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Federal Antitrust Laws - Exclusive Dealing - Standards of Illegality Under Section 3 of the Clayton Act

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FEDERAL ANTITRUST LAWS — EXCLUSIVE DEALING — STANDARDS OF ILLEGALITY UNDER SECTION 3 OF THE CLAYTON ACT—In a recent treatment of exclusive dealing arrangements, *Tampa Elec. Co. v. Nashville Coal Co.*,[1] the Supreme Court enunciates with some care the standards to be applied in judging the legality of requirements contracts under section 3 of the Clayton Act.[2] This

[1] 365 U.S. 320 (1961).
[2] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

comment analyzes the merits and the impact of this needed clarification of a controversial area of antitrust law.

Exclusive marketing arrangements manifest themselves in various forms, and it is not uncommon to find more than one variety in a given contract. This inquiry, however, will be restricted largely to full requirements contracts, obligating a buyer to purchase from a seller all that he may require of the latter's product for a specified period of time, and to other exclusive dealing agreements the intended effect of which is to preclude the buyer from dealing in merchandise that competes with the seller's product.

I.

Because in its judgment the applicable provisions of the Sherman Act,[3] like the common law doctrines preceding them,[4] failed to curb the injurious effects upon competition of some exclusive dealing arrangements, Congress in 1914 enacted section 3 of the Clayton Act. That section forbids certain transactions which incorporate a buyer's or lessee's agreement not to use or deal in the commodities of the seller's or lessor's competitors, but only where the effect thereof "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[5] This qualifying clause has been the source of most of the interpretative difficulties attending application of the statute.

In an early case, *Standard Fashion Co. v. Magrane-Houston Co.*,[6] the Supreme Court found section 3 to have been violated by exclusive dealing contracts between a manufacturer of standard garment patterns and its dealers where the manufacturer or its holding company controlled about forty percent of the 52,000 pattern agencies in the United States. While the Court did place some emphasis upon the manner in which such contracts could be used to deny competitors access to the retail market,[7] it also

3 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).

4 At common law, a bargain to deal exclusively with another was illegal if it effected, or formed part of a plan to effect, a monopoly. If reasonably ancillary to a main lawful purpose, it escaped censure. See 2 RESTATEMENT, CONTRACTS §§ 514, 516(e) (1932).

5 This phrase was inserted "because of an apparent realization that some legitimate business considerations might justify certain forms of exclusive dealing. . . ." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 138 (1955).

6 258 U.S. 346 (1922). Compare Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

7 The Court quoted with approval from the opinion of the court below: "'The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a

implied that the inference of lessened competition or tendency toward monopoly was supportable by a bare finding that the seller in question dominated the market.[8] The *Standard Fashion* opinion thus created issues which have characterized this area ever since. What is the required scope of market analysis? Is denial of market access a necessary concomitant of the parties' observance of exclusive dealing contracts? Does the use of such contracts by a seller in a dominant market position automatically produce a section 3 violation?

The issue of prime importance, to which these questions are all related, has been, and probably will continue to be, the standard of proof to be applied. In early court cases, and generally in Federal Trade Commission proceedings, there exists a willingness to judge exclusive dealing contracts on a comparative standard permitting the substantiality of a denial of market access to be weighed in terms of its relation to the pattern of competition in the line of commerce involved.[9] More recently, however, the standards of analysis tend to reflect the influence of the quantitative test established for "tying" contracts by *International Salt Co. v. United States*.[10] There it was held that coverage by patent tying clauses of a not insignificant volume of commerce was sufficient basis from which to infer a lessening of competition or tendency toward monopoly.

But the economic realities which perhaps dictate the appropriateness of this "quantitative substantiality" test[11] for tying con-

monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.'" 258 U.S. at 357.

8 *But see* HANDLER, ANTITRUST IN PERSPECTIVE 32-33 (1957): "Under this reading, per se invalidity would attach to the use of exclusives by any dominant seller. . . . [But], as a matter of authority, the case in no wise holds that the existence of dominant power automatically results in a Section 3 violation."

9 *E.g.*, Pick Mfg. Co. v. General Motors Corp., 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936); United States v. Linde Air Prods. Co., 83 F. Supp. 978 (N.D. Ill. 1949); Revlon Prods. Corp., 51 F.T.C. 260 (1954); Maico Co., 50 F.T.C. 485 (1954). The FTC has jurisdiction in § 3 cases by virtue of § 11 of the Clayton Act, 64 Stat. 1126 (1950), as amended, 15 U.S.C. § 21 (Supp. II, 1960).

10 332 U.S. 392 (1947). Leases of patented machines on condition that lessees purchase from lessor all unpatented salt consumed in them were held on summary judgment to be a violation of § 1 of the Sherman Act and § 3 of the Clayton Act. For sample definitions of tying and exclusive contracts, see Judson L. Thomson Mfg. Co. v. FTC, 150 F.2d 952 (1st Cir.), *cert. denied*, 326 U.S. 776 (1945).

11 This term denotes a standard of illegality which depends solely upon the amount of goods or dollar volume involved, considered in absolute terms. This test should be

tracts are not necessarily characteristic of other types of exclusive dealing agreements. While most tying contracts are justifiably thought to be inherently anticompetitive in nature, since they "serve hardly any purpose beyond the suppression of competition,"[12] other exclusive arrangements, and especially requirements contracts, can promote as well as restrain competition.[13] Therefore, while a finding of great market leverage or of coverage of a substantial amount of business may entitle a court to take the experientially-justified shortcut to the conclusion that a tying contract will necessarily lessen competition or tend toward monopoly, such simplicity of inference is generally ill-suited to other types of exclusive dealing agreements. The fact that exclusive sales contracts can at times be consistent with antitrust objectives indicates that further analysis of market structure and behavior will usually be necessary. Yet *Standard Oil Co. v. United States*,[14] heretofore the most important application of section 3 to requirements contracts, lends some support to use of the quantitative approach.

II.

At issue in the *Standard Stations* case were approximately 8,000 exclusive contracts between Standard and 5,937 independent retail outlets, by the terms of which the retailers agreed to take from Standard all their requirements of one or more products, chiefly gasoline, either for a specified term or from year to year. The contracts covered 16 percent of the independent outlets in the relevant market area, comprised of seven western states, and in-

distinguished from the "substantial share of commerce" test which is based upon the proportion of the market which the amount of commerce in question bears to the market as a whole. *Compare* International Salt Co. v. United States, 332 U.S. 392 (1947), *with* Standard Oil Co. v. United States, 337 U.S. 293 (1949). See 49 COLUM. L. REV. 241 (1949). Since the *Standard Stations* decision, exclusive dealing controversy has often taken the form of "quantitative substantiality versus rule of reason inquiry," with the understanding that these terms signify general approaches rather than technical niceties. However, the same generality that makes these phrases convenient only serves to introduce confusion into any attempt to distinguish among their more limited applications. See note 17 *infra* and text accompanying note 18 *infra*.

12 Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949); *accord*, Black v. Magnolia Liquor Co., 355 U.S. 24 (1957).

13 Exclusive arrangements can bolster weak competitors and facilitate entry into the market. For parties to requirements contracts, positive values include enhanced certainty and ability to plan in a fluctuating market, lower costs, and assured supply. See KAYSEN & TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 159 (1959); Stockhausen, *The Commercial and Antitrust Aspects of Term Requirements Contracts*, 23 N.Y.U.L. REV. 412 (1948).

14 337 U.S. 293 (1949) [hereinafter referred to as *Standard Stations*].

volved the purchase of more than $57,600,000 worth of gasoline, or 6.7 percent of the total gallonage in that area, as well as 2 percent of tire and battery sales. While not as a matter of law in a position of dominance, Standard was nevertheless the market leader; its total gasoline sales in 1946 constituted 23 percent of the taxable gallonage in the western area. Standard's six leading competitors, who also utilized exclusive dealing arrangements, absorbed 42.5 percent of the total taxable gallonage, and the remainder was divided among more than seventy small companies.

The district court expressly declined to hold the contracts illegal *per se,* and allowed many comparative statistics to go into the record as relevant to the determination of unreasonableness of restraint under the Sherman Act and substantiality of restraint or tendency to create monopoly under the Clayton Act. However, the court held that "substantiality of restraint or tendency to create monopoly is established by (a) the market foreclosed, — here represented by the controlled units, — and (b) the volume of controlled business" and that "there is illegal restraint here under both Acts, whether the commerce be considered quantitatively or comparatively."[15]

The issue before the Supreme Court, as framed by Mr. Justice Frankfurter, was whether the qualifying clause of section 3 could be satisfied simply by proof that the requirements contracts affected a substantial portion of commerce or whether it was necessary to show that competitive activity did or probably would diminish. The Court held "that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[16] In so concluding, the Court appears to have rejected the applicability of the quantitative substantiality test. Mr. Justice Frankfurter explicitly refused to regard the *International Salt* decision as dispositive of the case because of the economic differences between tying and requirements contracts which make the latter less obviously detrimental to competition and render quantitative substantiality alone a weaker foundation for the inference that competition may be lessened by requirements contracts.[17] To accept this distinction, the Justice

15 United States v. Standard Oil Co., 78 F. Supp. 850, 872 (S.D. Cal. 1948), *aff'd,* 337 U.S. 293 (1949).

16 337 U.S. at 314.

17 See note 13 *supra.* In general, tying clauses are unreasonable per se under the Sherman Act whenever the defendant has sufficient market power in the tying product to restrain competition appreciably for the tied product *and* a "not insubstantial" amount

continued, is to make relevant further economic tests, toward which some of Standard's evidence was addressed. The implication seems to be that in a normal case direct proof of actual or probable diminution of competition would be necessary to find a section 3 violation, and that the cases must be considered with regard to the particular market settings involved. On the other hand, it is clear that the Court, in section 3 cases, will not indulge in that broad market analysis appropriate to most Sherman Act trade restraint cases.[18] "It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that act had been interpreted as requiring."[19]

For the cause before him, Mr. Justice Frankfurter appears to have settled upon a standard of proof requiring less market analysis than that contended for by Standard and more than that used by the court below. In his judgment, the circumstances of the case relieved the Court of any obligation to consider Standard's evidence pertaining to actual increase or decrease in the number of its competitors and their dealers because, even granting the comparison sought to be established, a court would be unable to conclude with certainty whether competition had or probably would be substantially lessened as a result of the contracts. Two factors

of commerce is affected. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). The presence of *either* of the above factors will render a tying clause illegal under § 3 of the Clayton Act. And if the clause transgresses either under the Sherman Act or the Clayton Act, it is a violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (a) (1958). See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608 (1953); United States v. American Linen Supply Co., 141 F. Supp. 105, 112 (N.D. Ill. 1956). The requisite market power can be inferred from sales leadership or even from the desirability of the tying product to the buyer. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), Note, 70 YALE L.J. 804 (1961).

18 In deciding whether a restraint of trade is unreasonable under § 1 of the Sherman Act, "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (per Mr. Justice Brandeis). *Accord,* United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948).

19 Standard Oil Co. v. United States, 337 U.S. 293, 312 (1949). See *Antitrust Law Symposium,* 1959 N.Y.S.B.A. SECTION ON ANTITRUST LAW 105 n.105, to the effect that factors properly considered under § 1 of the Sherman Act are also relevant to the question whether an incipient violation exists under § 3 of the Clayton Act.

were emphasized in justification of this view. First, exclusive dealing was an industry practice, and may have enabled the major suppliers at least to maintain shares of the market which would otherwise have been smaller. Second, other marketing devices, equally capable of restricting competition, were readily available to these suppliers. Agency contracts and vertical integration were obvious alternatives. Hence the standard of proof for which Standard argued was virtually impossible to meet, directed as it was toward what might have happened or what would happen to the market but for the contracts in issue.

It seems a fair interpretation to say that the Court felt, not that it was ill-equipped to undertake extensive market analysis,[20] or even that such analysis was inappropriate in the usual section 3 case, but rather that it would prove futile in this particular litigation. Ordinarily, such a finding would necessitate holding that the Government had not met its burden of proof, for it is a long step from the proposition that Standard could not show that competition was not lessened to the conclusion that an actual or probable lessening of competition had been established. Yet this conclusion was nevertheless drawn. It is the nature of this more limited standard of proof and the factors which will trigger its invocation with which this comment is concerned.

In holding against Standard, the Court apparently found factual justification in the substantiality of the amounts comprehended, the number of retail outlets involved, the percentage of the relevant market covered by the contracts, Standard's position as the sales leader, the fact that its largest competitors also engaged in exclusive dealing, and its great bargaining power relative to the retailers with whom it dealt.[21] If, as the *Standard Fashion* case

20 Although the opinion states that the test offered by Standard Oil "would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts," 337 U.S. at 310, it is not likely that the Court would profess a loss, in § 3 cases, of that ability which it so obviously exercises under the Sherman Act. A reasonable explanation would appear to be that the Court viewed Standard's argument as one which would not be meritorious under either act, in view of the circumstances of the case. The possible validity of the alternative interpretation —that Mr. Justice Frankfurter employed a fallacious argument to preclude the use of extended market analysis in § 3 cases — must be admitted. However, it is possible to reconcile his position with subsequent and less stringent pronouncements of the Court, which lend hindsight support to the more charitable view, and that is attempted here. *But see* Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy,* 50 MICH. L. REV. 1139, 1162 (1952).

21 Mr. Justice Frankfurter's attention to market structure and competitive patterns may have been more extensive than it initially appeared. See his dissenting opinion in FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 401-02 (1953), where *Standard*

may be said to have held, dominance coupled with exclusive coverage of a substantial share of commerce is sufficient ground for inferring a lessening of competition, it extends the principle but little to say that Standard's status, because of the peculiar pattern of competition in this market, was the legal equivalent of market dominance. While the inevitability of the result escapes many, the Court has apparently subscribed to the view that there is a connection between great market power and the likelihood of foreclosure of competitive activity which obviates the necessity of making an extended market analysis when a substantial[22] share of the relevant market has been tied up through exclusive dealing agreements. This emphasis in *Standard Stations* led courts in a number of cases thereafter decided to proclaim a *per se* rule in applying the statute.[23]

Apparently "foreclosure" is thought to be an inevitable result of the mere observance of the contracts by the parties to them, since adherence by a buyer automatically removes him for the length of the contract from the group of such buyers to whom competitors of the supplier may sell. But whether foreclosure of competition is an actual or likely result of contract observance should depend entirely upon what market is considered relevant.[24] If, as was held in *Standard Stations,* the arena of competition among suppliers is the independent retail dealer market, contracts

Stations was discussed in terms of such factors as public interest, the bargaining power of the seller vis-à-vis the retailer, and the importance of the relevant product to the retailer's total business.

22 The percentage must be more than *de minimis,* but, in view of the 2% and 6.7% figures found in *Standard Stations,* it need not be great. It should be noted that the statute is aimed at the probability, not the mere possibility, that competition will be substantially lessened. Compare B. S. Pearsall Butter Co. v. FTC, 292 Fed. 720 (7th Cir. 1923) (1% coverage not a violation). There is, of course, the possibility that the Court will lower its standard of substantiality as other restrictive elements appear. This would be in keeping with the objective of reaching incipient violations.

23 Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954) (dictum); Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954) (dictum), *cert. denied,* 349 U.S. 940 (1955); United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam,* 343 U.S. 922 (1952) (on basis of *Standard Stations*). Compare Signode Steel Strapping Co. v. FTC, 132 F.2d 48 (4th Cir. 1942); Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F.2d 764 (6th Cir. 1936). *Cf.* Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953).

24 Some criticism has been leveled at the majority in *Standard Stations* for failing to consider alternative marketing channels. *E.g.,* HANDLER, ANTITRUST IN PERSPECTIVE 36 (1957). Compare Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act,* 65 HARV. L. REV. 913, 919, 935 (1952). Such criticism appears to involve the prejudgment that the area of effective competition was some market other than the one found by the Court to be relevant. See Standard Oil Co. v. United States, 337 U.S. 293, 299-300, 300 n.5 (1949).

with a certain percentage of the dealers handling a certain share of commerce in a particular commodity[25] will deny to competitors of the contracting supplier access to that much of the relevant market. To that extent the opportunity of suppliers to compete for the business of the retailers is foreclosed. Even if the competitors develop new markets, competition for the pre-empted share will have been suppressed, and if that share is substantial, section 3 may be said to have been violated. On the other hand, if the Court in *Standard Stations* had found that competition among the suppliers was in actuality for the purchase dollars of automobile owners, and that the retailers were "only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer" and "the instrumentalities through which competition for this ultimate market is waged,"[26] exclusive contracts binding a certain share of the retail dealers would not necessarily result in a lessening of competition. At least that conclusion could not be drawn without further analysis of the actual or probable effects of the contracts, for at the making of the contracts the ultimate consumers will not yet have committed themselves to buy from particular retailers.

As will appear, *Tampa Electric* does not suggest a diminution of the Court's hostility toward dominant users' employment of exclusive dealing contracts. Rather, it clarifies by indirection such cases as *Standard Stations* while underlining the necessity for more extensive market analysis where the exclusive dealing supplier does but a small share of the business in the relevant market.

III.

The *Tampa Electric* case presented for the Court's consideration a requirements contract by which defendant coal company agreed to sell to plaintiff, a Florida utility company, substantially all the coal which the latter would require to operate the first two units of a new generating station for a period of twenty

[25] In a § 3 case, the court must determine the relevant market area. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961). *Cf.* United States v. Yellow Cab Co., 332 U.S. 218, 226 (1947). Also of importance is the determination of the relevant product or line of commerce. Whether substitute products will be included may depend upon "cross-elasticity of demand." *Compare* United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956), *with* International Boxing Club v. United States, 358 U.S. 242, 249-50 (1959), *and* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

[26] Standard Oil Co. v. United States, 337 U.S. 293, 323 (1949) (dissenting opinion of Mr. Justice Jackson).

years. Before any coal was delivered, defendant advised plaintiff that it would not perform since it regarded the contract as illegal under the antitrust laws. In plaintiff's action to have the contract declared valid, the district court[27] granted the coal company's motion for summary judgment on the ground that the undisputed facts showed a substantial lessening of competition in violation of section 3 of the Clayton Act. Primary emphasis was placed upon the fact that the estimated coal tonnage, competition for which was foreclosed by the contract, exceeded the previous annual consumption of all of peninsular Florida, and also upon the fact that the contract value of the coal covered by the twenty-year term — $128,000,000 — was not "insignificant or insubstantial."

In an opinion by Mr. Justice Clark, Justices Black and Douglas dissenting, the Supreme Court reversed, holding that the courts below had not properly considered the controlling factor of "relevant market." The relevant market, said Mr. Justice Clark, was the area of effective competition between defendant and the other 700 coal producers to whom Tampa Electric could have turned for its supply. The Court concluded from its consideration of certain statistics that even with pre-emption to the extent of maximum anticipated total requirements, Tampa Electric's share of the relevant coal product would be less than one percent. Noting that dollar volume alone is not the proper test, the Court held that pre-emption of competition to the extent of the tonnage involved did not tend to foreclose competition substantially. The supplier's market position was not inherently anticompetitive, as was the case in *Standard Fashion, Standard Stations* and *International Salt,* and only a small share of the relevant market was affected. Also stressed were the mutually advantageous nature of the contract and the public interest in the availability to a utility company of an assured and ample fuel supply.

In the course of his opinion Mr. Justice Clark took advantage of the opportunity to elaborate upon the tests to be applied in cases such as the one before him. As threshold questions, he noted, a court must determine whether the contract involved is in fact an exclusive dealing arrangement; what line of commerce is involved; and the relevant market area. In order to hold section 3 violated, the court must further find (1) that there has been or

27 168 F. Supp. 456 (D.C. Tenn. 1958), *aff'd,* 276 F.2d 766 (6th Cir. 1960), 46 VA. L. REV. 1463 (1960), 60 COLUM. L. REV. 1188 (1960).

probably will be a "foreclosure of competition" — presumably consisting of denial of market access; (2) that such foreclosure occurs in the relevant market area; and (3) that the competition foreclosed constitutes a substantial share of the relevant market.

Perhaps the most important feature of the opinion is its emphasis upon market analysis and the necessity for weighing various factors in their competitive setting before arriving at a decision in a given case. It is the Court's position that in determining whether there is or probably will be a substantial foreclosure of competition such as will violate section 3, the probable effect of the contract upon the relevant market should be weighed. Consideration should be given to: (1) the relative strength of the parties to the contract; (2) the duration of the contract, including such particularized considerations of the businesses involved as may be relevant thereto;[28] (3) the percentage of commerce in the relevant market that is involved; and (4) the probable effects, both immediate and future, of a pre-emption of that percentage upon effective competition in the relevant market.

While undertaking its first notable elaboration of the foreclosure concept, however, the Court leaves several questions in need of clarification. Among these is the weight to be assigned to a determination of the relative strength of the contracting parties. While legislative history gives some indication that section 3 was intended to mitigate the coercive effects of an inequality of bargaining power between the contracting parties,[29] it is arguable that the

[28] Considerations of motive should be distinguished, since they are irrelevant in a § 3 case. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 148 (1955); DIRLAM & KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 45 (1954). Under § 3, the weight of "particularized considerations of the parties' operations" is far less than under the Sherman Act, or under § 5 of the Federal Trade Commission Act, where "the point where a method of competition becomes 'unfair' . . . will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question." FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 396 (1953) (per Mr. Justice Douglas).

[29] *E.g.*, H.R. REP. No. 627, 63d Cong., 2d Sess. 10-13 (1914); 51 CONG. REC. 9072, 9083, 9160-61, 9407-08, 14270 (1914). See Beloit Culligan Soft Water Serv., Inc. v. Culligan, Inc., 274 F.2d 29, 35 (7th Cir. 1959); Maico Co., 51 F.T.C. 1197, 1205 (1955) (dissenting opinion of Commissioner Mead). *But see* Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto Corp., 182 F. Supp. 412, 423 (D.N.J. 1960). It has been held that the plain language of § 3 precludes resort to legislative history for its interpretation. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954). That language clearly permits coercion to be considered in determining whether an exclusive dealing arrangement has in fact been made, but whether § 3's protection embraces the competitive opportunities of the buyer or lessee is not clear. If the buyer's ability to compete, presumably in a different relevant market, is somehow impaired by his exclusive contract with the supplier, coercion might become relevant, although still not controlling. However, this is a different issue entirely, and it should be treated separately in the cases, if at all.

language of the statute protects competitors of the seller or lessor while preserving only indirectly the exercise of independent choice by customers. If this interpretation is correct, then neither the result nor the nature of the standard of proof should be determined by the presence or absence of coercive elements in the contract relationship, for the buyer or lessee surrenders his right to choose among competing suppliers for the contract's duration whether or not he has been forced to accede to the exclusive dealing provision. In this sense, at least, relative bargaining power of the contracting parties is irrelevant to the issue of foreclosure of competition.

On the other hand, concentration of economic power in a supplier vis-à-vis competing suppliers may have some bearing on the foreclosure question, since in the absence of direct evidence to the contrary, and barring unusual patterns of competition, it points to the increased probability that the supplier's exclusive dealing agreements will lessen competition or tend toward monopoly. Yet the Court, while reaffirming the vitality of *Standard Fashion* and *Standard Stations,* has once again provided a minimum of enlightenment upon the relationship between dominant market power and the standard of proof needed to satisfy section 3's qualifying clause. Mr. Justice Clark states the teaching of the *Standard Fashion* case and *United Shoe Mach. Corp. v. United States*[30] to be "that a finding of domination of the relevant market by the lessor or seller was sufficient to support the inference that competition had or would be substantially lessened by the contracts involved there," but observes that some heed was given to "the practical effect" of the contracts.[31] Similarly, he interprets *Standard Stations* as holding that requirements contracts "are proscribed by § 3 if their *practical effect* is to prevent lessees or purchasers from dealing in the goods, etc., of a competitor or competitors of the lessor or seller and thereby 'competition has been foreclosed in a substantial share of the line of commerce affected.'" Later, however, he states that the combination of the large number of gasoline stations, the large number of contracts and the great volume of products involved "*dictated* a finding that 'Standard's use of the contracts [created] just such a potential clog on competition as it was the purpose of § 3 to remove' where, as there,

[30] 258 U.S. 451 (1922).
[31] 365 U.S. at 326.

the affected proportion of retail sales was substantial."[32] Doubt thus remains to cloud the evidentiary issue.

But in carefully distinguishing the Tampa Electric contract from those made by suppliers wielding disproportionate market power, the Court further elucidates its position on this issue and offers a clue to the proper reading of *Standard Stations*:[33]

> "There is here neither a seller with a dominant position in the market as in *Standard Fashions* . . . nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil* . . . nor a plainly restrictive tying arrangement as in *International Salt*. . . . On the contrary, we seem to have only that type of contract which "may well be of economic advantage to buyers as well as to sellers."[34]

The flavor of the opinion taken as a whole suggests the conclusion that the Court will enlarge or restrict the scope of the standard of proof from case to case, depending upon the presence or absence of certain evidentiary factors. Where the supplier occupies a position of market dominance or its equivalent, a holding of illegality may be predicated upon proof that a substantial percentage of the relevant market in the line of commerce involved has been pre-empted by exclusive dealing arrangements. Where the supplier does not have such market control, no violation of section 3 will be found in the absence of further evidence showing actual or probable substantial diminution of competition in the relevant market for the line of commerce involved.

The division between these varying applications of the statutory standard may in actuality be less sharply-defined, however. Something less than dominant market power is likely to be its equivalent in legal effect. In the light of *Standard Stations,* this category will no doubt include leadership of a dominant group of suppliers, the other members of which also deal exclusively. The inclusion seems appropriate, for the potential detriment to small

[32] *Id.* at 329. (Emphasis added.) Mr. Justice Frankfurter's silent participation in the majority opinion should be noted.

[33] For various interpretations of the *Standard Stations* case, see KAYSEN & TURNER, *op. cit. supra* note 13, at 147, 160; HANDLER, *op. cit. supra* note 24, at 33-37; DIRLAM & KAHN, *op. cit. supra* note 28, at 93-94, 100; McLaren, *Related Problems of "Requirements" Contracts and Acquisitions in Vertical Integration Under the Anti-Trust Laws,* 45 ILL. L. REV. 141, 161-65 (1950); Schwartz, *Potential Impairment of Competition—Impact of Standard Oil Co. of California v. United States on Standard of Legality Under Clayton Act,* 98 U. PA. L. REV. 10 (1949).

[34] 365 U.S. at 334.

competitors is substantially similar whether one firm or a handful employ the restrictive devices. Even here, evidentiary considerations might vary, depending upon the number of the major suppliers using exclusive dealing contracts, although conservative counseling will point out the high antitrust risk attending any major's extensive use of such practices.

An exception to the dominance rule might apply where a short term requirements contract is the "appropriate unit of sale"[35] in the industry—that is, where requirements contracts are the prevailing mode of sale and where, in view of the line of commerce and the market structure, such a manner of dealing is appropriate or necessary. An exception of this kind could be asserted with some force on behalf of utility companies, for example, since their private necessities in this regard are reinforced by a public duty. Regardless of the appropriateness of requirements contracts for the industry concerned, the duration of the contract should be considered for its effect upon the substantiality of the foreclosure, since the shorter the term of the contract, the less obvious are its detrimental effects upon competition.[36]

Similarly, dominance should be controlling only when related to the relevant line of commerce. If Standard Oil, for example, had contracted exclusively with regard to an accessory over which another supplier maintained a virtual monopoly, competition might thereby have been promoted rather than suppressed. In such a case it would be unrealistic to say that Standard's market power over gasoline sales automatically narrowed the standard of proof required to show a lessening of competition in the relevant market for the accessory.[37]

In short, "dominance" must not become an epithet with which to condemn exclusive dealing arrangements as though they existed *in vacuo*. To be legally operative, dominance must relate to effective competition in a relevant consuming market, in a relevant market area, for the appropriate line of commerce. Its effects may

[35] See KAYSEN & TURNER, *op. cit. supra* note 13, at 147, 160.

[36] To the effect that requirements contracts limited to a duration of one year need not be unreasonable restraints of trade or unfair methods of competition, see FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 396 (1953); United States v. Linde Air Prods. Co., 83 F. Supp. 978, 982 (N.D. Ill. 1949) (dictum); United States v. American Can Co., 87 F. Supp. 18 (N.D. Del. 1949) (dictum).

[37] See Excelsior Motor Mfg. & Supply Co. v. Sound Equip., Inc., 73 F.2d 725 (7th Cir. 1934), *cert. denied*, 294 U.S. 706 (1935). There the supplier's exclusive dealing arrangement would have operated in a market over which a competitor exercised monopoly power. The court noted that the effect of the arrangement would have been to introduce, rather than lessen, competition.

vary with the pattern of competition, the duration of the contract, public interest, and the substantiality of the denial of market access to competitors.

Finally, it should be noted that although the scope of market analysis is certain to be affected by the nature of the standard of proof applied in a given case, the concepts are not so intimately related as to be completely interdependent. Thus while the actual effects of a dominant supplier's exclusive contracts need not be proved, evidence thereof will often be pertinent to such important issues as "relevant market" and "substantiality of foreclosure." In this regard, the impact of *Tampa Electric* upon the lower federal courts is likely to be considerable. By restricting the quantitative substantiality doctrine to tying contract cases and by limiting the applicability of the *Standard Stations* opinion, the Court has practically insured, and properly so, the future utilization of a more extensive factual inquiry than the courts have lately exhibited a willingness to undertake.

IV.

The probable impact of *Tampa Electric* upon the Federal Trade Commission's approach to exclusive dealing is more difficult to predict. At one time, this approach was characterized by an emphasis, in contested cases, upon the necessity for showing an actual or probable lessening of competition beyond considerations of market power and quantitative substantiality.

For example, in *Maico Co.,*[38] a case involving a manufacturer of hearing aid instruments and other products, the examiner found a violation on the basis of respondent's rank in the field, its volume of business, and the number of exclusive contracts it had with distributors. He rejected evidence introduced by respondent to show an increase in competition, a decrease in its own share of the market, the small percentage of dealers it actually had under contract, and other matters of like import. The Commission, believing these unconsidered factors bore materially on the question whether there was or might be a substantial lessening of competition, remanded the matter to the examiner "for the development of a record sufficient to enable us to determine the effect of respondent's practices on competition."[39]

[38] 50 F.T.C. 485 (1953).

[39] *Id.* at 488. See also Revlon Prods. Corp., 51 F.T.C. 260, 276 (1954) (FTC declines to restrict its consideration to quantitative substantiality). Compare the Commission's

Until recently, FTC approval of a less inclusive standard of proof has been virtually nonexistent, although this is perhaps due to the fact that actual exclusion of competitors has usually been affirmatively demonstrated even in those cases where a more restricted inquiry would have sufficed to prove a violation.[40]

In two such cases, *Dictograph Prods., Inc.*[41] and *Anchor Serum Co.*,[42] affirmance by the reviewing courts was couched in language expressing approval of a narrower approach. This did not accord with the Commission's position, judging from the view expressed in *Maico* that the FTC, because of its expertise, should consider evidence of actual effect on competition even though it understood Mr. Justice Frankfurter in *Standard Stations* to have found courts ill-equipped for the task.[43]

In so indicating that it might require a greater showing of anticompetitive market effects even where dominance and other restrictive factors would, in a federal court, relieve the Government of that burden, the Commission assumed a position inconsistent with the idea that the evidentiary criteria of illegality in section 3 cases should not vary with the tribunal involved.[44] Dual enforcement of the statute need not, and should not, dictate dual standards of legality.

More recently, however, the Commission has retreated from its *Maico* stand to a position substantially in harmony with *Tampa Electric's* view of *Standard Stations* and related cases. In *Mytinger & Casselberry, Inc.*,[45] where the Commission held illegal respondent's exclusive dealing contracts with 80,700 distributors of its vitamin and mineral supplements, covering from 8.6 percent to 61.52 percent of three relevant markets, the Commission observed:

approach to tying cases in Insto-Gas Corp., 51 F.T.C. 363 (1954). *Cf.* Pillsbury Mills, 50 F.T.C. 555 (1954) (under § 7 of the Clayton Act).

40 *E.g.*, Harley-Davidson Motor Co., 50 F.T.C. 1047, 1066 (1954).

41 50 F.T.C. 281 (1953), *aff'd*, 217 F.2d 821 (2d Cir. 1954).

42 50 F.T.C. 681, *aff'd*, 217 F.2d 867 (7th Cir. 1954).

43 50 F.T.C. at 488. This view somewhat overgeneralizes the Justice's opinion which should have been read in the light of the evidence offered by Standard in that case and the particular pattern of competition involved there. See note 20 *supra*. *But see* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 148 n.77 (1955): "We do not read the Federal Trade Commission's opinion in the *Maico* case . . . as launching that agency into economic investigations beyond the inquiry authorized by the governing interpretations of Section 3 that bind courts and the Commission alike."

44 See Standard Oil Co. v. United States, 337 U.S. 293, 310 n.13 (1949); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 148 (1955).

45 F.T.C. Docket 6962, September 28, 1960.

> "Respondents introduced certain economic data as justification for the use of their exclusive dealing arrangements. It is true . . . that in the *Maico* case, the Commission issued an order remanding the matter to the hearing examiner for the purpose of obtaining evidence as to the economic effect of the exclusive dealing agreements used by that company. . . . However, since the date of the Commission's action in the *Maico* case, the courts have made it clear that in a situation such as that shown to exist in this record, the plain language of Section 3 makes irrelevant those economic considerations urged by respondents."[46]

Similarly, in *Timken Roller Bearing Co.*,[47] the Commission struck down respondent's exclusive dealing contracts covering over 7,500 marketing outlets for the sale of tapered roller bearings in the replacement market for that product. A probable substantial lessening of competition was held to be fully established, in the light of *Standard Stations, Dictograph* and *Anchor Serum,* by evidence demonstrating that respondent was by far the leading supplier in the replacement market[48] and that its exclusive dealing contracts affected a substantial share of the market.

In narrowing the scope of required market inquiry, the Commission has not only recognized that the validity of such an approach is not restricted to the courts, but also it has gone farther and applied the criteria invoked in *Standard Stations* to situations involving market leadership unaccompanied by other important indicia of dominant power. Whether the Supreme Court would be willing to go so far is doubtful in view of the limitations the Court has already placed upon the applicability of the more quantitative test. It is by no means obvious that market leadership, without more, is sufficient to establish a clear probability that competition will be substantially lessened by the leader's extensive use of exclusive dealing contracts. Therefore, a closer look at market effects would appear to be warranted.

CONCLUSION

The primary effect of the *Tampa Electric* opinion is likely to be a greater emphasis, by the courts and perhaps by the Federal

46 *Id.* at 3.

47 F.T.C. Docket 6504, January 24, 1961.

48 Timken's dollar volume was roughly ten times that of its nearest competitor; it had over fourteen times the number of different items in its roller bearing line; and it had almost four times as many customers. *Id.* at 14-15.

Trade Commission, upon qualitative factors in section 3 exclusive dealing cases involving non-dominant suppliers. At the same time, *Standard Stations* has been paired with the dominant-supplier cases in such a manner as to reaffirm the applicability of a less searching, although not entirely quantitative, standard of proof where the existence of special market power and certain other structural and behavioral circumstances increases—to an as yet not clearly-defined degree—the probability of anticompetitive consequences.

While *Tampa Electric* does not remove all obstacles to understanding, it would be unreasonable to expect the Court to employ a relatively clear-cut case as a vehicle for the anticipatory resolution of every marginal issue likely to arise in this area of "not insubstantial" complexity. The antitrust aspects of exclusive dealing are significantly illuminated by what the opinion *does* say and its shortcomings as a definitive work should not render it less welcome.

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