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Cover Page Footnote

With apologies to W.S. Gilbert.

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FOREWORD
AN ANTITRUST COUNSELOR'S LOT IS NOT A HAPPY ONE*

*Harry S. Gerla***

This issue of the *University of Dayton Law Review* presents an antitrust symposium. The four articles in the symposium are derived from presentations given at the Ohio State Bar Association's 1983 annual meeting and span a wide range of antitrust and antitrust-related topics.

Mr. Michael M. Briley's article covers the sometimes inconsistent decisions on dealer restraints in the Sixth Circuit.[1] In his article, Mr. Briley emphasizes that the key to judging the legality of nonprice dealer restraints in the Sixth Circuit seems to be the source of motivation for the restraints. If the restraints come from the manufacturer, they are likely to be given rule-of-reason analysis and pass antitrust scrutiny under that analysis. If, however, the restraints stem from pressure by rival distributors, a finding of *per se* illegality is a distinct possibility.

The second article in the symposium is written by Mr. Stanley A. Freedman.[2] Mr. Freedman's article deals with the scope of the corporate attorney-client privilege. While the issues involving the privilege are not limited to the antitrust arena, such issues are quite frequently faced by antitrust counselors. In his article, Mr. Freedman explores a number of the issues left unresolved by the United States Supreme Court's decision in *Upjohn Co. v. United States*,[3] such as corporate attorney communications with former employees and the distinction between business and legal communications. Mr. Freedman also brings a comparative law focus to his article by discussing the status of the cor-

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* With apologies to W.S. Gilbert.

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1. Briley, *Dealer-Restraint Litigation Trends in the Sixth Circuit*, 9 U. DAYTON L. REV. 409 (1984).

2. Freedman, *Corporate Attorney-Client Privilege since* Upjohn, *at Home and Abroad*, 9 U. DAYTON L. REV. 425 (1984).

3. 449 U.S. 383 (1981).

porate attorney-client privilege in the European Economic Community.

Mr. Leslie W. Jacobs is the author of the third article in the symposium.[4] Mr. Jacobs in his article discusses the applicability of the antitrust laws to municipalities. After discussing the history of the Supreme Court's efforts in this area (including its latest decision *Community Communications Co. v. City of Boulder*[5]), Mr. Jacobs goes on to a discussion of some of the post-*Boulder* developments in the lower courts and to a general consideration of the policies behind municipal immunity from the antitrust laws.

The final article in the symposium is authored by Mr. Murray S. Monroe.[6] Mr. Monroe's article deals with the antitrust problems which are faced by trade and professional associations. Mr. Monroe deals with trade association activities such as data dissemination and member discipline which raise potential antitrust difficulties—such as potential liability for price-fixing and concerted refusals to deal.

Two points should emerge from a review of the articles in the present symposium. The first is an appreciation of the limits of papers presented at conferences and the articles derived from them. The second point is an increased respect for the practitioners, such as the authors of these articles, who must counsel real-life clients in the intricacies of modern-day antitrust law. The two points are related.

The articles presented here are designed to acquaint practitioners, who are not necessarily specialists in antitrust law, with some of the antitrust considerations which they may encounter in their counseling function. The articles are not designed to be comprehensive treatises on their subjects. The articles fulfill their function as primers admirably. The articles do not, nor can they be expected to, present their topics in their full complexity. For example, Messrs. Jacobs and Monroe accurately note that the Supreme Court in *National Society of Professional Engineers v. United States* ("*NSPE*")[7] held that health and safety considerations should not be incorporated in a rule-of-reason analysis.[8] Instead, effect on competition is the sole currency of the rule of reason.[9] The Court has not, however, always been consistent in holding that health and safety considerations are irrelevant in a rule-of-reason analysis. For instance, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[10] the

4. Jacobs, *Antitrust and the Public Defendant: Application of the Antitrust Laws to Governmental Entities*, 9 U. DAYTON L. REV. 451 (1984).

5. 455 U.S. 40 (1982), *cited in* Jacobs, *supra* note 4, at 459.

6. Monroe, *Trade and Professional Associations: An Overview of Horizontal Restraints*, 9 U. DAYTON L. REV. 479 (1984).

7. 435 U.S. 679 (1979).

8. *NSPE*, 435 U.S. at 690.

9. *Id.* at 694.

10. 433 U.S. 36 (1977).

case in which the Court held that vertical territorial restraints receive rule-of-reason treatment, the Court approvingly cited the case of *Tripoli Co. v. Wella Corp.*[11] in which the Third Circuit allowed a justification of protecting consumer safety to justify a then-*per se* illegal vertical territorial division.[12] Thus, to state that antitrust courts do not accept public health and safety considerations in rule-of-reason analysis, while technically accurate, may not be completely correct. The lesson for the reader of this symposium is that while these articles are fine starting points for the attorney faced with an antitrust problem involving trade associations, municipal immunity, dealer restraints, or attorney-client privilege, he or she must delve further when faced with a question in one of these areas.

The necessity for intensive research highlights the increasing difficulty of contemporary antitrust counseling. Part of what makes antitrust counseling so difficult is that antitrust courts frequently have been unable to develop a consistent body of antitrust jurisprudence. The inconsistency of the Supreme Court has already been noted.[13] This by itself can lead to some serious counseling problems. For example, let us consider an attorney who is serving as counsel for a trade association. The association wishes to expel a member and withhold the association's coveted seal of approval from the member's products. The reason for this action is that the member is making its products out of cheap, flammable materials which endanger public health and safety. Unfortunately, thanks in part to its choice of inferior materials, the member is also the discount price leader in the industry. What should the attorney tell the association? On the one hand, the Court in *NSPE* has suggested that public health and safety considerations do not matter in a rule-of-reason analysis.[14] Thus, the elimination of price competition might not be outweighed by the benefits to public health and safety. On the other hand, there is a line of cases beginning with the Supreme Court's decisions in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*[15] and *Silver v. New York Stock Exchange*[16] which suggests that trade association self-regulatory action which is designed to further public health and safety considerations will pass antitrust muster provided the action is taken pursuant to nonarbitrary standards and the member-defendant is provided some form of commercial due process.

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11. 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970), *cited in Sylvania*, 433 U.S. at 48 n.14.

12. *Tripoli*, 425 F.2d at 939.

13. *See supra* notes 7–12 and accompanying text.

14. *See supra* text accompanying notes 8–9.

15. 364 U.S. 656 (1961).

16. 373 U.S. 341 (1963).

Under this standard, the association's proposed action might withstand antitrust scrutiny. What advice does the attorney give the association with respect to the antitrust consequences of its proposed action? Thanks to the Supreme Court, there is no easy answer.

Complicating inconsistent pronouncements by the Supreme Court are splits both among and within the federal courts of appeals. A hypothetical drawn from the bailiwick of Mr. Briley's article will suffice to illustrate this point. Assume that an attorney is counseling a corporate manufacturing client which distributes its product through a number of independent retail outlets. The retailer with the largest share of the manufacturer's sales approaches the client and insists that it cut off a rival retail outlet. The client-manufacturer is reluctant to do this because the putative victim has been a good distributor, albeit not in the same league as the firm which seeks to have it terminated. Nonetheless, the client-manufacturer is leaning toward termination because it is reluctant to lose its most fruitful retail outlet and approaches its attorney for advice as to the possible antitrust consequences of such a move. The answer may depend on the federal circuit in which the client and its retailers operate. A recent Ninth Circuit case suggests that the terminated distributor must demonstrate a market effect, that is, an effect on price or output, in order to prevail on either a *per se* horizontal group-boycott claim or a rule-of-reason analysis.[17] In contrast, the Sixth Circuit seemingly rejected a market-effect requirement in *Com-Tel, Inc. v. DuKane Corp.* ("*Com-Tel*").[18] Even assuming that the attorney can determine if there is likely a "market effect" caused by termination, how does he or she advise the client if it operates in both circuits?

Operating within the boundaries of a single federal circuit does not assure that a uniform interpretation of antitrust law can be counted on by the attorney-counselor. For instance, the Sixth Circuit panels in two of the cases discussed in Mr. Briley's article (*Com-Tel* and *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*[19]) seemingly disagreed on whether a *per se* illegal group boycott requires more than one defendant operating on a single distributional level.[20]

To add to the confusion, even if a clear trend is established, the substance of the developing rule may prevent effective antitrust coun-

17. Cascade Cabinet Co. v. Western Cabinet & Millwork Inc., 710 F.2d 1366, 1372–73 (9th Cir. 1983).

18. 669 F.2d 404, 414 (6th Cir. 1982).

19. 691 F.2d 241 (6th Cir. 1982).

20. *Compare Com-Tel*, 669 F.2d at 413 n.16, 414 (suggesting in dicta that numerosity is not required for *per se* illegal group boycotts) *with Nu-Car*, 691 F.2d at 244–45 (suggesting that numerosity on the same level as boycotted party is necessary for finding a *per se* illegal group boycott).

seling. An excellent example may be plumbed from Mr. Jacobs' article. The author points out that an emerging trend in the municipal antitrust immunity area is to give a wider scope of immunity to traditional governmental activities.[21] Mr. Jacobs notes that in doing so the antitrust courts are drawing a distinction between proprietary and governmental functions.[22] The counselor for a municipality should not necessarily rejoice at this development. The governmental/proprietary distinction was used for many years in questions of municipal tort immunity.[23] It has now been largely abandoned because it proved to be unworkable.[24] As the Pennsylvania Supreme Court stated in the case in which it abandoned the distinction, " '[perhaps] there is no issue known to the law which is surrounded by more confusion than the question whether a given municipal operation is governmental or proprietary in nature.' "[25] Attorneys for municipalities should not look forward to facing such confusion.

The contradictions and divisions of opinion over antitrust law make counseling clients in the area a difficult task. Those of us in academia, to a certain extent, can revel in the inconsistencies; the contradictions and disputes make for interesting classroom discussions, scholarly articles, and general opportunities to expound our views on what antitrust law should be. Those attorneys who must counsel real-life clients lack that luxury. They must advise clients with potentially huge financial stakes in the matter on the antitrust consequences of real-world actions. In a sense what are playgrounds for antitrust academics are minefields for antitrust counselors. Understanding the complexities of modern antitrust law can only increase one's respect for those (such as the authors of the articles that follow) who must guide clients through them. It is a task which is growing more difficult.

The articles in this symposium can be valuable in assisting attorneys who engage in antitrust counseling. The articles can make the an-

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21. Jacobs, *supra* note 4, at 462–65.

22. *Id.* at 466.

23. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 979–84 (4th ed. 1971).

24. For a listing of jurisdictions which have abandoned or limited the governmental/proprietary distinction in municipal tort liability, see Haas v. Hayslip, 51 Ohio St. 2d 135, 141 n.6, 364 N.E.2d 1376, 1380 n.6 (1977), *overruled*, Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982). Ohio recently joined the jurisdictions which have abandoned the distinction. Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983).

25. Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 598, 305 A.2d 877, 884 (1973) (quoting Morris v. School Dist., 393 Pa. 633, 637, 144 A.2d 737, 739 (1958)). As an example of the confusion engendered by the governmental/proprietary distinction, the Pennsylvania Supreme Court cited its own decisions in *Morris* and in Shields v. Pittsburgh, 408 Pa. 388, 184 A.2d 240 (1962), *overruled*, *Ayala*, 453 Pa. 584, 305 A.2d 877 (1973). In the former case the court held that the operation of a summer recreation program was a proprietary function. In the latter case, the court held that the operation of a playground during vacation is a governmental function.

titrust counselor aware of problems and trends that exist in the areas covered by the articles. As this foreword emphasized above, that certainly is not the end of antitrust counseling. It is, however, an indispensable beginning.