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Antitrust Law—Tying Arrangements—Separability of Tying and Tied Products "Sufficient Economic Power." —Associated Press v. Taft-Ingalls Corp.

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Antitrust Law—Tying Arrangements—Separability of Tying and Tied Products—“Sufficient Economic Power.”—*Associated Press v. Taft-Ingalls Corp.*¹—Taft-Ingalls, a regular member of Associated Press (AP), operated a Cincinnati newspaper. Under its arrangement with AP, Taft-Ingalls received AP’s general news (“A”) wire, financial news (“D”) wire, Ohio regional news (“S”) wire, and its Kentucky regional wire.² The arrangement further required that Taft-Ingalls give two years’ advance notice of its intention to terminate AP’s services. When Taft-Ingalls requested that AP furnish it only the “S” wire, AP refused and required Taft-Ingalls to continue receiving the other three wires in accordance with their prior agreement. Taft-Ingalls terminated all AP news services without giving the agreed upon notice or paying for the subsequent two years’ services, and AP sued to recover the payments due under its agreement with Taft-Ingalls. Taft-Ingalls set up as a defense that its agreement with AP constituted an illegal tying arrangement in violation of the Sherman Act³ and also counterclaimed for treble damages on the same ground.⁴ The district court held that Taft-Ingalls had failed to produce evidence sufficient to show that the wires were separable and that without this there could be no tying arrangement.⁵ It thereupon awarded damages to AP for Taft-Ingalls’ breach of contract. On appeal, the Sixth Circuit HELD: The arrangement in the instant case is an unlawful tying agreement under the Sherman Act.

The court found that the three elements of an illegal tying arrangement—separability of tying and tied products, “sufficient economic power,” and effect on a substantial amount of interstate commerce—were sufficiently established. For its finding that the “S” wire was separable from the other three wires, the court relied primarily⁶ on two facts: (1) when Taft-Ingalls

¹ 340 F.2d 753 (6th Cir. 1965), petition for cert. filed, 33 U.S.L. Week 2386 (U.S. May 26, 1965) (Nos. 183, 185). Both parties have filed a petition for certiorari.

² It is not clear that the Kentucky wire was included as part of Taft-Ingalls’ basic service. The stipulation of facts entered into between the parties only named the first three wires as the basic AP service furnished Taft-Ingalls. *Id.* at 757. The dissenting opinion, *id.* at 775, and AP’s Petition for Writ of Certiorari, No. 183, p. 12, indicate that the Kentucky wire was furnished to Taft-Ingalls under a separate AP membership for its newspaper in Covington, Kentucky.

³ 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

⁴ Such a counterclaim is authorized by the Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

⁵ The district court gave the following reason for its decision:

Defendant has failed to provide this Court with sufficient facts upon which it may be concluded that there is a natural division in the cost of gathering news transmitted over the A, D, and State trunks. Without such a complete division, it is unnecessary and futile to explore the other elements of the alleged tying agreement. Recognition must be made that the compulsory joining of two separate and distinct things is a fundamental prerequisite of an illegal tie sale situation.

Brief for Appellant, pp. 10sa-11sa, *supra* note 1.

⁶ Other facts which the court found pertinent, but upon which it placed little emphasis, were: the Ohio “S” wire was operated at different hours from the other wires; it was controlled from Columbus while the other wires were controlled elsewhere; it

ceased publishing and sold certain of its assets to its competitor, the E. W. Scripps Company, AP made an offer to Scripps to drop the Kentucky wire with a proportionate reduction in price; and (2) AP provided its members at extra cost certain optional services—a sports wire and a wirephoto service. The court refused to accept as conclusive on the separability issue AP's contention and the district court's holding that for the "S" wire to be separable, the costs of gathering and distributing the "S" wire news had to be naturally separable from the costs attributable to the other wires.⁷ For its finding that AP had "sufficient economic power," the court relied on three facts: (1) AP held a position of dominance in the news field; (2) AP's news dispatches were unique; and (3) AP's news wires were *desirable* to newspapers in general and its "S" wire was *desirable* to Taft-Ingalls.⁸

It is submitted as the better view that AP's "S" wire was not separable from the other three wires. A tying arrangement is an agreement by a vendor to sell a desired product—the "tying" product—only on condition that the purchaser also buy a less desirable product—the "tied" product.⁹ Thus a *sine qua non* for an illegal tying agreement is that the tying and the tied products be separate and distinct.

Certainly the court drew a permissible inference of separability by analogizing the "S" wire—the tying product—to the Kentucky, wirephoto, and sports wires—the tied products. If the latter wires could be provided separately, it followed that the "S" wire could also be provided separately. The court, however, did not give due weight to the circumstances which gave rise to AP's numerous wire classifications. The facts showed that AP originally provided all its news over one wire and, in fact, still did so for its small volume members.¹⁰ Other wires were subsequently added simply because the news volume became too great for one wire. For the sake of customer convenience, AP established the classifications of general news, financial news, regional news, sports news, and wirephotos, and attempted to segregate each news item to a particular wire. That this was not always feasible is indicated by the fact that there was "spill over" from the "A" or "D" wires to the "S" wire as a result of excess news volume. The classification of AP's news wires, therefore, was purely artificial and was done by AP only for the convenience of its members and not for the purpose of establishing or extending a monopoly or restricting competition in the field of news. This case, therefore, differed from all other cases involving illegal tying arrangements in that the tying and tied products here were not naturally separate and distinct.¹¹ If AP reverted to its earlier practice of

could—physically—be added to or taken away from any newspaper; and separate receiving equipment was required for each wire. *Supra* note 1, at 763.

⁷ See note 5 *supra*.

⁸ As to desirability, the court's language is very misleading. The subheading for that portion of the opinion is entitled "Desirability of Tied Product"; and immediately below the subheading the court states that "one test of sufficient economic power is the desirability of the tied product to the purchaser." *Supra* note 1, at 767. The court must have intended to refer to the desirability of the tying product. See *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962).

⁹ *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

¹⁰ Brief for Appellant, p. 7sa n., *supra* note 1.

¹¹ See, e.g., *United States v. Loew's Inc.*, 371 U.S. 38 (1962) (individual copyrighted

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sending all types of news over one wire or if AP transmitted its news indiscriminately over four wires as time and volume dictated, certainly the court would not then find that the "S" news was in any way separable from AP's other news or that the "S" wire was a separate and distinct product. It would seem, therefore, that AP's artificial separation and classification of its news should not have been controlling on the separability issue.

It is further submitted that the court erred in finding that AP had the requisite economic power. "Sufficient economic power"¹² may be shown by the vendor's dominant position in the tying product's field or inferred from the uniqueness of the tying product or its desirability to consumers.¹³ However, it should be emphasized that the alleged violator of the Sherman Act must have the requisite power with respect to the tying product's field, not with respect to the field of his products in general.¹⁴ Furthermore, such power must result in restraint on competition in the tied product's market, not in the general market in which the vendor deals.¹⁵

The court first emphasized AP's position of dominance in the news field by pointing out that sixty-nine percent of the daily newspapers in the United States were AP members.¹⁶ From this it reasoned that AP possessed the requisite power "with respect to its basic news services,"¹⁷ neglecting to confine its inquiry as to sufficient economic power solely to the field of the "S" wire, the tying product. It cannot be denied that AP is a giant

films); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (land and transportation services); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (individual copyrighted films); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (salt and salt-dispensing machines); *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (television antenna systems and maintenance services).

¹² The test of "sufficient economic power" as set forth in *Northern Pac. Ry. v. United States*, *supra* note 11, developed from earlier patent and monopoly cases. In *Universal Motion Pictures Patent Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917), the Supreme Court refused to enforce a tying agreement which tied other commodities to patented devices. Tying agreements were enjoined under the Clayton Act in *United Shoe Mach. Co. v. United States*, 258 U.S. 451 (1922), and *International Business Machs. Corp. v. United States*, 298 U.S. 131 (1936). In both cases the defendants had a virtual monopoly on both the tying and the tied products. In *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942), the Court refused to enforce, as against a direct infringer a patent which was used to impose tying restrictions. Finally, a tie-in with a patent was declared illegal under both the Sherman and Clayton Acts in *International Salt Co. v. United States*, *supra* note 11. The test applied in that case was whether its effect was to "foreclose competitors from any substantial market" in the tied commodity. The Court found that the foreclosure of \$500,000 annually in the market for the tied product was "not insubstantial." In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), the Court indicated that the vendor must have monopoly power or dominance over the tying product for a tie-in to be illegal *per se*, but the Court in *Northern Pac. Ry. v. United States*, *supra* note 11, construed this "as requiring . . . [nothing] more than sufficient economic power to impose an appreciable restraint on free competition in the tied product . . ." *Id.* at 11.

¹³ *United States v. Loew's Inc.*, *supra* note 11, at 45; *Northern Pac. Ry. v. United States*, *supra* note 11, at 19.

¹⁴ *Ibid.*

¹⁵ *Northern Pac. Ry. v. United States*, *supra* note 11, at 11.

¹⁶ *Supra* note 1, at 766.

¹⁷ *Ibid.*

in the news service field, but this does not by itself satisfy the more narrow requirement of dominance in the tying product's field. The fact that the defendant in *International Salt Co. v. United States*¹⁸ was dominant in the salt-producing industry did not establish the required dominance over the market for the tying product, a patented salt-dispensing machine. A separate inquiry was there made to find the requisite dominance in the tying product's field; and it was not market dominance in general; but the uniqueness afforded by a patent on the tying product which gave the defendant its sufficient economic power. Thus it seems that the court's reliance upon AP's "bigness" in general is misplaced.¹⁹

The court then inferred that AP had the requisite economic power from the fact that its news dispatches were unique. It reasoned that AP's news dispatches were unique in that AP's interest in them was comparable to a copyright, placing primary emphasis on *International News Serv. v. Associated Press*.²⁰ The *International News* case, however, seems inapposite to the present case. In that case the Court was concerned with the problem of finding some reasonable basis of recovery for a news service as against a piratical competitor in a field where the product was neither patented nor copyrighted. The Court was very careful to limit its holding to the particular facts before it;²¹ and AP's interest, which was held comparable to a copyright, was said to have that status only as to its competitor who was attempting to "reap where it has not sown."²² The facts in the present case show that the parties were in no sense competitors. Moreover, as to uniqueness also, the court failed to confine its inquiry to the "S" wire, the tying product, but considered AP's "news dispatches" in general.²³

Finally, the court inferred that AP had the requisite economic power on the basis of desirability. Relying on the facts that the AP's wires were

¹⁸ *Supra* note 11. Defendant there leased salt-dispensing machines only on condition that lessees use lessor's products in the leased machines. The machines were patented and defendant was the major salt-producer in the country.

¹⁹ Although the defendant in *Northern Pac. Ry. v. United States*, *supra* note 11, was a common carrier of great importance in the Northwest, the Court did not consider the defendant's position in the transportation field, but confined its inquiry to the defendant's position in the tying product's field—land.

²⁰ 248 U.S. 215 (1918). *International News* had made it a practice to take *Associated Press* news items from early editions and bulletin boards and distribute them as its own product to its member papers.

²¹ The Court stated:

[Although we] assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. . . . [W]e hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

Id. at 236.

²² *Id.* at 239.

²³ *Supra* note 1, at 767. It should be noted that while the court found AP's news dispatches unique and presumably the "S" wire was itself regarded as unique, AP's competitor, *United Press International*, had wires over which it transmitted news with similar wire classifications, including an Ohio news wire. *Id.* at 762; Brief for Appellant, p. 8, *supra* note 1.

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found generally desirable by newspapers²⁴ and that the "S" wire was deemed indispensable by Taft-Ingalls,²⁵ the court found that AP's "S" wire possessed the necessary desirability. However, as to the former point, the fact that AP's news services were generally desirable does not compel the conclusion that the "S" wire, the tying product, was so generally desirable that AP could use it as a lever to induce purchasers to take the other three wires, the tied products. As to the latter point, there was no evidence that other newspapers found the "S" wire extremely desirable; only as to Taft-Ingalls was it indispensable. In no case has the fact that one purchaser found a product desirable been suggested as conclusive on the question of whether the product is so generally desirable as to establish "sufficient economic power" in the product's market.²⁶ The court's reasoning in this part of the case would lead to the conclusion that any of AP's wires is a potential tying product while the other wires in its basic news service may be relegated to the servient role of tied products.

Although all the facts concerning AP's arrangements with its members may well constitute a violation of the Sherman Act, the facts adduced by Taft-Ingalls and relied on by the court in the present case do not establish an illegal tie-in. Though the scope of what constitutes an illegal tying arrangement has gradually broadened in recent years,²⁷ an illegal tying arrangement still consists of definite elements and courts should carefully examine and evaluate the facts in determining whether these elements have been sufficiently established. This means, of course, that courts should not seize on an insubstantial and merely formal separation as determinative of the separability issue. This also means that courts should not be impressed by the vendor's "bigness" in general and thereby fail to confine their inquiries to the field of the tying product.

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²⁴ *Supra* note 1, at 767.

²⁵ *Id.* at 762, 768.

²⁶ See *United States v. Loew's Inc.*, *supra* note 11 (25 separate contracts between the six defendants and various television stations); *Northern Pac. Ry. v. United States*, *supra* note 11 (over 1100 separate contracts containing the illegal tying arrangement); *United States v. Paramount Pictures, Inc.*, *supra* note 11 (four major film producers "block-booked" their films with what appears to be hundreds of individual exhibitors); *International Salt Co. v. United States*, *supra* note 11 (over 900 separate agreements involving a dollar sum of about \$500,000 annually in the tied product); *United States v. Jerrold Electronics Corp.*, *supra* note 11 (over 120 separate contracts containing the tie-in clauses). But see *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 221 F. Supp. 848 (S.D.N.Y. 1963) (motion to dismiss denied where four insurance companies acting as one prospective purchaser complained that defendant refused to allow them to sponsor a television program over 95 stations they desired and instead required them to sponsor the program over a total of 130 stations, 35 of which the plaintiff did not desire).

²⁷ See note 12 *supra*.