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*265 SEPARATE PRODUCTS IN THE TYING CASE

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*267 I. LOGICAL AND LEGAL UNDERPINNINGS OF PRODUCT DIFFERENTIATION.

A. The requirement of at least two separate and distinct products has been a logical component to a prima facie tying claim since the incipience of this cause of action. See, International Salt v. United States. 332 U.S. 392 (1947). For example, in Northern Pacific v. United States. 356 U.S. 1 (1957), justice Black opined on separate products:

For our purposes, a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted, competition on the merits with respect to the tied product is inevitably curbed. Pages 5 and 6. (Emphasis added).

B. Antitrust litigants should never assume a bright line separation between products. Indeed, the difference between integrated products which are not separate (e.g., camera and lens, or car and engine), and products which are obviously distinct (e.g., flour and sugar, or land and railroad service), can, to say the least, lie in the eyes of the beholder. See opposing views of Justice Stevens and Justice O*Connor in Jefferson Parish Hospital Dis. No. 2 v. Hyde. 466 U.S. 2 (1984), discussed infra.

II. THE SEPARATENESS IN PRODUCTS CAN BE BLURRED BY TECHNOLOGY.

A. The separateness of products becomes increasingly nettlesome in antitrust cases involving so-called “high tech” industries. This emanates not only from the practical difficulties of technical comprehension on behalf of the fact finder, but also genuine and complex interrelationships between products which do, in fact, impart a perception of singleness, e.g., computer hardware and uniquely applicable software applications. *Digital Equipment Corp. v. System Industries, Inc.*, 1990-1 Trade Cases, § 68,901 (D.C. Mass. 1990).

III. SEPARATE PRODUCT ANALYSIS BEFORE JEFFERSON PARISH.

A. No consistent rationale was utilized in analyzing separate products prior to Jefferson Parish. The Supreme Court itself had addressed the issue in at least three cases, but none of the cases set forth a clear, unambiguous standard.

*268 1. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953): Advertising brochures and newspapers were a single product as a result of the perceptions in the eyes of the buyers;

2. *Jerrold Electronics Corp. v. United States*, 365 U.S. 567 (1961): Components of antennas were separate products as a result of interbrand competition, inter alia, which did not sell antenna systems as a single product; and

3. *Fortner I.* 394 U.S. 495 (1969): Prefabricated homes and loans were separate products since different units of U.S. Steel Marketed each such product, and the loans were frequently for more than the amount needed to purchase the homes. Justice Black admitted the Court’s lack of a firm compass:

Whatever the standards for determining exactly when a transaction involves only a single product, we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product. Page 507. (Emphasis added).

B. Lower Courts promulgated a patchwork of “tests” to deal with the separate products issue. These tests, in general, focused to varying degrees on the buyer’s perceptions; the perception in the seller’s industry, and/or the so-called “functional relationship” between the products. The “functional relationship” test was a prevalent thread in numerous decisions. The essence of this test held that products were not separate if they were functionally related or integrated, i.e., one product was useless without the other. An overall discussion of the state of the law on separate products prior to Jefferson Parish is set forth in Pasahow, *Tying and the Single Product Issue*, 54 *Antitrust Law Journal*, 12/19-12/20(1986). Also see Comment, *A New Approach to the Legality of Franchising Tie Insurance*, 129 *V.Pa.L.Rev.* 1267 (1981).

Interestingly, the 9th Circuit developed a distinguishable test which can best be characterized as focusing on the “function of the aggregation.” The function of the aggregation test was

enunciated in Siegel v. Chicken Delight Inc. 448 F.2d 43 (9th Cir. 1971) cert. denied 405 U.S. 955 (1972). In that case, the Court stated:

*269 In determining whether an aggregation of separable items should be regarded as one or more items for tie-in purposes in the normal case of sales of products, the Courts must look to the function of the aggregation. Consideration is given to such questions as whether the amalgamation of products resulted in cost savings apart from those reductions in sales expenses and the like normally attendant upon any tie-in, and whether the items are normally sold or used as a unit with fixed proportions. Page 48.

Also see Moore v. J. H. Matthews Co., 550 F.2d 1207 (9th Cir. 1977), and ILC Peripherals Leasing Corp. V. IBM. 448 F.Supp. 228 (1978).

Interestingly, Justice Stevens raised serious questions as to the viability of the “functional relationship” test in Footnote 30 of Jefferson Parish. He wrote:

We have often found arrangements involving functionally linked products, at least one of which is useless without the other, to be prohibited tying devices. Page 19.

Justice Stevens then went on to detail numerous cases in support of that analysis.

IV. THE “DISTINCT MARKET” TEST OF JEFFERSON PARISH.

A. In Jefferson Parish, supra, the Supreme Court renounced the “functional relationship” test and shaped the “distinct market” test:

Our cases indicate, however, that the answer to the question of whether one or two products are involved turns not on the functional relationship between them, but rather on the character of the demand for the two items. Page 19.

The Court continued:

Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is sufficient to offer anesthesiological services separately from hospital services. Page 22. (Emphasis added).

*270 Justice Stevens went on to elaborate on this rationale in Footnote 35:

This approach is consistent with that taken by a number of lower Courts. See Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214-1215 (CA9 1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48-40 (CA9 1971), cert. denied, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972); Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 253 (CA4 1971); Susser v. Carvel Corn., 332 F.2d 505, 514 (CA2 1964), cert. dismissed, 381 U.S.

125. 85 S.Ct. 1364. 14 L.Ed.2d 284 (1965); United States v. Mercedes-Benz of North America, Inc., 517 F.Supp. 1369, 1379-1381 (ND Cal. 1981); In re Data General Corp. Antitrust Litigation. 490 F.Supp. 1089. 1104-1110 (ND Cal 1980); Jones v. 247 East Chestnut Properties, 1975-2 Trade Cases ¶ 60,491. pp. 67. 162-67, 163 (ND. Ill. 1974); N.W. Controls, Inc. v. Outboard Marine Corp., 333 F.Supp. 106, 107, 109, and n. 6 (ED Pa. 1968). See generally Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 123 Emory L.J. 963 (1974); Wheeler, Some Observations on Tie-Ins, the Single Product Defense, Exclusive Dealing and Regulated Industries, 60 Calif L.Rev. 1557, 1558-1567, 1572-1573 (1972); Note, Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws, 46 S.Cal.L.Rev. 160 (1972). See also Fortner I. 394 U.S., at 525. 89 S.Ct. at 1269-1270 (Fortas, J., dissenting); Note, Tying Arrangements and the Single Product Issue, 31 Ohio St.L.J. 861 (1970).

B. The actual thrust of the Jefferson Parish test used in delineating separate products focuses on distinct product markets and necessarily entails scrutiny as to the character of demand. However, the character of the supply of the products should also be reviewed.

1. Character of Demand Perspective.

The tying and tied products must each be able to sustain sufficient demand for their own purchase separately without regard to each other. In other words, if the products were not "tied," they must each be capable of being provided separately and purchased separately. The inquiry could also be posited as follows: Do consumers differentiate between the two products? Interestingly, the *271 importance of this consumer perception was amply illustrated in Times-Picayune Publishing Co., supra. This, of course, was pre-Jefferson Parish.

2. Character of Supply Perspective.

While separate demand is obviously a crucial indicium of separate product differentiation, the manufacturer's separate provision of the products should also be studied. This inquiry should focus on the following practical factors on the supply side of the equation:

- a. Are the products manufactured separately?
- b. Are the products marketed separately?
- c. Are the products invoiced separately?
- d. Are the products warranted separately?
- e. Are the products maintained separately?
- f. Are the products strategically differentiated by the manufacturer?

g. How are the products treated by other interbrand competitors?

The importance of the treatment by interbrand competitors, or industry recognition, was given special emphasis by the Jefferson Parish Court in Footnote 39. There the Court approvingly cites the opinion of District Judge Van Dusen in *Jerrold Electronics*, supra, when he wrote:

There are several facts presented in this record which tend to show that a community television antenna system cannot properly be characterized as a single product. Others who entered the community antenna field offered ALI of the equipment necessary for a complete system, but none of them sold their gear exclusively as a single package as did Jerrold. The record also establishes that the number of pieces in each system varied considerably so that hardly any two versions of the alleged product were the same. Furthermore, the customer was charged for each item of equipment and not a lump sum. for the *272 total system. Finally, while Jerrold had cable and antennas to sell which were manufactured by other concerns, it only required that the electronic equipment in the system be bought from it.

Jerrold, 187 F.Supp. at 599.

V. JUSTICE O*CONNOR*S CONCURRENCE IN JEFFERSON PARISH.

A. In her separate opinion, Justice O*Connor expressly found that there was no “sound economic reason for treating surgery and anesthesia as separate services.” 466 U.S. at 41. In arriving at this conclusion, she focused upon the probability of acquiring additional power, more than the “distinct market” test promulgated by Justice Stevens. She reasoned that patients were only interested in purchasing anesthesia in conjunction with other hospital services. Therefore, the hospital could not acquire any additional market power by selling the two services together. She pointed out that the tie between surgery and anesthesia would not affect the “quantity” of anesthesia provided, nor the price of anesthesia or surgery for those who chose to become hospital patients. She concluded that the products should probably not be characterized as distinct products for tying purposes.” U.S. 466 at 41.

Justice O*Connor further wrote:

If sugar is useless to consumers except when used with flour, the flour seller*s market power is projected into the sugar market whether or not the two products are actually sold together; the flour seller can exploit what market power it has over flour with or without the tie. The flour seller will therefore have little incentive to monopolize the sugar market unless it can produce and distribute sugar more cheaply than other sugar sellers. And in this unusual case, where flour is monopolized and sugar is useful only when used with flour, consumers will suffer no further economic injury by the monopolization of the sugar market.

U.S. 466 at 41.

B. Notwithstanding the opinion of Justice O'Connor, the Supreme Court's "distinct markets" test appears to be viable.

*273 VI. SEPARATE PRODUCTS TYING CASES AFTER JEFFERSON PARISH.

A. It is fair to say that, with a few noteworthy exceptions, the "distinct market" test of Jefferson Parish has been embraced by the lower Courts.

1. McGee v. First Federal Savings & Loan Assoc., 761 F.2d 647 (11th Cir. 1985) cell, denied 474 U.S. 905 (1986): Court did not find separate products where no separate demand shown for pre-mortgage appraisals. The other alleged product was the mortgage loan.

2. Southern Pines Chrysler-Plymouth v. Chrysler Corp., 826 F.2d 1360 (4th Cir. 1987): Court did not find separate products where fluctuating differences in the character of demand for particular models .. " did **not** clearly demarcate separate products, i.e., "fast" selling cars and "slow" selling cars.

3. 305 East 24th Owens Corp. v. Parman Co., 714 F.Supp. 1296 (SD NY 1989): District Judge Kimba Wood expressly rejected "functional relationship" test espoused by defendant and embraced the test enunciated by Jefferson Parish in finding the sale of coop units and leases for units to be separate products. Cf Johnson v. Nationwide Industries, Inc., 715 F.2d 1233 (7th Cir. 1983) where condominium and management contract for condominium were a single product.

B. There have been some concerns about where the Jefferson Parish test will lead. In Jack Walters and Sons Corn. v. Morton Bldg., Inc., 737 F.2d 698 (1984) cert. denied 469 U.S. 1018 (1984), Circuit Judge Posner raises questions about "... how far the 'separate markets' approach of Jefferson Parish will be pushed." Page 704. He queries whether belts and buckles will become separate markets.

C. In general, however, the principal action in tying cases for the next several years will doubtless focus more on thorny hi-tech product nuances than on a plethora of differing tests such as the pre-Jefferson Parish era.