Montana Law Review

Volume 30
Issue 2 *Spring 1969*

Article 2

1-1-1969

Schwinn and Beyond: The Survival of the Rule of Reason in Vertically Imposed Customer and Territorial Restrictions

Wilford Lundberg
University of Montana School of Law

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation
Wilford Lundberg, *Schwinn and Beyond: The Survival of the Rule of Reason in Vertically Imposed Customer and Territorial Restrictions,* 30 Mont. L. Rev. (1968).
Available at: https://scholarship.law.umt.edu/mlr/vol30/iss2/2

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

SCHWINN AND BEYOND: THE SURVIVAL OF THE RULE OF REASON IN VERTICALLY IMPOSED CUSTOMER AND TERITORRIAL RESTRICTIONS

By Wilford Lundberg*

THE BEGINNING: *SCHWINN*

United States v. Arnold, Schwinn and Company[1] has been interpreted to mean that territorial and customer limitations within a vertical arrangement are *per se* violations of the Sherman Act.[2] There is good reason for the adoption of this view. True, the Government did not contend in its brief that the restrictions were *per se* illegal.[3] Yet, Justice Fortas' opinion made clear that the Supreme Court had affirmed a finding by the Trial Court that a *per se* violation existed in the case of sales by a manufacturer to a distributor which were accompanied by territorial restrictions.[4] To this was added a similar condemnation of customer restrictions. By parting with dominion, title, or risk, the manufacturer loses his right to control disposition of the goods.[5] This opinion came within five years of *White Motor Company v. United States*[6] where Justice Douglas, speaking for himself and four of his colleagues had said:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. . . . We 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.[7]

*Professor of Law, School of Law, University of Montana.

[1]388 U.S. 365 (1967).

[2]Comanor, *Vertical Territorial and Customer Restrictions: White Motor and its Aftermath*, 81, HARV. L. REV. 1419, 1422 (1968). *Restraints in Distribution: General Motors, Sealy and Schwinn,* 36 A. B. A. ANTITRUST L. J. 84, 86 (1967). McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal,* 37 A. B. A. ANTITRUST L. J. 137, 144 (1968). ". . . where a manufacturer *sells* products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results. . . . the same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers to whom the goods are sold. . . . it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." *United States v. Arnold, Schwinn and Company,* supra note 1, at 379. By *per se* violation is meant the declaration by the court that a certain act violates the antitrust laws without inquiry into its actual effect upon competition. Territorial and customer limitations (or agreements to divide markets) have long been held to be *per se* violations when practiced among competitors, i.e., in a horizontal situation. The 1963 Supreme Court decision in *White Motor Company v. United States, infra.,* note 6, however, refused to apply the same rule in the case of a vertical arrangement, that is, in a situation where the restrictions were imposed upon a distributor by a supplier, two business entities not in competition with one another.

[3]388 U.S. 365, 368 (1967).

[4]388 U.S. 365, 376 (1967).

[5]388 U.S. 365, 382 (1967).

[6]372 U.S. 253 (1963). See note 2.

[7]*Id.* at 263.

Published by The Scholarly Forum @ Montana Law, 1968

Had the Court learned so fast? Or, was *Schwinn* merely the "natural, entirely-to-be-expected progeny of the Expediting Act?[8] Or, more significantly, has *Schwinn* repudiated *White Motor?*[9] The majority opinion distinguished *White Motor* on the grounds that possible factors relevant to a showing that a restraint is reasonable include the "new product" or "failing company" doctrines, neither of which could be applied to the *Schwinn* situation.[10] Furthermore, *White Motor* continues to be cited as authority for propositions contrary to the much accepted result in *Schwinn*.[11]

Assuming, for the moment, that the Court did in fact give the Government something for which it had not asked—a *per se* rule against any territorial and customer restriction imposed upon a customer—what, then, is left open for the manufacturer by way of imposing ancillary restraints? First, it seems clear, that "areas of primary responsibility" will not be attacked, particularly since they have been promoted by the Justice Department for so long.[12] Secondly, vertical integration by way of internal expansion is open to a manufacturer so long as he does not occupy sufficient market power so as to engage in a "price squeeze".[13] Corollary to internal expansion is the possibility of vertical integration through vertical merger. Problems raised by *Brown Shoe* and related merger cases make this avenue extremely hazardous, however.[14] In the third place, Justice Fortas' opinion

[8]This is the view of Richard W. McLaren. With the preclusion of Court of Appeals review of government proceedings for equitable relief, the *Schwinn* record — 23 thick volumes — was filed 60 days before oral argument. The Government's brief was filed 30 days later, and Schwinn's brief came in just two days before argument. Since the Court adopted the passage of title test, Mr. McLaren maintains the Court simply threw up its hands at even trying to make a rule of reason analysis in this situation. McLaren, *supra* note 2, at 143-144.

[9]This is most certainly the point of view taken by the dissent. 388 U.S. 365, 389 (1967). See also Orrick, *Marketing Restrictions Imposed to Protect the Integrity of "Franchise" Distribution Systems*, 36 A. B. A. ANTITRUST L. J. 63, 64 (1967).

[10]388 U.S. 365, 374 (1967).

[11]*Albrecht v. Herald Company*, 390 U.S. 145 (1968), 88 S.Ct. 869, 875. In his concurring opinion in this case, Mr. Justice Douglas said: "The case is therefore close to *White Motor Co.* . . ., where before ruling on the legality of a territorial restriction in a vertical arrangement, we remanded for findings on 'the actual impact of these arrangements.' " Justice Douglas felt that the legality of territorial franchises must be tried on a factual basis. It should be noted that the use of the word "franchise" is not entirely clear since this was excepted from the effect of *Schwinn, infra.*, note 15. It is suggested that franchise must necessarily mean something very close to customer and/or territorial limitations, *infra*, note 16.

[12]Orrick, *supra.* note 9 at 70.

[13]This seems to be the lesson of *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir., 1945). "A price squeeze occurs when a manufacturer selling both the raw material and the finished product is able to set the price of the raw material so high, in relation to the finished product, that it is not possible for purchasers of the raw material to compete with it." Simon, *Dual Distribution*, 37 A. B. A. ANTITRUST L. J. 168, 171 (1968). See also AREEDA, ANTITRUST ANALYSIS 523 1967).

[14]*Brown Shoe Company v. United States*, 370 U.S. 294 (1962). The *Brown Shoe* case did not establish any presumptive rule of illegality, holding that "a merger had to be functinally viewed, in the context of its particular industry", nevertheless it invalidated a merger that involved approximately 5% of the national relevant market. It did this, however, after an examination of the market, including structure, history, and probable future, and noted that the shoe industry was a highly frag-

explicitly exempted from the operation of *Schwinn* the "franchise" when he said

> a manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods.[15]

It has been suggested that a necessary element of the right of "franchise" is the right to have a location clause.[16] Finally, the manufacturer may proceed on a true consignment basis.[17] *Simpson* is not overruled, but it is confined to "culpable price fixing".[18] The result of the decision insofar as its practical impact upon Schwinn was slight, therefor, since 75% of Schwinn's distribution had been through some type of consignment.

The possibility exists, however, that *Schwinn* is being exaggerated. Analysis in the case was not done in traditional *per se* language. Indeed, it appears that only the result is ostensibly *per se* illegality without clearly calling it such. *White Motor* was carefully distinguished, and *Colgate* survived. It is arguable that the *per se* rule which was applied in *Schwinn* was that which arose from *Sealy,* i. e., territoriality with horizontal characteristcs is *per se* illegal,[19] even though Justice Fortas recog-

---

mented one in which local effects were often disproportionate to what would seem to be the effect as seen from a comparison based upon national statistics. More recent cases — involving horizontal mergers — have adopted a rule of presumptive illegality based on market shares above a *de minimis* level. Adler, *Merger Rules and Supreme Court Economics,* 36 A. B. A. ANTITRUST L. J. 4, 6 (1967), *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963), *United States v. Aluminum Company of America,* 377 U.S. 271 (1964), *United States v. Von's Grocery Company,* 384 U.S. 270 (1966), *United States v. Pabst Brewing Company,* 384 U.S. 546 (1966).

[15]*Schwinn, supra.* note 1 at 376. Justice Fortas cited *United States v. Colgate and Company,* 250 U.S. 300 (1919), a case which involved the right of a manufacturer to refuse to deal with those who did not follow suggested pricing. This decision has been greatly narrowed, however, by *United States v. Parke, Davis and Company,* 362 U.S. 29 (1960) and has often been thought of as dead. 36 A. B. A. ANTITRUST L. J. 87 (1967).

[16]McLaren, *supra.* note 8, at 144 ". . . a manufacturer must be free to appoint another to be his dealer at a given place and to agree not to appoint another dealer within a certain distance. If this were not so, a manufacturer would exhaust his right of dealer selection — which Justice Fortas says he has — once he appointed a single dealer." *Id.* at 144-145.

[17]This exemption seems to fly in the face of *Simpson v. Union Oil Company,* 377 U.S. 13 (1964) which honored substance over form and caused Justice Stewart to quote in his dissenting opinion from *United States v. Masonite Corporation,* 316 U.S. 265, 280 (1942): "So far as the Sherman Act is concerned, the result must not turn on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade." *Schwinn, supra.* note 1 at 393-394.

[18]*Id.* at 380. The *Simpson* situation involved a consignment agreement between a supplier and a distributor. The consignor (Union Oil Co.) retained title to the product until sold by the consignee and paid applicable property taxes as well. The court, however, held this arrangement to be a sale and therefore a *per se* violation since the agreement also carried price fixing features. In a true consignment situation, no violation would occur since the supplier would be dealing legally with his own product.

[19]36 A. B. A. ANTITRUST L. J. 89 (1967). *United States v. Sealy, Incorporated,* 388 U.S. 350 (1967). In this case, the Court specifically found the existence of a horizontal conspiracy within a corporate entity before applying *per se* rules to territorial

nized this as a "truly vertical arrangement".[20] Furthermore, the handling of the "failing company" and "new company" doctrines left much to be desired.[21] This doubt as to whether *Schwinn* has in fact promulgated a *per se* rule in the cast of restrictions on vertical distribution seems worthy of consideration.

THE AFTERMATH: *ALBRECHT*

Albrecht v. Herald Company[22] was decided on March 4, 1968, nearly a year after *Schwinn*. Here, a newspaper carrier who had been assigned an exclusive territory subject to cancellation if he exceeded a maximum price schedule sought treble damages against the newspaper publisher who solicited one-fourth of the carrier's business when the maximum price was exceeded. Furthermore, the publisher cancelled carrier's route when this suit was brought, forcing the carrier to sell the route at a profit although the profit was less than it would have been had all of the carrier's customers been included. The Court, holding for the carrier, applied the *per se* rule with regard to price fixing.[23] What is most interesting, however, is the Court's treatment of the defense that maximum prices were set to blunt the pernicious effects of exclusive territories. The Court merely stated that the "Court of Appeals was not entitled to assume . . . that

---

and customer restrictions. The 1919 decision in *United States v. Colgate & Co., supra.*, note 15, held a refusal to deal for failure to follow suggested prices not in violation of the antitrust laws. *Parke, Davis, supra.*, note 15, however, narrowed this holding to the point that where a supplier acts in concert with another entity — here, a wholesaler — he cannot legally refuse to deal with retailers who refuse to abide by the supplier's suggested restrictions. Consequently, since almost all suppliers deal through wholesale outlets in one form or another, the practical implications of *Colgate* as an avenue for lawful restrictive selling seem to have evaporated.

[20]*Schwinn, supra.* note 1 at 378.

[21]These doctrines — applied often in merger cases — have the effect of softening the treatment given firms which can show that *but for* the practice which has been called into question, they would either fail (and this showing must be buttressed by a history of significant decline), or that they are new and could not enter the competitive market in another way. Specifically, are these doctrines to be exceptions to a new *per se* rule or are they factors to be considered at reaching a conclusion? If the latter, then the rule of reason is being applied rather than one of *per se* illegality.

[22]390 U.S. 145, 88 S.Ct. 869 (1968).

[23]On this point, there had been considerable doubt as to whether maximum price fixing was *per se* illegal absent a horizontal arrangement. *Kiefer-Stewart Company v. Joseph E. Seagram and Sons, Inc.*, 340 U.S. 211 (1951) involved maximum prices, but the Court found a violation only after looking behind a corporate entity and finding a horizontal conspiracy in much the same way that it handled the *Sealy* case. In this case, however, the horizontal conspiracy found to have existed was between the publisher and two men he had hired to solicit and service the carrier's former customers. This is tantamount to finding a conspiracy between employer and employee to fix prices. Furthermore, the Court pointed out that a combination might have existed between publisher and carrier, among the other carriers, or between the publisher and the customers. *Albrecht, supra.* note 22 at 872. Justice Harlan's dissent took issue with this combination on the grounds that no combination can be found within a vertical structure (i.e., employer-employee) and the other "possible" combinations were irrelevant to the carrier's case. The dissent went on to say that maximum price fixing is done in the interests of the manufacturer-seller, not his customers. Therefore in order to be illegal, a horizontal conspiracy must exist, citing *Kiefer-Stewart. Id.* at 877, 878, 879.

the exclusive rights granted by the respondent (publisher) were valid . . .''[24], and it did not pass on the legality of the practice since it was not put in issue before the jury.[25] This opinion was written by Justice White who was with the majority in *Schwinn.* Furthermore, a concurring opinion by Justice Douglas who wrote the majority opinion in *White Motor* and who was with the majority in *Schwinn* stated that

> **Whether an exclusive territorial franchise in a vertical arrangement is per se unreasonable under the antitrust laws is a much mooted question. . . . The Court quite properly refuses to say whether in the newspaper distribution business an exclusive territorial franchise is illegal. . . . Under our decisions the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue. . . .**[26]

Justice Douglas concluded that the case was close to *White Motor* which required a finding on the impact of the arrangements before ruling on the legality of territorial restrictions in a vertical arrangement.[27]

While the *Albrecht* case is esentially an extension of the rule in *Parke, Davis,*[28] it is interesting that the Court did not apply the rationale of *Schwinn* to the question of exclusive territories even though the legality of this practice had not been raised in the Trial Court. Most certainly it was a legitimate part of the publisher's defense, and the Court often has shown no reluctance in giving relief beyond that which is sought. *Schwinn* is cited, aside from Justice Douglas' concurring opinion, only once and that for the proposition, previously stated, that no assumptions can be made as to the legality of exclusive territories. Surely, if *Schwinn* promulgated a *per se* rule in this area, only one assumption could be made—that such practices are illegal. The Court was silent, however.

As an extension of *Park, Davis,* however, the importance of

[24]*Id.* at 874

[25]It would seem, however, that the legality of territorial exclusivity must have been at issue since the publisher's defense rested upon the notion that this was the only way it could keep a complete monopoly out of the hands of its distributors. Indeed, Justice Stewart's dissenting opinion points this out when he says ''If it was illegal in the first place for the petitioner to enjoy a *conditional* monopoly, I am at a loss to understand how the respondent can be liable to the petitioner for not permitting him a *complete* monopoly. *Id.* at 882. The Court's treatment of the question of illegality of exclusive territories was not in keeping with its bold approach in *Schwinn* where it presumably found a *per se* violation when not argued by the Government.

[26]*Albrecht, supra.* note 22 at 874-875. As authority for the latter proposition, Justice Douglas quoted extensively from *Chicago Board of Trade v. United States,* 246 U.S. 231 (1918), a case which arose out of the peculiar characteristics of the grain market and which validated a price fixing scheme. This case has not been generally followed. Additionally, the *Schwinn* case is cited to the effect that the evidence of record ''elaborately sets forth information as to the total market interaction and interbrand competition, as well as the distribution program and practices. . . . ''*Albrecht, supra.* at 874-875. See note 8, *supra.*

[27]*Id.* at 875.

[28]*United States v. Parke, Davis, supra.* note 15. This extension is due to the fact that suppliers who refuse to deal with non-conforming distributors must not deal through persons who appear to be their own employees even though a wholesaler is not involved at all. Whatever is left of *Colgate* after this seems unworthy of mention.

Albrecht cannot be overstated. It appears to make inroads upon the traditional immunity held by sellers who instruct their employees as to prices and customers—an immunity essential to the normal operations of the business community. But the silence of the Court *viz a viz* the *Schwinn* rationale poses the distinct possibility that either the Court does not intend to go any further than that case narrowly held or that the Court in *Schwinn* was really speaking in terms of territoriality with horizontal characteristics as it did in *Sealy*.[29] In any event, *Albrecht* does not represent the kind of extension of *Schwinn* that was feared to result at the earliest opportunity.[30]

THE DESIRABILITY OF A PER SE RULE

A *per se* rule condemning sales as well as consignments with territorial or customer restrictions has been hailed as the best way to preserve competitive behavior at the dealer level and thereby discourage product differentiation.[31] Since intra-brand competition is destroyed through such restrictions, inter-brand competition takes the form of making products less and less reactively interchangeable.[32] While it is true that lower retail prices—a desirable competitive result—are preferred by single-firm monopolies as a way of maximizing profits, the more common situation in the business community is oligopolistic. Therefore, it can be argued that the manufacturer's best interests are served by higher markups at the dealer level which in turn encourage the services and showrooms that lead to product differentiation—all at the expense of the consumer.[33] Since this can be the ultimate result of customer and territorial limitations, such limitations seem without justification.[34] This theory, however interesting, is not without its answer, however. Professor Bork maintains that the power to differentiate creates an incentive for others to follow suit and cut into special markets. "Entry into the field of differentiation would tend to return the profitability of that activity to the competitive level."[35]

[29]Note 19, *supra*.

[30]Orrick, *supra*. note 9 at 72.

[31]Comanor, *supra*. note 2 at 1422. By this is generally meant the propensity to make products different, although not necessarily better, so as not to be truly competitive with one another. Thus, inter-brand competition diminishes, and the public is denied the benefits of this competition without any commensurate improvement in the product.

[32]*Id.* at 1424, 1426.

[33]*Id.* at 1424.

[34]*Ibid.*

[35]Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L. J. 373, 421-422 (1966) Professor Bork continues: "This effect does not appear to provide a reason for Sherman Act courts to interfere with price discrimination, and may suggest the contrary. If product differentiation succeeds, it is because customers like and respond to it. . . . to save short-run consumer benefits might deprive consumers of more substantial long-run benefits. . . . The long run merely refers to the time required for adjustments to new market conditions. . . . there seems to be no clear reason for a court to interfere. . . ." *Id.* at 422.

Furthermore, since territorial and customer restrictions tend to encourage inter-brand competition,[36] the absence of such restrictions gives rise to the "free-ride" problem. If a neighboring member of the group is allowed to undersell or cut into another's market, local promotion may become unprofitable.[37] Whether or not it is the local distributor or the manufacturer who should provide these services, however, is at least debatable.[38] It would seem that the cost to the consumer would be decreased if the services were provided locally. There would be less chance of the provision for unwanted services, and—considering the economics of the situation—the cost would pass through fewer hands on its way to the ultimate consumer.

Additionally, the assumption that application of *per se* rules in vertical-restriction cases will result in vertical integration cannot be taken lightly.[39] This seems to be exactly what happened in the case of *Schwinn*.[40] Keeping in mind the *Brown Shoe* case, mergers will not often be possible. The result, then, will be the destruction of smaller businesses, closing their avenues of exit.[41] It is no doubt true that "economies in distribution result from fully integrated facilities, and these economies may outweigh the competitive loss resulting from integration"[42], nevertheless a "franchise program"[43] "would seem to be a worthwhile factor in our competitive scheme as an alternative to a centrally owned concern or a vertically integrated manufacturer owning his own distribution system."[44] As a general proposition, it hardly seems supportable that the policy of the Sherman Act is to make bigness a requirement for survival. The application of *per se* rules simplifies the work of the Court, and it may well lead to more consent decrees. It does not follow that the results will be pro-competitive. Indeed, there is little, if any, unanswerable evidence

[36]Chadwell and Rhodes, *Antitrust Aspects of Dealer Licensing and Franchising*, 62 NW. U. L. REV. 1, 5 (1967).

[37]Bork, *supra.* note 35 at 435.

[38]Comanor, *supra,* note 2 at 1433.

[39]Comanor feels that firms are not likely to integrate since this is: 1) a low profit activity; 2) distribution frequently involves the purchase and sale of many products, and 3) distribution is associated with local managerial problems. *Id.* at 1435.

[40]37 A. B. A. ANTITRUST L. J. 184 (1968). ". . . the plain effect of Justice Fortas' opinion is going to be to force manufacturers like Schwinn to vertically integrate." 36 A. B. A. ANTITRUST L. J. 95 (1967).

[41]AREEDA, *supra.* note 13 at 536. Mergers have the effect of increasing ease of exit, an attraction to entering the market in the first instance. Absent the possibility of merger, policies which encourage vertical integration must make exit less attractive and hence reduce the ease of entry.

[42]Comanor, *supra.* note 2 at 1436.

[43]The term "franchise program" is taken to mean "the establishment of quasi-independent franchisees subject to various controls respecting his business operations" Chadwell and Rhodes, *supra.* note 36 at 1. It may include restrictions respecting territories and customers.

[44]*Id.* at 6. The author cites from the Trial Court *Schwinn* case 237 F. Supp. 334 where Judge Perry after comparing Schwinn to its major competitor which was vertically integrated refused to penalize the contract-integrated system of Schwinn. Further, testimony of Franklin D. Roosevelt, Jr. is cited for the proposition that "The disadvantaged citizen's chances of achieving independence are enhanced [by franchising]."

Montana Law Review, Vol. 30 [1968], Iss. 2, Art. 2

that such an approach is necessary in the area of vertical customer and territorial restrictions.

CONCLUSION

What seems clear is that the language in *Schwinn* has not laid to rest the problem of the application of *per se* rules in the case of territorial restrictions. Indeed, it will be remembered that Justice Fortas specifically exempted "franchises" citing *Colgate.*[45] Furthermore, note is taken of the "new company" and "failing company" doctrines which the Court had suggested in *White Motor* as factors in considering whether or not territorial restrictions should be *per se illegal.*[46] It is also interesting that Professor Comanor recommends that new firms or new products be exceptions to the *per se* rule, a rule which he feels is warranted and necessary to prohibit wasteful product differentiation.[47] And *Albrecht* cites *Schwinn* for the proposition that no assumption can be made as to the legality of territorial restrictions.[48]

It is suggested, therefore, that the rule of reason is not dead in territorial restriction cases within a vertical arrangement. Perhaps *Schwinn,* like *Chicago Board of Trade,* will be narrowly confined, remembering that the decision had the practical effect of applying to only 25% of Schwinn's distribution business. Considering the voluminous record filed in the case, *Schwinn* may well become authority for little more than outlawing those practices which have a "pernicious effect on competition and lack any redeeming virtue"[49], traditional grounds for finding a *per se* violation after a factual determination has been made. In determining whether these "pernicious effects" exist, however, the Court should look to the purpose of the program, the particular restrictions in question, and the actual impact upon competition.[50] Furthermore, since the evidence is great that *per se* rules will lead to vertical integration, the rule of reason is needed as a protection for the smaller business unit. It is interesting that Justice Fortas should have said in 1960:

[45]388 U.S. 365, 376 (1967).

[46]*Id.* at 374. It should be noted that *Sandura v. Federal Trade Commission,* 339 F.2d 847 (1964) is still alive as well. Although a Court of Appeals case, the criterion applied had the effect of exonerating restrictive arrangements when imposed by a small company seeking to compete against giants in the industry.

[47]Comanor, *supra.* note 2 at 1437-1438.

[48]Note 24, *supra.*

[49]*Northern Pacific Railway v. United States,* 356 U.S. 1, 5 (1958).

[50]Chadwell and Rhodes, *supra.,* note 36 at 18. The authors continue: ". . . a judge should look upon a program created . . . by small companies to fulfill a need for aggregating financial strength, engaging in joint advertising, exercising combined purchasing power, or sharing engineering or marketing expertise, differently than he would look upon a program developed with intent to prevent sales to or by price discounters. Similarly, a different decision is called for where a franchise program has the effect of strengthening interbrand competition, than where the effect is to eliminate most of the competition that had existed among the largest companies in an industry."

> . . . small—or smaller business—may have reason to fear that the Government's current enforcement emphasis may inadvertently have the effect of insulating our giant companies from real competition. . . . I propose that we remember with something more than antiquarian interest, the views of Brandeis; and that in the pursuit of our love for competition by antitrust enforcement, we heed the warning of Oscar Wilde: "For each man kills the thing he loves."[51]

Indeed, it is hoped that such a warning was heeded in *Albrecht* and that that case does more than merely raise the haunting specter that in antitrust cases, the only consistency is that the defendant always loses.[52] The re-affirmation of the rule of reason in vertically imposed territorial or customer restriction cases resulting from *Albrecht* would mitigate the fear that the Court has stood the Sherman Act on its head.[53]

[51]Fortas, *The Grievances of the Small Business Man — A Bill of Particulars*, 16 A. B. A. ANTITRUST SECTION 33, 36-37 (1960).

[52]The reader will please pardon the author's paraphrasing of Justice Stewart's oft-quoted statement from his dissent in *United States v. Von's Grocery Company*, 384 U.S. 270, 301 (1966): ''The sole consistency that I can find is that under §7, the Government always wins.''

[53]This was Justice Stewart's statement in dissent. *Albrecht, supra.*, note 22 at 882. Justice Stewart,however, confined his remarks to the appropriateness of applying *per se* rules to vertically imposed maximum prices.

MONTANA LAW REVIEW

Member, National Conference of Law Reviews

Volume 30 | Spring, 1969 | Number 2

EDITORIAL BOARD

LAURENCE E. ECK
Editor-in-Chief

ALAN F. CAIN
Business Manager

DOUGLAS M. GREENWOOD
Associate Editor

GARY L. GRAHAM
Associate Editor

PETER M. KIRWAN
Associate Editor

THOMAS A. HARNEY
Associate Editor

JAMES P. MURPHY, JR.
Associate Editor

* * * * * * * * * *

EDWARD BARTLETT
JOHN L. HILTS
RICHARD G. NOLLMEYER, M.D.
JAMES L. JONES
CARL F. ROEHL, JR.
WILLIAM P. ROSCOE, III
REX B. STRATTON, III

LARRY M. ELISON
Faculty Adviser

Published semi-annually, Spring and Fall, by students of the School of Law, University of Montana, Missoula, Montana