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FRANCHISE RESTRICTIONS: "TIED" SALES AND TERRITORIAL LIMITATIONS*

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When Senator Hart announced early last year that the Senate Antitrust and Monopoly Subcommittee would begin an inquiry into distribution problems, he noted recent concern about "enforcement policy which appears inconsistent with the philosophy of the antitrust law."[1] Opening hearings on March 2, 1965, he focused particularly on "sometimes chaotic legal situations" involving contractual restraints in franchising agreements and the "differing ideas... the Trade Commission and the Justice Department [and] the district courts seem to have... on how these restraints should be treated under the antitrust laws." Senator Hart questioned the applicability of *per se* rules in the franchising field, and whether legal tests should "be the same for the small as the large."[2]

There has been controversy over whether strict antitrust rules *should* be applied to certain restrictive distribution practices for at least 20 years, particularly when "small business" conduct has been questioned.[3] But it is doubtful that differences between courts and the enforcement agencies over the substance of relevant antitrust rules have been decisive in much of the recent litigation.[4] Though

*This paper is a revised and up-dated version of a Speech made on March 5, 1965, to the Antitrust Section of the Michigan State Bar Association.

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[1]Senate Antitrust and Monoply Subcommittee Press Release, January 28, 1965.

[2]Hearings on Distribution Problems Affecting Small Business Before the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1 Franchising Agreements, at 2 (1965). Hampered by uncertainty, the businessman who turns to "franchising in... [an] attempt to compete with the vertically integrated... corporate giants," Senator Hart felt, may be "caught in the middle," without "the funds to fight the enforcement agencies or set up an independent distribution system" while he "is in a competitive battle for survival against those who do and have." Ibid.

[3]See Timberg, "Territorial Exclusives," Address before the ABA Antitrust Section, August 8, 1965.

[4]Most disagreement between the Commission or the Antitrust Division and the courts about application of antitrust rules to specific restraints, e.g., in United States v. Arnold Schwinn & Co., 237 F. Supp. 323 (N.D. Ill. 1965), prob. juris. noted

the scope and nature of restrictions, the enforcement methods and the products and services involved under franchising arrangements are of almost infinite variety, all pose rather familiar antitrust variables. The considerable body of litigated cases testing contractual restraints designed to foster "orderly marketing" have developed reasonably well defined standards for distribution practices,[5] and those standards, for the most part, apply equally to franchising.[6]

Difficult and important questions, even so, complicate and conceivably may frustrate efforts by businessmen and the enforcement agencies to judge fairly the permissible range of conduct within franchise arrangements. It is likely, of course, that Senator Hart's continuing investigation will provide a better insight into the general impact franchise restrictions have on competition. More immediately, we expect significant clarification of some rules applicable to franchising from the U.S. Supreme Court this term.[7] Of perhaps broader impact, the Antitrust Division of the U.S. Department of Justice is readying "guidelines" reflecting that agency's conclusions concerning some aspects of proper franchising behavior. According to Assistant Attorney General Turner, "careful study" is being given to "the problem of

382 U.S. 936 (1965); Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); and Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963), has seemingly been generated by contrary appraisals of the evidence. Such uncertainty derives from the possibility that facts may be variously interpreted, an uncertainty characteristic of any situation where business or any other human conduct must be judged by legal norms. Even well marked price-fixing doctrine admits such uncertainties. Who can say that a businessman's nervous tic at hearing his competitor mention a price may not be thought by some future jury to be the "knowing wink" of a conspirator? See, Esco Corp. v. United States, 341 F.2d 1000 (9th Cir. 1965). An observation made by counsel for the International Franchise Association in his January 16, 1965 Address to that Association summarizing antitrust developments puts this problem in good perspective. Quoting Mr. Justice Holmes, he said "Certainty generally is an illusion, and repose is not the destiny of man." His address is reprinted in Hearings, supra note 2, at 467.

[5]See e.g., Jones, Control of Distributors' Activities, 26 A.B.A. Antitrust Section 68 (1964); Robinson, Providing for Orderly Marketing of Goods, 15 A.B.A. Antitrust Section 282 (1959); Stewart, Exclusive Franchises and Territorial Confinement of Distributors, 22 A.B.A. Antitrust Section 33 (1963); Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795 (1962).

[6]This is not to say that distinctive attributes of the franchising concept may not affect traditional antitrust analysis of particular restraints, as for instance, where "suggested retail prices" for "national advertising" are utilized within a trademark-based franchise. See e.g., Final Judgment in United States v. Spring-Air Co. (N.D. Ill., Aug. 16, 1962), 1962 CCH Tr. Cas. 70,402.

[7]United States v. Arnold Schwinn & Co., supra note 4; United States v. General Motors Corp., 234 F. Supp. 85 (S.D. Cal. 1964), 1964 CCH Tr. Cas. 71,250, prob. juris. noted 380 U.S. 940 (1965) (No. 820), argument presented Dec. 9, 1965; United States v. Sealy, 1964 CCH Tr. Cas. 71,258 (N.D. Ill. 1964), prob. juris. noted 382 U.S. 806 (1965) (No. 238).

territorial restrictions on dealers." Believing that the Justice Department's enforcement "role can only be performed satisfactorily by a constant preoccupation with the formulation of legal rules," Mr. Turner has announced his intention to publish "the Government's views" on this subject, thus inspiring "a continuing dialogue among the Government, the bar, business groups and the academic profession" that will "speed... up the processes of development of the law."[8]

It is timely, therefore, to comment on some general propositions tested in recent litigation bearing on two main types of restriction: *First,* limitations which restrict the sources from which a franchisee may purchase; and, *Second,* territorial restrictions. Either type of restriction can be vertical or horizontal—that is, imposed by a franchisor upon its francisees, or adopted by agreement of francisees, perhaps with the franchisor's encouragement or assistance. Horizontal arrangements characteristically involve the greater antitrust peril.[9]

I.

PURCHASE RESTRICTIONS

The *Carvel*[10] litigation provides a jumping-off point for consideration of restrictions preventing a franchisee from purchasing business supplies from other than the franchisor or franchisor-specified sources. Plaintiffs (franchisees) in the private treble-damage case charged that Carvel's requirement that they purchase certain supplies (the ice cream mix, cones, and other ingredients of the end product sold

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[8]Address by Donald F. Turner, American Bar Association Antitrust Section Meeting, August 10, 1965.

[9]There is some merit in the argument that the effect of a restraint is the same regardless of whether horizontally or vertically adopted. On the other hand, there are some real differences. Horizontal territorial allocations, for instance, are far more likely to eliminate intra-brand competition and are normally so intended, while vertically set territories may primarily serve the franchisor's market development purposes [see the discussion of the White case, infra] and, even though discouraging cross-selling, usually will not completely shut off intra-brand competition. In many areas of antitrust, "the effect of a transaction is not dispositive of its legality." Robinson, supra note 5, at 296. The circumstances under which a vertical arrangement may be viewed as, or actually become, horizontal have been much disputed in arguments to the Supreme Court in United States v. Sealy, supra note 7; and United States v. General Motors, supra note 7.

[10]Susser v. Carvel, 206 F. Supp. 636 (S.D.N.Y. 1962), *aff'd,* 332 F.2d 505 (2d Cir. 1964), *cert. granted,* 379 U.S. 885 (1964); after argument certiorari dismissed as improvidently granted, 381 U.S. 125 (1965). The Federal Trade Commission attacked essentially the same conduct, Carvel Corp., Docket 8574, but dismissed its own complaint on July 19, 1965.

to the public) from Carvel through Carvel-approved sources was an unlawful tie-in sale.[11] The district court, trying the case on the basis of a pre-trial stipulation that plaintiffs relief only on *per se* violations shown in certain written agreements and other documents, dismissed the tie-in charge, and was affirmed by a divided court of appeals.

The appeals court noted that Carvel-franchised stores, which numbered about 180 in 1954, by 1962 totaled approximately 400 and were located "throughout the eastern... United States from Maine to Florida and as far west as Wisconsin." Annual gross sales by franchisees ranged "from six to eight million dollars" while "Carvel's sales to the stores of supplies, equipment, and machinery reached a high point of $5,532,396 in 1957 and in 1960 totaled $4,460,689."[12]

The court split on the "tying" issue. Judge Lumbard, who wrote the majority opinion on all aspects save that point, felt that it "is the lease or license of the trademark itself, buttressed by this array of patents and subsidiary trademarks, to which are tied the other products."[13] Carvel thus had sufficient economic power under its trademarks to appreciably restrain free competition for the "tied" products,[14] and since plaintiffs had evidenced the essentials of a tying arrangement, in Judge Lumbard's view, it was up to Carvel thenceforward to justify the "tie" as reasonably necessary to protect its trademark. Unsatisfied with the record on this point, he would have remanded to give Carvel the chance to prove that specifications for substitute products would be so complex and detailed as to make it impracticable for Carvel to establish such specifications. He emphasiz-

[11]The litigation involved several other charges. Plaintiffs' charge of fraudulent misrepresentation in the franchise negotiations was dismissed after a lengthy trial before the court without a jury. In addition to tie-in, the antitrust charges included allegations that Carvel had unlawfully fixed the prices of the retail products sold in the franchised stores and prevented franchisees from selling other items at the franchised outlet, e.g., hamburgers. The district court held that Carvel's pre-1955 franchise agreements did involve unlawful price maintenance, a feature eliminated by a 1955 amendment to the agreements, and dismissed the complaint on all other counts.

[12]Susser v. Carvel, supra note 10, at 509.

[13]Id. at 513.

[14]As Judge Lumbard saw it: "In short, in order to secure the benefits of employing the Carvel name on his retail products, the dealer has been forced to surrender his right to negotiate with suppliers of his own choice on matters such as price, delivery and other aspects of a contract of sale. Where such a surrender may be traced to the economic leverage of the other party, arising from its trademark, the elements of an unlawful tying arrangement have been established. Certainly the amount of commerce here involved is not insubstantial, in light of Carvel's sales to the franchise dealers in 1960 alone of $3,965,923 in ingredients and other supplies." Id. at 514.

ed that tied ingredients other than the secret mix, though made to specifications, were available elsewhere, and pointed to *Engbrecht v. Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962), where the record showed that Dairy Queen, with a nationwide chain of some 3,400 soft ice cream franchise stores, had established specifications to govern its franchisees' purchases of mix and other ingredients but did not require its dealers to purchase such items directly from it or from other approved sources.[15]

Judges Friendly and Medina, however, were satisfied that the pretrial order limiting plaintiffs' case to *per se* violations foreclosed recovery on the tie-in theory. Tying arrangements, they pointed out, " 'are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of commerce is affected.' "[16] Plaintiffs' case met neither test. Noting their view that a patent was but *"prima facie,"* *i.e.*, rebuttable, "evidence of market control," they held that the Carvel trademark had not acquired "such prominence... [as] would satisfy the market dominance test of *Times-Picayune* and *Northern Pacific*." Second, excluding the dollar volume of secret mix sold to the franchisees which "could legally be tied to the Carvel trade-mark if that mark was to retain its significance," the "minor" amount of allegedly tied sales revealed the " 'insubstantiality' of the commerce affected."[17] Finally, the majority was convinced that the record supported the District Judge's finding that specifying standards for the Carvel ingredients would be an unreasonable burden, particularly when "something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone" is at issue.[18]

Considering basically identical charges, but after full evidentiary hearings under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45), the Federal Trade Commission dismissed its complaint against Carvel,[19] reversing the Hearing Examiner who had found a violation

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[15]In Engbrecht, plaintiffs' complaint that Dairy Queen tied the freezer to sales of the finished products was rejected by the Court because "plaintiffs evidence falls short of showing any other type of freezer which would produce a product satisfying defendant's standard for quality." 203 F. Supp. 714, 719.

[16]Susser v. Carvel, supra note 10, at 518. [citing Northern Pacific Ry. v. United States, 356 U.S. 1, 6 (1958).]

[17]Id. at 519 and 521.

[18]Id. at 520. That a competitor, whose mix is not made under a secret formula, may be satisfied by less exacting standards seemed of little force to the majority.

[19]In the Matter of Carvel Corp., Docket 8574, Opinion of the Commission, July 19, 1965.

on facts similar to those cited by Judge Lumbard.[20] At the outset, Commissioner Jones emphasized that the Commission found it "conceptually impossible... to view a license to use a trademark as separate and distinct from the sale of the trademarked product or its ingredient.... Since Carvel's franchise for the sale of Carvel products and its license to use are part of a single package, we conclude that... the Carvel franchise agreements were [not] illegal tie-in arrangements."[21] To the contrary, "Carvel's restrictions on its dealers' sources of supply of mix and commissary items" were lawful "ancillary" restraints under the *Addyston Pipe* doctrine, being imposed "as a valid and reasonable exercise of the legitimate business interests of the trademark owner in protecting his mark and insuring the quality of his product."[22] Moreover, the Commission agreed with the Second Circuit majority that maintaining the quality of its soft ice cream by less restrictive measures, such as designating specifications, was not shown to be practical. Even viewing the arrangement "in the nature of... a tie," Commissioner Jones, like Judges Medina and Friendly, found no evidence, either that Carvel "possesses the requisite dominance or economic power in the soft ice cream business"[23] or that a "not insubstantial amount of commerce in the tied products... [was] affected."[24]

Different, but related, problems were involved in *Atlantic Refining Co. v. FTC*,[25] decided by the Supreme Court last term. The Court affirmed a Seventh Circuit judgment upholding Federal Trade Commission orders under §5 of the FTC Act barring Atlantic and the Goodyear Tire & Rubber Co. from continuing a joint sales promo-

[20]Docket 8574, Initial Decision, May 25, 1964. The Examiner held (1) the Carvel franchise to be the "tying product," (2) that the franchisor thus had "sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product," and (3) "that a not insubstantial amount of interstate commerce is affected."

[21]Docket 8574, Opinion of the Commission, supra note 19, 3 CCH Tr. Reg. Rep. ¶ 17,298. "No property right inheres in a trademark grant from the product or service to which it relates," Commissioner Jones noted, whereas "tie-in arrangements must involve two separable and distinct products...."

[22]Ibid.

[23]Ibid. Carvel was but one among "numerous other franchise chains and independent operators."

[24]Ibid. Though the record suggested that Carvel held 37% of the total soft ice cream business in the relevant market area, the "virtual absence of barriers to entry into this business," and the dearth of facts showing the significance of Carvel licensees as market outlets for mix-supplying dairies, convinced the Commission that Carvel's market share percentage alone was meaningless.

[25]381 U.S. 357 (1965), *affirming* 331 F.2d 394 (7th Cir. 1964); *affirming* 58 FTC 309 (1961).

tion program.[26] In essence, the forbidden sales commission plan had provided for Atlantic to be paid a commission for "sponsoring" the sale of Goodyear tires, batteries and accessories (TBA) to those of Atlantic's wholesale dealers and retail service stations located in three sales regions; Atlantic's similar sales commission contract with Firestone covering three other sales regions was not directly attacked in the action.

Though "the Goodyear-Atlantic contract is not a tying arrangement,"[27] Mr. Justice Clark acknowledged, "the central competitive characteristic" of the Atlantic-Goodyear plan is the same as a "tie"—"the utilization of economic power in one market to curtail competition in another."[28] And there was, the Court found, "substantial evidence" of Atlantic's "economic leverage": Atlantic's "lease and equipment loan contracts with their cancellation and short-term provisions...; Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers... [and had] extensive control of all advertising on the premises of its dealers."[29] In sum, Atlantic and its dealers "simply do not bargain as equals."[30] Evidence that Atlantic employed overt coercive tactics in sponsoring Goodyear TBA "bolstered" the "lever" which resulted from Atlantic's economic power over its distributors and dealers. The results, as shown by the record, were that "wholesalers and manufacturers of competing

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[26]Atlantic Refining Co. v. FTC was one of three companion cases challenging sales commission arrangements between major rubber companies and major oil companies. The other two are: Firestone Tire & Rubber Co. 58 FTC 371 (1961), involving Firestone and Shell Oil Co. (now on appeal in the Fifth Circuit); B. F. Goodrich Co. — FTC — Docket 6485; Opinion of the Commission, January 14, 1966, involving Goodrich and Texaco. In each, the Commission held the sales commission plan unlawful, finding the "competitive effects of the... plan... like those of an unlawful tying arrangement—... a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)"—affecting a "not unsubstantial" amount of commerce. 58 FTC 367; 58 FTC 406. The Goodrich-Texaco proceeding is procedurally more complicated, but the Commission's 1966 Opinion cites the same defects as fatal to all. Use of sales commission plans is widespread. Goodyear had similar agreements with 21 oil companies (381 U.S. 357, 373); Goodrich and Firestone likewise had such arrangements with a substantial number of oil marketers.

[27]Atlantic Refining Co. v. FTC, supra note 25, at 369. For, the Court noted, "Atlantic is not required to tie its sale of gasoline and other petroleum products to purchases of Goodyear tires, batteries and accessories. Nor does it expressly require such purchases of its dealers."

[28]Ibid.

[29]Id. at 368. The Seventh Circuit observed that the "service station dealer is more of an economic serf than a businessman free to purchase the TBA of his choice." 331 F.2d 394, 400. Cf. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), cited by Mr. Justice Clark at this point in his discussion.

[30]381 U.S. at 368.

brands ... were foreclosed from the Atlantic market; ... Firestone and Goodyear were excluded from selling to Atlantic's dealers in each others territories;... [and] Atlantic wholesalers and retailers ... were effectively foreclosed from selling brands other than Goodyear ... [and] could buy only at Goodyear's price."[31] The Court saw no need for "extensive economic analysis" of the plan's "competitive effect ... [in] the entire [TBA] market ...," and approved the Commission's rejection of evidence of "economic justification of the program."

> "[J]ust as the effect of this plan is similar to that of a tie-in, so it is unnecessary to embark upon a full-scale economic analysis of competitive effect. We think it enough that the Commission found that a not unsubstantial portion of commerce is affected."[32]

The Commission's Order, barring any use of sales-commission plans by *either* Atlantic or Goodyear with any other company, Mr. Justice Clark held, was "well within the ambit of the Commission's authority."[33] Both "worked together to achieve the program's success," Goodyear "harnessing and utilizing" Atlantic's power.[34]

Thus, *Carvel* and *Atlantic* came to opposite conclusions. For what Carvel may *require* its franchisors to do—buy from it or approved sources—Atlantic may not *recommend* to its dealers. The pragmatic explanation for the variant results may be the difference between oil and ice cream. A more useful answer may be suggested by reviewing some general principles consistent with both cases, against the background of prior "tie-in" decisions.

First, the "tying" doctrine is elastic, perhaps especially expansive in § 5 litigation. Neither *Carvel* nor *Atlantic* involved the typical "tie," but both Courts used "tying" rules because the practice was "like" a tying arrangement. It is noteworthy, too, that the Commission's *Carvel* opinion, though conceptually rejecting the "tying-trademark" analysis, even so measured the evidence against "tying" standards.

Second, a factual inquiry into the franchisor's "economic power" is the key to whether a franchisor can lawfully restrict his franchisee's

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[31]Id. at 370.

[32]Id. at 371. Goodyear and Firestone sales in five years exceeded $50 million.

[33]Id. at 373.

[34]Id. at 373. Goodyear urged that there was "no evidence of the economic power of many of the companies with which it has sales commission plans," in protesting the scope of the FTC's Order. The Court noted, however, that Goodyear could "seek a reopening of the order" if it "has ... a contract with ... a company ... not possessed of economic power over ... [its] dealers."

freedom of purchase. Evidencing only the franchise relationship, even if it is trademark-based, will not meet plaintiff's burden of proof on this issue. Use of a patent to restrict a franchisee-licensor's purchases of "tied" products may or may not be conclusively barred.[35]

Third, the opinions in *Atlantic* (and the Commission's opinion in *Goodrich)* suggest that proof of the "utilization" of economic leverage "in one market to curtail competition in another,"[36] *i.e.,* the actual "tie," may be satisfied by evidencing something less than an express (or inferred) agreement, or other form of overt coercion. Whether "recommendation is tantamount to command," as the Seventh Circuit said in *Atlantic,*[37] will likely be straightened out if either Goodrich or Texaco appeals the Commission's Orders just issued against them.[38]

Fourth, per se assertions will not substitute for the required factual showings of "economic power" and a "not insubstantial" amount of affected commerce. To paraphrase Mr. Alfred Perlman, the *per se* doctrine should not be used as a drunk uses a lamp post—more to lean on than for illumination.[39] The *per se* approach may serve some purpose, however, in showing the point at which factual inquiry may be terminated, *i.e.,* it may eliminate the need for either "full-scale economic analysis of competitive effect" or evidence of "economic justification" for the challenged conduct.[40] In a different context, even this use of *per se* might be unwarranted.[41]

Fifth, a franchisor can control his franchisee's purchases by establishing reasonable specifications for products reasonably related to protection of the franchisor's good will. If a trademark license is involved, the burden of showing the need for protection of the franchisor's good will is reduced, because Section 5 of the Lanham Act[42] requires the licensor of the mark to exercise control of "the nature and quality

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[35]Cf. Susser v. Carvel, 332 F.2d 505, 519 (2d Cir. 1964); Northern Pac. Ry. v. United States, 356 U.S. 1, 17-19 (1958) (dissent); Standard Oil Co. v. United States, 337 U.S. 293, 307 (1949).

[36]Atlantic Refining Co. v. FTC, supra note 25, at 369.

[37]Atlantic Refining Co. v. FTC, supra note 25, 331 F.2d at 401.

[38]B. F. Goodrich, Docket 6485, supra note 26.

[39]Quoted in the Wall Street Journal, January 24, 1966, p. 14.

[40]Atlantic Refining Co. v. FTC, supra note 25, at 371.

[41]Note, in this connection, the assertions by the International Franchise Association, Inc., appearing before the Supreme Court as amicus curiae in Susser v. Carvel, that extension of per se rules to "...franchising arrangements could be ruinous...and [could] jeopardize the continuation of a method of business operation which has proven valuable and effective throughout the country." IFA Amicus Brief, p.2.

[42]15 U.S.C. § 1055.

of the goods or services in connection with which the mark is used."[43]

Sixth, in the usual situation, "specification of the type and quality of the product to be used... is protection enough [for the manufacturer's]... good will"[44] and limiting the franchisee to purchases from the franchisor or franchisor-approved sources will pass muster "only... where specifications for a substitute would be so detailed that they could not practicably be supplied."[45]

Finally, a secret formula likely will justify requiring a franchisee to buy materials so prepared from the franchisor, but the *bona fides* of the "secret" formulation and other factors of its use, including the significance of the secret to the unique quality of the end product sold to the public, are proper subjects for judicial inquiry.[46]

Restricting a franchisee's freedom of purchase, even if the franchisee must buy from his franchisor, is not unlawful. Rather, to the extent it is directed to maintaining quality control and protecting the franchisor's good will, such a restriction may engender competition. Equally apparent, however, is that such restraints can be used to frustrate competition. Nevertheless, in most situations, guided by "rule-of-reason" standards, it is possible to make fairly precise judgments about the lawfulness of specific purchase restrictions.[47]

II.

TERRITORIAL LIMITATIONS

In general, territorial limitations prescribed by the franchisor involve less well defined antitrust questions than "tying" restrictions do, partly because the restrictiveness of the limitations imposed varies significantly in different franchises and industries, and partly because

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[43]§ 45 of the Lanham Act (15 U.S.C. § 1127) so defines the control requirement under which a "related company[s]" use of a mark is permitted under § 5 (15 U.S.C. § 1055) without "affect[ing] the validity of such mark or of its registration." Cf. Morse-Starrett Products Co. v. Steccone, 86 F. Supp. 796 (N.D. Cal. 1949); duPont v. Celanese Corp., 167 F.2d 484 (C.C.P.A. [Patents] 1948).

[44]Standard Oil Co. v. United States, supra note 35, at 306. *But see* Denison Mattress Factory v. The Spring-Air Co., 308 F.2d 403 (5th Cir. 1962), holding specification of sources not unreasonable on facts there shown.

[45]Standard Oil Co. v. United States, supra note 35, at 306.

[46]That specifications for the "secret" formulation have, in fact, been made available to approved companies also will bear on the reasonableness of source restrictions.

[47]An interesting case raising related issues is Brown Shoe Co. v. FTC, 339 F.2d 45 (8th Cir. 1964); *cert. granted,* 382 U.S. 808 (1965). FTC there held that Brown's franchise program tied its franchise plan to purchases of Brown Shoes and prevented its franchisees from buying shoes from Brown's competitors, but the Eighth Circuit Court of Appeals reversed.

the competitive consequences of such limitations are not so obvious nor so easily categorized. A basic objection to territorial restrictions is that they eliminate competition between the fenced-in franchisees (sellers). Nevertheless, it is argued, territorial limitations actually improve market performance and foster competition between the territorially-limited franchisees and competing manufacturers or other franchise operations. Litigated tests of these conflicting assertions, while not extensive, do afford some insights on appropriate antitrust standards for territorial limitations.[48] First, however, a brief resume of the key arguments for and against setting fixed bounds to a franchisee's sales area will give perspective to the developing case law.

It is obvious that competition is restrained by territorial limitations. Just as an exclusive franchise eliminates the potential intra-brand competition that another franchisee would represent, so an *effective* restriction of exclusive franchisees within non-overlapping territories eliminates all intra-brand competition. Even where the restriction is not completely effective (for whatever reason) or where exclusive franchises are not involved, some intra-brand competition is eliminated—and indeed that is usually the purpose of the restriction.

Equally obvious, intra-brand competition can constitute, at least in the short term, a most important stimulus to overall market price competition. For as a general matter, a seller must either cut prices or otherwise shave his net return to increase his sales in competition against sellers of same-brand products. In a reasonably competitive market, intra-brand price cutting will induce inter-brand price competition as well. The intra-brand competition, including cut-price competition, often benefits a franchisor by increasing his total sales and maximizing his market coverage, and it may boost his franchisees' competitive positions as well. The inter-brand competition may also tend to expand total product sales as well as maximize consumer want satisfaction.

Such, even so, are only some of the effects of intra-brand competition. While expanding sales for one franchisee, intra-brand competition may shrink another franchisee's sales proportionally, especially in a relatively static product market. And this effect, particularly in the

[48]Territorial restraint cases or problems often may involve other sorts of restrictions, *e.g.*, exclusive franchises, customer restrictions, or efforts to maintain resale prices, the lawfulness of which depends on a basically different analysis, of market foreclosure, or per se combination or conspiracy. The effort to generalize rules to cover practices so diverse in purpose and use actually tends to exaggerate legal uncertainty. In a specific factual context, to the contrary, probably most territorial limitations can be readily appraised under antitrust standards.

long-run, may prevent or stifle market competition by frustrating the growth of strong unified franchise systems.

The important impetus to market competition that territorially limited franchises can provide is most usually exampled by the manufacturer trying to break into the market with a new product. He may find it difficult to get franchisees willing to invest in building outlets, adding to existing facilities, or paying for advertising and other promotional activities *unless* there is some certainty of adequate financial reward if the product is successful. But the manufacturer who finds his existing distribution channels are not effective to maximize sales of his goods faces similar problems. His efforts to persuade his franchisees to spend the time, money, and effort needed to build continuing demand for his product may fail if franchisees from other market areas can cash in on such efforts without making any comparable investment or work.

Pertinent, too, are service problems. Many service costs are charged to the customer, but some are not passed on in order to promote product good will, and to thus strengthen the competitive stature of the franchise. A cross-selling franchisee may be able to make sales outside his own territory at cut prices solely because he bears no service burden. When the invaded franchisee is unable or unwilling to give service on an item he has not sold and on which he has not realized any sales profit, the franchisee's market position may suffer.

Finally, franchisors plan distribution systems so that franchisees will develop all accounts in a given market—not just the easier ones. And since efforts can be concentrated to develop all potential trade in the limited areas, territorial restrictions should tend to increase the number of franchisees a franchisor can economically deploy.[49] A cross-selling franchisee can disrupt full market exploitation since he may find it more profitable to stick to fewer accounts in his own area if he takes sales from his neighbor—whereas the franchisee who loses the "cream" accounts in his territory may find the remaining business insufficiently profitable to be worthwhile. Moreover, the franchisee caught with an inventory build-up frequently dumps it in somebody else's market—where it affects somebody else's price structure. By such a course, the argument goes, franchisees fail, franchisors lose distribution, and markets become less competitive.

The Justice Department views most of these rationalizations for territorial restrictions skeptically. Detailed guidelines for such restrictions have not yet been published by the Antitrust Division,[50]

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[49]Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law and Contemporary Problems 506 (1965).

[50]Turner Address, supra note 8.

but Assistant Attorney General Turner has said that he "approach[es] territorial and customer restrictions ... inhospitably in the tradition of antitrust law."[51] Using *Addyston Pipe*'s "ancillary restraint" doctrine[52] as his guide, the "question ... of overriding importance" Mr. Turner sees is "Are territorial restrictions more restrictive than necessary to achieve any legitimate purpose?" And his "tentative view" is that there is a "convincing case made for [but one] ... exception ... to a rule of illegality, ... that involves the entry of new firms and/or the introduction of new products," where "territorial restrictions may be necessary ... to induce dealers to make the investment necessary to get the manufacturer's new product effectively introduced." Otherwise, Mr. Turner believes that if a

> dealer ... is charging too high a price, normally he should be undersold [by a cross-selling dealer]. If he cannot survive on the remaining business, what reason is there to keep him in? ... [Even] where ... territorial restrictions ... appear to be the only method by which a weak firm can obtain dealers, ... I am not at all sure that it is good antitrust policy to attempt to preserve in this way companies that have run the competitive race and have been fairly beaten.

It would be easy to exaggerate the disparity between Mr. Turner's generalized views on enforcement policy and traditional Sherman Act "rule of reason" analysis which relies on evidence of the restriction's purpose, market share data, availability of competitive outlets and products, and other such measures to determine whether a restraint has sufficient anticompetitive impact to be ruled unlawful. Mr. Turner seems to suggest that courts should presume that territorial restrictions are an unreasonable interference with competition, an arguably stricter standard for restraints of intra-brand competition than that applied to some inter-brand restraints.

> [W]hen it is demonstrable that the agreements are in any event serving no useful purpose that cannot be served by less restrictive arrangements ... restraint[s] as anticompetitive in ... terms as territorial restraints ... are ... commonly if not usually employed primarily because of the benefits which the ending of competition will confer on the parties concerned ... should be held unlawful without more.[53]

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[51]Address by Donald F. Turner, Antitrust Law Section of the New York State Bar Association, February 2, 1966.

[52]Addyston Pipe & Steel Co. v. United States, 85 Fed. 271, *aff'd* 175 U.S. 211 (1899).

[53]See also Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 698-99 (1962).

A more particularized application of this general theory may shortly be available when the Antitrust Division's guidelines are released. It is interesting, even without the more precise standards, to review some of the territorial restriction cases with this generalized theory in mind.

The *Philco* suit,[54] though not recent, provides a cornerstone theory in this field. In that case, terminated by a consent judgment, the complaint had charged a well-policed conspiracy between Philco and its wholesale distributors to prevent cross-selling between fixed wholesale distribution territories and to eliminate sales to unapproved retail outlets. The consented-to judgment set a pattern consistent with Mr. Turner's thesis by providing that "Philco may . . . designate geographical areas in which [its] . . . distributors shall respectively be primarily responsible for wholesaling Philco products and . . . terminate the franchises of distributors who do not adequately represent Philco and promote the sale of all Philco products in areas so designated as their primary responsibility."

More recent cases illustrate possible consequences of designating territorial limitations more stringent than areas of "primary responsibility." Of these, *White Motor*[55] is the key "vertical" case. The District Court on motion for summary judgment held that the provisions of White's dealer contracts requiring its dealers to maintain resale prices and forbidding them to sell outside certain territories or to customers White reserved for itself, were *per se* unlawful. White did not contest the price-fixing holding but appealed on the territorial and customer limitations. The Supreme Court reversed, holding that "summary judgment, apart from the price-fixing phase of the case, was improperly employed in this suit. . . . We only hold that the legality of the territorial and customer limitations should be determined only after a trial."[56]

White had justified its restrictions to the Supreme Court on arguments similar to those mentioned above. It pointed to the strong competition it faced and argued that if it was to obtain maximum sales in a given area its distributors and dealers had to concentrate on trying to take sales away from other competing truck manufacturers rather than from each other. "The plain fact is," White argued,

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[54]United States v. Philco Corp., Civil Action 18216, E.D. Pa., Final Judgment filed on July 13, 1956, paragraph IV (D). A summary of cases challenging territorial limitations brought by the Department of Justice and terminated by consent judgments is given in Timberg, op. cit. supra note 3.

[55]United States v. White Motor Co., 194 F. Supp. 562 (N.D. Ohio 1961), *rev'd*, 372 U.S. 253 (1963).

[56]White Motor Co. v. United States, 372 U.S. 253, 264 (1963).

> as we expect to be able to show to the satisfaction of the Court at a trial of this case on the merits, that the outlawing of exclusive distributorships and dealerships in specified territories would reduce competition in the sale of motor trucks and not foster such competition.[57]

The majority of the Supreme Court recognized this as "the first case involving a territorial restriction in a *vertical* arrangement;" and said:

> Horizontal territorial limitations, like "group boycotts, or concerted refusals by traders to deal with other traders" ... are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and within the "rule of reason." 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.[58]

Like the majority, Mr. Justice Brennan, in a concurring opinion, was unwilling to assume "without a trial" that vertical "restraints serve the same pernicious purpose and have the same inhibitory effects upon competition as horizontal division of markets. . . ."[59] Neither would he accept as valid the equation of resale price maintenance, which reduces both intra-brand and inter-brand competition, with territorial restrictions which though reducing intra-brand competition could have quite different effects on inter-brand competition. Mr. Justice Brennan clearly shares the concern that territorial restrictions should not exceed their justification. "The problem," Mr. Justice Brennan pointed out,

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[57]Id. at 257.

[58]Id. at 262. In dissent (p. 281), Mr. Justice Clark, writing for himself, the Chief Justice, and Mr. Justice Black, pointed out that the rule of reason "is inapplicable to agreements made solely for the purpose of eliminating competition.... The offered justification must fail because it involves a contention contrary to the public policy of the Sherman Act, which is that the suppression of competition is in and of itself a public injury. To admit, as does the petitioner, that competition is eliminated under its contracts is, under our cases, to admit a violation of the Sherman Act. No justification, no matter how beneficial, can save it from that interdiction."

[59]Id. at 267.

> is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessay, or excessively anticompetitive, when viewed in light of the extenuating interests.[60]

But, in Mr. Justice Brennan's view, "no . . . inquiry . . . into the question of [less restrictive] alternatives could meaningfully be undertaken until the District Court has ascertained the effect upon competition of the particular territorial restraints in suit, and of the particular sanctions by which they are enforced."[61]

After that opinion, antitrust lawyers waited, as one of them put it, for "the other shoe to drop."[62] But White eliminated its challenged restrictions and the case was ended by a consent judgment. Other cases decided after *White* offer some instruction on facts lower courts feel may justify territorial restrictions, suggesting when such restrictions may be, to use Mr. Justice Douglas' phrase, "allowable protections against aggressive competitors."

The *Snap-On Tools* case[63] was a proceeding under FTC Act Section 5 against a manufacturer of a complete line of tools, ranging from small wrenches and pliers to a line of electric devices and automobile testing equipment. The complaint charged that Snap-on: (1) maintained resale prices; (2) restricted the territory within which and the persons to whom its dealers could sell; and (3) required those of its dealers who ceased to represent Snap-On to agree not to engage in a similar business within the same state for a period of one year.

The Commission, reversing its Hearing Examiner,[64] found that the provision for exclusive territories "was part of the over-all distribution plan which encompassed all of the restrictions here involved and was designed to prevent competition among its dealers. More specifically, exclusive territories buttressed the resale price maintainance provision by preventing all competition, including price competition,

[60] Id. at 270. Mr. Justice Brennan wanted to know, for instance, what sanctions White imposed against distributors who raided other territories, pointing out that if the dealer who cross-sells took the chance of losing his franchise altogether the restrictions might well completely deter competitive efforts.

[61] Id. at 272.

[62] Potvin, Choosing and Dropping Distributors, 26 A.B.A. Anti-Trust Section 99, 100 (1964).

[63] FTC Docket 7116; *rev'd*, Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963).

[64] The Hearing Examiner originally held that a prima facie case had been made only on the price maintenance charge and dismissed the other charges. In reversing, the Commission directed the Examiner to evaluate the company's entire course of dealing. After a further hearing, the Examiner once again dismissed without considering the practices as a unitary course of action.

among respondent's dealers."[65] Snap-On's legitimate ends, the Commission pointed out, could be met "without suppressing or eliminating competition among its dealers" by "assigning areas of primary responsibility to its dealers and insisting that they provide adequate sales coverage and service within these territories."[66]

The Seventh Circuit reversed, holding that the evidence did not support the finding of price-fixing and that none of the other restraints, viewed separately on the record, was unreasonable. The territorial restrictions were reasonable, in the Court's view, because of the importance of service to Snap-On's business and the great difficulties of providing adequate service without limited territories. Moreover, the Court emphasized that there were no facts which suggested that Snap-On's territorial arrangement was adopted by the company and its dealers in order to limit competition. Perhaps the key to the decision, however, was the Court's judgment that Snap-On had no monopoly position in the tool business and had no patents or trade secrets which give them a dominant position:

> Rather the evidence is that there are over eighty competing concerns in the hand tool industry and that "competitive conditions in the Hand Tools Industry are bitter and bloody."[67]

The Commission's conclusion that assignment of areas of "primary responsibility" would provide satisfactory less restrictive alternatives to the exclusive territories was summarily rejected.

An FTC decision that territorial limitations upon Sandura Company's floor covering distributors violated Section 5 of the FTC Act was recently reversed by the Sixth Circuit Court of Appeals.[68] Here, too, the Commission had found the territorial restrictions part of an overall price-fixing scheme, but the court found this conclusion unsupported by the record.[69] Moreover, the Court was convinced that Sandura had to adopt closed territories to get adequate distribution in the face of strong competition from the "giants" of the floor covering industry. When Sandura had first marketed its newly developed "Sandran," it encountered product failures which nearly forced it into bankruptcy and demoralized its distribution organization. Testimony in the record, the Court felt, showed the unwillingness of deal-

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[65]Opinion of the Commission, 1961-63 CCH Tr. Reg. Rep. Transfer Binder, FTC Complaints, etc., 15,546. "The law is clear," the Commission pointed out, "that the public is entitled to the benefit of competition on the dealer level."

[66]Ibid.

[67]Snap-On Tools Corp. v. FTC, supra note 63, at 833.

[68]Dockett 7042; *rev'd*, Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964).

[69]Sandura did not appeal the resale price-fixing finding.

ers to make the investment necessary to handle Sandura's products without closed territories. Without the intra-brand restraint, it appeared, the market might well have lost a significant competitive innovator.

Not only was Sandura's distributorship organization lawfully conceived, the court found, but Sandura's dependence on its distributors for advertising and promotion justified continuance of the closed territory system:

> It is axiomatic that no purpose, however reasonable, may be used to justify a restraint of trade greater than the minimum necessary to reasonably attain it. Accordingly if it were possible to accept the finding that Sandura could achieve at least its present valid purposes by establishing merely de facto closed territories through use of "primary-responsibility" exclusive territories, the Commission's order should be enforced. We believe, however, that the Commission was not justified in its rejection of the great body of uncontradicted testimony that the distributors would not have been willing to undertake the Sandura program without closed territories and would either drop the line or greatly alter their methods if deprived of their closed territories today.[70]

Cases challenging franchise restrictions employed by Arnold, Schwinn & Co., General Motors, and Sealy, Inc. may be noted here for the additional light they give on some aspects of the Government's views on territorial restrictions. Extended comment at this juncture on those cases, however, would be premature, since all three are presently on appeal to the Supreme Court.[71]

Schwinn was rather a stand-off in the District Court, where it was held that Schwinn and certain of its distributors had participated in a horizontal conspiracy to allocate sales territories among the distributors. On the other hand, the vertical features of Schwinn's rather complex franchising arrangement, whereby Schwinn distributors sold to Schwinn-franchised retail outlets only were upheld.[72] On appeal, analogizing Schwinn's customer restrictions to territorial restraints, the Government stressed the need for intra-brand competition in "in-

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[70]Sandura Co. v. FTC, supra note 68, at 856.

[71]See note 7, supra. GM was argued on December 9, 1965. Argument in the Sealy and Schwinn cases, however, may go over to next term.

[72]Schwinn, the District Court held, had laid out the territories unilaterally "one distributor for a general area, and one retail dealer for a particular locality.... All of which," the Court found, "is sound economically and perfectly legal." United States v. Schwinn, supra note 4, at 340. Despite the conspiracy violation, Judge Perry found "no grounds whatsoever for ordering or directing Schwinn to alter or change its territories or distributors." Id. at 342.

dustries in which products are highly differentiated ... [and] like Schwinn bicycles ... [have] a market of ... [their] own," particularly when "intra-brand competitive efforts ... may be essential to promote competition between brands and to hinder the tendency toward accommodation among the few manufacturers."[73] Moreover, the antitrust agency suggested in a footnote that the "burden was upon Schwinn to show that the restraint was needed to maintain Schwinn as a competitive bicycle manufacturer, and this it failed to do."[74]

Territorial limitations of the sort here previously discussed were not involved in *United States v. General Motors,* for GM's Los Angeles Chevrolet dealers there involved were free to sell to any customer, at any price, anywhere.[75] The complaint in that case, which charged that GM and its Los Angeles dealers had conspired to suppress competition by preventing sales of Chevrolets through discount houses and referral services, was dismissed by the District Court after trial oriented mainly on a "group boycott" theory. In the Supreme Court appeal the Government's principal attack was against General Motors' disapproval of dealer sales through discount house and referral arrangements, on the basis of a clause in its franchise contract forbidding the franchisee to establish unauthorized branch locations. The District Court had found that GM had adopted the "location" clause as a key part of its franchise system to insure adequate distribution and servicing for its products, thus promoting competition. The Court found, too, that intra-brand competition involved 85 Chevrolet dealers in the Los Angeles area.

While accepting for the purposes of argument the principle that some vertically imposed "restrictions on distribution may ... be reasonable," the Antitrust Division argued that "the presumption should be against ... vertical restraints ... shown to be anticompetitive in nature," and "that it is incumbent upon those manufacturers employing ... [such restraints] to prove that they are necessary to promote or preserve competition, and no more restrictive in nature or in duration that conditions require."[76] Arguments like those made in *Schwinn*

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[73]United States v. Arnold, Schwinn & Co., supra note 4, Government's Jurisdictional Statement, p. 14. The appeal also challenges the proposition that otherwise invalid territorial and customer restrictions could be properly used in the context of agency or consignment arrangements.

[74]Id. at 15, n.15. In its motion to affirm the District Court, Schwinn argued strongly in opposition to these propositions, stressing that the Government's prosecution in the District Court postulated no such theory of its case, and that the record below would not support it.

[75]United States v. General Motors Corp., supra note 7.

[76]United States v. General Motors Corp., supra note 7, Brief for the United States, at 19-20.

stressed the importance of intra-brand competition in light of "the position of General Motors in the automobile industry" and the significance of the Chevrolet brand, "in its own right a very significant and important product market," and suggested that preventing sales through discount houses had a "direct and immediate depressant effect... upon price competition among Chevrolet dealers."[77] GM's position, to the contrary, was that even if the location clause had been challenged in the District Court, the facts of record showed the branch location restriction was essential to an efficient and competitive franchise organization.

Whether territorial restraints on sales of trademarked "Sealy" mattresses are horizontal or vertical (or if horizontal should be treated as vertical) was the liminal issue in *United States v. Sealy*.[78] The Antitrust Division, noting that Sealy, Inc., the corporate title holder to the trademark, is 98 percent owned by the licensees among whom the U. S. Market is divided, stated flatly that the territorial allocation was a horizontal market division and *per se* unlawful. The District Court rejected this analysis, holding that the territorial allocation was not designed to eliminate competition but to afford a basis for proper exploitation of the Sealy name and trademarks, and thus under the *Addyston* rule merely ancillary to the main purpose of a lawful contract.[79] There was evidence offered to show vigorous competition in the bedding industry, and the need for Sealy franchisees to undertake expensive promotion and advertising to build market demand for their products in competition with heavily advertised and promoted national brand rivals.

While the extent to which coherent territorial restriction rules can be derived is qualified by the important and possibly broadreaching questions posed in cases now on appeal before the Supreme Court, ceratin principles seem reasonably clear:

(1) Franchises set up on the basis of "areas of primary responsibility" are presumably lawful.[80]

(2) Horizontal territorial arrangements among franchisees are generally *per se* unlawful.[81]

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[77]Id. at 20, 23, 24.

[78]Supra note 7.

[79]United States v. Sealy, Inc., 1964 CCH Tr. Cas. 75,258 (E.D. Ill. 1964).

[80]United States v. Philco, supra note 54; Snap-On Tools (Commission Decision), supra note 65; Turner, op. cit. supra note 53, at 699.

[81]White Motor Co. v. United States, supra note 56; Addyston Pipe & Steel Co. v. United States, supra note 52; Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Arnold, Schwinn & Co., supra note 4.

(3) vertically imposed territorial limitations are not *per se* unlawful.[82] The burden of proof plaintiff bears to make a *prima facie* case cannot be generalized, but could encompass, *inter alia,* evidence relating to (1) unlawful purpose or motive (thus the restriction would not be "ancillary to the main purpose of a lawful contract");[83] (2) the existence and substance of both inter-brand and intra-brand competition in the product market affected;[84] and (3) the effectiveness of the restrictions halting intra-brand competition and the character of the sanctions imposed to enforce those restrictions.[85] Mere proof of the existence of territorial restrictions would not likely suffice.

(4) Justification of territorial limitations most usually will depend on a factual showing of the franchisor's *need* for such restrictions to gain, retain, or operate within a competitive marketing position. Where the proven need arises in connection with a franchisor's entry into a new market or his introduction of new products, such restrictions should not be challenged.[86] Further, where the company imposing territorial limitations faces much larger and more powerful competitors,[87] in an industry where inter-brand competition is strong,[88] it is not unlikely that use of territorial restrictions will continue to be permissible, particularly where their use can be shown to expand or protect the franchisor's competitive position.[89] Testimony by franchisors and franchisees (dealers), supported by other extrinsic evidence of purpose and need, should be persuasive.[90] There seems to be no valid reason why the lawfulness of territorial limitations in

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[82]White Motor Co. v. United States, supra note 56.

[83]An example might be a franchisor's adoption of territorial limitations worked out by his franchisees.

[84]Plaintiff would be expected to stress, where appropriate, defendant's substantial market share, his mature and extensive franchise organization, and the separateness of the market for the territorially limited brand, such as, "Chevrolet" or "Schwinn."

[85]See text supra at note 61.

[86]Turner, supra, text at note 51.

[87]E.g., as in Snap-On Tools Corp v. FTC, supra note 63; Sandura Co. v. FTC, supra note 68.

[88]Ibid.

[89]Cf. Preston, supra note 49. Legislation has been proposed under which "a contract... restricting the right of the purchaser to the distribution of the supplier's product within a clearly delineated territorial area shall not in and of itself be deemed to be an unfair method of competition...." or otherwise in violation of the Sherman or FTC Acts, if specified competitive market circumstances are fulfilled. S. 2549, 89th Cong., 1st Sess. The future of this bill depends on the outcome of the cases now before the U.S. Supreme Court, supra note 7. See also H.R. 4862, 89th Cong., 1st Sess.

[90]Sandura Co. v. FTC, supra note 68. But see Note, 78 Harv. L. Rev. 1679, 1680 (1965).

a trademark-based franchise should not be judged according to such standards, regardless of whether the limitations are vertical or horizontal in form.[91]

(5) Whether the franchisor could achieve his legitimate ends by less restrictive arrangements, such as assignment of "areas of primary responsibility," is a relevant inquiry and may be controlling, particularly where the franchisor's justification is otherwise vulnerable.[92]

(6) Territorial restrictions are most likely to be attacked when the franchise program also embodies price maintenance activities,[93] but a price fixing violation does not render the entire franchise program unlawful.[94]

(7) Treble damage problems arising from territorial limitations may be troublesome, especially where franchisee termination is involved.[95]

The search for simple, definite, and unchanging rules which are certain in their application to territorial limitations is likely to be unavailing. For, to borrow Mr. Frost's words, the "Something... that doesn't love a wall" is constant. The circumstances under which " 'Good fences make good neighbors' " change.[96]

CONCLUSION

As Chairman Dixon stated last year to Senator Hart's Subcommittee:

"Where franchising has an over-all effect of increasing compe-

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[91]This is at least arguable on the basis of Mr. Turner's speech, supra note 51. But see The Gray Line, Inc. v. Gray Line Sightseeing Companies Associated, Inc. (N.D. Cal. 1966) 5 CCH Trade Reg. Rep. 71,704, holding a trademark-based territorial agreement illegal per se.

[92]White Motor Co. v. United States, supra note 56, at 264 (concurring opinion); Sandura Co. v. FTC, supra note 68.

[93]Price-fixing charges were an important element in the White, Snap-On, Sandura, Schwinn and Philco cases.

[94]Chairman Dixon, testifying before the Hart Subcommittee on March 4, 1965, stated that White stands for "several important propositions concerning franchises: (a) restrictive provisions regarding territorial and customer division do not of themselves render a franchise program illegal; (b) the legality of vertical integration by contract, including franchise systems, can be determined only in the context of the factual background of the industry concerned; (c) insofar as a franchise system may result in horizontal price-fixing, it falls under the prohibition of Section 1 of the Sherman Act, but this does not mean that the entire program is necessarily unlawful." Hearings, supra note 2, at 82.

[95]Cf. Simpson v. Union Oil Co., 377 U.S. 13 (1964).

[96]"Mending Wall" from Complete Poems of Robert Frost 47 (Henry Holt & Co. Inc. 1930).

> tition or has no significant effect on competition, the law will not interfere with franchising operations."[97]

That statement, of course, gives small comfort to those whose franchise arrangements may be challenged, but it suggests that normal enforcement attitude toward franchise restrictions is to require factual analysis of their competitive effects. One can anticipate, of course, different views on the "over-all effect" particular franchising systems have (witness *Sandura* and *Snap-On*), and, as well, on the lawfulness of specific "tying" or "territorial" restraints. But Supreme Court review and Justice Department guidelines likely will bring some of the principal issues into sharper focus, and more clearly indicate some of the reasons why and occasions where territorial and purchasing restrictions may be properly employed in franchising systems.

[97]Hearings, supra note 2, at 85. Chairman Dixon suggested that uncertainty about enforcement intentions can be reduced by asking for a Commission Advisory opinion. (Ibid.).

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