

SUPREME COURT FAILS TO HOLD VERTICAL DIVISION OF TERRITORY ILLEGAL PER SE

White Motor Co. v. United States
372 U.S. 253 (1963)

The White Motor Company, a truck manufacturer, imposed territorial and customer restrictions on its dealers and distributors and retained specified volume accounts for direct sale. The territorial agreements either prohibited dealers and distributors from selling to customers located outside of a specified geographical area or confined the dealers to a named customer or customers. The restrictions precluding dealer sales to customers retained by the manufacturer may be labeled customer restrictions and the others territorial restrictions. Certain pricing policies were similarly imposed. The Justice Department brought a civil antitrust suit to enjoin¹ these restrictions as contrary to sections 1 and 3 of the Sherman Act.² On summary judgment motion by the government the district court held³ that the restrictive agreements and the price fixing provisions were illegal per se. The decision on price fixing was not appealed. Mr. Justice Douglas, writing for the majority of the Supreme Court,⁴ held that whether the restraints are illegal per se or whether they might be found ancillary to a reasonable business practice could only be determined after the inquiry of a trial on the merits.⁵ The bare bones of the evidence before the Court were insufficient to describe the economic character of such agreements. Mr. Justice Brennan, concurring in the result, distinguished customer restrictions from territorial restrictions⁶ for the benefit of the court below. He diagrammed the various types of territorial restraints possible and concluded that at least some might be justifiable as reasonable business practices. The customer restrictions were categorized as seemingly more dangerous and probably less capable of being rationalized. The dissent by Mr. Justice Clark in turn characterized the arrangement laid bare by the record as "one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century."⁷ He found no room for "the rule of reason" where agreements are made solely for the purpose of elimi-

¹ Under § 4 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958).

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

³ *United States v. White Motor Co.*, 194 F. Supp. 562 (N.D. Ohio 1961).

⁴ *White Motor Co. v. United States*, 372 U.S. 253 (1963).

⁵ The definitions of per se rules, the rule of reason, de minimis, ancillary restraints, their history and interrelationship, are discussed in Neale, "The Antitrust Laws of the U.S.A." 13-23, 424-433 (1960).

⁶ In one county White assigned all the customers in the county to one dealer except for one customer who was assigned as the only customer of a second dealer and another customer who was retained by White for direct sale. Mr. Justice Brennan lumps the assignment of geographic areas and customers together as territorial restrictions. He classifies the retention of customers by the manufacturer as a customer restriction.

⁷ *White Motor Co. v. United States*, *supra* note 4, at 276.

nating competition and he concluded that the majority opinion had no value as precedent in substantive antitrust law⁸ and would only permit the truck manufacturer to enjoy the fruits of its illegal conduct for a few more years.

This is the first case before the Supreme Court concerning the question of vertical division of territories.⁹ At the present time the Court refuses to consider agreements effecting such division as illegal per se, but there is no barrier to the emergence of a per se rule at some future time after consideration of other cases. It is significant that the Court did squarely consider the vertical division separately from the price fixing issue in the lower court.¹⁰ Although White did not contest the district court opinion on price fixing, it would not have been difficult for the court to consider the designation of territories and customers as an integral part of the illegal price fixing scheme.¹¹

⁸ The case arose upon a motion for summary judgment governed by Rule 56 of the Federal Rules of Civil Procedure. A proposed amendment to this rule includes a requirement of affidavits from the adverse party setting forth facts showing that there is genuine issue for trial. White was not required to do so under the old rule, and the need for remand arose from the insufficiency of the record. The amendment is submitted to Congress pursuant to 28 U.S.C. § 2072 and will probably take effect in the near future. The amendment will eliminate the problem of the sufficiency of the record.

⁹ In *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), cert. denied, 317 U.S. 695 (1943) exclusive territories were held legal. Yet in *Boro Hall* there was no prohibition against selling to any customer. The restraint involved only the location of sales facilities. Such arrangements normally permit abundant intrabrand competition as opposed to the restrictions of White.

¹⁰ At least two writers had reservations as to whether this issue would be separately considered. See Kaapcke, "How to Distribute Your Products," 1962 N.Y. State Bar Association Antitrust Symposium 55, 59, and Day, "Exclusive Territorial Arrangements Under The Antitrust Laws—Reappraisal," 40 N.C.L. Rev. 223, 244-245 (1962). Kaapcke counseled marketers to avoid any kind of territorial security other than assigning areas or customer classes of "primary responsibility" for distribution and sales promotion. He concluded that this arrangement alone would be satisfactory to the Antitrust Division and the Federal Trade Commission under the authority of *United States v. Philco Corp.* (E.D. Pa. 1956), 1956 Trade cases, #68409 and *Snap-On Tools Corps.*, F.T.C. Docket 71116. Since the Court still has not passed on this question other than to separate it from the price-fixing provisions the advice is still pertinent. See also Rifkind, "Division of Territories" from Van Cise and Daum, "How to Comply with Antitrust Laws," and Robinson, "Restraints on Trade and the Orderly Marketing of Goods," 45 Cornell L.Q. 254 (1960).

The area of primary responsibility concept is based on the Colgate doctrine, *United States v. Colgate and Co.*, 250 U.S. 300 (1919), which allows a marketer to announce the conditions on which he will continue to deal with other parties and to discontinue his dealings if these conditions are not fulfilled. For a summary of advice to marketers see 60 Mich. L. Rev. 1006, note 15 and accompanying text (1962).

¹¹ In *Snap-On Tools*, *supra* note 10, the FTC held that territorial restraints were an integral part of illegal price-fixing and inseparable as a second issue. In *United States v. Bausch and Lomb Optical Co.*, 321 U.S. 707 (1944) the Court expressed disfavor toward customer restrictions but considered them to be bound up in a system of retail price maintenance.

The distinction between territorial and customer restrictions is important. Territorial restrictions of assignment of territories among dealers by a manufacturer seemingly involves no agreement between competitors.¹² However, a customer restriction, *i.e.*, an agreement between a dealer and a manufacturer to divide business between themselves is clearly an agreement between actual or potential competitors to divide a portion of the market.¹³ The Court should have experienced no difficulty in pronouncing the latter class of agreements as illegal *per se* under authority of *Addyston Pipe*¹⁴ and other cases involving a horizontal division of territory.¹⁵ To volume customers both White and a competing dealer or distributor would appear to be on the retail level.¹⁶

Whether or not a manufacturer may divide customers and territories among his dealers and distributors is a more troublesome issue. There is no comparison between vertical and horizontal division of territories. There is no agreement between competitors¹⁷ in a vertical division and the manufacturer has an independent competitive purpose in making a vertical division. The analogy of vertical division of territories to resale price maintenance¹⁸ is more helpful, but a manufacturer has a high stake in securing

¹² There is no direct agreement between the dealers and distributors, but they all know that the other dealers and distributors are agreeing to the same conditions. "Conscious parallelism" has in at least one important case been held to be agreement. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); but see *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) and *P. W. Cook, Jr., "Fact and Fancy on Identical Bids,"* 41 Harv. Bus. Rev. 67 (1963). For an exhaustive discussion of "conscious parallelism" see Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal," 75 Harv. L. Rev. 655 (1962).

¹³ *United States v. McKesson and Robbins, Inc.*, 351 U.S. 305, 312 (1956) and *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D.C. Minn. 1945), are directly in point. Mr. Justice Brennan agrees in the instant case that an agreement between a manufacturer and a dealer that the dealer will not sell to an account retained for direct sale by the manufacturer is an agreement between competitors to divide a portion of the market, but adds a further requirement that the agreements should actually foreclose competition. He reasons that if the dealers and distributors would be unable to compete anyway then the agreements do no more than codify the obvious. However, effect on competition is not the sole criteria as to whether there is a violation of the Sherman Act. An anti-competitive purpose should be enough, see discussion on intent in Neale *supra* note 5, at 429-430. These agreements can have no other purpose than to foreclose competition. A dealer who cannot compete now might be able to enlarge his operations to competitive status if the stultifying restraint were removed. The present reasonableness of a restriction may be future unreasonableness. See *United States v. Trenton Potteries Company*, 273 U.S. 392, 397 (1927).

¹⁴ *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

¹⁵ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. National Lead Co.*, 332 U.S. 319 (1947).

¹⁶ See cases cited *supra* note 13.

¹⁷ See discussion and cases cited *supra* note 12.

¹⁸ In the district court the instant case was primarily decided by analogizing it to the leading case in retail price maintenance, *Dr. Miles Medical Co. v. Park and Sons*, 220

effective distribution of his product by territorial restraints while he has little interest in maintaining its resale price. It may be easier for a dealer to sell to the more desirable accounts in another territory after he has sold the more desirable in his own than to exploit the less attractive accounts at home.¹⁹ The manufacturer loses sales, and the dealer in the raided territory is weakened or competitively destroyed with a corresponding detriment to local sales and service. The raided dealer often must pay extensive servicing, installation, local advertising and sales costs²⁰ which the raider is avoiding by selling outside his territory. Arguably the interests of the manufacturer and the public will be served by some form of territorial restraint, but the nature of the restraint is crucial. The uncompromising revocation of a franchise may protect the manufacturer but unduly and unnecessarily restrict competition.

Manufacturers have legal means to protect themselves and their dealers without eliminating intrabrand competition. A manufacturer may announce a refusal to deal with a distributor or dealer who fails to develop and service its territory in a satisfactory fashion.²¹ It can combat the undesirable effects of "cream skimming" by means such as a partial "profit passover."²² A local dealer with out-of-pocket expenses for servicing or installation could be reimbursed by the raiding dealer. The manufacturer is assured of service and customers are assured of competition. The local dealer has no advantage over his intrabrand competitors except the normal advantage of location. Any dealer attempting to charge a price unwarranted by its costs and a reasonable profit is subject to intrabrand competition from other dealers.²³ The foreign dealer's penalty is only its normal expenses in its own territory. In that there are reasonable alternatives, absolute restraints should be illegal per se.²⁴ Refusals to deal with unproductive dealers are legal, and a moderate

U.S. 373 (1911). In *Dr. Miles*, the Supreme Court realized that a vertical imposition of prices by marketer on his buyers would have the same effect as an agreement between the buyers to sell at the identical price. The Court reasoned that price-fixing agreements between competitors were illegal and that this agreement with the same effect should be illegal also.

¹⁹ See Notes, "Restricted Channels of Distribution," 75 Harv. L. Rev. 795, 811 (1962).

²⁰ *Id.* at 811-13.

²¹ See the discussion on the areas of "primary responsibility," *supra* note 10.

²² A profit passover is an enforcement device whereby a raiding dealer pays all or part of his profits on any sale outside his assigned territory to the raided dealer. See Notes, "Restricted Channels of Distribution," *supra* note 19, at 814-817.

²³ *Ibid.*

²⁴ Whether a practice is ancillary to a legitimate business purpose is determined "by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given and not so large as to interfere with the interests of the public." *Addyston Pipe and Steel Co. v. United States*, *supra* note 14, at 282. Since a manufacturer may fairly protect his interests by means not affecting competition then the reasoning of the district court in the instant case should apply. See the rationale of the district court, *supra* note 18.

restraint such as a partial profit passover²⁵ could serve to strengthen manufacturers and dealers with a corresponding *de minimis* effect²⁶ on competition.

However, the main thrust of the appellant's argument remains unanswered. White contended that its small size made territorial restraints necessary if it were to compete with its giant rivals. A new entrant or a small expanding producer may be unable to acquire satisfactory outlets for its products unless it insulates its distributors against intrabrand competition.²⁷ These circumstances offer more opportunity for a "rule of reason" inquiry because freedom of entry is a highly sanctioned objective of antitrust law.²⁸ Normally an oligopolistic producer has no problem of access to the market, and the "rule of reason" inquiry may be safely restricted to non-oligopolistic industries and to small producers in industries dominated by giants.²⁹ The disconcerting aspect of allowing the "rule of reason" test to operate under the facts of *White* is the reason behind its need. Here, as in the area of resale price maintenance, the motivating force behind the agreement is coercion by the dealer. Manufacturers promise to punish price cutters because other dealers will not buy from them if they refuse to do so. New entrants or small producers must promise to enforce territorial restrictions because dealers will not handle their products without restrictions. However, price maintenance and vertical division of territories are distinguishable. The usual purpose of resale price maintenance is to protect dealers from competition in goods that are readily saleable and already highly competitive with other brands.³⁰ The public has no interest in maintaining high prices,³¹ but a public purpose is served by encouraging more competitors. In this context the superior bargaining power of the dealer should be overlooked if the restrictive practice will be carried on only for a reasonable length of time.³² Within a

²⁵ See text accompanying notes 21 and 22 *supra*.

²⁶ In *United States v. Columbia Steel*, 334 U.S. 49 (1948), the court accepted a *de minimis* argument. Although this case was subsequently overruled by amendment to the Clayton Act, its holding is still valid in a Sherman Act case. Enforcement measures designed only to reimburse a local dealer for his out of pocket expenses would only restrain competition to the extent of the local dealer's location advantage. Such a slight effect can be safely labeled as *de minimis*.

²⁷ See "Legality of Territorial Franchises Argued in Supreme Court" (a summary of the oral arguments in the instant case), 80 BNA Antitrust and Trade Reg. A-1, A-5 (January 22, 1963).

²⁸ See *United States v. Aluminum Co. of America*, 148 F.2d 416, 430-431 (1945).

²⁹ But see Kaiser and Turner, "Antitrust Policy," 142-144 (1959). The authors set up criteria for the pronouncement of *per se* rules. One condition is that the prohibited practice must be an instance of business conduct unrelated to market situation. They argue that a *per se* rule can only be fair if it is something that could have been voluntarily avoided, yet market position is usually obvious to everyone, especially to a firm in the market, and such a firm should have no difficulty in determining whether its position has reached oligopolistic proportions.

³⁰ See Jordon, "Exclusive and Restricted Sales Areas Under the Antitrust Laws," 9 U.C.L.A.L. Rev. 111, 120-121 (1962).

³¹ *Ibid.*

³² *United States v. American Can*, 87 F. Supp. 18 (1949), involved a tying contract

reasonable time a new entrant should become well enough established to acquire or retain sales outlets without luring prospective dealers by a promise of a protected territory. A new entrant or a small expanding producer should not receive special treatment for an extended period of time by virtue of smallness alone.³³ The manufacturer's legitimate interest in having his territory well covered may be insured by a refusal to deal with a dealer who does not develop his territory well.³⁴ Where a dealer can realize full potential from his own territory, yet still sell outside then the manufacturer can prevent the undesirable effects of "cream skimming" by the de minimis restriction such as a partial profit passover.³⁵ All of the above considerations will have to be developed at the trial of this and similar cases.

and *F.T.C. v. Motion Picture Advertisers*, 344 U.S. 392 (1953) involved an exclusive dealing contract. Under the facts of each case the respective courts held that the present arrangements were illegal, but approved them if they were restricted to a period of one year.

³³ Whether White is a small producer is dubious. White ranks 118 of the 500 largest corporations in the United States. See *Fortune*, July, 1963. White advertises itself as the world's leading producer of heavy duty trucks. In 1962 White sold 15,000 trucks with a rating of 19,500 lbs. G.V.W. or more. Trucks of this rating or above are considered heavy duty trucks. International Harvester sold 46,000; General Motors 16,000; Ford 20,000; and Mack 9,000. See 1963 *Fleet Reference Annual*, *Commercial Car Journal*.

³⁴ See note 21 *supra* and accompanying text.

³⁵ See note 22 *supra* and accompanying text.