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## Anti-Trust--Market Concept Broadened--Section 2 of Sherman Act

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## Recent Decisions

### ANTI-TRUST — MARKET CONCEPT BROADENED — SECTION 2 OF SHERMAN ACT

The United States government brought a civil suit under section 4 of the Sherman Act<sup>1</sup> alleging that the E.I. du Pont de Nemours and Co. had monopolized and was monopolizing interstate commerce in cellophane in violation of section 2 of the Sherman Act.<sup>2</sup> An injunction was sought to restrain further monopolization and divestiture was prayed for to dissipate the effect of the monopolization.

The du Pont Co. controls 75% of the manufacture and sales of cellophane in the United States. But du Pont's sales represent less than 20% of the sales of the various flexible packaging materials.

The trial court ruled that du Pont had not monopolized trade in cellophane.<sup>3</sup> The United States appealed this ruling directly to the Supreme Court.

A majority of the Supreme Court held that the relevant "market" in which cellophane sold is that of the flexible packaging materials. In the opinion of the majority du Pont was considered not to have monopolized cellophane "when that product has the competition and interchangeability with other wrappings." <sup>4</sup>

As in every case based on section 2 of the Sherman Act, the Court was forced to consider two questions: (1) What is monopoly power within the purview of section 2, and (2) how is the presence of this monopoly power determined?

The American courts are agreed that "a party has monopoly power if it has a power of controlling prices or unreasonably restricting competition."<sup>5</sup> But in order to apply this definition to any given set of facts, it is necessary for the courts to determine the relevant "market" which is the subject or object of the alleged offense.

Generally the relevant "market" for any product or service is defined by the other products or services which compete with it in the applicable

<sup>1</sup> 26 STAT. 209 (1890), 15 U.S.C. § 4 (1952). "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title. "

<sup>2</sup> 26 STAT. 209 (1890), 15 U.S.C. § 2 (1952). "Every person who shall monopolize, or attempt to monopolize any part of trade or commerce among the several states shall be deemed guilty of a misdemeanor. "

<sup>3</sup> *United States v. E. I. du Pont de Nemours and Co.*, 118 F. Supp. 41 (D. Del. 1953).

<sup>4</sup> *United States v. E. I. du Pont de Nemours and Co.*, 351 U.S. 377, 403 (1956).

<sup>5</sup> *Id.* at 389.

sales area. Divergent opinions, however, have been advanced in the past as to what type of products do in fact compete with one another. Whether a defendant is guilty of monopolizing "any part" of interstate trade may very well depend upon the *number* of products which the court regards as a part of the relevant "market."

Prior to 1953 courts defined the relevant "market" strictly. Used aluminium was found to be in a market distinct from that in which virgin aluminium was sold.<sup>6</sup> Linen rugs were considered to be in a market separate from that in which other floor coverings sold.<sup>7</sup> One of the most strict definitions of the "market" was set forth by a circuit court which found that bus lines in 27 cities constituted the relevant "market" for gasoline, tires, parts, etc., for the purposes of an alleged section 2 violation.<sup>8</sup>

In the case of *Times-Picayune Publishing Co. v. United States*,<sup>9</sup> the District Court for the Eastern District of Louisiana found that the Times-Picayune, the only morning newspaper in New Orleans, sold in a "market" distinct from that in which the two evening papers sold. The courts which decided the earlier cases would undoubtedly have found this same "market" distinction. The Supreme Court, however, over-ruled the trial judge's finding, and in so doing hinted that a change was coming. The court found that the Times-Picayune did *not* sell in a market by itself, but rather that the relevant "market" included all three daily newspapers.<sup>10</sup>

The Court based its finding on the fact that the product being sold was advertising and that:

nothing in the record suggests that advertisers viewed the city's newspaper readers as other than fungible customer potential.<sup>11</sup>

The Court concluded that since the "readership" bought by these advertisers was fungible, it would be impossible to find sellers of this product in different markets.

<sup>6</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The trial court found that the defendant controlled 33% of the relevant "market" as that court determined it. The circuit court in an opinion by Judge Learned Hand, ruled that "secondary ingot" or used aluminum was not part of the relevant market. Absenting used aluminum from Alcoa's market, the figures showed that the defendant controlled 90% of the production and sales of virgin aluminum. On the basis of this finding Alcoa was found guilty of a violation of section 2 of the Sherman Act.

<sup>7</sup> *United States v. Klearflax Linen Looms Inc.*, 63 F. Supp. 32 (D. Minn. 1945).

<sup>8</sup> *United States v. National City Lines Inc.*, 186 F.2d 562 (7th Cir. 1951).

<sup>9</sup> 105 F. Supp. 670, 678 (E.D. La. 1952). "The corporation is able to enforce the unit rate only because of the dominant position which the Times-Picayune (the morning newspaper) occupies in New Orleans."

<sup>10</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

<sup>11</sup> *Id.* at 613.

The *Times-Picayune* decision indicated a tendency on the part of the Court to widen the scope of substitutes which may be included in one "market." Was the holding of the *Times-Picayune* case merely the result of a peculiar fact situation or did this opinion indicate a real trend?

The Supreme Court has answered this question in the *du Pont* case. As a general rule to be followed whenever a "market" question arises, the Court in the instant case announced that:

commodities *reasonably interchangeable* by consumers for the same purposes make up the "part of trade or commerce" monopolization of which may be illegal.<sup>12</sup> (Emphasis added).

The Court applied this rule of reasonable interchangeability to the product involved and found that although "cellophane combines the desirable elements of transparency, strength and cheapness more definitely than any of the others it has to meet competition from other materials in every one of its uses."<sup>13</sup> Inasmuch as one material or another competed with cellophane in each of its uses the Court felt that it was reasonable to include cellophane in the same "market" with all of the flexible wrapping materials.

Having found that cellophane was merely a part of the large flexible wrapping material market, the Court ruled that *du Pont's* control of 17.9% of that "market" did not amount to monopolization of trade in violation of the Sherman Act.

This decision represents a departure from the previous judicial pronouncements concerning the concept of the "market." Carried to its logical conclusion the rule of reasonable interchangeability could result in a substantial lessening of convictions under sections 1 and 2 of the Sherman Act. Several questions previously settled are now open to speculation. For instance, may the owner of theatres in a number of single theatre towns still be regarded as without competition in these towns?<sup>14</sup> Are taverns with television sets, dance halls and countless other forms of public entertainment to be considered as "reasonably interchangeable" with motion pictures after the *du Pont* decision? Is not the second hand

<sup>12</sup> *United States v. E. I. du Pont de Nemours and Co.*, 351 U.S. 377, 395 (1956).

<sup>13</sup> *Id.* at 398. The Court categorized the other flexible wrapping materials as follows:

- "1. Opaque nonmoistureproof wrapping paper designed primarily for convenience and protection in handling packages;
2. moistureproof films of varying degrees of transparency designed primarily either to protect or to display and protect, the products they encompass;
3. nonmoistureproof transparent films designed primarily to display ,
4. moistureproof materials other than films of varying degrees of transparency. (foils and paper products)."

<sup>14</sup> *United States v. Griffith*, 334 U.S. 100 (1948).