COMMENTS

ANTI-TRUST LAW—NECESSITY OF PROOF OF SEPARATION OF PRODUCTS TO ESTABLISH "TYING"

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)

Defendant company, publisher of the only morning newspaper and one of two competing evening newspapers in New Orleans, refused to sell general or classified advertising separately in either its morning or evening paper, but sold such advertising only as a unit for the two papers. In a civil action under the Sherman Act[1] the district court enjoined the use of these "unit" contracts.[2] Both parties appealed directly to the Supreme Court,[3] which reversed the district court's decision and held that the evidence was insufficient to establish either an unreasonable restraint of trade or an attempt to monopolize.[4]

Section 1 of the Sherman Act has been construed as prohibiting only unreasonable restraints of trade rather than all possible restraints.[5] Section 1 is violated by conduct that is unreasonable *per se, i.e.*, without reference to the motivation causing the conduct, such as price-

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1. 15 U.S.C. §§ 1-7 (1946). Section 1 provides:
> 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. . . .

Section 2 provides:
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

Section 4 vests jurisdiction to prevent and restrain violations of sections 1-7 in the district courts of the United States and makes it the duty of the district attorneys of the United States to enforce the Act.

2. The district court found that the morning *Times-Picayune* and the evening *States*, though published by the same company, were two separate and distinct newspapers reaching separate reader groups. The *Times-Picayune* was the "dominant" newspaper in New Orleans and insertions in it were deemed essential by advertisers desiring to cover the local market. The other evening paper, the *Item*, was the only effective competition in the newspaper advertising field. The defendants adopted unit selling in order to ". . . restrain general and classified advertisers from making an untrammeled choice between [the *States* and the *Item* . . .] in purchasing advertising space, and also to substantially diminish the competitive vigor of the *Item*. . . ." The results of this system, enforceable only because of the dominant position of the *Times-Picayune*, was a substantial rise in classified and general advertising in the *States* and an improvement of its comparative position toward the *Item*. United States v. The Time-Picayune Publishing Co., 105 F. Supp. 670 (E.D. La. 1952).

3. A direct appeal to the Supreme Court is provided by 15 U.S.C. § 29 (1946).

4. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

5. The standard of reason which was applied to similar subjects at common law is applied to these sections. United States v. American Tobacco Co., 221 U.S. 106, 178-181 (1911); The Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60-62 (1911). See the opinion of Mr. Justice Brandeis in Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

fixing,[6] boycotting,[7] "tying,"[8] and "blockbooking" by lessors of copyrighted films.[9] Section 1 is also violated by an otherwise reasonable restraint used with a specific intent to accomplish a forbidden result,[10] and that intent may be inferred from unlawful effects.[11] Section 2 prohibits attempts to monopolize. One who in fact achieves a monopoly can be found guilty of an attempt to monopolize without proof of a specific intent to do so,[12] but one who lacks monopoly power can be found guilty only if such a specific intent is shown.[13]

"Tying" occurs when a seller who controls the supply of one product refuses to sell that monopolized product unless the buyers also buy a related but non-monopolized product.[14] The monopolized product is referred to as the "tying" product, and the non-monopolized product is the "tied" product. If "tying" forecloses competitive sellers of the "tied" product from any substantial market, it is an unreasonable restraint *per se* under section 1.[15]

The Court in the principal case held the fact that the defendant owned the only morning newspaper in New Orleans did not by itself establish a prima facie case of market control, and also held that the evidence was insufficient to support a finding that the defendant did in fact control the market. It is important to realize which market the Court said the defendant did not control. The Court reasoned that newspapers sell two different products: news and advertising content to their readers, and the means of communicating with the public to their advertisers. The market for news and advertising content was separated into a morning market and an evening market, and the defendant obviously controlled the morning market. The Court, however, found nothing in the record to suggest that the advertisers

6. Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

7. Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600 (1913); *cf.* Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941).

8. United States v. Griffith, 334 U.S. 100 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947).

9. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

10. *See* United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948).

11. *See* United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948); United States v. Griffith, 334 U.S. 100, 105-108 (1948); United States v. Patten, 226 U.S. 525, 543 (1913).

12. United States v. Griffith, 334 U.S. 100 (1948).

13. *See* United States v. Columbia Steel Co., 334 U.S. 495, 532 (1948).

14. 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, 942-943 (1952). Tying also occurs when a buyer who is the only market for a product in one locality refuses to buy that product unless he is given advantageous terms on the purchase of the product in localities where he is not the only market. United States v. Griffith, 334 U.S. 100 (1948).

15. United States v. Griffith, 334 U.S. 100 (1948); International Salt Company v. United States, 332 U.S. 392 (1947).

thought that communication with morning readers was separate and distinct from communication with evening readers. The alleged "tying" product (communication with morning readers) was not separated from the "tied" product (communication with evening readers); the two together formed a single product (communication with readers). The market for communication, therefore, was not separted, but was only one market. It was this undivided market that the defendant did not control. The Court held that, because the principal case did not factually fit the "tying" pattern, the restraint which resulted from the use of the unit contracts was not unreasonable *per se*. The Court further found that there was no proof in the record of the specific intent necessary for an unreasonable restraint of trade under section 1 or an attempt to monopolize under section 2.

The trial court attempted to straddle the issue of whether there was a violation *per se*, and reached a decision that could not be upheld on any ground because the court had not required proof of a specific intent. The decision of the Supreme Court is sound because it requires definite proof of individuation of products in "tying" cases.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—WAIVER OF UNANIMOUS VERDICT

Hibdon v. United States 204 F.2d 834 (6th Cir. 1953)

Appellant was tried in a federal court for commission of a felony. After twenty-seven minutes of deliberation the jury reported that they were unable to agree on a verdict. Both parties then agreed, at the suggestion of the judge, to accept a majority verdict. A poll of the jury disclosed a majority in favor of conviction, and the trial court entered a verdict of guilty. The appellate court reversed the lower court's judgment, remanded the case for a new trial, and held that a defendant on trial in a federal court for commission of a felony cannot waive his right to a unanimous verdict by the jury.[1]

The Federal Rules of Criminal Procedure require a unanimous verdict.[2] The court in the principal case points out that there is no provision in the present Rules for a waiver of this requirement by the accused, despite the fact that such a provision was found in the First Preliminary Draft of the Rules.[3]

Many of the rights guaranteed to an accused by the Constitution

1. Hibdon v. United States. 204 F.2d 834 (6th Cir. 1953).
2. FED. R. CR. P. 31(a): "The verdict shall be unanimous."
3. FED. R. CR. P. 29(a) (First Prelim. Draft, 1943). The reason for the elimination of this provision was the adverse criticism of both the judiciary and the bar. Hibdon v. United States, 204 F.2d 834, 836 (6th Cir. 1953).