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## Trade Regulation—Federal Trade Commission Act—Gasoline—TBA Tying Agreements as Unfair Competition.—Goodyear Tire & Rubber Co. v. FTC; Texaco, Inc v FTC

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than for bond filing would have avoided the pitfall of the *Leich* case is not clear. Specification of purpose was a factor not unemphasized in a case cited in the original hearing on the issue of "payment."<sup>15</sup> Nevertheless, the court also considered other factors. In some few cases where the prerequisites are fulfilled for its application, Section 6501(d) of the Internal Revenue Code of 1954 will allow a "Request for Prompt Assessment." A preliminary judicial or administrative ruling might be sought, to provide certainty that a remittance was in response to an "asserted liability."<sup>16</sup>

PETER E. PICHE

**Trade Regulation—Federal Trade Commission Act—Gasoline-TBA Tying Agreements as Unfair Competition.—*Goodyear Tire & Rubber Co. v. FTC*;<sup>1</sup> *Texaco, Inc. v. FTC*.<sup>2</sup>**—In the first of these two cases, the Atlantic Refining Co. and the Goodyear Tire & Rubber Co. entered into a written sales commission agreement by the terms of which Goodyear was to pay Atlantic a ten per cent commission on all sales of Goodyear tires, batteries, and accessories (TBA) to Atlantic dealers in return for Atlantic's promoting Goodyear products to these dealers. The majority of Atlantic dealers leased stations from Atlantic; the leases, in addition to being cancellable at the will of either party, contained provisions giving Atlantic control over station advertising, hours, maintenance, and other particulars. The FTC, after an original finding by a Hearing Examiner that Atlantic had coerced its dealers to stock Goodyear TBA, entered a sweeping order, not only upholding this ruling, but also condemning the whole sales commission system as a violation of Section 5 of the Federal Trade Commission Act.<sup>3</sup> In addition, the Commission prohibited both Goodyear and Atlantic from entering into any future similar agreements with any other companies. The court, affirming the FTC, HELD: Apart from overt coercive methods, Atlantic had sufficient economic power over its dealers to force their purchase of sponsored TBA; and, considered in the context of this economic power, the sales commission contracts were, in effect, tying arrangements and illegal since a substantial amount of commerce had been affected.

In *Texaco*, sales commission agreements were again involved, here be-

<sup>15</sup> *Atlantic Oil Producing Co. v. United States*, 35 F. Supp. 766 (Ct. Cl. 1940). Discussion of the meaning of the term, "payment" has been purposely avoided in this note, as the matter was not directly in question. It should be pointed out, however, that "payment" and "asserted liability" may, in some cases, be constituted by similar circumstances when Internal Revenue Service activity is in issue. For an excellent discussion of the term, "payment" see, Alexander, *Overpayments of Taxes or Government Investment at Six Per Cent: The Problem of Allowance of Interest*, 7 Tax L. Rev. 231 (1952).

<sup>16</sup> Emmanuel, *Federal Tax Refund Procedures*, 5 U. Fla. L. Rev. 133 (1952); Stark, *Claims for Refund of Federal Taxes*, 41 Iowa L. Rev. 496 (1956).

<sup>1</sup> 331 F.2d 394 (7th Cir. 1964).

<sup>2</sup> Trade Reg. Rep. (1964 Trade Cas.) ¶ 71189 (D.C. Cir. July 30, 1964).

<sup>3</sup> 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1958): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

tween Texaco and the B. F. Goodrich Co., a TBA manufacturer and distributor. As in *Goodyear*, cancellable leases existed between Texaco and its dealers, coercion was found at the original hearing, and the Commission entered a broad decree against Texaco and B. F. Goodrich identical with the *Goodyear* decree. The Circuit Court for the District of Columbia, however, reversing the Commission, HELD: There was not substantial evidence on the record as a whole to support the conclusion that Texaco had sufficient economic power over its dealers to cause the purchase of sponsored TBA without the use of overt coercion.

Although, superficially, the *Texaco* decision seems to rest on the procedural basis of insufficient evidence, in fact *Texaco's* rationale, insofar as it denies the necessary inference of coercive economic power from the dealer-gasoline company relationship without showing particular instances of coercion, directly conflicts with *Goodyear*. Without this inference, the broad order of *Goodyear*, prohibiting the Goodyear Co. from forming future sales commission agreements with any gasoline company, cannot stand.

The *Goodyear* court found that the sales commission system, interwoven as it was with Atlantic's coercive economic control over its dealers, was, in effect, a tying arrangement.<sup>4</sup> The court further determined that this arrangement met the "substantiality of economic effect on commerce" test of *Northern Pac. Ry. v. United States*<sup>5</sup> in that a substantial amount of commerce had been affected and Atlantic was powerful enough in the service station market to restrain a substantial amount of commerce in TBA. The "tying" here, of gasoline to TBA, really occurs at the level of the Atlantic-dealer relationship. Atlantic pressures its dealers, through economic threats, to agree to buy only Goodyear TBA and thus effectively refuses the dealers access to the tying product (gasoline) unless they also agree to purchase the tied product, TBA.

Dealers' agreements, either written or oral, to purchase sponsored TBA exclusively or at least substantially, when obtained through overt threats and coercion by their gasoline suppliers and lessors, have been consistently condemned as violating antitrust laws.<sup>6</sup>

Such agreements need not even be express, but may be implied from a course of dealing between the parties.<sup>7</sup> In *United States v. Sun Oil Co.*,<sup>8</sup> although dealers were never required to enter into any oral or written con-

<sup>4</sup> A tying arrangement is defined as an "agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958). On tying agreements generally, see *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

<sup>5</sup> *Northern Pac. Ry. v. United States*, supra note 4, at 6.

<sup>6</sup> *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) (written requirements contract); *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), aff'd, 343 U.S. 922 (1953). See also *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (consignment agreement giving Union right to fix prices).

<sup>7</sup> *McElhenney Co. v. Western Auto Sup. Co.*, 269 F.2d 332 (4th Cir. 1959). See *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

<sup>8</sup> 176 F. Supp. 715 (E.D. Pa. 1959).

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tracts concerning TBA, it was held that Sun Oil, through the use of coercive tactics such as threats of cancelling leases or ceasing gasoline deliveries, had effectively forced the dealers into a tacit agreement not to sell competing TBA. In *Osborn v. Sinclair Ref. Co.*,<sup>9</sup> cited by the *Goodyear* court, Osborn sought damages for cancellation of his lease, caused by his failure to stock sponsored TBA despite Sinclair's efforts under a sales commission agreement with Goodyear. Even without a written agreement between Osborn and Sinclair, the court found an illegal tie-in, and hence an antitrust violation, resulting from Sinclair's coercion of dealers to carry substantial amounts of Goodyear TBA.

Had the *Goodyear* court based its decision on overt coercion, it would have been in agreement with these previous decisions.<sup>10</sup> There were many instances of overt coercion found by the court in *Goodyear*: dealers testified to threats of lease cancellation; dealers were badgered by Atlantic salesmen whose commission was partially derived from TBA sales and whose failure to recommend that leases be renewed was tantamount to cancellation; wholesalers competing with the Goodyear supply points stated that dealers felt themselves bound to buy only Goodyear TBA; at the original hearing, a finding was made that Atlantic had openly coerced its dealers.

Hence, the *Goodyear* court might have found that the sales commission agreement, operating as it did in this context of coercion, was, in effect, an illegal tying arrangement. Further, this finding of coercion might have been sufficient even to support the broad order against Atlantic, on the theory that Atlantic had not given the Commission any indication that coercion would not continue under future similar agreements. It is generally held that the FTC is not limited to prohibiting practices "in the precise form" existing in the past,<sup>11</sup> nor necessarily limited in the scope of its decrees to the immediate parties to the action.<sup>12</sup>

An order based merely on coercion, however, could not have supported the broad prohibition placed on Goodyear, the other party to the agreement.

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<sup>9</sup> 286 F.2d 832 (4th Cir. 1960). The *Osborn* court, however, did not rely solely on a tacit agreement by the dealer to carry sponsored TBA brought on by coercion. Osborn, having lost one lease for failure to purchase sufficient amounts of Goodyear TBA, entered into an oral agreement to take a definite amount of TBA before his second, subsequently cancelled, lease was given. Moreover, the *Osborn* court did not decide the legality of the Sinclair—Goodyear sales commission contract.

<sup>10</sup> Even though the action in *Goodyear* was brought under Section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1958), while most tying agreement cases are treated as violating Section 3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958), or Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958), this is of minor importance since Section 5 of FTCA includes both Clayton and Sherman Act violations. *FTC v. Cement Institute*, 333 U.S. 683 (1947); *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941).

Generally, in fact, courts consider this section as also including prohibition of those trade methods which, if unchecked, could develop into violations of the Clayton or Sherman Acts or which could achieve the same anticompetitive effects by a means not specifically condemned by either of these acts. See, e.g., *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

<sup>11</sup> *FTC v. Mandel Bros.*, 359 U.S. 385, 392 (1959); *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

<sup>12</sup> *FTC v. Cement Institute*, supra note 10, at 728-29.

Such an order would have to presume either that every oil company with which Goodyear might make an agreement would engage in illegal coercion of its dealers, or that every such sales commission contract is, in itself, and apart from the Atlantic-dealer relations, illegal.

Perhaps the *Goodyear* court could have found sufficient anti-competitive effects, aside from dealer coercion, to render this particular sales commission agreement illegal. Atlantic had, for example, in addition to the Goodyear contract, a similar contract with Firestone. Firestone and Goodyear were each assigned different and exclusive areas of the Atlantic service station market, thus eliminating competition between the two in these districts. Agreements between competitors resulting in horizontal division of competitive markets have been condemned as violations of the Sherman Act,<sup>13</sup> and such a conspiracy might have been found in these two agreements. The court also mentioned that the contract called for specific and exclusive dealer supply points, at which Atlantic dealers had to purchase all their Goodyear products, eliminating the Atlantic stations from the market of the other Goodyear wholesalers and retailers.

Neither of these effects, however, is a necessary part of the sales commission system. The court in *Goodyear* admitted that the sales commission contract, in itself, has no tying features. "Only when the contract is considered contextually with the oil company-dealer relationship . . . does its tying feature emerge."<sup>14</sup>

Thus, in order to support the order against Goodyear, the court linked the sales commission contract not to specific instances of coercion but to the inherent economic control of the gasoline company over its lessee-dealers. By basing this economic control simply on the lessor-lessee relationship under a short-term, easily cancellable lease, and the dealer's necessary dependence on the oil company for his station and equipment, the dealer's economic dependence on his lessor and consequent economic "serfdom"<sup>15</sup> could be presumed to exist, without any showing of actual instances of coercion, wherever the basic lease arrangement existed. Such an arrangement is certainly the one employed by the greater number of gasoline companies.<sup>16</sup> Since, therefore, any sales commission contract that Goodyear entered into with a gasoline company would have to operate in this general climate of economic dependence, the Commission decreed, and the court affirmed, that Goodyear avoid all such contracts.

It is precisely this inference of economic control that *Texaco* denies. The *Texaco* court found that the Commission's contentions that the sales

<sup>13</sup> *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

<sup>14</sup> *Goodyear Tire & Rubber Co. v. FTC*, supra note 1, at 402.

<sup>15</sup> "Ostensibly, they are independent businessmen; but behind the legalistic facade of independence, there exists a servitude. . . . [I]t is evident that the service station dealer is more of an economic serf than a businessman. . . ." *Goodyear Tire & Rubber Co. v. FTC*, supra note 1, at 400.

<sup>16</sup> Besides the two principal cases, similar systems were found to exist in *Simpson v. Union Oil Co.*, supra note 6; *United States v. Sun Oil Co.*, supra note 8; *United States v. Richfield Oil Corp.*, supra note 6; *Firestone Tire & Rubber Co.*, 58 F.T.C. 371 (1961).

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commission contracts were illegal were based on the conclusion that Texaco had sufficient economic power over its dealers to cause them to purchase substantial TBA "even without the use of overt coercive tactics."<sup>17</sup> The court then determined that there was not "substantial evidence on the record as a whole to sustain that conclusion"<sup>18</sup> and dismissed.<sup>19</sup> Admittedly, the opinion's report of what facts were on the record is sparse. The court, however, did state that merely because Texaco was a large corporation, and the dealers small businessmen, this did not demonstrate controlling economic power.<sup>20</sup>

In his dissenting opinion, Judge Washington provided an insight into the contents of the record. He listed, for example, one year leases, terminable on ten days' notice, contractual control by Texaco over the appearance and maintenance of the stations, and the high personal investments of lessees in their stations.<sup>21</sup> Disagreeing with the majority, Judge Washington felt that the court could have used the legal doctrines of *Goodyear* and *Firestone*<sup>22</sup> coupled with facts from the Hearing Examiner's record and upheld the decrees against B. F. Goodrich and Texaco.<sup>23</sup>

The *Texaco* court concluded that the Commission had shown neither economic power nor coercion (since the Commission had explicitly stated that it was not basing its order on the Examiner's initial finding of coercion), and that "it may not be presumed that either will exist in future similar situations."<sup>24</sup> This last remark indicates the opinion of the *Texaco* court that each sales commission contract must be examined in the specific fact situation in which it exists, as being between a particular gasoline company and a particular TBA distributor. The *Texaco* court further stated that the Commission's sweeping order against Goodrich either attributed to all oil companies sufficient economic control over their dealers to restrain their market freedom, or implied that sales commission agreements are inherently illegal. As to inherent economic control, the court held that this had to be shown by sufficient evidence "on the record."<sup>25</sup> Thus, *Texaco* requires a searching in each case for this economic power and refuses to infer it from the general oil company-dealer economic structure. The court further held that sales com-

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<sup>17</sup> *Texaco, Inc. v. FTC*, supra note 2, at 79731.

<sup>18</sup> *Ibid.*

<sup>19</sup> The court might have simply reversed this case and remanded to the Commission for a de novo consideration on other grounds, stemming from a speech made by the Commission Chairman prior to the *Texaco* opinion in which he condemned sales commission agreements as illegal, mentioning both Texaco and B. F. Goodrich by name. Instead, they considered the evidence as a whole and dismissed.

<sup>20</sup> *Texaco, Inc. v. FTC*, supra note 2, at 79732. Compare with the view of the *Goodyear* court, supra note 15.

<sup>21</sup> *Texaco, Inc. v. FTC*, supra note 2, at 79735-36.

<sup>22</sup> *Firestone Tire & Rubber Co.*, supra note 16.

<sup>23</sup> *Texaco, Inc. v. FTC*, supra note 2, at 79736. The Commission intended, in fact, to proceed on the *Goodyear* theory, for the court quoted the Commission as saying, "The legal principles relevant to this decision . . . are set forth at length in the opinions of the Commission in *Goodyear* . . . and *Firestone*." *Texaco, Inc. v. FTC*, supra note 2, at 79730.

<sup>24</sup> *Texaco, Inc. v. FTC*, supra note 2, at 79733.

<sup>25</sup> *Id.* at 79732.

mission agreements were not necessarily illegal unless they constituted unfair competition.<sup>26</sup> In each case, then, the unfairness must be shown.

The *Texaco* view is more in accord with the traditional curbs placed on the injunctive power of the FTC. The order should not be any broader than is necessary to prohibit similar illegal acts in the future,<sup>27</sup> nor should its enforcement forbid methods of competition that do not unfairly restrain trade.<sup>28</sup> Rather, it should be effective at the level at which the restraint takes place. As Justice Frankfurter, dissenting in *International Salt Co. v. United States*,<sup>29</sup> said concerning the rule of *FTC v. Royal Milling Co.*<sup>30</sup> and *Jacob Siegel Co. v. FTC*,<sup>31</sup>

[T]he law . . . respects the wisdom of not burning even part of a house in order to roast a pig. . . . The Government is not entitled to a provision in the decree which can be justified only on some indication . . . that appellant's past shows a devious temper which needs to be hobbled by withdrawing a conceded legal right.<sup>32</sup>

The Commission, in fact, in two recent cases,<sup>33</sup> agreed to consent orders which ordered a franchisor to cease coercing his dealers to carry a sponsored product but did not outlaw the franchisor's sales commission plan.

In conclusion, the *Texaco* court refuses to use economic power to prospectively prohibit all future sales commission agreements between the TBA supplier and any gasoline company, as the *Goodyear* court did. These restraints placed by *Texaco* on the prohibitive scope of the FTC's decrees are more in agreement with the traditional views of that agency's powers. The *Goodyear* decision, in so far as it restrains Goodyear from any further competition for sales commission agreements, may be a more serious restraint of trade than the sales commission system it was intended to eliminate.

GEORGE M. DOHERTY

**Trade Regulation—Lanham Trade-Mark Act—Right to Registration for Bottle Configuration on Principal Register During Life of Design Patent.—Application of *Mogen David Wine Corp.*<sup>1</sup>—Mogen David Wine Corporation was the holder of a design patent on a bottle configuration and applied for trademark registration of the configuration on the principal**

<sup>26</sup> Ibid.

<sup>27</sup> See *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *Swanee Paper Corp. v. FTC*, 291 F.2d 833 (2d Cir. 1961); *Virginia Excelsior Mills, Inc. v. FTC*, 256 F.2d 538 (4th Cir. 1958).

<sup>28</sup> *FTC v. Cement Institute*, supra note 10, at 727.

<sup>29</sup> Supra note 4.

<sup>30</sup> Supra note 27.

<sup>31</sup> 327 U.S. 608 (1946).

<sup>32</sup> *International Salt Co. v. United States*, supra note 4, at 403, 405.

<sup>33</sup> *O.K. Rubber Welders, Inc. and the B. F. Goodrich Co.*, 1964 FTC Complaints, Orders, Stipulations ¶ 16953 (July 3, 1964) at 22014; *Kaiser Jeep Corp.*, 1964 FTC Complaints, Orders, Stipulations ¶ 16891 (April 27, 1964) at 21927.

<sup>1</sup> 51 C.C.P.A. (Patents) 4, 328 F.2d 925 (1964).