Volume 9 | Issue 3 Article 9

1964

Antitrust - Sherman Act - Network Sponsorship Practices Are Tying Agreements in Violation of Section I

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RECENT DEVELOPMENTS

ANTITRUST—SHERMAN ACT—NETWORK SPONSORSHIP PRACTICES ARE TYING AGREEMENTS IN VIOLATION OF SECTION 1.

American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc. (S.D.N.Y. 1963)

The original action was instituted by American Manufacturers' Mutual Insurance Company (hereinafter Kemperer) for treble damages and injunctive relief for an alleged violation of section one of the Sherman Act[1] by American Broadcasting-Paramount Theatres, Inc. (hereinafter ABC). Plaintiff sought sponsorship of a news program called "Evening Report" that was televised on defendant's network. Kemperer alleged that it desired to purchase sponsorship over 95 of ABC's affiliated network stations, as these were all that were required for its business purposes. ABC, however, required that Kemperer purchase or pay for sponsorship over a total of 130 stations. Kemperer alleged ABC's demands to purchase these additional 35 stations constituted a tying agreement repugnant to the antitrust laws. The court denied defendant's motion to dismiss the complaint pursuant to rule 12(b)6[2] and its alternative motion to strike certain paragraphs of the complaint and certain prayers for relief pursuant to rule 12(f),[3] *holding* in effect that defendant's practice was in violation of the Sherman Act. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 221 F. Supp. 848 (S.D.N.Y. 1963).

Tying arrangements have often been defined by the courts,[4] but in each instance two separate and distinct products have been involved.[5] For,

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ." 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 U.S.C., § 1 (1958).
2. Fed. R. Civ. P. 12(b)6. In order for the complaint to withstand ABC's motion to dismiss, plaintiff must allege facts which if proven would constitute a violation of the Sherman Act.
3. FED. R. CIV. P. 12(f).
4. See, *e.g.*, definition set out *infra* note 8.
5. See Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6, 78 S.Ct. 514, 518 (1957), involving the leasing or deeding of railroad property on condition that the grantees and lessees ship products obtained from the land on the railroad; Standard Oil Co. v. United States, 337 U.S. 293, 305–06, 69 S.Ct. 1051, 1058 (1949), herein the agreement conditioned the sale of gasoline upon the purchase of all other necessary automotive accessories such as, tires, batteries, and the like; United States v. Paramount Pictures, 334 U.S. 131, 156–59, 68 S.Ct. 915, 928–29 (1948), where the licensing of one feature or group of features was conditioned on the exhibitor also licensing another feature or group of features released by the distributor during a given period; Dehydrating Process Co. v. A. D. Smith Corp., 292 F.2d 653, 655 (1st Cir. 1961), there the court held a refusal to sell certain unloaders where they were not to be installed in presently-purchased or already owned silos of the seller's own manufacture was not in violation of the antitrust laws.

although "a seller may attempt to persuade his purchaser to buy his products rather than those of a competitor, he will run afoul of the antitrust laws only when the sale of one product (the tying product) is made under an agreement, arrangement or condition under which the buyer must also purchase another product (the tied) product."[6] The purchaser is thereby forced to buy the undesired product to obtain that which is desired. This tends to restrain competition in the tied product.[7]

Tying agreements have traditionally been in violation of the Clayton Act,[8] but it was not until *International Salt Co. v. United States*,[9] that the Court held that the tie-in of the sale of one product to that of another was a per se violation of section one of the Sherman Act. In *Standard Oil Co. v. United States*,[10] an action involving section three of the Clayton Act, the Court again expressed its displeasure with these conditioned sales stating that such agreements could hardly serve any purpose other than the suppression of competition.

International Salt was the harbinger of a series of decisions which gradually set forth the elements of an illegal tying arrangement. There, an agreement in violation of the Sherman Act and in fact a tie-in arrangement was found where the seller held patents over the tying product giving it a legal monopoly, while it maintained a "dominance" over the tied product.[11] The following year, however, in a case which also involved a legal monopoly resulting from certain copyrights, the Court advanced the proposition that a more appropriate standard would be "distinctiveness" of the tying product.[12] Subsequently the Court decided that agreements to violate section one of the Sherman Act must meet both tests set forth by the narrow standards of section three of the Clayton Act.[13] Four years later, in 1957, the Supreme Court specifically stated that the rule of per se unreasonableness would apply to all tying agreements in which the defendant (1) had sufficient economic power with respect to the tying product

6. Osborne v. Sinclair Refining Co., 286 F.2d 832, 836 (4th Cir. 1960).

7. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514 (1957).

8. When the 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 arrangement violates the narrow standards expressed in § 3 of the Clayton Act. . . . And because for even a lawful monopolist it is 'unreasonable, per se, to foreclose competitors from any substantial market,' a tying agreement is banned by § 1 of the Sherman Act whenever both conditions are met.

Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608–09, 73 S.Ct. 872, 880 (1953); see also 15 U.S.C., §§ 12–27 (1963).

9. 332 U.S. 392, 68 S.Ct. 12 (1947). However, this rule had been previously suggested in Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680, 684, 64 S.Ct. 278, 280 (1944) (dictum).

10. 337 U.S. 293, 305, 69 S.Ct. 1051, 1058 (1949).

11. International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12 (1947). Dominance was shown in that defendant had a limited monopoly by patent over the two machines in question and was the nation's largest producer of salt.

12. United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915 (1948). The criterion of distinctiveness was necessary since defendant held no monopoly by patent nor was it the largest producer of films in the nation, but the distinctiveness of each feature and its protection by copyright was what made it desirable and gave the distributor the necessary leverage to induce the buyer to agree.

13. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872 (1953). See *supra* note 8.

giving him the ability to impose an appreciable restraint on free competition in the tied product, and (2) that a not insubstantial amount of interstate commerce would be affected.[14] The Court further expanded the test applied to the tying product holding that desirability and uniqueness of the product are sufficient to satisfy the test.[15]

However, previously, in 1956, the Court had shown that it never receded from its position on the rule of reason,[16] holding that "it is logical that some agreements and practices are invalid per se while others are illegal only applied to particular situations."[17] Relying on this, it was recently held that the per se rule is not binding "as to any set of facts not basically the same as those in the case in which the rule was applied."[18]

The initial problem that must be faced in the instant case is how to distinguish the tying product from the tied product. Plaintiff contended that there were in fact two separate tying agreements: "(1) the tie-in of 35 undesired stations to 95 desired stations and (2) the tie-in of sponsorship on 35 undesired stations to the basic sponsorship of the unique program "Evening Report."[19] The defendant relied heavily on the reasoning of *Times-Picayune Publishing Co. v. United States*,[20] which would seem to exclude the present agreement from the classification of tying agreements. There it was decided that the conditioning of sale of advertising space in one of two newspapers owned by the same publisher on purchase of space in the second was not a tying agreement. The basic premise advanced was that for all practical purposes the products were identical and the market the same.[21] It is difficult to reconcile this court's holding the present agreement to be a tying agreement with the Supreme Court's earlier reluctance to find any product distinction between a morning and an evening edition of a newspaper.

In *Times-Picayune*, although two newspapers were involved, the Court considered the sole product to be access to the general reading public.[22] Similarly here, though two groups of stations have been designated, the sole product seems to be sponsorship of one television show. Kemperer itself acknowledged that it entered into the contract with ABC to purchase the sponsorship of the unique program "Evening Report." Therefore, as had been suggested in a previous case,[23] Kemperer was purchasing "the

14. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518 (1951).
15. See United States v. Loew's, Inc., 371 U.S. 38, 83 S.Ct. 97 (1962).
16. This involves searching the entire record for unreasonable restraint of trade rather than classifying the agreement as a violation on its face.
17. United States v. E. I. Dupont de Nemours & Co., 351 U.S. 377, 387, 76 S.Ct. 994, 1002 (1956).
18. United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567, 81 S.Ct. 755 (1961).
19. American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848, 849 (S.D.N.Y. 1963).
20. 345 U.S. 594, 73 S.Ct. 872 (1953).
21. *Id.* at 614, 73 S.Ct. at 884.
22. *Ibid.*
23. Columbia Broadcasting v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961), *cert. den.*, 369 U.S. 812, 82 S.Ct. 689 (1962).

privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products."[24] This agreement then could be a question of the quantity of a product that the seller desires to make available to the producer as distinguished from the sale of a desired, dominant product on condition that the purchaser acquire a second, distinct product. Kemperer negotiated with ABC to avail itself of the network facilities and then attempted to dictate to ABC just how much of the network exposure it would purchase. If, indeed, plaintiff was attempting to buy advertising time on certain stations and was being forced to buy time on unwanted stations, it could have negotiated with the individual stations to buy advertising spots between regularly sponsored network programs. Instead, Kemperer, wishing to identify itself with "Evening Report," negotiated with ABC for purchase of the show's sponsorship, but only on Kemperer's terms. Plaintiff could just as easily have demanded that it only pay for sponsorship of ten stations or, to the extreme, only one station. If ABC refused, it could be implied from the language of this decision, that sufficient facts would be present to allege a violation of the Sherman Act. Such a result would be unfortunate as it could well lead to the end of the network television; financing network programs would prove to be difficult, if not impossible.[25]

The practices of some networks have already been subject to a great deal of criticism. The main brunt of this criticism has been directed at a practice called the "must buy" arrangement under which a network designates a minimum lineup of affiliated stations as "basic required" stations, and makes no sale of television station time to an advertiser unless the advertiser ordered all of the stations on the "basic required" lineup.[26] The House Committee considered this practice to fall within the category of tying agreements, with the wanted stations designated as the tying product under the *Northern Pacific* rationale without looking further into dominance or monopoly.[27] Professor Donald Turner, testifying before the

24. *Id.* at 378.

25. However, this is not to say that all network practices would be lawful or above reproach. *But cf.* John Wright & Assoc., Inc. v. Ullrich, 203 F. Supp. 744, 751 (D. Minn. 1962). The court stated that "acts which only incidentally or indirectly restrict competition, while their principal purpose and effect is the reasonable advancement of legitimate purposes, are not prohibited" by the antitrust statutes.

26. Report of the House Comm. on Interstate and Foreign Commerce, *Network Broadcasting*, H.R. REP. 1297, 85th Cong., 2d Sess. 512 (1958) [hereinafter cited as *Network Broadcasting*].

27. *Ibid.* The report further stated:

> A network employing the 'must buy' practice imposes the requirement that the advertiser take a second commodity (one or more unwanted basic stations) in order to obtain the wanted 'tying' product (those network affiliates in markets desired by the advertiser). Since the 'must buy' practice does require the advertiser to purchase all of the basic stations in order to gain access to the network, those stations basic or optional, wanted by the advertiser, constitute the dominant 'tying' product under the Northern Pacific rationale. It is irrelevant that there are other TV stations affiliated with other networks or independently operated, or even that there are competing TV stations in many markets in which the network has a basic or optional station which the advertiser wants to buy. Hence, there is no necessity for relying upon the 'monopoly' one station markets in which the network has an affiliate, basic or optional, which the advertiser

Senate Committee on Interstate and Foreign Commerce, felt that these acts would clearly be "an unreasonable restraint on trade."[28]

These operations, however, have been attributed to the other two major networks and not to ABC. "ABC has never had a regular 'must buy' group of stations in its television operations"; it merely imposes upon the advertisers a "minimum dollar requirement" whereby they must purchase a minimum amount of program time at ABC's rates for its various affiliated stations.[29] In fact both the Senate and House Committee recommended that the other two networks change their policy to conform to that of ABC.[30] Such a "minimum dollar requirement" would solve the networks' problems and represent just compensation for use of network facilities.[31] The court in the present action, however, has intimated that it would consider even this "minimum dollar requirement" in violation of the Sherman Act,[32] relying on language in *United States v. Loew's, Inc.*[33] *Loew's*

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wants in order to show the requisite leverage. Further, the proportion of the television advertising market controlled by the network to the total advertising market is also irrelevant as is the necessity for showing adverse competitive effects resulting from the 'tie-in' aspects of the 'must buy' practice. It may be reiterated that even if all of the unwanted stations are in large, metropolitan markets where several competing stations operate, all of the basic stations, whether in one-station or multi-station markets, are forced upon the advertiser. This practice thus would seem to fit squarely within the Northern Pacific 'tie-in' formula.

For a complete study of network practices see Schwartz, *Antitrust and the F.C.C., The Problem of Network Dominance*, 107 U. PA. L. REV. 753 (1959); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

28. The "must buy" arrangements . . . foreclose independent TV stations from access to programs, and again foreclose small advertisers from an opportunity to purchase prime television time. Again we would conclude that, even apart from the movie cases — I mean just on general anti-trust principles — this would be clearly an unreasonable restraint on trade. . . .

Hearings on Television Inquiry Before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. 1559 (1956) (testimony of Professor Donald Turner).

29. *Network Broadcasting* at 474.

30. *Id.* at 524–25. There two recommendations are presented (1) "elimination of the must buy requirements and (2) modification along the lines of the ABC requirement." The Committee went further to say that:

> it would be reasonable, therefore, to proscribe the present "must buy" requirement of CBS and NBC, which require the order of specific stations, but to permit an aggregate minimum requirement. Such a requirement might take one of several forms, such as: a minimum dollar requirement (the present ABC practice); a minimum number of stations; or a minimum percentage of the total network (as measured by the aggregate of station rates or of station circulation).

See also STAFF OF SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85th Cong., 1st Sess.; REPORT ON TELEVISION NETWORK PRACTICES 42 (Comm. Print 1957) [hereinafter cited as SENATE STAFF REPORT].

31. SENATE STAFF REPORT at 42:

> (1) The must buy practice does serve to bar local and regional advertisers from networks. This is necessary to provide a national circulation needed to sustain quality programming and to provide sufficient revenues from time charges to pay the networks' interconnection charges and support their news, sustaining, and public-affairs activities.
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> (2) The requirement that an advertiser purchase a specified list of stations imposed by NBC and CBS, however, seems possibly to discriminate against affiliates not on the list and to force national advertisers to conform to rigid patterns which may not fit their individual needs. It, therefore, might appear that a minimum dollar purchase would serve all the legitimate needs of the networks in this area and should be substituted for the must-buy practice now in use.

32. American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848, 851 (S.D.N.Y. 1963). Even if plaintiffs were not required to take the additional 35 stations, but would be forced, if they chose not to, to pay a disproportionately high rate for the 95 stations, this too would constitute a violation.

33. 371 U.S. 38, 54, 83 S.Ct. 97, 106–07 (1963).

and the line of cases which preceded it involve the standard block-booking practices where the buyer was purchasing one film on the condition that certain others were bought; there two distinct products were involved.[34] A further suggestion of the House Committee was that the networks institute a type of block or group booking policy. This requirement the Committee thought reasonable and satisfactory to all interests.[35]

It appears that this decision might cause destruction of the major television networks. The production of a network show involves a great deal of financial backing. If a sponsor can completely dictate what stations he wishes his sponsorship to be carried, there can be no degree of certainty that the network can acquire the financial backing necessary to finance the show. It is not unreasonable to require an advertiser that wishes to be identified with a specific program and avail itself of the network facilities to compensate the network for this privilege. The "minimum dollar requirement" seems the most reasonable solution short of outright sale of the program, but both practices would seem to meet the disfavor of the court. It must be remembered, however, that the court stated that "with the law in flux, this is all the more reason, for denying a motion to dismiss. . . ."[36]

The sweeping decision of the court definitely classifies the alleged agreement as a tying agreement in violation of the Sherman Act. At trial, the court will have an opportunity to review the many aspects of this agreement which should have been considered before it was rendered invalid. In particular, more evidence than that produced on the motion is necessary to settle the important question as to whether ABC actually follows a "must buy" practice. The present proceeding having arisen only on a motion to dismiss, the court may reverse itself at trial and find the agreement not prohibited by the act.[37]

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34. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S.Ct. 915 (1948). *But see* Times-Picayune Publishing Co. v. United States, 345 U.S. 564, 73 S.Ct. 872 (1953), where the Court held that Times' refusal to sell was not alone a Sherman Act violation.

35. See *Network Broadcasting* at 525; SENATE STAFF REPORT at 42.

36. Manufacturers Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848, 851 (1963).

37. Before this agreement can be declared to be in violation of the antitrust laws, a great many factors must be considered and important issues decided. The initial problem that must be faced by the court is whether a network television program is to be considered as a single package or unit or whether the two groups of stations are to be considered as separate distinct products. From here it would become necessary to delve into the actual practices of the networks. The following are only some of the factors that might require exploration:

(1) Whether ABC has in fact instituted a must buy procedure such as that attributed to the other two major networks.

(2) Whether the must buy practice is in fact in violation of the antitrust laws. In deciding this, the court would have to investigate into the business necessity of such a practice. There are the questions of necessity to unity and identity of the network and the necessity of a stable programming practice to preserve the marketability of the product offered by the network. However,