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be used legitimately; but it may not be used to accomplish an unlawful purpose."³⁴ It is imperative that the action taken by Simplicity and Parke-Davis be immediately condemned before large manufacturers make a farce of the antitrust laws.

Gerald P. Lally

TRADE REGULATION—RESTRAINT OF TRADE—EXCLUSIVE DEALING
CONTRACTS OF VITAMIN DISTRIBUTOR HAVING 8.6 PER CENT OF
MARKET ARE VIOLATIVE OF SECTION 3 OF CLAYTON ACT.

Mytinger & Casselberry, Inc. v. FTC (D.C. Cir. 1962).

The Federal Trade Commission found that petitioner violated section 3 of the Clayton Act¹ by virtue of exclusive-dealing contracts which it had with 80,700 house-to-house distributors of a multi-vitamin and mineral food supplement known as Nutrilite. Petitioner purchased the manufacturer's entire output of Nutrilite and marketed it through distributors whose contracts prohibited them from selling or distributing any of the numerous products which were in competition with petitioner's. There were between 400 and 500 competitive items being peddled from door-to-door, and another 50 to 100 being sold in retail outlets. In 1958, proceeds from the sale of Nutrilite were \$19,145,000, which represented 8.6% of retail sales of vitamin concentrates sold through all types of outlets.² The Commission denied an appeal by petitioner and adopted the Hearing Examiner's findings and his proposed cease and desist order. The court of appeals denied the subsequent petition to set aside the order, *holding* that petitioner's volume of business was substantial and that the exclusive dealing contracts affected a substantial share of the relevant market within the scope of section 3 of the Clayton Act. *Mytinger & Casselberry, Inc. v. FTC*, 301 F. 2d 534 (D.C. Cir. 1962).³

34. *Id.* at 4.

1. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Section 3 states: "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 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 the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

2. Nutrilite sales in 1958 accounted for 61.25% of all house-to-house sales of vitamins and 34.6% of all sales of vitamins similar in composition to Nutrilite.

3. The court held further that petitioner violated section 5 of the Federal Trade Commission Act by requiring its salesmen to agree not to compete with petitioner for two years after they stopped selling its product.

The Clayton Act,⁴ as can be seen from its legislative history,⁵ was intended to bolster the then existing antitrust legislation, principally the Sherman Act of 1890.⁶ Section 3 of the Clayton Act prohibits exclusive-dealing contracts⁷ which are susceptible of division into two categories: "tying" arrangements,⁸ whereby X product is sold or leased only on condition that Y product be purchased or used in connection therewith, and, "requirements" contracts,⁹ under which one binds himself not to buy, use or sell any product competitive with his supplier's product. Despite the numerous economic reasons for the justification of requirements contracts,¹⁰ they have encountered opposition under the antitrust laws, particularly section 3 of the Clayton Act,¹¹ when the effects of such contracts ". . . may be to . . . substantially lessen competition or tend to create a monopoly in any line of commerce."¹² Tying arrangements and requirements contracts are not difficult of determination under section 3; the real problem stems from the application of the final or "qualifying" clause of section 3.¹³ A case by case interpretation of "substantially lessen competition" and "any line of commerce" must be made; and, since substantiality can only be appraised in terms of the line of commerce affected,¹⁴ the latter phrase must be given first attention. Simply stated, the line of commerce is the relevant product market (e.g., packaging materials,¹⁵ first run motion picture exhibitions¹⁶) as limited by the area of effective competition,¹⁷ which may be nationwide¹⁸ or confined to a

4. *Supra* note 1.

5. H.R. Rep. No. 1168, 63d Cong., 2d Sess. 11-12 (1914).

6. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 42 S. Ct. 360 (1922). See Levy, *The Clayton Law — An Imperfect Supplement To The Sherman Law*, 3 VA. L. REV. 411 (1916).

7. *Supra* note 1.

8. *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 42 S. Ct. 363 (1922); *International Business Machines Corp. v. United States*, 298 U.S. 131, 56 S. Ct. 701 (1936); *International Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12 (1947).

9. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 42 S. Ct. 360 (1922); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 69 S. Ct. 1051 (1949).

10. Requirements contracts afford the buyer supply, protection against price increases, and make possible long-term planning on the basis of known costs. As for the seller, such arrangements protect him from price fluctuations, reduce selling expenses, and enable him to rely on a predictable market. 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 (1952).

11. *Supra* note 1.

12. *Ibid.*

13. *Ibid.*

14. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 299, 69 S. Ct. 1051, 1055 (1949).

15. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994 (1956).

16. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S. Ct. 915 (1948).

17. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S. Ct. 623 (1961). It was decided that the area of effective competition was the several-state Appalachian area where 700 coal producers were actively competing, rather than the state of Florida where the station in question was using the coal.

18. *Standard Fashion Co. v. Magrane-Houston Co.*, *supra* note 9.

smaller area.¹⁹ Although the market may be different from case to case, it was announced in *United States v. E. I. du Pont de Nemours & Co.*²⁰ that the relevant market “. . . is composed of products that have reasonable interchangeability for the purpose for which they are produced — price, use and qualities considered.” Consequently, there is some semblance of a workable formula for solving half of the section 3 problems. Remaining is the Herculean task of determining whether the practice which occasioned the antitrust litigation substantially lessens competition within the meaning of section 3. In the first case before the United States Supreme Court involving this section of the Clayton Act, *Standard Fashion Co. v. Margrave-Houston Co.*,²¹ it was announced that although the Act was intended to supplement the Sherman Act by reaching, in their incipiency, agreements which fall within the Sherman Act upon their fruition, the Clayton Act was not intended to reach every remote lessening of competition. The Court held that section 3 was intended to deal a lethal blow to arrangements which would *probably* lessen competition; hence, requirements contracts which a dress pattern company had with two-fifths of the nation's pattern agencies fell before the Act's prohibition. However, it should not be concluded that Congress intended to outlaw requirements contracts;²² suspect as they may be, they are not per se illegal.²³ In spite of the fact that the relative market position of the supplier is perhaps the most significant factor influencing the decisions in this area, there is no rigid rule for ascertaining the exact amount of control which the Act permits, nor the approximate degree of market dominance which will render such exclusive-dealing arrangements violative of section 3. If only one per cent of the particular line of commerce is controlled by the supplier, he would have little ability to substantially influence the competitive factors;²⁴ but, if the vendor dominates the market with forty per cent control, a section 3 violation could readily be found.²⁵ The difficulty, of course, lurks in the gray area between these extremes. In *Standard Oil Co. of California v. United States*,²⁶ (commonly referred to as the *Standard Stations* case), it was held that “the qualifying clause of section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected.”²⁷ There, Standard Oil had exclusive supply contracts with many independent service stations in a seven state market area. Gasoline sales totaling \$57,646,233 (6.7% of the area total) were held to be a substantial share.²⁸ While setting forth the “quantitative-

19. See *supra* note 16.

20. *Supra* note 15.

21. *Supra* note 9.

22. *Anchor Serum Co. v. FTC*, 217 F.2d 867 (7th Cir. 1954).

23. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S. Ct. 623 (1961).

24. *Pearsall Butter Co. v. FTC*, 292 Fed. 720 (7th Cir. 1923).

25. *Standard Fashion Co. v. Magrane-Houston Co.*, *supra* note 9.

26. *Supra* note 14.

27. *Supra* note 14, at 314, 69 S. Ct. at 1062.

28. *Ibid.*

substantiality" test, the Court declared that market dominance per se supports the inference that competition had been or probably would be lessened when one enjoying such a position enters into exclusive-dealing contracts.²⁹

Although the *Standard Stations* case has had a far-reaching influence, it has not survived years of antitrust litigation unscathed. There, the Court had deemed itself ill-suited to consider relevant economic factors or the competitive effect of the practice under attack because of the difficulty of applying various economic tests. However, the Court did note that the Federal Trade Commission was adequately equipped to consider all relevant economic factors.³⁰ For this reason, the Commission in *In the Matter of Maico*³¹ frowned upon *Standard Stations'* "simplified" test.³² Thus, since the Clayton Act was to be enforced by both the judicial³³ and administrative³⁴ branches of the government, and since each branch had adopted its own test to determine violations, a sharp divergence developed between the courts and the Commission regarding the manner of applying the Act. To add to the confusion, the United States Supreme Court, in *Tampa Electric v. Nashville Coal*,³⁵ cast a shadow over its former decision in *Standard Stations*. Although the Court was concerned primarily with the problem of determining the relevant market area, it suggested that in any determination of the terms of a requirements contract insofar as it relates to the substantiality of the foreclosure of competition, ". . . particularized considerations of the parties' operations are not irrelevant."³⁶

29. See *supra* note 14 at 309, 69 S. Ct. at 1060.

30. See note 14, *supra*, at 308, 69 S. Ct. at 1059. See also Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N.Y.U.L. REV. 412 (1948).

31. 50 F.T.C. 485 (1953). The respondent had exclusive dealing contracts with retail dealers of hearing aids. The Commission found that certain factors such as an increase in the number of respondent's competitors, or an increase in the volume of their business, or a decrease in respondent's share of the market and the fact that its dealers constituted a small percentage of the total number of hearing aid dealers in the country, together with other matters relating to the effect on competition, were significant in determining whether there had been or may have been a substantial lessening of competition due to respondent's exclusive dealing contracts. The Commission concluded, at 487: "To refuse to exercise our talents as an administrative tribunal in these cases because the courts feel 'ill suited' to weight all of the relevant factors, would deprive the country of the very services which we were created to furnish." See also *Harley-Davidson Motor Co.*, 50 F.T.C. 1047 (1954).

32. *Maico*, *supra* note 31, at 487.

33. 38 Stat. 736-37 (1914), 15 U.S.C. §§ 25, 26 (1958) confer jurisdiction on various administrative agencies.

34. 64 Stat. 1125 (1950), 15 U.S.C. § 21 (1958) confers jurisdiction on federal district courts to restrain violations in government prosecutions and to give injunctive relief to private parties.

35. *Supra* note 17. Appellant electric utility company had a twenty year requirements contract with appellee coal company for an average of over one million tons a year. This was greater than the annual coal consumption in the entire state of Florida. Appellee coal company refused to deliver the coal, contending that the contract was a violation of section 3 of the Clayton Act. The United States Supreme Court, on certiorari from the court of appeals, reversed the lower courts' finding of a violation of section 3, and remanded the case to the district court with directions to weigh the probable effects of the contract on competition in the relevant market. The court found that the area of effective competition was the seven-state Appalachian area wherein the contract preempted only .77% of the bituminous coal market.

36. *Supra* note 17.

Thus, it appears that the Supreme Court may have begun to temper the rigidity of the "quantitative-substantiality" test of *Standard Stations* — a kind of retreat by one of the combatants in the *Standard Stations-Maico* controversy.

The court in the present case did not find it necessary to determine which line of commerce³⁷ was the relevant one. Under the "quantitative-substantiality" test of *Standard Stations*, even if total retail sales of vitamin concentrates sold through all types of outlets throughout the nation is considered the line of commerce, it would seem that petitioner's \$19,145,000 or 8.6% of the sales in that line would result in a foreclosure of competition in "a substantial share of the line of commerce affected."³⁸ Undoubtedly, this would have been the result had the present case been factually similar to *Standard Stations*. The difference lies in the present petitioner's house-to-house selling method as contrasted with Standard Oil's service station marketing device. Although the court in the instant case dismissed this distinction summarily,³⁹ the differences appear to be real ones. Service stations are not as easily established as are outlets for vitamin pills. The erection of such stations requires a large capital expenditure; operating expenses are also considerable. On the other hand, only a minimum investment is necessary to establish one as a distributor of Nutrilite. The cost of an inventory of vitamins would be geared to the financial resources of the sales personnel whom petitioner hoped to attract. Inasmuch as competitors of Nutrilite could easily enter this line of commerce by tapping the vast supply of potential salespeople, "foreclosure"⁴⁰ of a substantial share of the line of commerce affected would be almost impossible.⁴¹ Practically, petitioner's requirements contracts could not effectively foreclose competition in a substantial share of the line of commerce affected, in a market where competition could enter so easily. Perhaps this is that "remote lessening" of competition which the Clayton Act was not intended to reach.⁴²

37. The three possible lines were: total house-to-house sales of vitamins, total sales of vitamin products similar in composition to Nutrilite, total retail sales of vitamin products sold through all types of outlets.

38. *Supra* note 14, at 314, 69 S. Ct. at 1062.

39. *Mitinger & Casselberry, Inc. v. FTC*, 301 F.2d at 534 (D.C. Cir. 1962).

40. *Ibid.*

41. In this respect, two other cases which the court cited are worthy of note. A Seventh Circuit case in 1954, *Anchor Serum Co. v. FTC*, 217 F.2d 867 (7th Cir. 1954), held that requirements which a manufacturer of animal health products had with sixteen wholesalers violated section 3. Such a holding is compatible with *Standard Stations* in light of the fact that outlets for hog serum were limited to drug stores, farm bureaus, veterinarians and wholesalers, and the ultimate consumer market was the hog farmer. *Dictograph Products v. FTC*, 217 F.2d 821 (2d Cir. 1954), was likewise factually akin to *Standard Stations*. The retail marketing of hearing aids demanded the establishment and maintenance of retail outlets together with considerable specialty training for salesmen. Only those with auditory impairments or, more realistically, those willing to admit such defects constituted the consumer market in *Dictograph*, while, in the present case, the market was "limited" to the consumer public likely to buy vitamins.

42. See note 5, *supra*.

It will be interesting to view the effect of this exaggerated application of *Standard Stations* on the *Standard Stations-Maico* conflict, assuming, that is, that the former has survived the blow dealt by *Tampa Electric*.⁴³

William F. Coyle

43. Perhaps the "quantitative-substantiality" test of *Standard Stations* has been read too closely by its critics. Although the court was concerned with the fact that Standard's requirements contracts affected \$58,000,000. in sales, it must be remembered that this was 6.7% of retail sales in the area. This latter fact is often overlooked because of the extent to which the court emphasized the dollar volume of sales. However, in a footnote in *Standard Stations*, the court did caution that:

... a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area's competitors. 337 U.S. 293, 299, 69 S. Ct. 1051, 1055 n.5.

In light of *Tampa Electric* and the protestations which *Standard Stations* has engendered, it might be well to lay the case to rest and have Congress memorialize its brief existence by granting to the Federal Trade Commission primary jurisdiction in this area of antitrust litigation. See Schwartz, *Potential Impairment of Competition — The Impact of Standard Oil of California v. United States on the Standard of Legality under the Clayton Act*, 98 U. PA. L. REV. 10 (1949).