

Fall 1971

United States v. Topco Associates, Inc.: Illegal Combination and/or Procompetitive Arrangement?

Richard G. Bolin

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Bolin, Richard G. (1971) "United States v. Topco Associates, Inc.: Illegal Combination and/or Procompetitive Arrangement?," *Indiana Law Journal*: Vol. 47 : Iss. 1 , Article 9.

Available at: <http://www.repository.law.indiana.edu/ilj/vol47/iss1/9>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

UNITED STATES v. TOPCO ASSOCIATES, INC.: ILLEGAL COMBINATION AND/OR PROCOMPETITIVE ARRANGEMENT?

Before the Supreme Court this term is the important antitrust case of *United States v. Topco Associates, Inc.*¹ The case involves alleged per se violations of § 1 of the Sherman Act.² The government alleges that an association of small- and medium-sized regional supermarket chains violated the Act despite the association's contention that the purpose and effect of its actions was to increase competition by allowing its members to compete effectively with large national chains.³ The issue facing the Court is whether the following agreements among actual or potential competitors are illegal per se: (1) assignment of exclusive marketing territories; (2) prohibition against reselling the association's private-label grocery products at wholesale after title has passed to individual members. Prior cases involving these issues have generated considerable confusion.⁴ The Court now has an opportunity to clarify and further define the guidelines laid down in those decisions.

THE RULE OF REASON AND PER SE VIOLATIONS

Read literally, the Sherman Act's prohibition against all restraints of trade is broad enough to strike down every conceivable contract or combination involving commerce. Soon after the passage of the Act, however, the Supreme Court recognized that some combinations could promote trade. Therefore, implementation of the Act required some standard for determining whether a particular combination violated the law. In *Standard Oil Co. v. United States*⁵ the Court adopted the first guideline: "the standard of reason which had been applied at the common

1. *United States v. Topco Associates, Inc.*, 319 F. Supp. 1031 (N.D. Ill. 1970), *prob. juris. noted*, 402 U.S. 905 (1971). The appeal from the district court opinion went directly to the Supreme Court under 15 U.S.C. § 29 (1970).

2. 15 U.S.C. § 1 (1970).

3. For a more comprehensive statement of the district court's findings of fact, see 319 F. Supp. at 1032-38.

4. The most notable of the previous cases are *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). See notes 32-33 *et seq. infra* and text accompanying. A few of the many articles dealing with this controversy are: Keck, *The Schwinn Case*, 23 BUS. LAW. 669 (1968) [hereinafter cited as Keck]; Lundberg, *Schwinn and Beyond: The Survival of the Rule of Reason in Vertically Imposed Customer and Territorial Restrictions*, 30 MONT. L. REV. 141 (1969) [hereinafter cited as Lundberg]; Sfikas, *Antitrust Consequences of Vertical Restrictions*, 56 ILL. B.J. 1028 (1968); Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy*, 1967 DUKE L.J. 732.

5. 221 U.S. 1 (1911).

law and in this country in dealing with the subjects of the character embraced by the [Sherman Act]."⁶ Shortly thereafter, in *Chicago Board of Trade v. United States*,⁷ the Court stated that a supplementary test of legality was whether the particular restraint merely regulated rather than suppressed competition. The determination of this question necessarily required consideration of the facts in a particular case, including "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained. . . ."⁸ From these cases, the "rule of reason" has evolved as the basic standard under the Sherman Act.

Because of heavy caseloads and the costly economic analysis involved in case-by-case application of the "rule of reason,"⁹ courts began to develop categories of offenses which had such a "pernicious effect on competition"¹⁰ that they were presumptively unreasonable and illegal per se. Such per se classifications had the added effect of facilitating business by delineating simple, clear and predictable guidelines.¹¹ Among those practices generally found illegal per se were price fixing,¹² tying arrangements,¹³ group boycotts,¹⁴ horizontal divisions of markets¹⁵ and certain vertical restrictions on customers and territories.¹⁶ The practices at issue in *Topco* are horizontal division of markets among competitors¹⁷ and vertical restrictions on customers and territories.¹⁸

6. *Id.* at 60.

7. 246 U.S. 231 (1918).

8. *Id.* at 238. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 781-82 (1965), discusses the development of the rule of reason and its "accordian-like career."

9. This principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . an inquiry so often wholly fruitless when undertaken.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). See Abend, *Applications of the Per Se Doctrine to Commerce with Foreign Nations: Desirable or Disastrous*, 49 VA. L. REV. 448, 449-50 n.12 (1963).

10. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

11. This principle of *per se* unreasonableness . . . makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned. . . .

Northern Pac. Ry. Co. v. United States, 356 U.S. at 5.

12. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

13. International Salt Co. Inc. v. United States, 332 U.S. 392 (1947).

14. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

15. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

16. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

17. This arrangement involves companies performing similar functions in the production or sale of comparable goods or services.

18. This situation can exist among companies standing in a supplier-customer relationship; e.g., manufacturers and their distributors, wholesalers and their retailers.

In 1944 the Supreme Court decided *United States v. Bausch & Lomb Optical Co.*,¹⁹ a case which involved vertical customer and territorial restrictions. Bausch & Lomb had granted Soft-Lite an exclusive right to sell trade-marked lenses. Soft-Lite then established a restricted territorial distribution system and attempted to control the resale price of lenses. The Court held that “[a] distributor of a trademarked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell”²⁰ Although the language supports the conclusion that territorial restrictions are illegal per se, this distribution did involve a price-fixing scheme, and price-fixing had already been declared illegal per se.²¹

Timken Roller Bearing Co. v. United States,²² a 1951 case, involved an Ohio corporation that licensed its trademark to British and French companies. The Court held that Timken had restrained foreign and interstate commerce because the companies involved had given each other exclusive territories, fixed prices and protected each other’s markets. Despite the fact that the Court was dealing with an aggregation of trade restraints in a horizontal context, *Timken* is generally accepted as standing for the proposition that any horizontal division of markets is illegal per se.²³

White Motor Co. v. United States,²⁴ decided in 1963, was the first case to reach the Supreme Court on the Justice Department’s theory²⁵ that all vertical territorial restraints were illegal per se. White’s distribution system, made up of wholesale distributors and retail dealers, involved a combination of exclusive franchises and territorial restrictions. The district court held that White’s vertical territorial restrictions were per se illegal and entered summary judgment for the Government.²⁶ The Supreme Court reversed. It found that a vertical territorial limitation

19. 321 U.S. 707 (1944).

20. *Id.* at 721.

21. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

22. 341 U.S. 593 (1951).

23. See REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMISSION TO STUDY THE ANTITRUST LAWS 27 (1955).

24. 372 U.S. 253 (1963).

25. Prior to *White Motor* the Justice Department had brought numerous actions attacking vertical territorial restrictions, but all of them had resulted in consent decrees under which the defendant agreed to discontinue the arrangement. In 1956 the Justice Department issued a policy statement that it considered all market divisions to be illegal per se. *Hearings on H.R. 528, H.R. 2688 and H.R. 6544 Before the Subcomm. on Automobile Marketing Legislation of the House Comm. on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 362 (1956).

26. 194 F. Supp. 562, 587 (N.D. Ohio 1961). In support of its holding that vertical territorial restrictions are illegal per se, the district court cited *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). *Id.* at 578.

could not be classified as illegal *per se* on a motion for summary judgment absent evidence showing the "economic and business stuff out of which these arrangements emerge."²⁷ The Court stated:

[w]e need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as *per se* violations of the Sherman Act.²⁸

Although *White Motor* held only that there was insufficient information available to sustain a summary judgment, two subsequent decisions, *Snap-On Tools Corp. v. FTC*²⁹ and *Sandura Co. v. FTC*,³⁰ neither of which reached the Supreme Court, apparently viewed *White Motor* as a mandate for the rule-of-reason approach to vertical restrictions. Both cases rejected a *per se* approach to vertical marketing systems and, in essence, found that "good business reasons"³¹ justified certain restraints on intrabrand competition. In *Snap-On Tools*, the manufacturer of mechanics' hand tools sold products to independent dealers who resold in restricted territories. The court, relying on *White Motor*, held that the record failed to show that Snap-On's vertically imposed territorial restrictions had the same inhibitory effect on competition as horizontal divisions of markets. In *Sandura*, vertical territorial and customer restrictions were again upheld. The court noted that Sandura was a relatively small concern competing with the giants of the floor-covering industry. Sandura, near bankruptcy and suffering from a bad product reputation, needed to provide some inducement to attract distributors. The court found no evidence that intrabrand competition had been decreased; it did find that competition between brands had been increased.

MATTRESSES, BICYCLES AND A NEW *PER SE* CATEGORY

Probably the two most important cases dealing with territorial restraints are *United States v. Sealy, Inc.*³² and *United States v. Arnold, Schwinn & Co.*³³ In *Sealy*, the defendant was charged with price fixing

27. 372 U.S. at 263.

28. *Id.*

29. 321 F.2d 825 (7th Cir. 1963).

30. 339 F.2d 847 (6th Cir. 1964).

31. *Cf. United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967).

32. 388 U.S. 350 (1967).

33. 388 U.S. 365 (1967).

and market allocation. In return for royalties, Sealy licensed local manufacturers to make mattresses under its trademark and granted exclusive territories. The approximately thirty manufacturer-licensees substantially owned Sealy, although the corporation had a separate professional management. The district court found that Sealy was involved in a conspiracy to fix prices and enjoined that aspect of the marketing arrangement. On the issue of mutually exclusive territories, however, the court held that the Government had not proved such conduct to be an unreasonable restraint of trade. Sealy did not appeal the price fixing issue, but the Supreme Court reversed as to the territorial restraints, observing that although the Sealy arrangement was vertical in form it was horizontal in fact since the manufacturers owned Sealy and were dividing territory among themselves. The Court held that these horizontal territorial restraints were part of an "aggregation of trade restraints including unlawful price fixing"³⁴ and, therefore, were illegal per se.

In order to persuade the Court that a per se rule should not be applied to horizontal market restrictions, counsel for Sealy posed a hypothetical situation in which a number of small grocers might allocate territories among themselves and thereby promote interbrand competition. In response to this contention the Court stated that Sealy's "territorial arrangements certainly [do] not require us to go so far as to condemn that quite different situation"³⁵ By leaving the question open, the Court may have intimated that there could be an exception to the per se rule against horizontal allocation of territory.

Schwinn involved vertical customer and territorial restrictions. The manufacturer used three methods for its wholesale distribution of bicycles: (1) sales to independent wholesale distributors (Schwinn relinquished ownership); (2) sales to retailers through wholesalers on an agency or consignment basis (Schwinn retained ownership) and (3) sales to retailers with wholesale distributors taking orders and receiving commissions (ownership passed directly from Schwinn to the retailers). The wholesale distributors could sell only in their own territories and only to franchised dealers approved by Schwinn. The important distinction in *Schwinn* was between those goods distributed to wholesalers under a sales agreement, in which Schwinn parted with ownership, and those goods distributed to wholesalers under an agency or consignment agreement, in which Schwinn retained ownership. As to the former, the

34. 388 U.S. at 357.

35. *Id.*

Court invoked a per se rule of illegality,³⁶ but as to the latter, the rule of reason was applied:³⁷

Schwinn adopted the challenged distribution programs in a competitive situation dominated by mass merchandisers which command access to large-scale advertising and promotion, choice of retail outlets, both owned and franchised, and adequate sources of supply. . . . [T]here is nothing in this record . . . to lead us to conclude that Schwinn's program exceeded the limits reasonably necessary to meet the competitive problems posed by its more powerful competitors. In these circumstances, the rule of reason is satisfied.³⁸

THE TOPCO ORGANIZATION

Topco Associates, Inc. is an association of small- and medium-sized regional supermarket chains, 25 at the time of suit, operating stores in 33 states. Topco serves as a co-operative buying organization. Through it members can purchase over 1,000 food and related non-food items, most of which are sold under brand names owned by Topco. The organization's members acquire nationally advertised brands through other distribution channels. Members purchase only such items as they desire from Topco and do not operate under the "Topco" name. Topco member firms own both the common and preferred stock of the association in designated proportions. By-laws control the disposition of this stock so that it cannot fall into the hands of non-members. Topco is managed by a board of fourteen directors, each director also being a principal officer of a member chain. The market share of the members in their various areas varies from 1.4 to 16.3 per cent, averaging 5.8 per cent. In 1967 they had combined retail sales of 2.3 billion dollars, exceeded only by A & P, Safeway and Kroger. Although individual sales volumes varied from 1.6 to 182.8 million dollars, products procured through Topco accounted for only about

36. The Court did not explain how it reached this conclusion. One commentator questions whether the Court had time to read either the record or the briefs in *Schwinn*: Just about 60 days before oral argument, which was heard on April 20, 1967, the *Schwinn* record was filed—23 thick volumes. The government's brief was filed on March 20, 1967, some 30 days later, and—an extension of time having been refused—Schwinn's brief came in on April 18, two days before the argument. . . . [T]he decision came down on June 12th. . . .

Pollock, *Alternative Distribution Methods After Schwinn*, 63 Nw. U. L. REV. 595, 611-12 n.67 (1968) [hereinafter cited at Pollock].

37. 388 U.S. at 382.

38. *Id.* at 380-81.

ten per cent of total sales. Topco members compete in their respective areas with national chains, other regional and local chains and independents.

Topco memberships are of three types. Exclusive membership confers on a chain the sole right to sell Topco-provided products in the geographic territory defined in the membership agreement; a non-exclusive member may sell Topco products but must share his area with other non-exclusive members; co-extensive membership allows two or more designated members to sell Topco products within the same geographic region. Most memberships are exclusive. Non-exclusive or co-extensive memberships are generally granted only when the member chains are not large enough to cover the entire marketing area. No member may sell Topco products outside his designated territory. This requirement has limited the expansion of members on some occasions. Nevertheless, some members operate stores in the territories of other members but do not sell Topco products in those stores. Topco is constantly seeking new members for unrepresented territories.³⁹

THE ECONOMICS OF PRIVATE LABELS

Virtually all national supermarket chains have extensive private-label programs. Indeed, the private label has become an almost essential element in supermarket competition. A recent study⁴⁰ concludes that private labels have not impaired competition within the food industry.⁴¹ Published studies show that private label products are essentially equal in quality to brand-name products but cost less, thus providing better values.⁴² Also, since private labels allow small manufacturers to achieve production and marketing economies,⁴³ small firms pressure brand-name

39. The foregoing information on Topco's operations is taken from the district court's findings of fact. 319 F. Supp. at 1032 *et seq.* As member chains become large enough to economically maintain their own private label programs, they usually withdraw from Topco. The level of annual sales necessary to institute such a program appears to be 250 million dollars or more. *Id.* at 1039.

40. W. APPLEBAUM & R. GOLDBERG, BRAND STRATEGY IN UNITED STATES FOOD MARKETING (1967) [hereinafter cited as APPLEBAUM].

41. [T]he contending forces have grown enormously, have prospered conspicuously, and have been able to maintain profit records that compare favorably with other industries. . . . [N]o one has ever suggested that the business failures and dropouts that have occurred among food manufacturers, wholesalers, and retailers were a direct consequence of the battle of the brands.

Id. at 44.

42. *Id.* at 47.

43. The private label mechanism . . . enables the small food manufacturer . . . to have access to a mass market with a minimum selling cost and with the economies of long production runs on a single specified product.

Id. at 82.

manufacturers to seek product innovations and lower prices.⁴⁴

Research shows that the main reason distributors sell private brands is to secure customer loyalty to a line of products carried exclusively in their stores.⁴⁵ Although it is generally assumed that private brands are more profitable to distributors than brand-names, there are no published statistics to verify this claim.⁴⁶ Regardless of profitability, however, distributors will continue trying to strengthen their private-label position in order to compete with other stores carrying private labels, to provide a low-cost image for their stores, to put price pressure on national brand manufacturers and to provide a traffic-building product at a reasonable price.⁴⁷

THE DISTRICT COURT DECISION IN TOPCO

In the district court the Government conceded that if Topco, rather than being a co-operative buying association for smaller chains, were a single, large national chain, none of its practices would be objectionable under the antitrust laws.⁴⁸ It also conceded that Topco's private-label program enabled its members to compete more effectively with non-member supermarkets and groceries.⁴⁹ Nevertheless, the Government contended that because Topco's exclusive territory practices cause competition in Topco-controlled brands (intra-brand competition) to diminish the Sherman Act has been violated as a matter of law, even though the ultimate result of these practices may be an overall increase in super-market (inter-brand) competition.⁵⁰

The Government relied on *Sealy* and *Schwinn* and asserted that in both of these cases, as in *Topco*, "the effect of the agreements was to substantially eliminate or reduce competition either among manufacturers or dealers who might otherwise compete with each other."⁵¹ Topco, in response, argued that contracts which have only remote or incidental adverse effects on competition are not prohibited.⁵² It quoted

44. *Id.*

45. *Id.* at 45.

46. *Id.* at 46.

Just as manufacturers have some products that produce little or no profit for them, so do distributors have some private labels that produce little or no profit.
Id. at 47.

47. *Id.* at 81.

48. 319 F. Supp. at 1040.

49. *Id.*

50. *Id.*

51. *Id.* at 1041.

52. Topco relied on the following cases, *inter alia*: *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Hopkins v. United States*, 171 U.S. 578 (1898); *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

Mr. Justice Brandeis in *Chicago Board of Trade* to the effect that “[t]he mere fact that the parties to an agreement eliminate competition among themselves is not enough to condemn it. . . .”⁵³

In sustaining Topco’s contentions, the district court quoted from *Sandura*:

The distributors, the dealers and the public will *best* be served by the continued economic health and competitive existence of *Sandura* as well as its distributors. We are of the opinion that *on this record*, the only justified conclusion is that elimination of the closed territory arrangement would impair competition, rather than foster it.⁵⁴

The court felt that *Sandura* was virtually identical with *Topco*.⁵⁵ The court further stated that it was difficult to determine whether intrabrand competition had been diminished. There was some evidence that applications of members to move into the territory of other members had been denied. In some cases the member whose application had been denied did not expand into the area; in others it expanded but did not interfere with the exclusive right of the original member to handle Topco brands. On occasion, a member resisted the expansion of other members into its territory, but at other times, in order to expand membership and strengthen the organization, members agreed to reductions of territory or franchise changes. Thus, the court found that Topco was not a “restrictive organization whose members are primarily interested in keeping new members out and protecting their exclusivity.”⁵⁶

The court, in its conclusions of law, found that in overall economic effect, “the Topco cooperative serves a legitimate, procompetitive purpose”⁵⁷ by: (1) allowing its members to offer the consumer another high-quality, low-price product; (2) enhancing its members’ competitive position against stronger national and regional chains; (3) enabling its

53. 319 F. Supp. at 1041.

In applying this test a close and objective scrutiny of particular conditions and purposes is necessary in each case The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the . . . industry, the practices which have obtained, the nature of the defendant’s plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan. . . .

54. 319 F. Supp. at 1041-42.

55. *Id.* at 1042. The court noted the exception that in *Sandura* the distributorships were conferred by a manufacturer rather than by a board of existing franchisees. *Id.*

56. *Id.*

57. *Id.* at 1038.

members to remain independently owned and (4) benefiting the small manufacturers and processors which supply Topco's private label products. The court also found that "[t]he Topco licensing provisions are not inherently unreasonable and have no substantial adverse effect on competition in the relevant market."⁵⁸

The court avoided labeling the Topco marketing system either vertical or horizontal, but instead stated that Topco's licensing provisions are "reasonable" and ancillary to a legitimate, "procompetitive" purpose. This language suggests that the court considered the arrangement vertical, because, in terms of precedent, all horizontal territorial restraints are *per se* unlawful and, therefore, not subject to the rule of reason. This logic is supported by the court's conclusion that the case was virtually identical with *Sandura*, in which the arrangement was vertical. But the Topco marketing arrangement is not vertical. It is horizontal in the same way that the operation in *Sealy* was horizontal, for the distributors own Topco and divide territories among themselves. Moreover, Topco's member chains actively manage the association, a difference from the *Sealy* situation that could make it even easier for the Court to look through form to the substance of a horizontal combination.

Not having made the vertical-horizontal distinction, the district court did not specifically address itself to the problems raised by *Schwinn* and *Sealy*. It may be, however, that the effects of those cases will be minimal. In *Schwinn* the Court was trying to make most territorial restrictions illegal and yet to avoid the undesirable effects of inflexibility by reserving certain exceptions:

On the other hand, as indicated in *White Motor*, we are not prepared to introduce the inflexibility which a *per se* rule might bring if it were applied to prohibit all vertical restrictions. . . . Such a rule might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers, and it might sharply accelerate the trend towards vertical integration of the distribution process.⁵⁹

If the Court in *Schwinn* was trying to maintain its options so as to be able later to carve out exceptions for small companies, the sale-agency distinction was not the best vehicle for achieving that purpose. First, small enterprises, especially those that are failing or are new-

58. *Id.*

59. 388 U.S. at 379-80.

comers, are least able to afford the added expense of an agency or consignment distribution system. Second, the sale-agency distinction has been criticized because it distinguishes between distribution systems that may have the same economic effect.⁶⁰ Finally, if the Court was seriously concerned about retarding "the trend toward vertical integration,"⁶¹ it should consider that reliance upon the distinction may have the opposite effect. Topco members have testified that the best alternative to the present arrangement for them will be to develop their own private-label programs to the extent possible.⁶² While this may result in a very limited program for the smaller members, some of the larger members have a sales volume sufficient to support a nearly complete private-label program.⁶³ It would be ironic indeed if application of the *Schwinn* agency-sale distinction to Topco were to impel these larger chains into the very sort of vertical integration the Court sought to avoid by the rule.⁶⁴ Because of the inadequacies of the sale-agency distinction, *Schwinn* may "be narrowly defined" and "may well become authority for little more than outlawing those practices which have a 'pernicious effect on competition and lack any redeeming virtue'."⁶⁵ Likewise, it may be that *Sealy* stands for nothing more than the proposition that aggregations of trade restraints including price-fixing and horizontal territorial restrictions are illegal per se.⁶⁶

60. That there is no difference [in economic impact between sale and agency transactions] can be illustrated by the application of the *Schwinn* rule to a part of the marketing program in *Snap-On*. In that case "during the initial stages of a dealer's franchise, by way of financial assistance, Snap-On [sold] to him on consignment. After a dealer [built] up an account equal to the value of his inventory, the company [sold] to him on a cash basis." At all times the dealer was subject to territorial restrictions, and presumably any adverse effect that these restrictions had no competition would be equally present in both the sale and the consignment transactions. Nevertheless, under the *Schwinn* rule these restrictions are per se illegal only when Snap-On ends the consignment arrangement and begins outright sales.

Comment, *The Impact of the Schwinn Case On Territorial Restrictions*, 46 TEX. L. REV. 497, 510 (1968) (footnote omitted).

61. 388 U.S. at 380. Vertical integration is the creation of a marketing system in which "giant" manufacturers control the entire distribution process without independent distributors or wholesalers. See Note, *A Consignment Approach to Vertical Marketing Restrictions*, 43 IND. L.J. 486 n.4 (1968).

62. 319 F. Supp. at 1040.

63. See note 39 *supra* and text accompanying.

64. Even though 75 per cent of *Schwinn's* marketing program was upheld, *Schwinn* itself has decided to adopt vertical integration. Keck, *supra* note 4, at 686-87. *Schwinn* is taking this action even though the Government assured the Supreme Court that vertical integration by *Schwinn* was "an entirely remote possibility." Pollock, *supra* note 36, at 610 n.60.

65. Lundberg, *supra* note 4, at 148.

66. *Schwinn* cited *Sealy* for this proposition. 388 U.S. at 373, 375-76.

CONCLUSION

In *Topco*, the Supreme Court is confronted with a relatively pure horizontal situation, free of price-fixing and other trade restraints and involving relatively small businesses in competition with giants. The horizontal restraints used by Topco impair intrabrand competition minimally when compared to the enhancement of interbrand competition. Better interbrand competition will certainly result in efforts to improve total efficiency in distribution costs, thereby benefiting manufacturers, distributors and consumers alike.⁶⁷

The Government has conceded that Topco's practices would not be objectionable if Topco were a large chain. If further admits that Topco's practices promote more effective competition. An exception to the rule against horizontal divisions of territory, even after a "sale" of the goods in question, is, therefore, desirable because per se rules should not be applied when their effect is anticompetitive.

RICHARD G. BOLIN

67. APPLEBAUM, *supra* note 40, at 49.