ANTITRUST SYMPOSIUM

FOREWORD

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It is said in France that no one can be in business for five hours without violating the law.

In the United States, no business of even moderate size can operate for twenty minutes without being faced with, if not the occasion for antitrust sin, at least the suspicion of having sinned. So broadly have the courts conceived their regulatory role, and so various are the forms of business conduct regulated in the name of antitrust, that virtually no business having suppliers, customers or competitors can count itself safe from the prying eyes of governmental investigators or treble damage suitors. The enormous potency of antitrust as a business regulator in our society and the haphazard manner of its invocation from case to case have, in the eyes of many business managers, raised antitrust litigation to the status of a natural calamity, like a flood or fire, or a major economic disaster, like a strike, calling for belt-tightening and the mobilization of defensive reserves to meet a time of loss, harassment and trial.

The antitrust bar lives close to the antitrust calamity. Like seismologists, its members are fascinated by antitrust eruptions and their consequences. At frequent intervals in Ohio, as elsewhere throughout the country, the members meet to compare notes on their observations. The papers in this issue of the OHIO STATE LAW JOURNAL were originally presented at such a meeting, on the occasion of the Ohio State Bar Association's 87th Annual Meeting at Dayton in May, 1967. For the most part they have been substantially rewritten for publication.

As befits a subject so various as antitrust, the papers cover a wide range.

For his contribution, former Federal Trade Commissioner John R. Reilly examines the phenomenon of the conglomerate merger. In the last several years, conglomerates have become fashionable vehicles for corporate expansion, partly no doubt because of their supposed immunity, or at least resistance, to antitrust attack. There is no question that the enforcement agencies have had their difficulties establishing new tests of illegality. But, as Mr. Reilly points out, the elimination of potential competition, the gaining of decisive competitive advantages, the raising of barriers to market en-

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try, and the creation of anticompetitive reciprocity opportunities have all furnished means for attacking what the Commission regards as a major cause of industrial concentration today.

Richard Pogue's article analyzes the new uncertainties injected into the law of territorial and customer restraints by *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). He traces the ups and downs of vertical resale restrictions at the hands of the Supreme Court in ten leading cases, from the ringing prohibition of price maintenance in *Dr. Miles* to the technical permissiveness of *Colgate* and, more recently, from the self-deprecating willingness of the Court to listen to justifications for territorial and customer resale restrictions in *White Motor* to the explicit ban on them in *Schwinn*. In the light of that history, he catalogues the restrictions as to price, territory and customer which manufacturers may impose with respect to the distribution of their products, and appraises the varying degrees of risk attached to each.

Mr. Pogue is troubled by the alternating *per se* rigidity and *ad hoc* flexibility suggested by *Schwinn*. Except in cases where "title has passed" (a magic phrase which, according to *Schwinn*, automatically invokes the ancient shibboleth against "restraints on alienation"), the seedlings of small business are entitled to protect themselves by sundry restrictive props and fences which are denied the mighty oaks of the forest. But, asks Mr. Pogue, how does one tell a middle-aged seedling from a young oak? And how, one may also ask, is a pampered "newcomer" or small business to be deprived of its restrictive prerogatives without acute withdrawal symptoms when it has grown to antitrust maturity? The only certainty, concludes Mr. Pogue, is continued uncertainty (for which we may read "still more litigation about distribution practices").

John McClatchey reviews in his article several current areas of difficulty under the Robinson-Patman Act. When does a wholesaler's customer become an "indirect customer" of the manufacturer? When does the concept "like grade and quality" yield to physical differences in products? What competitive pricing practices, not themselves predatory, will support a rival seller's claim for damages? To what extent can a seller give price recognition to valuable distribution functions performed by some jobbers but not by others? Mr. McClatchey concludes with a brief discussion of the "meeting competition" defense and problems associated with promotional allowances.

Carl Steinhouse, Chief of the Great Lakes Field Office of the Antitrust Division, has furnished a straight-forward explanation of the government antitrust investigation. How to react to such an

investigation is the subject of the panel discussion among four private practitioners — Messrs. Ford, Monroe, Bates and Unger — with comments by Chief Steinhouse on the propriety and effectiveness of the suggested approach.

These papers are not caviar for the general. The immediacy of antitrust — its terrible effectiveness as a business challenge — its virtual irresistibility in the hands of a skillful and determined practitioner — have removed it from the realm of the rich and recherche. For if the operations of *any* business of moderate size are susceptible to antitrust attack, the lawyers who represent such businesses have fools for clients who do not insist on adequate antitrust representation.

At the same time, it is imperative that there be a more general understanding of the truly calamitous nature of the antitrust proceeding, and that, as in the case of every natural calamity, attempts be made to ameliorate at least the more distressing inequities which it can cause.

It is no secret, for example, that the government antitrust agencies are inherently "political" vehicles, interested no doubt in the abstractions of fair competition, motivated in part by the purest of professional desires to build trust-busting reputations, but usually set in motion by politicians, political pressures, and political needs. When the initiation of an investigation turns on political sponsorship, who can predict where the onslaught will fall? And what assurance can there be that the heavy hand of antitrust will fall with equal weight on the equally guilty (or innocent) everywhere?

Besides the government, and lying in wait at every turn of the business screw, are the self-interested: the suppliers, customers and competitors who more and more accept as established practice the extension of business relationships into antitrust litigation. No longer is it *infra dig* for substantial and reputable corporations to bring treble damage and injunction suits claiming competitive injuries against other substantial and reputable corporations. And if the substantial and reputable are antitrust plaintiffs, one need not wonder that the nuisance suitors, the business failures, and the aggressive newcomers swarm about them in the courthouse, buzzing with phantasmagorical allegations of conspiracy, discrimination, monopoly, and the like.

It is the nature of antitrust, aided no doubt by badly drafted statutes, overlapping governmental authorities, busy courts, and the heady prospect of recovering treble damages and attorneys' fees, that makes antitrust litigation so attractive an enterprise for the nimble-witted, the hard-headed, and the long-winded. How noble and awe-

some the appointed task: to protect the weak from the strong, remove unreasonable clogs on commerce, spur competition, prevent discrimination, preserve a free enterprise economy! But how crude the means and how inequitable the results!

Discovery is the principal weapon of antitrust battle. The burden of unrestrained inquisition by interrogatory, deposition, and demands for documentary production — involving in some cases hundreds of witnesses, thousands of files, and decades of time past — is simply inconceivable to lawyers unfamiliar with the wonderland of antitrust. The usual litany of conclusory antitrust charges has come to be a hunting license for the antitrust plaintiff. With nothing more in hand, he is free to stalk the defendants' officers, employees and records searching for evidentiary tidbits relating, not to one or several isolated events, but to a limitless course of business conduct, until he runs out of time and money.

There is an obvious need for close judicial supervision and control over antitrust discovery. The antitrust plaintiff is only too ready to take the whole sinful antitrust world for his hunting preserve. The court must work from the outset towards focusing the issues, and must keep discovery pointed toward those issues.

Unfortunately, even the routine housekeeping requirements of antitrust litigation tend to exasperate busy courts preoccupied with heavy dockets and other demands on their time and attention. The sheer bulk of the record and the complexity and imprecision of the issues combine and conspire to dissuade the most conscientious judges from the intellectual and physical tasks of mastering the action and keeping it cut down to size.

The same factors tend to cause substitution of a search for evidentiary nuggets in place of definitions of markets and analyses of market effects. Courts and juries unaccustomed to antitrust find its legal-economic concepts difficult to grasp, and they are put off by the impenetrable language of the experts. The result is an unwarranted emphasis on minutiae. The litigation ignores what actually happened in the marketplace and turns instead on an unfortunately worded letter, a slip of the tongue on deposition, or some other snare. In search of such golden pebbles, aggressive antitrust suitors will sieve vast moraines of gravel.

It is easy to see why the discovery weapon, in antitrust cases, is fearsome and frequently determinative. Few defendants are in a position to make antitrust litigation their principal business activity. Few are anxious to speculate on the highly unscientific results of trial. And fewer still are prepared to face with equanimity the penalties incident to an adverse verdict and judgment, no matter how

upright their business character and conduct.

There is no easy dichotomy between "good" and "bad" antitrust suits to guide the courts. All are entitled to be tried. What the courts can do — and *must* do if the rising tide of treble damage antitrust litigation is not to pollute the ordinary channels of commerce and inundate the federal judicial system — is to accept responsibility at the outset for precise clarification of issues and energetic direction of discovery towards those issues. Unrestrained discovery and unsupervised pre-trial maneuvering can damage irreparably both the rights of the parties and the role of antitrust as a business regulator. The courts should not wait until those evils have occurred to take action but should move promptly, in the spirit of the Clayton Act, to cut them off in their incipiency.

As a first step in that direction, there must be greater familiarity by bench and bar alike with the actual workings and meaning of antitrust. The arcane mysteries, and the conceptual or semantic difficulties, that in so many cases have caused judicious men to blanch and honest minds to boggle, must be shown to be a legal variant of the emperor's clothes.

These papers are offered as part of the continuing program of the Antitrust Law Committee of the Ohio State Bar Association to extend ever more widely an educated appreciation of antitrust in action.