agreements. In Texaco-Goodrich, the Commission found no coercion and remanded the case to the hearing examiner for additional evidence on anticompetitive effects. Without taking the additional evidence the examiner concluded that the sales commission plan was unlawful. This conclusion was affirmed by the Commission in 1963.[7] On appeal, the United States Court of Appeals for the District of Columbia dismissed the complaint on the ground that in the absence of proof of coercive tactics or use of controlling economic power to force dealers to buy the sponsored products there is "nothing illegal or even unethical in the payment of commissions for such services . . . ."[8]

Meanwhile, the United States Court of Appeals for the Seventh Circuit affirmed the FTC's finding of illegality with regard to the Atlantic-Goodyear plan.[9] The Supreme Court granted certiorari and, in *Atlantic Ref. Co. v. FTC*,[10] affirmed the Seventh Circuit's decision. The Supreme Court then granted the FTC's petition for a writ of certiorari in *Texaco* and remanded that case to the FTC for further proceedings in the light of *Atlantic*.[11] In January 1966, the FTC held that the *Atlantic* case compelled the conclusion that the Texaco-Goodrich plan was unlawful and that both Texaco and Goodrich should be prohibited from performing or entering into any other sales commission plans.[12] Texaco then brought the present appeal to the Court of Appeals for the District of Columbia. HELD: reversed. The noncoercive Texaco-Goodrich sales commission plan is not an unfair method of competition as proscribed by section 5.[13] The court concluded that *Atlantic* did not make sales commission plans per se unlawful, stating that three conditions must exist before a TBA sales commission plan will be found unlawful: (1) the oil company must possess dominant economic power over its dealers; (2) the oil company must exercise that power over its dealers by overt coercion or covert practices designed to pressure dealers into taking the sponsored TBA; and (3) anticompetitive effects must result from use of that power.[14] The court conceded Texaco's dominant economic power over its dealers. It

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[5] Id.

[6] Goodyear Tire & Rubber Co., 58 F.T.C. 309 (1961); Firestone Tire & Rubber Co., 58 F.T.C. 371 (1961); B.F. Goodrich Co., 58 F.T.C. 1176 (1961).

[7] B.F. Goodrich Co., 62 F.T.C. 1172 (1963).

[8] Texaco, Inc. v. FTC, 336 F.2d 754, 763 (D.C. Cir. 1964), vacated and remanded per curiam, 381 U.S. 739 (1965). See Note, 6 B.C. Ind. & Com. L. Rev. 375 (1965).

[9] Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964).

[10] 381 U.S. 357 (1965).

[11] FTC v. Texaco, Inc., 381 U.S. 739 (1965).

[12] B.F. Goodrich Co., [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,424 (FTC 1966). The Commission thought it appropriate to enter virtually the same prohibitions against Texaco and Goodrich that the Supreme Court had approved in *Atlantic*. Id. at 22,656.

[13] 383 F.2d 942 (D.C. Cir. 1967).

[14] Id. at 945.

refused, however, to conclude that Texaco exploited its service station market by using its dominant economic power to compel its dealers to purchase sponsored TBA. Neither did the court find that the dominant power of Texaco over its dealers resulted in anticompetitive effects. Since the *Atlantic* case was so crucial to the *Texaco* decision, *Atlantic* is an appropriate starting place for analysis of the *Texaco* decision.

The Atlantic sales commission plan generally involved the same contractual provisions as other TBA plans. In addition to the contractual provisions, the Atlantic-Goodyear plan was characterized, among other things, by: (1) overt threats to cancel dealers' licenses; (2) dual solicitation of Atlantic's dealers by representatives of both companies to convert the dealers to Goodyear products; (3) policing of dealers to see that they met their purchasing quotas of Goodyear TBA; and (4) assigning to each dealer one single point of TBA supply.[15] These practices were obviously designed to increase the pressure on Atlantic's dealers to buy the sponsored TBA.

The Supreme Court analyzed the Atlantic-Goodyear sales commission plan by comparing it with illegal tying arrangements. Tying arrangements exist when a seller conditions the sale of one product on the purchase of some other product of the seller.[16] The substance of a tie may exist even where there is no express conditioning of the sale of the tying product. The illegal condition may be implied from a course of dealing, it may result from coercion or it may be voluntary.[17] The crucial factor is whether, as a practical matter, the buyer must take both products to get one.[18] The Supreme Court has said that "tying agreements serve hardly any useful purpose beyond the suppression of competition."[19] The manner in which the tie suppresses competition is to allow the seller to compel unmerited recognition in the market for the tied product, in which he has no power, because of his strong position in the market for the tying product.[20] If the tying product is desirable, and the seller's position in the market for that product is substantial, the conditioning of the sale of the tying product to the purchase of the tied product will result in purchasers shifting their purchases of the tied product to the seller of the tying product with a resulting foreclosure of other sellers of the tied product from these markets. The *Atlantic* Court recognized that just as the tying agreement allows the seller to utilize power in one market to cur-

[15] Atlantic Ref. Co. v. FTC, 381 U.S. at 365. The Court noted the "undeniable success" of the Atlantic-Goodyear sales commission plan. Within seven months after the plan went into effect, "Goodyear has signed up 96% and 98%, respectively, of Atlantic's dealers in two of the three areas assigned to it." Id. at 366. Goodyear enjoyed this success in spite of the fact that just a few years earlier, a survey had indicated that "67% of the dealers had preferred Lee tires and 76% Exide batteries." Id. at 369. A good deal of this success was undoubtedly the result of the exercise of Atlantic's dominant economic power.

[16] Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

[17] See McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 338 (4th Cir. 1959).

[18] United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457-58 (1922); Pearson, Tying Arrangements and Antitrust Policy, 60 Nw. U.L. Rev. 626, 630 (1965).

[19] Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

[20] Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953).

tail competition in another, so also does the Goodyear-Atlantic sales commission plan result in such effects.[21] It felt that the economic power of Atlantic in the service station market and the sales commission plan, "bolstered" by the pressuring practices engaged in by Atlantic, had the effect of limiting the dealers' freedom to purchase the TBA of their choice.[22]

The *Atlantic* Court stated that when conduct resembles recognized antitrust violations, the FTC may look to cases dealing with those violations for guidance with regard to the standard of illegality.[23] Since the restraint in this case was similar to a tie, the law of tying should be examined in order to determine the standard. Tying arrangements are generally considered to be illegal per se.[24] The per se rule eliminates the necessity of proving the anticompetitive effects of a particular restraint. As applied to tying, the per se rule requires proof that a "non insubstantial" amount of commerce is affected.[25] Whether the Court applied the tying rule to the *Atlantic* facts is not clear, even though the Court said that this approach could be taken by the Commission. The Court first stated:

> Goodyear and Atlantic contend that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories. But just as the effect of this plan is similar to that of a tie-in, so is it unnecessary to embark upon a full-scale economic analysis of competitive effect. We think it enough that the Commission found that a not insubstantial portion of commerce is affected.[26]

This language, taken alone would seem to indicate that the Court did indeed apply the per se tying standard of illegality to the Atlantic-Goodyear TBA plan. Although the FTC has argued for this interpretation in the courts of appeals which subsequent to *Atlantic* decided the two companion cases,[27] this interpretation of *Atlantic* has not been judicially accepted. On the contrary, the courts of appeals in both *Shell Oil Co. v. FTC*[28] and the instant case have looked to other language in the *Atlantic* opinion and concluded that a showing of the economic effect on the market is necessary to a finding of illegality. The *Texaco* opinion even concluded that the *Atlantic* opinion was "very clear" on this point![29] These courts cited the following statement from *Atlantic* as indicative of the necessity of considering the full record for examples of anticompetitive effects: "The anticompetitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications in determining

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21 381 U.S. at 370.
22 Id. at 371.
23 Id. at 369.
24 Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).
25 Id. at 6; International Salt Co. v. United States, 332 U.S. 392, 396 (1947).
26 381 U.S. at 371.
27 Texaco, Inc. v. FTC, 383 F.2d 942, 949 (D.C. Cir. 1967); Shell Oil Co. v. FTC, 360 F.2d 470, 476 (5th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).
28 360 F.2d 470 (5th Cir. 1966).
29 383 F.2d at 949.

whether this was a method of competition which Congress has declared unfair and therefore unlawful."[30] Further, the courts of appeals noted that the Supreme Court in *Atlantic* did not disapprove of the FTC's inquiry into the "whole record" in order to conclude that the economic effects of the sales commission plan "impaired competition at three levels of the tires, batteries and accessories industry."[31]

In analyzing the *Texaco* decision, two questions must be considered; namely, whether a sales commission plan must be coupled with coercive practices before it may be considered an unfair method of competition, and, if a noncoercive sales commission plan may be an unfair method of competition, whether there must be a showing of anticompetitive effects before the plan can be considered a violation of Section 5 of the FTC Act. The *Texaco* court required a showing of coercive practices and proof of anticompetitive effects. These requirements were derived by the court from the *Atlantic* opinion.

The conclusion of the *Texaco* court that the *Atlantic* decision requires a showing of coercion may not be a necessary one, although it is true that the Supreme Court made many references to the coercive practices in the *Atlantic* record.[32] In discussing the FTC's findings on the issue of foreclosure, the issue which was crucial to the analogy to tying arrangements, the Court, however, made the following statement:

> [The Commission] found that . . . manufacturers of competing brands . . . were foreclosed from the Atlantic market. In addition, it recognized the obvious fact that Firestone and Goodyear were excluded from selling to Atlantic's dealers in each other's territories. *Both* of these effects on competition flowed from the *contract itself*.[33] (Emphasis added.)

One implication which may be drawn from this language is that the foreclosure of competing manufacturers from the TBA market was caused by the sales commission plan itself and that therefore the discussion of coercion was merely the Court's method of showing the aggravated nature of the Atlantic-Goodyear plan.

An analysis of the Court's discussion of the remedial order in *Atlantic* reveals a further indication that the Court sought to prohibit some noncoercive sales commission plans. As to Atlantic, the order completely prohibited the use of sales commission plans.[34] The Court noted that the Commission could have limited its order to coercive plans, but that apparently the Commission felt that unless all plans were prohibited "dealers would not enjoy complete freedom from unfair practices . . . ."[35] In discussing the remedy as to Goodyear, the Court threw some light on the *Atlantic* situation, noting that the tendency toward coercion results from the *market power of*

30 381 U.S. at 371.

31 Texaco, Inc. v. FTC, 383 F.2d at 949; Shell Oil Co. v. FTC, 360 F.2d at 478.

32 381 U.S. at 366-68, 372, 374.

33 Id. at 370.

34 Id. at 372.

35 Id. at 372-73.

the oil company over its dealers.[36] The Atlantic Refining Co. had such power and coercion resulted. To bolster this conclusion the Court also noted that Goodyear had sales commission plans with 20 other oil companies, at least four of which had substantial power over their dealers, and where pressures similar to those in *Atlantic* were exerted.[37] Although the FTC could and apparently did prohibit Goodyear from using *any* sales commission plans, the Court seemed to recognize a distinction between plans and limited the order accordingly when it stated:

> This order does not necessarily prohibit Goodyear from making contracts with companies not possessed of economic power over their dealers. The evidence in this particular record, however, does involve relationships such as it has enjoyed with Atlantic and its propensity to use those relationships for an unfair competitive advantage. Goodyear offered no evidence that it has arrangements differing from those mentioned in the instant case. In these circumstances it is sufficient to point out that in the event it has such a contract with such a company it may seek a reopening of the order approved today.[38]

This statement distinguishes between those cases in which there is a retail distribution system dominated by a major oil refiner and those where there is no such dominance. Combining this statement with the facts of *Atlantic* and the four other coercive relationships referred to above, it would appear that a noncoercive sales commission plan will almost necessarily be an unfair method of competition when the oil company dominates its dealers, although it may not be when there is no such dominance. Since dominance was conceded by the court of appeals in *Texaco*,[39] the plan should have been held to be an unfair method of competition because of its tendency to foster coercive practices and because of its inherent effect in foreclosing competitors of the TBA supplier.

Assuming, however, that the *Texaco* court was correct in reading *Atlantic* as turning on a finding of coercive practices, it is submitted that a finding of coercion is not necessary for a sales commission plan to be held an unfair method of competition, in that, even absent coercion, the plan causes the same undesirable results as a tying agreement. Recalling the control Texaco had over its dealers because it was the source of their gas and oil supply and was frequently the lessor of their stations and equipment, it would seem highly unlikely that a dealer would lightly consider the *suggestions* and *recommendations* of the Texaco representative who solicited his TBA order. Even if the dealer knows that the oil company's sales policy will not allow his franchise to be cancelled if he refuses to buy the sponsored TBA he may not want to risk testing the application of that policy and the loss of the time and money that he has spent in developing his business at a certain location. This risk is heightened by the reluctance of competing oil

36 Id. at 373.
37 Id. at 375.
38 Id. at 376-77.
39 383 F.2d at 946.

companies to franchise a dealer who has been cancelled by another oil company, especially if the cancellation was for lack of cooperation.[40] Furthermore, with regard to the "suggestion and recommendations" of the oil company's representative, the question always arises as to whether it was merely suggestive or whether it was understood by the dealer as a threat.

If the dealer did not regard the purchase of sponsored TBA as a condition for maintaining his dealership, at a minimum, it would be safe to assume that if the merits of competing brands of TBA are nearly equal, the average dealer would tend to choose the sponsored brand to please his company, especially when he knows that the company stands to gain financially from his purchase.[41] Such a result would give the sponsored TBA an unmerited advantage in the market of the sponsoring oil company.[42] Thus in the absence of coercive practices or economic pressures, the sales commission plan, in and of itself, will cause the same anticompetitive results that are caused by the coercive sales commission plan or the tying agreement.

The restrictiveness of the sales commission plan is heightened when it is understood that this method of distribution is not available to all TBA suppliers.[43] In order to offer a sales commission plan, a supplier must enjoy general public acceptance and be able to offer a complete line of TBA to its service station customers.[44] Furthermore, the supplier must have distribution facilities at least as widespread as are the dealers of its customers in order to service them.[45] It is virtually impossible for any but the largest supplier to meet these requirements.[46] Consequently, in addition to being foreclosed from the service station market tied up by large TBA suppliers, the small manufacturers and distributors are automatically excluded from soliciting for sales commission plans of their own.

Assuming, therefore, that a noncoercive sales commission plan is an unfair method of competition, the next question to be encountered is whether there must be a showing of anticompetitive effects before the plan can be considered a violation of Section 5 of the FTC Act. As previously indicated, there is language in the *Atlantic* opinion relied upon to support both a negative and affirmative response. Which response the Court intended, however, may have been clarified by its decision in *FTC v. Brown Shoe Co.*,[47] its most recent decision concerning Section 5 of the FTC Act. In *Brown Shoe*,

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[40] See Standard Oil Co. v. Moore, 251 F.2d 188, 204-12 (9th Cir. 1957), cert. denied, 356 U.S. 975 (1958).

[41] For the importance of such a financial connection to a finding of illegality, see Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934, 939 (6th Cir. 1964), cert. denied, 380 U.S. 954 (1965).

[42] The argument that tying arrangements are bad because the tied product does not "compete on its own merits" has been accepted by the Supreme Court. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953). But see Pearson, supra note 18, at 636.

[43] Shell Oil Co. v. FTC, 360 F.2d at 472-73 n.4; Klaus, Analysis of the Sales-Commission System of Tires, Batteries, and Accessories, Distribution in Retrospect: Answers for an Incisive Dissent, 44 Tex. L. Rev. 890, 912 (1966).

[44] Shell Oil Co. v. FTC, 360 F.2d at 472-73 n.4.

[45] Id.

[46] Id.

[47] 384 U.S. 316 (1966).

the second largest manufacturer of shoes in the nation offered free of charge to hundreds of its dealers certain valuable services among which were architectural plans, costly merchandising records, services of a Brown field representative, and a right to participate in group insurance at lower rates than the dealers could obtain individually. In return for these services the dealers promised that they would deal primarily with Brown and would not purchase conflicting lines of shoes from Brown's competitors. The Court sustained the FTC's finding that the practice was an unfair method of competition. According to the Court, the practice violated the "central policies" of Section 1 of the Sherman Act and Section 3 of the Clayton Act because it restricted purchaser freedom on the open market.[48] When the respondent objected that there was insufficient market analysis presented to sustain a finding that the practice "may substantially lessen competition" the Court replied:

> We reject the argument that proof of this § 3 element must be made for as we pointed out above our cases hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.[49]

The *Brown Shoe* opinion emphasizes the FTC's findings of effective foreclosure of Brown's competitors from a substantial number of shoe retailers[50] and the removal of the retailer's freedom to buy in the open market.[51] The Court thus appears to be saying that when a practice which deprives buyers of their freedom of choice and forecloses competitors of the firm imposing the restriction is challenged under Section 5 of the FTC Act, no proof of anticompetitive effects is necessary.[52] While the facts of *Atlantic* and *Brown Shoe* are different in some respects (*Atlantic* is similar to a tie while *Brown Shoe* is more closely related to an exclusive dealing contract), in both cases the practice is subject to attack on the grounds that it forecloses competitors and deprives purchasers of their freedom of choice. After *Brown Shoe,* section 5 cases, at least those with the characteristics of the *Brown Shoe* case no longer require proof of anticompetitive effects. Thus if *Atlantic* had reached the Supreme Court after *Brown Shoe* and the Court had followed its decision in that case, no proof of effects would be required. The Court would not have borrowed the burden of proof from the tying cases as the FTC claims it did in *Atlantic*; nor would it have required proof of effects as the courts of appeals said it did in *Atlantic*. On the contrary, the Court would merely have examined the practice, found foreclosure and restraint on the purchaser, and affirmed the FTC's finding of illegality. By failing to con-

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48 Id. at 321.

49 Id. at 322.

50 Brown admitted that approximately 250 of its retailers had executed written franchise agreements and that over 400 others had entered into its franchise program without execution of the franchise agreement. Id. at 318-19.

51 Id. at 321.

52 It has been stated that the *Brown Shoe* decision is inconsistent with antitrust policy which would require at least a demonstration of anticompetitive effects as a standard of illegality. Pearson, Section 5 of the Federal Trade Commission Act as Antitrust: A Comment, 47 B.U.L. Rev. 1, 17 (1967).

sider the *Brown Shoe* case, the court of appeals in *Texaco* ignored the most recent relevant decision from the Supreme Court on the standard of illegality in a section 5 case.

The foregoing discussion would seem to indicate that the standards of illegality allegedly derived from *Atlantic* were either not present in that case or, if arguably present, have been removed by the subsequent *Brown Shoe* opinion. The court in *Texaco* should, therefore, have affirmed the FTC's finding of illegality. The sales commission plan, in the situation where the sponsor dominates a "captive market" should have been held to be inherently anticompetitive thus eliminating the necessity of coercion; and the requirement of proof of the substantial lessening of competition should also have been unnecessary.

In addition to being analyzed as a case involving a "practice," the sales commission plan can be regarded as one involving industry "structure."[53] While the plan does not involve a merger or consolidation in the usual sense of those terms, it may be considered an integration by contract. Indeed, the Supreme Court cited with approval statements of the lower court in *Atlantic*:

> [T]he sales commission plan enabled Goodyear "to integrate [into] its own nationwide distribution system the economic power possessed by Atlantic over its wholesale and retail petroleum outlets." . . . Indeed, the most striking aspect of the program, in the Commission's view, was the degree to which the petitioners worked together to achieve the program's success. A Goodyear representative put it very neatly when he said: "After years of courtship Atlantic and Goodyear have wed. . . . We welcome wholeheartedly this merger."[54]

The question is whether the structural characteristics of this plan produce the same kind of destructive effect on competition as those condemned by Section 7 of the Clayton Act so as to warrant condemnation as an unfair method of competition.

The TBA sales commission plan achieves by contract the same result that may be achieved by a merger of a customer and a supplier. The TBA suppliers, by means of the sales commission plan, can be said to have acquired the means of distribution over which the oil companies have dominant power. While it is true that the service station operators are theoretically "independent businessmen,"[55] in fact, they are really "economic serfs"[56] subject to the dominant power of their supplier and landlord. Looked at in this light, the oil company is the customer and once the TBA supplier has contracted with the oil company, the integration of customer with supplier is complete. As the *Atlantic* Court stated, "It is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers . . . ."[57]

[53] 1 L. Schwartz, Free Enterprise and Economic Organization 225 (3d ed. 1966).

[54] 381 U.S. at 373.

[55] Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 400 (7th Cir. 1964).

[56] Id.

[57] 381 U.S. at 376.

The similarities between the result in the market for TBA caused by contract mergers and the result in cases involving vertical ownership mergers is manifest. In both situations, competitors are foreclosed. "Every extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement."[58]

In *Brown Shoe Co. v. United States*,[59] a landmark case dealing with a merger having both horizontal and vertical aspects, the Supreme Court laid down the criteria of illegality for a vertical merger. Although not to be considered determinative, the Court first required analysis of the size of the market foreclosed.[60] Second, the Court stated that a "most important" factor to be considered is the nature and purpose of the arrangement.[61] The Court discussed at this point the "failing company" doctrine of *International Shoe Co. v. FTC*,[62] and the merger of two small companies in order to enable them to compete with larger corporations dominating the market.[63] Third, the Court felt that the "trend toward concentration in the industry" was a factor to be considered.[64] Finally, the effect of the merger on "the economic way of life sought to be preserved by Congress" must be considered.[65]

Each of the undesirable effects mentioned in *Brown Shoe* as relevant for proof of a violation of section 7 by vertical merger may also be caused by the TBA sales commission contracts. Applying the *Brown Shoe* factors to the *Texaco* case, the following results appear: (1) the Texaco distribution system covers over 30,000 dealers representing 16.5 percent of all the service stations in the country;[66] (2) neither Texaco nor B.F. Goodrich were failing companies and both were giants in their respective industries; (3) when the Shell and Atlantic TBA systems are added to the Texaco system, and the 20 other TBA plans in which Goodyear was involved, not to mention any others that might be run by the other major oil companies, are considered, "the trend toward concentration in the industry" is apparent; (4) the effect of the TBA plan upon "local control of industry and upon small business"[67] in the form of the service station operator appears to be exactly what Congress intended to prevent by enacting section 7. Thus if the *Texaco* case involved an ownership merger, it is likely that the Supreme Court, following

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58 Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

59 370 U.S. 294 (1962).

60 Id. at 328.

61 Id. at 329.

62 280 U.S. 291 (1930).

63 370 U.S. at 331.

64 Id. at 332.

65 Id. at 333.

66 In *Brown Shoe*, the customer, Kinney, had 400 stores out of a total of 70,000 retail shoe outlets and made less than 2% of all shoe sales. 370 U.S. at 300, 303. The significance of Texaco's position in the distribution of gasoline becomes apparent when its size is compared with that of Atlantic. Prior to the institution of the TBA cases, Atlantic had approximately 5000 contract and lessee stations. Thus Texaco was six times larger than Atlantic. Atlantic Ref. Co. v. FTC, 381 U.S. at 363.

67 370 U.S. at 333.

its *Brown Shoe* precedent would find a violation of Section 7 of the Clayton Act.[68]

The Texaco-Goodrich sales commission plan might also be viewed as having the less apparent yet significant structural aspects of a product extension merger. Generally speaking, the term "product extension merger" applies to a merger when the products of the acquired company are complementary to those of the acquiring company and may be produced with similar facilities, marketed through the same channels and advertised by the same media.[69] In short, the whole technique of marketing the acquired product is almost indistinguishable from that employed by the acquiring company in marketing its own product.

The recent Supreme Court case, *FTC v. Procter & Gamble Co.*,[70] illustrates the product extension concept. Procter, a large diversified manufacturer of high turnover household cleaning products, acquired the Clorox Company, the nation's largest producer of household liquid bleach. Packaged detergents, Procter's major product line, and liquid bleach are used complementarily in the washing of clothes and fabrics and in general household cleaning. Both products are marketed chiefly through grocery stores and receive the benefit of massive advertising and sales promotions by the manufacturer.

The Supreme Court struck down this merger as a violation of Section 7 of the Clayton Act because it was "fraught" with anticompetitive effects.[71] As the most serious of the anticompetitive effects flowing from this merger the Court listed, "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm"[72] which the Court said, "may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing."[73] There were several reasons why these anticompetitive effects flowed from this merger. First, Proctor had a much larger advertising budget than any bleach manufacturer and could divert a substantial amount of that budget to promote Clorox bleach.[74] Second, Procter would be able to use the volume discounts it obtained as the nation's largest advertiser to advantage in advertising Clorox bleach.[75] Third, Procter's marketing practices would be easily adaptable to the liquid bleach business because of the similar nature of the Procter and Clorox products.[76] Finally, the Court apparently agreed with the FTC that the retailers might be induced to give Clorox preferred shelf space since it would be manufactured by Procter which also produced a number of other products marketed by the retailers.[77] By these means the great size and market power of Procter could be exercised in a manner which

68 15 U.S.C. § 18 (1964).
69 FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).
70 386 U.S. 568 (1967).
71 Id. at 578.
72 Id.
73 Id.
74 Id. at 579.
75 Id.
76 Id. at 577-78.
77 Id. at 575.

would make it difficult for small competitors of Clorox to market their product. These marketing difficulties can be serious indeed when the product being sold is chemically identical to all other such products and advertising is the only way to differentiate one product from another.

The TBA sales commission plan, while not exactly parallel to the *Procter & Gamble* situation, involves similar marketing considerations which produce the anticompetitive effects.

The products of Texaco (oil and gasoline) and Goodrich (TBA) are complementary in that they both are employed to service automobiles. The service station is a very practical place to sell TBA and in fact the profit from such sales represents a significant part of the service station dealer's income. Furthermore, Texaco's position in the service station market might be generally equated to Procter's position in the household cleaning market and the competitive results of those positions are similar. In essence, Procter's strength in the advertising market and its ability to command preferential shelf space from retailers gave Clorox products a great advantage over competitors. Likewise, under the TBA sales commission plan, Texaco's market power over its dealers permits the producer of the sponsored TBA easier access to the marketing facilities of the "independent" businessmen who market the sponsor's petroleum products. Through contract merger, Goodrich, which is able to participate in the sales commission plan because of its size, is borrowing Texaco's influence over its dealers to promote its TBA. This gives Goodrich a substantial competitive advantage over other TBA suppliers in the market of its TBA partner.

This discussion does not mean to imply that section 7 may be used to condemn the TBA arrangement. Section 7 may only be used to reach ownership mergers. The import of this discussion is to demonstrate that the undesirable effects of an ownership merger on industry structure can be achieved by methods immune from attack under section 7 and thus to underscore the importance of prohibiting the "practice" before market structure can be adversely affected.

In conclusion, then, it would seem that the *Texaco* court's decision that a noncoercive sales commission plan is free from the proscription of Section 5 of the FTC Act is erroneous. The existence of a participating oil company's dominant economic power over its dealers should be the sole factor necessary to make such a plan illegal. The concept of a sales commission plan contemplates that the leverage obtained from such power will direct the buying preferences of the oil company's dealers to oil company-sponsored TBA. Coupling this consideration with the fact that only major TBA suppliers can employ such plans, it would seem that the natural result of their use would be to restrict competition by foreclosing the smaller TBA suppliers from the substantial service station markets. Since this result springs from the sales commission plan even in the absence of a conscious exercise of the sponsor's dominant economic power and since the economics of the petroleum industry make it impossible to dissipate the power of the refiners over their service stations, the sales commission method of distribution must be eliminated as an "unfair method of competition" in order to eliminate the evil.

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