

# WASHINGTON ANTITRUST REPORT

*"Busting Trustbusters Since '86"*

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## THE RETURN OF THE LIVING DEAD -- RESTORING DR. HILES

Political momentum is building up in Congress behind legislation to reverse recent judicial interpretations and administrative enforcement policy regarding vertical restraints on product distribution. A pair of bills, H.R. 585 and S. 430, would attempt to fully restore the per se rule of Dr. Miles for vertical price arrangements. (See "RPM Roll Back Rolls On," *infra* at p. 11). They would also encourage dealers to sue manufacturers over contract terminations by easing evidentiary standards and thereby improving the odds of such court challenges getting before juries.

Opposed by the Justice Department, the Federal Trade Commission, the American Bar Association House of Delegates, and a broad business coalition known as the Monsanto Group, both bills have been criticized for (1) undermining the Sylvania rule of reason standard for vertical non-price restrictions, (2) blurring the distinction between concerted action and unilateral conduct by manufacturers under the Colgate doctrine, (3) bypassing traditional evidentiary standards under the law of conspiracy, (4) encouraging frivolous lawsuits, (5) chilling manufacturers' efforts to police their distribution networks, (6) preempting further judicial modernization of antitrust law concerning vertical restraints, and (7) freezing rigid rules into permanent statutory prohibitions.

But the greatest danger posed by such legislation could well be the long-term harm it might do to consumers seeking products that require special information and services, as described in the following article.

### BLINDFOLDING CONSUMERS

by Sheldon L. Richman

Two bills now before the Congress would severely hamper consumers in getting information about products before they buy them. Perhaps contrary to the intentions of the bills' supporters, the legislation would penalize retailers who provide costly services, such as product demonstrations, and in turn harm consumers who value and are willing to pay for those services.

But, inexplicably, instead of being called "The Consumer Blindfold Act," the bills, sponsored by Rep. Peter Rodino (D-N.J.) and Sen. Howard I'etzenbaum (D-Ohio), respectively, go under the names "The Freedom From Vertical Price-Fixing Act of 1987" (H.R. 585) and "The Retail Competition Enforcement Act of 1987" (S. 430).

The bills are aimed at the perennial whipping boy known as "resale price maintenance." Technically, they would make it easier for a retailer whose contract with a manufacturer has been terminated to sustain the charge of illegal price-fixing. In fact, they blindfold consumers.

The following typical case is the target of the legislation. Suppose that two retailers carry a manufacturer's product and one begins to offer a discount price. The non-discounter complains that he is being hurt by the discounting and urges the manufacturer to stop dealing with the discounter. Under the

pending legislation, if the manufacturer does indeed cut off supplies of his product to the discounting retailer, and this sequence of events can be demonstrated, a jury is free to conclude that the antitrust laws were violated.

Under current law, a manufacturer may take unilateral efforts to encourage maintenance of the retail price for a product (usually in order to encourage competition in sales effort and promotional activities among its retail dealers). To present a claim for antitrust injury to a jury, a plaintiff must first produce direct or circumstantial evidence that there was a conspiracy among the manufacturer and one or more of his dealers that intended to maintain the product's retail price level. Under the 1984 Supreme Court ruling in *Monsanto v. Spray-Rite*, it is not enough to merely show that a non-discounter complained and that the manufacturer thereafter terminated the discounter's contract.

The proponents of the bills claim that they are serving consumers by cracking down on the "higher" prices imposed by resale price maintenance. Sen. Metzenbaum, among others, often argues that any practice that limits discounting is inherently anti-consumer and should be illegal.

But the real world of servicing customers is not as simple as he makes it out to be. With many consumer products, especially more complex ones such as electronics and computers, people don't shop for price alone. They place a high value on dealer service and support. These services begin even before a sale is made. For example, consumers like to have dealers attractively display a product. They want to have sales people demonstrate how it works and talk knowledgeably about it. They prefer after-sale service. All these services, of course, cost money, and consumers have demonstrated their willingness to pay for them.

But a problem arises when consumers can get these services without paying for them. How can this happen? Discounters are able to charge lower prices by, among other methods, not providing the services we've been discussing. But since consumers still want such services, many will first go to the full-price dealer to partake of them, and then buy the product from his discounter rival. The full-price dealer has invested in the valuable services but has lost the sale. By "free-riding" on the full-price dealer's investment, the discounter gets benefits from his "competitor" without paying for them.

A good deal for the consumer, you say? Not for long. Eventually, the full-price dealer will have to stop providing costly services, and consumers will have to do without them. This is why manufacturers of service intensive products turn to the tool of resale price maintenance. The manufacturer does not benefit from the higher retail price -- it raises revenues for the retailer only. If the manufacturer thought he could raise his own revenues through higher prices, he would take the direct route -- by raising his wholesale price to retailers.

The manufacturer's overall interest lies in satisfying more customers and selling more products, by assuring that necessary retail services are available. Obviously, the manufacturer has no interest at all in helping retailers to charge uncompetitively high prices. That would only drive consumers to rival products. On the other hand, the manufacturer is clearly interested in enhancing sales of his product through dealer services, provided that consumers are willing to pay for them. The day that consumers stop wanting such services, the manufacturer will have no further interest in resale price maintenance.

The proposed legislation fails to disclose one other inevitable side effect. Consumers need information services most of all for new products. The less familiar an item, the more likely it is that consumers will be willing to pay for product information. Thus, laws that restrict the ability of manufacturers to assure a plentiful supply of information will hurt innovators more than those dealing in familiar products. We can look on the Metzenbaum and Rodino bills, then, as discriminatory legislation that favors established business interests.

But what of those beloved discount stores? Surely, this legislation is needed to save them. Again, shortsightedness is the malady here. The proposed bills <sup>7111</sup> actually threaten the long-term future of discounters. A manufacturer will think twice about dealing with discounters in the first place, if he faces the risk of treble damage antitrust lawsuits just for terminating contracts with them someday. Moreover, the potential penalties will encourage manufacturers to do their own retailing (a perfectly legal way to maintain retail prices) and thereby remove the risk.

When politicians intrude into economic matters, one must always look at the unseen effects of simplistic proposals. A regulation that on its face appears benign and pro-consumer can turn out, on closer look, to be inimical to the welfare of the average shopper. Such is the case with H.R. 585 and S. 430.

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## RECENT RULINGS

### More Physicians' Peer Pressure

On October 5, the U.S. Supreme Court decided to review the Ninth Circuit's decision in *Patrick v. Burget* that the "state action" antitrust exemption applies to private participants on a state-supervised physician peer review panel, even when there are allegations of "bad faith" conduct on the part of a panel member. The Ninth Circuit ruling provides broader protection from antitrust liability for peer review than the 1986 omnibus health bill (P.L. 99-660). (See *Washington Antitrust Report*, Vol. 1, No.2, pp. 2, 3). The legislation signed by President Reagan in November 1986 extended immunity only to private lawsuits alleging anti-competitive conduct undertaken in good faith. The state action immunity in *Patrick* would apply to state-regulated peer review activities, including bad faith conduct, and to both public and private lawsuits.

The Solicitor General urged Supreme Court review on the ground that the Ninth Circuit misapplied the "active supervision" prong of the state action test to "private conduct that cannot be attributed to the state."

### Knocking the "Stuffing" Out of Noerr-Pennington

Also on October 5, the Supreme Court decided to review the Second Circuit's decision in *Allied Tube & Conduit Corporation v. Indian Head, Inc.* that refused to extend the Noerr - Pennington doctrine (which protects petitioning of government from Sherman Act scrutiny) to lobbying activities directed at influencing private associations that set product safety standards routinely incorporated into state legal codes. Circuit Judge J. Edward Lumbard had ruled that efforts at "ballot stuffing" by a steel electrical conduit manufacturer (packing the annual meeting of the National Fire Protection Association with new members for the sole purpose of excluding Indian Head's competing form of plastic electrical conduit from National Electrical Code standards, and consequently from the marketplace) should not be deemed government petitioning. The Second Circuit also held that, despite Allied's literal compliance with NFPA rules and existence of objective scientific evidence supporting exclusion, its "subversion of the NFPA code-making process" could be determined to violate the Sherman Act.

In a more ambiguous decision involving another private code-setting organization, however, the Ninth Circuit ruled on September 2 in *Sessions Tank Liners, Inc vs Joor Manufacturing, Inc.* that the Noerr-Pennington doctrine did apply to a tank repairer's antitrust attack on a manufacturer of hazardous storage tanks. Circuit Judge Joseph Sneed decided that Joor's success in persuading the Western Fire Chiefs Association to set restrictive safety standards for underground tank repairs was part of a plan to procure favorable local fire safety laws and, "absent improprieties in the lobbying process," merited protection from antitrust liability. But the court allowed Sessions to pursue, under the doctrine's sham exception, a limited challenge to misrepresentations allegedly made by Joor to local fire officials acting in their administrative capacity.

If the Supreme Court does not set clear limits on exceptions to Noerr-Pennington protection for lobbying of such quasi-legislative bodies, a new burst of antitrust actions against private code-setting organizations appears likely.

#### You Can't Have Your Territory, and Sue Over It, Too

On September 18, the Seventh Circuit ruled in *General Leaseways, Inc. v. National Truck Leasing Association* that when a member of an association of "full service" truck lessors (who furnished maintenance and repair services to each other on a reciprocal basis) complained of territorial and affiliation restrictions imposed on the association's membership, but bore substantially equal responsibility for such antitrust violations, a jury could refuse to award any damages to the complaining member. Circuit Judge Kenneth Ripple pointed out that General Leaseways had approved and supported enforcement of location restrictions on other NTLA members. The court concluded that the jury could have found that General Leaseways had challenged the restrictions "only after seeking exemptions for itself and that it remained committed to avoiding competition from fellow Association members."

At an earlier stage of this lengthy litigation, another Seventh Circuit panel had ruled that the NTLA restrictions severely limited over-the-road leasing competition and constituted an illegal, per se horizontal market division that did not appear to be ancillary to reciprocal provision of repair and maintenance services. While subtly suggesting alternative lines of attack against antitrust liability in future cases, Circuit Judge Richard Posner concluded that the Association's free-rider justification was unpersuasive, since the repair services were sold to individual NTLA members and not "given away" like information to consumers. (See 744 F.2d 588).

#### The Ties That Don't Bind

On September 4, the U. S. District Court for the western District of Pennsylvania dismissed allegations of tying, exclusive dealing, and a boycott in *Waldo v. North American Van Lines*. Chief District Judge Maurice Cohill, Jr. ruled that NAVL's arrangements to provide insurance to drivers (like Waldo) to whom it rented trucks was not an inherently coercive "tying arrangement," but rather an economic convenience to them. The court also found that the security and operating agreements used for tractor and trailer rentals did not constitute the purchase of separate products or services (under the Sherman Act). It concluded that the exclusive dealing provisions imposed on drivers in NAVL's operating agreement were mandated by the ICC's regulatory scheme and thus protected from antitrust scrutiny, but in any event lacked substantial anti-competitive effect.

#### Second-Guessing Wholesale Price Discounts

On October 26, the Ninth Circuit in *Hasbrouck v. Texaco, Inc.* upheld a Robinson-Patman price discrimination claim by twelve-Texaco retail service station dealers against Texaco for selling gasoline at a lower price to two wholesalers serving independent stations in the Spokane, Washington area. In rejecting Texaco's argument that the price differential was a legitimate discount available to all wholesalers, Circuit Judge Stephen Reinhardt found that the discount "was not justified by the services those companies performed" and that Texaco failed to provide an adequate quantitative justification for its functional discount. In other words, Texaco was guilty, until proven innocent, of deliberately losing money by overpaying wholesalers for insubstantial services. The court derisively brushed aside the distinction between protecting competition and protecting competitors as an "oft-quoted chestnut" that "may not be invoked blindly."

### Two ~ Three Brewer Suits Tapped Out in Second Circuit

On October 19, the U.S. District Court for the District of New Jersey ruled in *Package Shop, Inc. v. Anheuser-Busch, Inc.* that wholesale distributors of beer had legitimate business reasons for concentrating sales efforts in distributor territories assigned by two nationwide brewers (Busch and Miller). In rejecting claims by New Jersey beer retailers of a horizontal conspiracy among distributors to allocate exclusive territories, District Judge Dickinson Debevoise pointed to evidence that the distributors were merely responding to the vertical policy direction of their brewers to refrain from extensive extra-territorial sales. The court concluded that the defendants' purported fear of brewer sanctions for engaging in such sales was reasonable and that intense interbrand competition in the New Jersey market effectively constrained the distributors from raising their wholesale prices above competitive levels.

On November 19, however, the U.S. District Court for the Eastern District of New York refused to grant two other brewers (Stroh and Heileman) summary judgment against charges that their exclusive territory agreements for wholesale distributors eliminated competition by independent wholesalers and artificially raised the price of beer. In this consolidated litigation (*New York v. Anheuser-Busch, Inc.; Uniondale Beer Co., Inc. v. Anheuser Busch, Inc.; Cumberland Farms, Inc. v. Anheuser Busch, Inc.; Vasiliow Co., Inc. v. Anheuser Busch, Inc.*), District Judge Thomas Platt, Jr. rejected the two-step approach used in other circuits that requires proof of market power as a prerequisite for further rule of reason inquiry into the competitive effects of territorial restraints. The court ruled that evidence of the two brewers' limited market shares (a combined 13 percent of the New York sales) was only one of the factors to be considered, along with high entry costs, in balancing the effects on intrabrand competition against the benefits to interbrand competition.

Judge Platt sidestepped the neighboring decision in *Package Shop* with several strained distinctions (more transshipping and larger market share involved in the New York case, consideration of product differentiation as an additional indicator of market power in the New Jersey case).

On November 9, the Second Circuit overturned a \$45 million price discrimination award against two brewers (Falstaff and Pearl) in *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, because it found no evidence of competition between the plaintiff and another beer distributor allegedly receiving lower prices. Circuit Judge Frank Altimari found that the markets assigned to Best Brands (Mid-Atlantic U.S.) and the other master beer distributor, Southland (Southeastern U.S.), were exclusive, and neither they, nor their customers, competed within the other's territory. No competition. No harm. No foul.

### Laker Employees' Suit Bumped

On September 1, the U.S. Court of Appeals for the D.C. Circuit upheld the denial of standing to former employees of Laker Airways, who alleged that an antitrust conspiracy to drive Laker out of business had reduced airline competition and cost them their jobs. In *Adams v. Pan American World Airways, Inc.*; *Clifton v. Pan American World Airways, Inc.*, Circuit Judge Stephen Williams noted that Laker and its customers, who had already recovered damages in two previous settlements with one-time Laker competitors, were "superior plaintiffs" as "immediate victims" who suffered "far less ambiguous" antitrust injury.

Apart from concern over the risk of duplicative recoveries on inconsistent theories, and the problem of complex apportionment of damages in the former employees' suit, the court also doubted whether the latter plaintiffs would clearly lose more than they gained from the collapse of Laker. Post-Laker movement toward cartelization would encourage comparative laxity on airline employee costs, according to Judge Williams, and the volatility of the airline industry would also increase the uncertainty of damage calculations.

### Back to the Courts for Sports

On December 17, the U.S. District Court for the District of New Jersey passed up an opportunity to make an early, dispositive ruling on the key "labor exemption" issue in *Bridgeman v. National Basketball Association*. The court concluded that expiration of a collective bargaining agreement between the League and its Players Association does not necessarily make restrictions on free agency for players (right of first refusal, compensation, college draft) subject to antitrust laws, as long as NBA management reasonably believes that the restrictions will be included in a new agreement. District Judge Debevoise kept the labor exemption issue open until trial by leaving it to the jury to decide whether such a management belief is reasonable.

A similar antitrust suit by professional football players, *Powell v. National Football League*, awaits a January ruling on the same issue in the U.S. District Court for the District of Minnesota. Both lawsuits challenge each sports league's respective reserve system, college draft, and free agent compensation rules -- all of which limit off-season competition to sign players in return for enhanced competitiveness among all teams in game action. But prior case law (*Robertson*, *Mackey*, *Smith*) indicates tough sledding for restraints on free agency for players -- even under rule of reason analysis (particularly for free agent compensation rules in the NFL and the college drafts in both leagues). A successful legal defense by the two professional sports leagues would appear to hinge on the labor exemption issue, which in turn will be determined by questions of whether (1) expired collective bargaining agreements still have effect, (2) player restraints are permissive or mandatory subjects of collective bargaining, and (3) existing restrictions were the product of bona fide arm's-length collective bargaining.

### A Switch in Time Saves Airline Merger

On October 30, the Department of Transportation, reversing an earlier decision by Administrative Law Judge Ronnie Yoder, granted final approval for USAir's acquisition of Piedmont Aviation, Inc. The unconditional approval came as a bit of a surprise to most observers, as DOT was expected to reject the merger, or at least require certain divestitures before granting approval.

ALJ Yoder, in his September decision, had recommended disapproval of the merger on the grounds that (1) the merger carriers would have undue market power in the Northeast U.S. "regional

market," (2) barriers to entry would keep competition low where the merged carriers had a high market share, and (3) the merger would hurt competition at National and LaGuardia airports.

Assistant Secretary of Transportation Matthew Scocozza (making the decision for the Department because Acting Secretary James Burnley had recused himself) rejected each of these arguments. First, he found no support for the claim that the "Northeast" was an identifiable submarket which should be treated separately. He also questioned the "entry barriers" cited by Yoder -- including frequent flier programs, computer reservation systems, and broker commissions, as well as hub domination. Many of the practices cited, Scocozza pointed out, were actually beneficial to passengers, and really pro-competitive in some cases. He noted that, except for LaGuardia and National, landing slots and gates were available to new entrants at the airports served by the two airlines. Lastly, the Assistant Secretary found that the shortage of landing slots at these two airports did not pose a problem, because the relevant market was not simply LaGuardia and National airports, but the metropolitan areas which they serve. Other airports in the New York and Washington areas are available to new entrants, and thus would prevent any lessening of competition. America West Airlines has appealed this decision in federal district court. Its request for a stay pending appeal has, however, been denied.

#### Division Decries Detroit Dailies' Deal

In a September 23 filing, the Antitrust Division recommended to a DOJ administrative law judge that a joint operating agreement between the Detroit News and the Detroit Free Press be disapproved. Under the proposed JOA, the News and the Free Press would remain separately owned, but would merge their operations and pool their profits. Under the 1970 Newspaper Preservation Act, such agreements, once cleared by DOJ, are free from antitrust barriers.

The Division stressed in its filing that neither paper had proven that it was in danger of financial failure, despite the fact that both have suffered continual losses over the last seven years. Ironically, the Division suggested as an alternative to the JOA that the two companies could stem their losses by making their now-low prices and advertising rates comparable to those in other markets. Consumers should be glad to learn that they can be protected from mergers simply by paying higher prices. A final decision on this case will be made by the Attorney General, after receiving the ALJ's recommendation (expected in late December).

#### FTC Collecting Merger Scalps

On November 16, the Federal Trade Commission unanimously voted to seek a preliminary injunction blocking Dun & Bradstreet's plans to acquire Information Resources, Inc., saying that the transaction would substantially reduce competition in syndicated national tracking services (methods of market research which track what products consumers purchase). Actually, another competitor (SAMI-Burke) in the relatively new three-company market would, after the merger, still account for about half of all syndicated tracking service business. Nevertheless, in response to the FTC warning shot, Dun & Bradstreet dropped its proposed acquisition the very next day.

No sooner had the FTC staff gleefully pointed out that this was the sixth time in 1987 that the Commission had authorized a merger-blocking suit than the Commission voted 3-2 (Oliver and Calvani dissenting), on November 18, to approve a lawsuit blocking Owens-Illinois, Inc.'s proposed acquisition of Brockway, Inc. The deal would combine the second and third largest manufacturers of glass containers in the nation. Subsequent efforts by Owens-Illinois to revive the merger by offering some sacrificial sale or shutdown of its production capacity have yet to soothe the savage merger-eating beasts at the Commission.

## RECENT WORKS

\*Alden Abbott, "U.S. Competitiveness Would Be Enhanced By Amending 1984 Act," *Legal Times*, December 7, 1987. Abbott, senior counsel in the Office of Legal Counsel of the U.S. Department of Justice, argues that reducing the potential antitrust liability for joint research and development ventures could increase the competitiveness of U.S. firms. Under the National Cooperative Research Act of 1984, antitrust barriers to joint R&D ventures were reduced by putting those activities under the rule of reason and eliminating treble damages. Abbott maintains that this has not sufficiently reduced the disincentive to such ventures. He recommends further legislation to abolish private suits altogether, or to limit plaintiffs in such suits to injunctive relief. Moreover, he would limit the types of conduct which could be found illegal under rule of reason challenges.

\*William F. Baxter, "The Viability Of Vertical Restraints Doctrine," *Stanford Law School Law and Economics Program Working Paper No. 33* (April 1987). In this working paper, Professor William Baxter, former head of the Justice Department's Antitrust Division, criticizes rigid application of the per se/rule of reason dichotomy to different categories (price vs. non-price) of vertical restrictions. He also dismisses the upstream-downstream concept of market power directionality. Professor Baxter concludes that all vertical arrangements should generally be presumed benign and seen as partial contractual substitutes for the additional bureaucratic costs of tighter vertical integration through ownership and employment. He notes sadly that "[a] majority of the Supreme Court appears determined to preserve the verbal formulations of long-standing per se rules even as it guts them of content

\*Gary S. Becker, "Antitrust's Only Proper Quarry: Collusion," *Business Week*, October 12, 1987. Becker, University Professor of Economics and Sociology at the University of Chicago, argues that antitrust policy should be directed exclusively at collusive activities, pointing out that "[p]olitical pressures often divert antitrust enforcement toward condemning business practices that promote efficiency but hurt weak companies." He specifically criticizes predatory pricing cases, noting that he does not know of any documented instances of predatory pricing, although many efficient practices are often labelled as predatory.

\*James Gattuso, *Antitrust Policy During the Reagan Years*. In this short paper prepared for a Cato Institute conference on the Reagan Years, Gattuso, McKenna Senior Policy Analyst at the Heritage Foundation, reviews developments in antitrust since 1980, finding substantial progress in court decisions and enforcement policy, but little legislative change. A revised version of the paper will be published next year by Cato along with other papers from the conference. Any comments would be welcome. Contact: James Gattuso, The Heritage Foundation, 214 Massachusetts Ave., N.E., Washington, D.C. 20002. (202) 546-4400.

\*Richard McKenzie and E. Thomas Sullivan, "Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation," *32 Antitrust Bulletin* 373 (1987). McKenzie, Professor of Economics at Clemson University, and Sullivan, Professor of Law at Washington University, challenge the commonly held view that the National Collegiate Athletic Association (NCAA) is actually a cartel which acts to keep the pay of student athletes low. First, they point out that athletes are not actually "underpaid" -- low income during college years is more than made up for by expectations of higher professional salaries. This, they say, is why more athletes do not turn pro before their college eligibility is finished. Moreover, McKenzie and Sullivan argue, it would be nearly impossible to keep the 850 members of the NCAA together if it were merely a cartel and did not create some real efficiencies. These efficiencies result in an improved overall product made possible by uniform rules. McKenzie and Sullivan conclude that increased application of the antitrust laws to NCAA sports would not only be unnecessary, but counterproductive.

\*Bert Rein, "Congress Squares Off With Administration In Antitrust Battle," Legal Times, October 19, 1987. In this article, Rein, a partner with the Washington law firm of Wiley, Rein & Fielding, reviews the current battle in Congress to overturn the Monsanto decision and to codify the ban on resale price maintenance. Rein points out that business has so far taken very little interest in the issue, despite the dangers it poses for manufacturers. Even after being amended to placate some manufacturer concerns, S. 430, says Rein, still would permit a jury to find an illegal vertical conspiracy without any evidence of concerted action. He also cautions that the Senate legislation may make "ancillary restraints" illegal and create vertical price restraint rules "even more rigid and inflexible than the law governing horizontal price agreements."

Rein stresses that this legislation, instead of a minor change in current law, would actually make some rather sweeping changes in antitrust. He concludes that "it remains to be seen whether the sleeping business giant will awaken in time to prevent S. 430 from becoming the first step in the antitrust counterrevolution that veterans of the activist 1960s clearly hope to foment."

\*Hal Stratton, "Why the NAAG's Herger Guidelines Are Wrong," Washington Legal Foundation Legal Backgrounder, October 9, 1987. Last March, the National Association of Attorneys General (NAAG) released a set of merger guidelines to be followed by its members. At the time, NAAG said the guidelines, which embodied a restrictive "big is bad" view of merger law, were supported unanimously by its members. However, Stratton, Attorney General of the State of New Mexico, takes exception and argues forcefully for less government interference with mergers. "[E]nforcement of the NAAG guidelines," he says, "will impede mergers that are not harmful to consumers and will needlessly impose government regulation in the marketplace."

Available from the Washington Legal Foundation, 1705 N Street, N.H., Washington, D.C. 20036. (202) 857-0240.

\*Robert D. Tollison & Robert B. Ekelund, Jr. "The Economic Efficiency Of Geographic Restraints In The Malt Beverage Industry." June 1987. In this as yet unpublished paper, Tollison, director of the Center for Public Choice at George Mason University, and Ekelund, Professor of Economics at Auburn University, analyze the effects of territorial restrictions on retail beer prices in those states which mandate exclusive territories for beer distribution versus retail beer prices in other jurisdictions. Their evidence suggests that if there is any effect at all, state-mandated exclusive territories lead to lower retail beer prices. Tollison and Ekelund find, however, that state-imposed advertising restrictions do artificially raise retail beer prices. They conclude that the clarification of the antitrust treatment of the territorial distribution system (proposed by S. 567, the Malt Beverage Interbrand Competition Act) would be precompetitive and efficient from the perspective of beer consumers.

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## IN CONGRESS

### RPM Roll Back Rolls On

On November 9, the House approved by voice vote H.R. 585, which would codify resale price maintenance as a per se illegal practice, overturn the Monsanto decision, and thereby make it easier to challenge distribution arrangements between manufacturers and distributors as improper price-fixing. In earlier consideration of the bill, the House Judiciary Subcommittee on Monopolies rejected, on a 10-5 vote, an amendment by ranking minority member Rep. Hamilton Fish (R-N.Y.) to require a dealer complaining of termination to prove there was an agreement to fix prices between the manufacturer and a rival dealer (in addition to showing the termination was in response to a prior price communication from the other dealer).

Companion legislation in the Senate, S. 430, remains in suspended animation despite its approval by the Senate Judiciary Committee last August. (See "Senate Committee Votes to Roll Back Clock on RPM," Washington Antitrust Report, Vol. 1, No.4, pp. 9-10). The bill's primary sponsor, Sen. Howard Metzenbaum, and his Judiciary Committee colleagues, Sen. Charles Grassley (R-Iowa) and Sen. Dennis DeConcini (D-Ariz.), have been unable to resolve disputes over the precise nature of a last-minute compromise agreement they forged in voting the legislation out of committee. This has stalled agreement on final language for the committee report, and thus prevented floor consideration of the bill. Opponents are focusing on gathering signatures by senators requesting a "hold" to slow down consideration of the legislation, and then garnering enough votes to back up Justice Department threats of a presidential veto.

### WIMP-TV

On December 3, the Senate Judiciary Committee approved the Television Violence Act, which would provide television programming executives with a 3-year exemption from antitrust scrutiny, in hopes of enabling them to develop joint, voluntary standards on televised violence. Sponsored by Sen. Paul ("Pee Wee") Simon (D-Ill.), S. 844 is premised on the theory that TV violence can incite overly aggressive behavior in children. The bill, however; does not exempt network officials from the competitive pressures of Nielsen ratings and viewer demand. As Huey Newton once put it, "Violence is as American as cherry pie."

### Beer Bill Goes Flat

On November 18, the Senate Judiciary Subcommittee on Antitrust narrowly approved (5-4) the Halt Beverage Interbrand Competition Act of 1987 (S. 567), after attaching a number of crippling amendments to it. The so-called "Beer Bill," as first introduced last February by Sen. Dennis DeConcini, would streamline antitrust scrutiny of exclusive territories for beer distributors. It would deem such distribution arrangements lawful when there is substantial and effective competition among different brands of malt beverage products within the defined geographic area. Using the bill's "screen" of interbrand competition could bypass complex and costly litigation under standard "rule of reason" analysis for non-price vertical arrangements.

Before the subcommittee cleared S. 567 for full Judiciary Committee consideration, however, Sen. Strom Thurmond (R-S.C.) gained approval of "killer" amendments to require a set of rotating health warnings on labels of bottles containing alcoholic beverages and to prohibit advertising promoting consumption of alcoholic beverages by minors. Sen. Metzenbaum then tacked on a final coup de grace -- an amendment (adopted on a 5-3 vote) requiring courts to apply rule of reason analysis to territorial restraints on beer distribution -- thereby negating the raison d'etre of the DeConcini legislation. Although Beer Bill supporters still hope to get the watered down legislation out of committee and on to the Senate floor (where the original version of the bill has greater support), the new amendments have weakened the overall prospects for final passage.

### Wising Up on Know-How Rules

On October 20, two subcommittees of the Senate Judiciary Committee held a joint hearing to consider S. 438, a bill that would require courts to apply rule of reason analysis, rather than per se illegal treatment, to challenges against intellectual property licensing arrangements. The legislation sponsored by Sen. Patrick Leahy (D-Vt.) would also detreble damage recoveries in such cases. Rep. Hamilton Fish, who has introduced a similar measure (H.R. 557) in the House, told the

subcommittees that traditional antitrust rules against tying agreements were counterproductive in high-technology settings where purchasing of hardware and software "systems" is an essential element in staying competitive. Washington attorney Thomas Susman also testified that treating intellectual property laws as granting economic monopolies has discouraged distribution of intellectual property through licensing agreements and thereby limited returns on research and development investment and inhibited further innovation.

### Changing Channels of Competition

On October 6, the FTC advised the Senate Judiciary Subcommittee on Antitrust that a 1961 statutory antitrust exemption for the NFL to pool revenues from "sponsored telecasting" probably does not apply to the League's new contract with the ESPN cable television network. But the Commission also carefully noted that a narrow interpretation of the exemption could reduce competition among alternative broadcasting companies televising professional football games.

On September 30, Sen. Arlen "Media" Specter (R-Pa.) had introduced a resolution urging the Justice Department to review the antitrust aspects of the NFL-ESPN television contract, which raised the prospect of more football games moving from "free" network television to "nonfree" cable. Specter argued that cable networks like ESPN do not qualify under the "sponsored telecasting" exemption. While the Pennsylvania Republican worried about the faint possibility that the NFL would reduce the size of its television audience in hopes of increasing overall fees for programming rights (more money for fewer viewers?), the FTC focused on the more relevant market—the one among telecasters of NFL games.

In any event, the ESPN games are sponsored (albeit at a lower price because of a smaller audience), "network" football is not "free" (viewers "pay" by having to watch higher-priced business advertisements), and ESPN's individual subscriber charge for cable access simply provides a different pricing mechanism that allows the smaller network to compete. But as long as Congress can make NFL officials dance to the tune of antitrust warnings, politicians will always have a captive audience for discussions about the placement of expansion franchises and relocation of existing teams.

### NOTABLE

### "Minimum Security" for Maximum Pricing - Book 'Em, Rickko!

On September 3, Assistant Attorney General Charles F. Rule told his first press conference as Chief of the Antitrust Division: "My number 1 priority is very simple: criminal cases and more criminal cases." Rule boasted that the Division has a record number of 146 grand juries empanelled (nearly triple the number in 1981), and asserted that prosecuting price-fixers and bid-riggers was "by far the most important thing we do."

Perhaps moving violent criminals out of cramped prison facilities, in order to make room for hard-core profit-seekers, will be a small price to pay if it distracts Justice Department antitrusters from engaging in greater mischief in the rest of the economy.

### Thesis - Antithesis ~ Synthesis

On December 3, President Reagan announced that he would nominate White House personnel official Susan ("Neither a lawyer nor an economist be") Phillips to succeed Patricia Bailey as a Federal Trade Commissioner. The very next day, her brother Howard Phillips called Reagan a "useful idiot" at a Washington press conference. Some reporters assumed that he was complaining about the upcoming Reagan-Gorbachev summit meeting.

#### QUOTABLE

"There are only two things that I cannot understand about this bill. First, how can such a worthless piece of legislation keep coming back? Secondly, why does the Congress of the United States have to waste a minute more time considering it, with all due apologies to my distinguished friend and colleague, who is the sponsor of the legislation..."

Sen. Howard Metzenbaum, chairing a Senate Judiciary Subcommittee on Antitrust hearing on S. 567, the Malt Beverage Interbrand Competition Act, on August 4, 1987.

"...I would only say to my good friend from Ohio the same reasons we waste so many minutes on bills that you introduce that I think are absolutely worthless that come before my committee that I chair..."

Sen. Dennis DeConcini, chief sponsor of S. 567, in response.

"Beer is not like oil. If you raise the price of beer, people are going to switch into other beverage products. I think there is a fascination in antitrust circles to define things as narrowly as possible, to define markets for beer, for soft drinks, for juice, for milk, for tea, for coffee, and so on. In fact, I think all of those commodities compete for the consumer dollar, and the kinds of results that you get in the literature suggesting that you have beer monopolists or potential for collusive gains among small numbers of beer producers, I think, are simply an artifact of the refusal of people to believe that soft drinks compete with beer."

Dr. Robert D. Tollison, testifying on S. 567 before the Senate Judiciary Subcommittee on Antitrust, on August 4, 1987.

"Particularly in an era of increasing international competition, we can no longer afford to attack American companies that are using innovative techniques to keep costs and prices down."

Assistant Attorney General for Antitrust Rick Rule, at a September 3, 1987 press conference.

"Nowhere in the language of the antitrust laws is there a mandate to keep businesses small or industries atomistic, to redistribute wealth to select classes of citizens, or to achieve any other identifiable social or political goals."

Assistant Attorney General Rule, speaking at the 21st New England Antitrust Conference, on November 13, 1987.

"During the last year and a half, the Commission has investigated more merger and acquisition filings than in any previous such time period and has brought more merger complaints than in any previous such time period. That is part of our effort to make the economy safe for competition." (emphasis added).

FTC Chairman Daniel Oliver, before the National Press Club on December 16, 1987. (As Tonto said to the Lone Ranger -- What do you mean "we," Paleface?)