Buyer's Liability in Exclusive Dealing

The major anticompetitive effect of exclusive dealing is the foreclosure of the buyer's market to the competitors of the seller who imposes the restriction.[1] A second restriction on competition is the curtailment of the buyer's freedom to deal with other sellers. Third, exclusive dealing deprives the public of a free choice of competing goods. The purpose of section 3 of the Clayton Act[2] was to remove these potential impediments to competition.[3] However, since some exclusive dealing arrangements may be justified by legitimate business aims, section 3 was designed to reach only those arrangements which are likely to substantially lessen competition.[4] The seller's liability in this area of exclusive dealing contracts is well established under section 3 of the Clayton Act. The asserted need for the cloak of protection offered by section 3 was a result of the seller occasionally inducing his distributors to handle his lines exclusively.[5] This was made possible by the seller's dominating position in the market. The buyer then was coerced into accepting the sometimes unconscionable demands of the seller.

However, the buyer's bargaining position has improved so that he sometimes initiates and demands an exclusive dealing contract, in most instances this being a requirements contract; that is, a contract between

1. Cavers, *Restricting Customers from Handling Competing Products*, in A PRIMER ON UNLAWFUL RESTRAINTS IN MARKETING AND DISTRIBUTION 22, 24 (1967).

2. 15 U.S.C. § 14 (1965).

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchase thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale of such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Several specific requirements must be met to bring an agreement within the ambit of the statute, these limitations being that the seller or lessor must be engaged in interstate commerce, it must involve a sale or a lease of goods not services and it must be limited to a sale within the United States and places under its jurisdiction. If the contract does not meet these requisites, such as services instead of goods, one must proceed under section 1 of the Sherman Act pertaining to contracts in restraint of trade. *See* E. KINTNER, AN ANTITRUST PRIMER, 49 (1964).

3. S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 577 (3d ed. 1968).

4. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

5. S. OPPENHEIM & G. WESTON, *supra* note 3.

a seller and a dealer whereby the buyer agrees to purchase all of his requirements of a commodity or service from that particular seller.[6] A powerful buyer might easily procure a contract from a seller to supply his entire requirement of a certain product. Furthermore, a group of buyers might entice a seller to furnish all of a particular service, such as advertising, for the group, thereby forming an exclusive dealing contract. The law concerning buyer's liability in these types of situations has not yet been fully developed. However, it is well settled that if an exclusive dealing contract violates section 3 of the Clayton Act, it is immaterial that the buyer induces it, the seller is still liable.[7] As a result, the seller is put in a most disadvantageous position; if he refuses the offer he stands to lose a lucrative outlet, but if he accepts, he is vulnerable to a suit by the United States or an injured competitor, even though he did not initiate the agreement.[8] The wrong on its face is the same—the seller's competitors are injured no matter who initiates the agreement. However, in these situations it appears the wrong party is penalized. This presents the problem of whether the buyer can be held liable, and if he can, should he be? That is, has the buyer in reality violated the antitrust laws? Furthermore, if he has, is it necessary that he and not the seller be punished in order to accomplish the aims contemplated by the passage of section 3?

Buyer-induced unilateral exclusive dealing agreements will be examined first with respect to the question of whether the buyer can and should be held liable.[9] An example of this type of arrangement is seen in *2361 State Corporation v. Sealy Incorporated*.[10] Wards, a large retailer, bought mattresses from several manufacturers for many years. In 1961 Wards selected Sealy to be its sole supplier of mattresses after earlier deciding to establish uniformity in this phase of its business. Another mattress manufacturer, who had previously done business with Wards, sued Wards and Sealy claiming to be injured by a purported exclusive dealing agreement. There was a question of whether there was an exclusive dealing agreement or merely a unilateral decision by Wards to deal solely with Sealy. Assuming that there was an exclusive dealing agreement, could Wards, the buyer, be held liable since the buyer and not the seller initiated the negotiations?

6. E. KINTNER, AN ANTITRUST PRIMER 54 (1964).

7. Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954).

8. The seller's position is made even more disadvantageous by the fact that he is liable for treble damages under the Clayton Act. 15 U.S.C. § 15 (1965).

9. The term unilateral describes an agreement whereby one buyer deals with one seller; whereas, the term multilateral pertains to an agreement whereby several buyers purchase from one or more sellers.

10. 263 F. Supp. 845 (N.D. Ill. 1967).

The buyer perhaps could be reached under section 1 of the Sherman Act[11] for a contract or combination in restraint of trade since an exclusive dealing agreement by its very nature impedes competition. However, this area is uncertain because the ease of proceeding against the seller under section 3 of the Clayton Act has made this approach unnecessary.[12] Section 1 has been used primarily when the seller could not be reached through the Clayton Act as when he supplies services as opposed to goods.

A buyer's liability might also be predicated upon section 5 of the Federal Trade Commission Act[13] by reference to section 3 of the Clayton Act, thereby treating an exclusive dealing agreement as an unfair trade practice. This reasoning is analogous to the similar use of section 5 by the FTC, proceeding through sections 2(d) and 2(e) of the Robinson-Patman Act[14] when trying to reach the buyer. Sections 2(d) and 2(e) which prohibit disproportionate payments of advertising and promotional services or grants of services and facilities to the buyer apply only to sellers. Thus, by inducing and receiving discriminatory payments from sellers the buyers cause their suppliers to violate sections 2(d) and 2(e) of the Robinson-Patman Act. The FTC in holding the buyer liable has argued successfully that conduct which runs counter to public policy declared in the Sherman and Clayton Acts violates section 5 of the FTC Act.[15] Since inducement of discriminatory payments is conduct which runs counter to the purpose of the Clayton Act, it is subject to action under section 5 of the FTC Act. Thus the FTC has filled a gap by using the "principle that it is an unfair trade practice violative of section 5 to procure, participate in or aid and abet the use by another of a trade practice which is illegal and against public policy."[16] Section 5 then has been used to deter buyers from inducing the seller to provide sections 2(d) and 2(e) prohibitions.[17] A logical extension of this reasoning could be used to hold the buyer liable under section 5 of the FTC Act for imposing an exclusive dealing agreement on the seller since the imposition of an

11. 15 U.S.C. § 1 (1965).

12. Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254, 276 (1960) (indirectly).

13. 15 U.S.C. § 45(a)(1) (1965).

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

14. 15 U.S.C. § 13 (1965).

15. Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966); The Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

16. Mezinis, *Group Buying*, 12 ANTITRUST BULL. 541 (1967).

17. Cases cited note 15 *supra*.

exclusive dealing agreement runs contra to the whole purpose and rationale of section 3 of the Clayton Act. With this line of reasoning applied to our present economic structure, the ends contemplated by Congress would perhaps best be achieved. One limitation in using this approach is the unavailability of treble damages.

As indicated above, an obvious question is whether it is important that the buyer can be held liable since illegal exclusive dealing agreements can be attacked anyway by holding the seller liable; that is, the wrong can be controlled whether the buyer initiates it or not. The seller is held to know that it is illegal under the antitrust laws to enter into an exclusive dealing contract if it substantially lessens competition. Even though a seller knows this Act and knows that he will be subject to prosecution, he may nevertheless be forced to comply with a buyer's request for an exclusive dealing contract. Because of the seller's disadvantageous position and in order for fairness to prevail, it seems essential that the true "wrongdoer" be subject to punishment. Moreover, to hold the buyer liable would probably diminish the number of section 3 violations since the buyer would not be so quick to impose his will on the seller. The evil would be eliminated at its source.

An analysis based on the premise that the buyer is imposing a restraint upon himself can lead to a conclusion that neither the buyer nor seller should be liable. As is evidenced by the buyer's choice to buy from *only* one seller, he is expressing his intention not to buy from any of the seller's competitors. Thus, no injury results to the competitors of the seller as the buyer was not going to deal with them anyway. Something that is nonexistent cannot be diminished; that is, as competition was nonexistent initially, it cannot be restrained. Consequently, the Act has not been violated. In light of the above premise, it is suggested that the seller would not be liable as his competitors were in no way affected. Also, since the only restraint made is by the buyer upon himself, he would not be liable either because to punish the buyer would be to punish him for self-restraint. Thus, an argument can be made that no liability should attach in buyer-induced exclusive dealing contracts. This argument can be rebutted though as competition was implicit, since the buyer initially chose one seller over all competing sellers for one reason or another. Further, once an exclusive dealing agreement is entered into, other sellers are not able to compete. Thus, it becomes important to restrain a buyer from foreclosing the market for a long period, shutting out the possibility of future competition for the buyer's business.

When this nebulous area is approached from one direction, the seller should be liable; from a second direction the buyer should be liable; and third, an argument can be made that neither should be liable. To keep in harmony with the antitrust laws, though, probably the best solution is to hold the buyer responsible. This would free competition from a restraint imposed by the buyer when he has the stronger bargaining power in the market. The *Bailey's Bakery Limited v. Continental Baking Company*[18] case states that exclusionary devices which permit business growth, but prevent new entry into the market or adversely affect those already in the market are condemned. Under this rationale the stronger party, in this case the buyer, should be prevented from imposing his will on the weaker party and dictating the structure of the market, thus removing the potential harm to continued unfettered competition.

Multilateral exclusive dealing agreements are potentially more dangerous than unilateral agreements. An illustration of this type problem is exemplified by *Instant Delivery Corporation v. City Stores Company*.[19] A group of department stores had been using a consolidated delivery service to deliver their packages. Labor difficulties caused the stores to resort to using several independent delivery services. Two of the stores were informed that after the Christmas rush the rates would have to go up. To return to the successful and cheaper arrangement of a consolidated delivery, the four stores invited two services to compete for a consolidated delivery service. The carriers presented their bids and capabilities. Two of the stores chose one of the delivery services and tried to persuade the other two that their choice was the better carrier. One of the two stores having been influenced by the action of the first two went along with their choice and soon after the other store joined in re-establishing a consolidated delivery service. The unsuccessful bidder sued the stores, charging a concerted refusal to deal. The trial court put aside the argument of per se illegality set forth in *Klor's, Incorporated v. Broadway Hale Stores, Incorporated*[20] saying that the aim and purpose of the refusal to deal as found in that case was to force a change in the boycotted businessman's trade practices or to exclude him from competition. Such intention was not present here. The case was settled before appeal. The proceeding in this case was under section 1 of the Sherman Act. Section 3 of the Clayton Act could not be used since the sale of services, not goods, was involved here.

18. 235 F. Supp. 705 (D. Hawaii 1964).
19. 284 F. Supp. 941 (E.D. Pa. 1968).
20. 359 U.S. 207 (1959).

To establish the liability of a group of buyers acting concertedly in forming exclusive dealing contracts requires a different analysis than that used in analyzing unilateral exclusives, although many of the same considerations are relevant. Competition is handicapped by requirements contracts entered into by a group in the same way as those entered into individually, and in fact the final result is the same. Thus, the same rationale set forth previously is applicable to concerted exclusive dealing with two additional concepts or considerations.

The first such consideration is simply that concerted action by a group is more dangerous than independent action by individuals. It is obvious that more of the market is foreclosed by a group than by an individual because of the larger number involved. Not only is competition hampered in multilateral exclusive dealing contracts by vertical restraints, but by horizontal ones also. Instead of one buyer's market being foreclosed to the favored seller's competitors several buyers are tied up. Furthermore, suppliers are more likely to respond to coercion applied by a group than by a single trader. As indicated, a multilateral exclusive dealing agreement is on its face more detrimental to competition than unilateral agreements and as such should be examined with greater scrutiny. "An act when done by one may become a public wrong when done by many acting on concert."[21]

The second consideration is whether the concept of boycott should be applied to multilateral exclusive dealing agreements. Every multilateral exclusive dealing contract is also a refusal to deal since by dealing with one person the group is necessarily refusing to deal with the favored seller's competitors. Thus, there is little doubt that the buyer might be liable for a concerted refusal to deal under section 1 of the Sherman Act. A boycott, though, is a per se violation of section 1.[22] This concept of per se illegality does not seem to be in harmony with section 3 of the Clayton Act. An exclusive dealing contract is illegal under the Clayton Act only if it substantially lessens competition. Also, a positive approach toward exclusive dealing agreements is used in section 3; that is, it looks to the forming of an exclusive dealing agreement which substantially lessens competition; whereas, a negative approach is used in the boycott concept; that is, it looks to the exclusion of someone from competition.

The trial court in the *Instant Delivery* case distinguished the refusal to deal aspect from cases such as *Klor's* by saying that there was no intent to discriminate against or exclude the complaining

21. Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600, 614 (1914).
22. Cases cited note 15 *supra*.

carrier from competition. This reasoning seems to be faulty since a boycott is per se illegal and the intent of the parties is of no consequence. Also every instance of competition has as its direct aim and result to exclude someone from competition. Perhaps the distinction, if any, is not excluding him from competition but preventing him from competing originally. There the rival carrier was not only allowed but invited to compete. This then gives rise to the problem of how far the buyer must go in seeking bids, that is, in promoting competition. Should he send invitations for bids to all interested sellers in an area? How much responsibility should be put on the seller to seek out competition?

As seen, there are two means by which to remedy the same problem. As indicated, however, it is difficult to synthesize section 3 and the boycott concept. If the injured competitors are given a reasonable opportunity to compete, it seems the best result would be obtained by using the positive approach of section 3 and abandoning the boycott idea unless there is a definite intent to exclude someone from competition. In solving the problem of buyers' liability in multilateral exclusive dealing agreements, it is suggested that the best result would be achieved by applying section 1 of the Sherman Act to the agreement as a contract in restraint of trade using the basic rationale of section 3 of the Clayton Act.

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