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ANTITRUST LAW—EXCLUSIVE DEALING ARRANGEMENTS—EMPLOYMENT BY COURTS OF DUAL TESTS IN APPLYING SECTION 3 OF THE CLAYTON ACT—Petitioner nationally markets its product through exclusive dealing contracts with 80,700 independent distributors. In 1958 petitioner's distributors accounted—as to vitamin concentrates—for 61.52 percent of all house-to-house sales 8.6 percent of the total retail sales, and 34.6 percent of the total sales, of similarly-composed products. The FTC examiner's finding that petitioner had violated section 3 of the Clayton Act[1] was sustained by the Commission. On appeal, *held,* affirmed, one judge dissenting in part. The control of 61.52, 34.6 or 8.6 percent of the market sales by a seller having exclusive dealing contracts with its buyers is sufficient proof that competition has been "substantially lessened" in the line of commerce affected. *Mytinger & Casselberry, Inc. v. FTC,* 301 F.2d 534 (D.C. Cir. 1962).

Early Clayton Act cases indicated that exclusive dealing contracts violated the act when an inference of substantial foreclosure existed, and this inference could be supplied by either the dominant market position of the seller[2] or the quantity of commerce involved under the contracts.[3] This narrow criterion was expanded in the notable decision of *Standard Oil Co. v. United States (Standard Stations),*[4] in which the Supreme Court verbalized what has been construed as the "quantitative substantiality" test: "[T]he qualifying clause of section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[5] The Court, in rejecting evidence introduced by Standard in an attempt to justify its use of exclusive dealing contracts, expressly indicated that a detailed market analysis of the competitive effects of exclusive dealing arrangements was not included in its "quantitative sub-

1 "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale of goods, wares, merchandise, machinery, supplies or other commodities . . . on the condition . . . that the . . . purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor . . . of the . . . seller, where the effect of such . . . sale, or contract . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

2 See, *e.g.,* Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

3 See International Salt Co. v. United States, 332 U.S. 392 (1947).

4 337 U.S. 293 (1949).

5 *Id.* at 314. This test has evolved from an absolute quantitative standard, considering only the dollar volume or amount of goods involved under the exclusive contracts, to a comparative quantitative standard examining the percentage of commerce affected in relation to the market as a whole. For convenience, the term "quantitative substantiality" is presently used in reference to the comparative quantitative substantiality standard. *Compare* Standard Oil Co. v. United States, 337 U.S. 293 (1949), *with* International Salt Co. v. United States, 332 U.S. 392 (1947). "Quantitative substantiality" is to be distinguished from "qualitative analysis," which weighs a variety of economic factors to determine the effect of exclusive contracts on competition, *including* the percentage of commerce affected.

stantiality" test.[6] Rather, it was indicated that proof of foreclosure of competition in a substantial *percentage* of the relevant market would be sufficient. As a result, Standard's exclusive dealing contracts with sixteen percent of the independent dealers in a seven-state area, involving 6.7 percent of the total gasoline sold, were held illegal.

The "quantitative substantiality" test was rigorously criticized because of its disregard of the economic utility of requirements contracts and its failure to examine the availability of outlets for the adequate marketing of a competitor's product.[7] As if in response to this criticism, the Supreme Court presumably broadened its criterion by declaring, in *Tampa Elec. Co. v. Nashville Coal Co.*,[8] that an economic inquiry into the effect of exclusive dealing arrangements on competition was necessary, in that case, in determining the applicability of section 3.[9] This "qualitative analysis" test contemplates an examination of the line of commerce involved, a determination of the effective area of competition, a consideration of the opportunity other buyers had to enter or remain in the market, and a weighing of the justifications for the exclusive contracts within the market involved.[10] However, the Court in *Tampa Electric* weakened its opinion by attempting to distinguish the case before it from *Standard Stations*, noting that the seller had but one exclusive dealing contract in the former rather than the "myriad outlets . . . coupled with . . . exclusive contracts" which Standard had controlled.[11] This differentiation impliedly acknowledged the continued existence of the "quantitative substantiality" test, thereby leaving in doubt the applicability of the *Tampa Electric* principle to a given section 3 case.

The principal case further obscures the judicial use of the "qualitative analysis" test. The court of appeals not only cited the "quantitative substantiality" test as authority for its holding in the principal case, but, furthermore, inferred that *Tampa Electric* was decided on the basis of the same test.[12] Thus the court neglected to give recognition to the

6 337 U.S. at 311. See also Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940).

7 See generally ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 142 (1955); HANDLER, ANTITRUST IN PERSPECTIVE 34-38 (1957); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 919-41 (1952).

8 365 U.S. 320 (1961), 59 MICH. L. REV. 1236.

9 365 U.S. at 329. Previous to *Tampa Electric* this approach had been followed by the FTC in contrast to the *Standard Stations* test. In remanding to the examiner, the Commission ordered the acceptance of seller's evidence indicating a small percentage of dealers under exclusive contracts, an increase in competition and a decrease in the seller's share of the market. Maico Co., 50 F.T.C. 485, 487 (1953). *But see* Timken Roller Bearing Co., TRADE REG. REP. 1960-1961 TRANSFER BINDER ¶ 29373 (1961); Mytinger & Casselberry, Inc., TRADE REG. REP. 1960-1961 TRANSFER BINDER ¶ 29891 (1960).

10 365 U.S. at 327-29, 334.

11 *Id.* at 334.

12 Principal case at 539. The court said that the pre-emption of the market by the

broader test which *Tampa Electric* had stated. Had the court employed the "qualitative analysis" test, the result in the principal case might have been different. For instance, the court might have found the extent of door-to-door sales negligible in comparison to the sale of vitamins through other outlets, the percentage of distributors small compared to existing outlets, or the availability of outlets unlimited since most persons can readily qualify as door-to-door distributors. Failure of the court to give further consideration to the *Tampa Electric* rationale leads to the speculation that the principal case signifies the availability of dual tests, either of which may be used by the courts in their interpretation of the qualifying clause of section 3: the "quantitative substantiality" test in cases involving a seller occupying a position of leadership or dominance within the relevant market, and the "qualitative analysis" test in situations where there is a non-dominant seller. This supposition finds support in the failure of the Supreme Court to overrule the "quantitative substantiality" test in *Tampa Electric* and the inference by the Court that *Standard Stations* would still apply when a leading seller pre-empted "myriad outlets."[13] Further grounds for this viewpoint exist in the factual situations of the cases that have followed either of these tests. Decisions holding section 3 to be violated under the test of *Standard Stations* have involved sellers with dominant market positions[14] while those applying the criteria of *Tampa Electric* involved sellers occupying a weaker market position.[15] The mutual exclusiveness in the use of these tests is demonstrated by the two cases[16] that have employed the "qualitative analysis" standard. The same result could have been reached in both cases by use of the "quantitative substantiality" test, since only a small percentage of commerce, albeit not *de minimis*, was involved under the exclusive contracts, but the courts refused to apply that test because of the innocuous position of the seller in the relevant market.[17]

seller in *Tampa Electric* amounted to only .77% as compared to at least 8.6% in the principal case.

[13] 365 U.S. at 334.

[14] See, *e.g.*, Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954) (seller's exclusive contracts included two largest buyers in limited market, *held*, § 3 violated); Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955) (seller's exclusive contracts involved 22% of the cream of the nation's retail hearing-aid distributors, *held*, § 3 violated); United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U.S. 922 (1952) (seller's 7,546 exclusive contracts amounted to over $43,000,000 in 1950 alone, *held*, § 3 violated).

[15] See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (seller had but one exclusive contract involving .77% of coal sold in the relevant market, *held*, contract valid); Curly's Dairy, Inc. v. Dairy Co-op. Ass'n, 202 F. Supp. 481 (D. Ore. 1962) (local seller's exclusive contracts pre-empted less than 2% of available retailers, *held*, contracts valid). Compare Rural Gas Serv., Inc., 3 TRADE REG. REP. ¶ 15515 (1961) (seller's exclusive contracts accounted for less than 4% of the industry's total sales in the relevant market, *held*, contracts valid).

[16] *Ibid.*

[17] See *ibid.* Since "qualitative analysis" includes in part the quantitative approach, cases not violating § 3 under the latter may reach the same result under the former. However, the converse is not necessarily true. For example, it has been suggested that

Therefore, it is submitted that the courts may apply a "qualitative analysis" test in cases charging small businesses with violating section 3, but will continue to use the "quantitative substantiality" test, as was done in the principal case, as to sellers found to occupy a preponderant market position.

A dual approach to section 3 raises a further imponderable for the consideration of the courts. When does a seller have enough economic power in the relevant market to qualify for the "quantitative substantiality" rather than the "qualitative analysis" test? This question will encourage decisions to be appealed in hopes that the higher court will apply the alternative test. Moreover, the dual standard unfairly discriminates against large concerns that might have legitimate needs for exclusive dealing arrangements. The court in the principal case missed an opportunity to mitigate the hazards of a double standard of interpretation by clarifying the applicability of *Tampa Electric* to a section 3 case like the one before it. Using *Tampa Electric* as precedent, the court could have attempted to adopt a single "qualitative analysis" test for all section 3 cases. On the other hand, it could have recognized the existence of a dual standard and offered some definite criteria for choosing one or the other of the tests in a given section 3 situation. Instead, these tasks were left for future decisions.

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a "qualitative analysis" test applied to the *Standard Stations* situation would alter that decision since the prohibition of exclusive dealing contracts could have encouraged dealers to give up their independent status as purchasers and become agents of the large oil companies. See Standard Oil Co. v. United States, 337 U.S. 293, 319-21 (1949) (Douglas, J., separate opinion); Lockhart & Sacks, *supra* note 7, at 916.