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Promotion by Oil Company of TBA Products Held Violative of FTC Section 5—*Goodyear Tire & Rubber Co. v. FTC**

The Atlantic Refining Company entered into an agreement with the Goodyear Tire and Rubber Company which provided that Atlantic would receive a commission on all tires, batteries, and accessories (TBA) sold by Atlantic's wholesale and retail dealers. This commission was to be paid Atlantic in consideration for assistance given in promoting Goodyear products to the independent Atlantic service station operators.[1] After an investigation of these agreements the Federal Trade Commission issued a complaint against Goodyear and Atlantic charging them with violating section 5 of the Federal Trade Commission Act.[2] Evidence introduced at a hearing before a Federal Trade Commission trial examiner showed that Atlantic had coerced its dealers into purchasing Goodyear TBA by implying that renewal of their dealers' leases or equipment loans depended upon these purchases. The trial examiner found that through this coercion Atlantic implemented tacit tying arrangements in violation of section 5 of the Federal Trade Commission Act, and he formulated a cease-and-desist order prohibiting Atlantic's use of coercion on its dealers. The Federal Trade Commission affirmed the findings of the trial examiner but went further and defined the basic issue to be the legality of the sales commission agreements themselves:

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* 331 F.2d 394 (7th Cir. 1964), *cert. granted,* 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296).

1. "Under the terms of the contract between Goodyear and Atlantic . . . , Atlantic is entitled to a commission amounting to 10 per cent of the net sales value of all sponsored (i.e., Goodyear . . .) merchandise sold by Atlantic retail dealers, as consideration for the assistance given by the Atlantic sales organization in obtaining TBA orders from Atlantic dealers." Goodyear Tire & Rubber Co., 58 F.T.C. 309, 335 (1961). The agreement between Atlantic and Goodyear covered only half of the Atlantic trading area. For the other half, Atlantic had a duplicate agreement with Firestone Tire and Rubber Company.

2. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1958).

> "Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA *even without the use of overt coercive tactics or of written or oral tying agreements.* . . . Determination of illegality in this context requires an evaluation of the competitive effects resulting from the sales commission method of distributing TBA . . . ."[3]

Finding that the sales commission system effected a substantial foreclosure of markets on all levels of the TBA industry,[4] the Commission expanded the examiner's order by prohibiting Atlantic or Goodyear from further participation in sales commission agreements with any other TBA manufacturer or oil company.[5]

This order was affirmed by the Seventh Circuit.[6] While the court of appeals admitted that "labeling is at times more harmful than helpful in formulating conceptions that correspond to reality,"[7] and further conceded that the contract between Goodyear and Atlantic had no tying features on its face, it found that the sales commission system was analogous to a tying arrangement[8] and that it contained inherently unlawful features in light of the economic "servitude" imposed on the dealers by the oil companies.[9] The court avoided any mechanical comparisons between the classical tie-in and the arrangement before it, but considered the effect of each on competition, reasoning that the sales commission scheme, like an explicitly stated tying arrangement, required the dealer to surrender his freedom to choose between competing brands of TBA.

The *Goodyear* case is one of a series of actions filed by the FTC against the sales commission system, the favored device by which major oil companies and TBA manufacturers paid off in the distribution of TBA products.[10] The practical result of the system

3. Goodyear Tire & Rubber Co., 58 F.T.C. 309, 364-65 (1961). (Emphasis added.)

4. *Id.* at 369.

5. *Id.* at 369-70.

6. Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964), *cert. granted,* 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296).

7. *Id.* at 400.

8. *Id.* at 402. A tying arrangement has been defined by the Supreme Court 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 . . . ." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Because such arrangements force the buyer to surrender his freedom of choice between competing products in the market for the tied product, they have fared poorly for many years under the antitrust laws. See United States v. Loew's Inc., 371 U.S. 38 (1962).

9. Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 402 (7th Cir. 1964), *cert. granted,* 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296). As a tying arrangement the sales commission agreements were found to be illegal upon application of the doctrine of Northern Pac. Ry. v. United States, *supra* note 8, which held that such restraints were unreasonable per se whenever a party has sufficient economic power with respect to the tying product appreciably to restrain competition in the market for the tied product and a not insubstantial amount of commerce is affected.

10. For a list of those oil companies with whom Goodyear has sales commission agreements, see Goodyear Tire & Rubber Co., 58 F.T.C. 309, 323 (1961).

has been that those independent dealers who "fly the flag" of a major oil company may handle only the TBA products that yield their oil company a commission. Prior to the adoption of the sales commission system the method most often used was the purchase-resale plan, an arrangement that involved the purchase and warehousing of the TBA by the oil companies and a subsequent resale by them directly to their dealers.[11] Until the Commission developed the approach used in the *Goodyear* case, neither of these two methods was considered illegal in itself. However, *United States v. Sun Oil Co.*[12] held illegal oral or tacit tying arrangements found to accompany the purchase-resale plans when they were coercively exacted. The Court found that Sun's salesmen coerced its dealers by making pointed references to the oil company's 30-day cancellation provision while suggesting that the dealers handle Sun's TBA to the exclusion of other brands. Sun was enjoined from "inducing, coercing and compelling" its dealers to enter into tacit agreements to deal exclusively in the TBA sold by Sun,[13] although the continued use of the purchase-resale plan was not prohibited. In *Osborn v. Sinclair Ref. Co.*,[14] sales commission agreements involving similar coercive tying arrangements were considered. The plaintiff in that case brought a private antitrust suit charging that his lease had been cancelled because he had not purchased substantial quantities of Goodyear TBA. The court found that Sinclair had engaged in an illegal course of conduct toward Osborn and its other dealers by conditioning their continued operation on the placing of substantial orders for Goodyear TBA.[15] Thus, the courts have looked with disfavor on the oil companies' use of coercive power over their dealers to reap profits in another market. However, the courts went only so far as to enjoin or punish the use of overt coercive power by the oil companies.

The novelty of *Goodyear* lies in the court's finding that, in light of the realities of power in the oil distribution industry, the oil companies can achieve the desired foreclosure of markets without following any demonstrably coercive course of conduct. The court viewed the relationship between the dealer and the oil company as an inherently coercive one in which the dealer was "more of an economic serf than a businessman" because of the great leverage provided the oil company by the lease and equipment loan contracts under which most of the dealers operate.[16] It recognized that in such

11. See Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 397-98 (7th Cir. 1964), *cert. granted*, 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296).
12. 176 F. Supp. 715 (E.D. Pa. 1959).
13. *Id.* at 739.
14. 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).
15. Osborn v. Sinclair Ref. Co., 286 F.2d 832, 836 (4th Cir. 1960).
16. Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 400 (7th Cir. 1964), *cert. granted*, 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296).

a context coercion can assume forms that would put its detection and control beyond the reach of the judicial process; therefore, it held the sales commission agreement, the oil companies' method of exploiting this power, was itself the evil to be eliminated.[17] To build and equip a modern service station requires an initial investment beyond the resources of the ordinary service station operator.[18] The normal practice is for the dealer to lease his station, fully equipped, from the oil company. If the station is owned by someone other than the company, the dealer signs an equipment loan contract for the equipment necessary to operate the station. Both of these agreements are characteristically short-term arrangements, generally of one year, and the lease contains numerous cancellation provisions which make the term of occupancy, in actuality, a matter of the oil company's discretion.[19] The immediate financial hardships of cancellation for the dealers are augmented by the understandable reluctance of other oil companies to take on a dealer who has been cancelled by another company. It is only natural for the dealer to be hesitant to arouse the displeasure of the oil company.[20] "In that setting," the *Goodyear* court concluded, "recommendation is tantamount to command . . . . Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats."[21]

Prior to the *Goodyear* decision, when the sales commission agreements were considered legal unless coercion was involved, courts generally were faced with the rather difficult problem of drawing a line between effective salesmanship and duress. By equating recom-

17. A significant amount of money is involved in these cases. The 1955 sales of TBA made by Goodyear through the Atlantic dealers came to $5,700,121, from which Atlantic realized $557,599. Firestone, whose sales commission agreement covered those Atlantic dealers not assigned to Goodyear, made sales in the same year to Atlantic dealers totalling $5,562,936 and paid Atlantic "overrides" of $506,199. When Atlantic's reward for pressuring its dealers comes to over one million dollars annually it naturally would be difficult to resist the temptation to do so. See Goodyear Tire & Rubber Co., 58 F.T.C. 309, 315-16 (1961).

18. The Commission found in a companion case to *Goodyear* that the cost of "constructing a modern service station, including land, averages about $90,000." Firestone Tire & Rubber Co., 58 F.T.C. 371, 403 (1961).

19. These provisions, in Atlantic's case, were laid out in their "Eleven Point Lease Letter," which defined the standards of operation for Atlantic dealers. Though the standards themselves seem to reflect only the legitimate interest the oil company has in protecting its goodwill, they are couched in such vague terms as to make them possible shields for the use of purely discretionary cancellations. These provisions, policed by Atlantic through its regular sales force as well as "Phantom Customer Inspectors," gave the oil company the ability to cancel for breach at virtually any time it pleased. See Goodyear Tire & Rubber Co., 58 F.T.C. 309, 338-39 (1961).

20. The trial examiner included as part of his findings that "dealers appearing to testify were under considerable pressure because they were naturally interested in not jeopardizing the renewal of their leases." *Id.* at 320.

21. Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 401 (7th Cir. 1964), *cert. granted*, 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296).

mendation with coercion, the court in the principal case achieved certainty and uniformity, but at the expense, it would seem, of a reasoned inquiry into the nature of the agreements and the circumstances surrounding them.[22] The presumption that recommendation equals coercion provided the illegal link between the sales commission agreements and the anti-competitive effects, thereby allowing the court to make use of the tying arrangement analogy in condemning the contracts as a section 5 violation. If the presumption is valid that the relationship between the dealer and the oil company is inherently coercive, the outlawing of the sales commission agreements when they are found to be accompanied by anti-competitive effects would seem to be justified. But the District of Columbia Circuit Court has not been willing to give the Commission the benefit of this presumption. In *Texaco Inc. v. FTC*,[23] on facts almost identical to those in the *Goodyear* case, it was held that the Commission had erred in concluding that Texaco had sufficient economic power over its dealers to force them to buy the promoted TBA. Although the dissent in *Texaco* suggested that the court's holding in favor of the oil company resulted primarily from the failure of the Commission to articulate facts and spell out its theories,[24] it seems nevertheless clear that there is now a split in the circuits on the issue of inherent coercion.[25]

Probably prompted by this split, the Supreme Court has agreed to pass on the matter,[26] and there are indications that it may be more receptive to the Seventh Circuit's characterization of the dealer-oil company relationship than that of the District of Columbia Circuit Court. In the recent case of *Simpson v. Union Oil Co.*[27] the Court struck down consignment agreements between the oil company and its dealers when they resulted in a program of resale price maintenance and when fear of nonrenewal of short-term leases was used as a coercive policing device. In recognizing the effectiveness of the short-term lease as a policing device, the Court, speaking through Mr. Justice Douglas, said that the lease provided the leverage by

22. In charging a violation of § 5, the Commission is not restricted to proving any specific prohibitions of the Sherman or Clayton Acts. See Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). The broad language of § 5 would seem to encourage utilization by the Commission of an extended rule of reason when evaluating alleged illegal conduct. See Oppenheim, *Guides To Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961).

23. 336 F.2d 754 (D.C. Cir. 1964), *petition for cert. filed*, 33 U.S.L. WEEK 3165 (U.S. Oct. 28, 1964) (No. 635).

24. *Id.* at 766.

25. "The mere fact that Texaco is a giant corporation and the dealers are in the main small businessmen cannot be said to demonstrate controlling economic power over the latter . . . ." *Id.* at 762.

26. Goodyear Tire & Rubber Co. v. FTC, 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296); Atlantic Refining Co. v. FTC, 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 292).

27. 377 U.S. 13 (1964).

which the dealers were coercively tied into an arrangement which deprived them of the right to make independent business decisions.[28] Clearly viewing the dealer-oil company relationship as inherently coercive by reason of the short-term service station leases, the Court did not require that overt coercion be shown in order to prove that the dealers were being forced into an acceptance of the resale price maintenance program. All that was held to be necessary for a showing of the existence of coercive policing of the consignment agreements was evidence that the desired result was being achieved.[29]

The Supreme Court's rather clear recognition of the inherently coercive nature of the dealer-oil company relationship, as well as its more basic concern with the welfare of the small "independent" businessmen who operate gasoline stations, may, however, cause the Court to oversimplify other factors in the sales commission system of TBA distribution. If the position of the Seventh Circuit is upheld, the logical result would be the prohibition of any participation by the oil companies in the distribution of TBA to their dealers. For, should the oil companies return to the purchase-resale plan, the Commission, using the *Goodyear* tying arrangement theory, need merely find that a not insubstantial amount of commerce is affected to declare the plan illegal.[30] However, even if the questionable presumption of coercion is valid, there is a further relevant consideration. In its opening observation regarding the difficulty of formulating conceptions that correspond to actualities, the *Goodyear* court implies that its decision is firmly based upon the realities of the oil distribution industry, and specifically the actual position of the dealer *vis-à-vis* the oil company. "Ostensibly, they are independent businessmen; but behind the legalistic facade of independence, there exists a servitude caused by the coercive pressures which Atlantic exerts upon its dealers."[31] Underlying the *Simpson* and the *Goodyear* and *Osborn* decisions seems to be a sympathetic attempt to liberate the gasoline service station operator from his dependence upon the oil company and allow him the position of a truly independent businessman. But as long as the

28. "By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on persons who otherwise might be competitive." *Id.* at 21.

29. "If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment of whether . . . to sell at competitive prices." *Id.* at 16. The similarity between this argument by Justice Douglas and the one formulated by the Commission in the *Goodyear* case is striking. The Commission in *Goodyear* held that if the sales commission agreement achieves a foreclosure of markets, it and the lease are being used to injure interstate commerce by depriving the dealer of his freedom to choose between brands of TBA.

30. See Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 402 (7th Cir. 1964), *cert. granted,* 33 U.S.L. WEEK 3215 (U.S. Dec. 15, 1964) (No. 296).

31. *Id.* at 400.

peculiarities of the gasoline distribution industry necessitate the close intermingling of the interests of the oil company with the interests of the dealers, the service station operator will never be a truly independent businessman. The power of the oil companies over their dealers must be sufficient to protect adequately the company's legitimate interest in the real estate and goodwill which it has entrusted to its lessees. By signing with a major oil company and thereby becoming a "member of the team," the dealer willingly gives up his status as a completely independent businessman in consideration for innumerable benefits.

The realities of the situation are not as simple as the court seems to picture them. In this light, the judiciary should be careful not to confuse restraints of trade, which constitute clear public injury, with mere restrictions on the freedom of the dealer to act as an independent businessman. This is where the approach of the Seventh Circuit would seem to differ significantly from the approach of the Commission. The Commission accepted the fact that the oil companies enjoyed controlling economic power over their dealers but did not condemn its use as such; it condemned only the abuse of this power. Only when it resulted in anti-competitive effects did the Commission step in.[32] By applying the tying arrangement analogy, the Seventh Circuit effectuated an important shift in emphasis from preventing anti-competitive effects toward protecting the dealers. Since one of the evils of the tying arrangement, as the Court has come to view it, is that it restricts the freedom of otherwise independent businessmen, as long as such a restriction affects a "not insubstantial" amount of commerce the courts will intervene to free the purchaser from these limitations. Because, however, of the necessarily "quasi-independent" character of the service station operator, the realities of the situation should not support judicial intervention unless it can be clearly shown that such restrictions substantially injure the public or competitors.

32. "Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA . . . . *Determination of illegality in this context requires an evaluation of the competitive effects resulting from the sales commission method of distributing TBA . . . .*" (Emphasis added.) Goodyear Tire & Rubber Co., 58 F.T.C. 309, 364-65 (1961).