1972

Government Regulation of Business (Antitrust): Final Examination (1972)

William & Mary Law School

Repository Citation
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Question 1:

Sperry and Hutchinson Company (S&H) has provided its trading stamp service to retail merchants since 1896. By 1964 its Green Stamps accounted for about forty percent of all trading stamp volume, making the company the undisputed leader of the industry. The purpose of the service is to enable S&H licensees to increase and maintain sales by attracting customers and inducing them to shop at their stores again.

Since 1904 the Sperry and Hutchinson Company (S&H) has utilized injunctions and the threat of injunctions to quell the unauthorized redemption or exchange of its Green Stamps by independent stamp exchanges and retailers.

Stamp exchanges, for a fee, exchange one type of stamp for another and purchase or sell stamps at varying rates. This service enables consumers to consolidate the redemption power of their various kinds of stamps, broadens their choice of redemption merchandise, and aids those who change residence to an area where a different stamp is used. S&H claims that the exchanges trespass on company rights (the company retains title to the stamps) and undermine the very purpose for the company’s existence—to create incentive for the consumer to patronize S&H licensees.

Retailers who are not licensed to dispense stamps sometimes offer to redeem them for merchandise or services in their own stores. S&H contended that this practice denies its licensees the benefit for which they pay and enables unlicensed retailers to capitalize on S&H’s service without paying for it.

Courts in nineteen states and eight federal districts have granted S&H forty-three injunctions.

The Federal Trade Commission (FTC) instituted a cease and desist proceeding against S&H, alleging that S&H’s suppression of these activities of stamp exchanges and retailers constituted an unfair method of competition in commerce, which lessened competition and promoted monopoly in the trading stamp business, in violation of Section 5 of the

In this proceeding the FTC contended that independent redemption and exchange of trading stamps was necessary to enable non-stamp dealers to compete with stamp-givers, usually supermarkets or large chain stores. Moreover, it is impossible for some retailers, particularly small or purely local ones, to secure a stamp franchise because the family-of-merchants policy pursued by the stamp industry tends to lock out smaller competitors.

After the hearing, the FTC issued a cease and desist order against S&H. The Commission's order directed S&H to cease its suppression of the activities of exchanges and redeeming retailers. The company was ordered to institute no further suits against those operations and to notify all affected parties that any injunctions presently in effect would not be enforced.

S&H petitioned the United States Court of Appeals for the Fifth Circuit, praying that the order of FTC be set aside.

How should the Court rule on the questions presented, and for what reasons?

Question 2:

Thill Securities Corporation, a licensed securities dealer, brought a class action in the United States District Court for the Northern District of Illinois against the New York Stock Exchange (Exchange) charging unlawful and unreasonable restraint of interstate trade and unlawful monopoly of the securities market in violation of the Sherman Antitrust Act and the Clayton Act. In particular, Thill attacked the Exchange's so-called "antirebate rule", which prohibits a member from sharing a commission with a nonmember even if the nonmember originally received the customer's order. Alleging lost commissions and reduced trade suffered as a result of the antirebate rule and other unfair practices, Thill requested treble damages in the amount of $21,000,000.

Specifically, Thill charges that "the Exchange has engaged in an unlawful and unreasonable combination and conspiracy in restraint of interstate trade and commerce and has unlawfully and unreasonably monopolized the securities market in the United States by among other things adopting
... a rule which prohibits any member of the Exchange from sharing any commission earned from the purchase or sale of securities with a non-member, even though the non-member may have furnished the order; and by discriminately discouraging customers and prospective customers of Thill and other non-members from doing business with non-members.

Article XV, § 1 of the CONSTITUTION OF THE NEW YORK STOCK EXCHANGE provides in part:

Sec. 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, or securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed; and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. No bonus or percentage or portion of a commission, whether such commission be at or above the rates herein established, or any portion of a profit except as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed, directly or indirectly, or as a salary or portion of a salary, to a clerk or person for business sought or procured for any member or allied member of the Exchange or member firm or member corporation.

The Exchange admitted that the anticompetitive effects of the rule would constitute a violation of the antitrust laws were those laws applicable; it contended, however, that the Securities Exchange Act of 1934 (1934 Act) immunized such Exchange activity from antitrust regulation. The pertinent part of the Securities and Exchange Act reads as follows:

15 U.S.C. §§ 78a-78jj (1964). Section 78a(b) states:

The [Securities and Exchange] Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as ... (9) the fixing of reasonable rates of commission, interest, listing, and other changes.

The Exchange argued that the grant of SEC review jurisdiction over the fixing of commission rates implied that the practice of fixing such rates was legitimate, and that this amounted to congressional approval which, the Exchange reasoned, should exempt the practice from antitrust
What questions are presented, how should the Court rule thereon and for what reasons?

Question 3:

The plaintiff, Interamerican Refining Corporation, brought an action in the United States District Court for Delaware under the Sherman and Clayton Acts, alleging that the defendants had engaged in a "concerted boycott designed to deny Interamerican Venezuelan crude oil required for its operations." Interamerican was an American corporation engaged in the business of processing Venezuelan crude oil at its bonded refinery in Bayonne, New Jersey. The principal stockholders of Interamerican were Venezuelan nationals, two of whom were personae non gratae to the present Venezuelan Government.

Defendants Texaco Maracaibo, Incorporated (Supven) and Monsanto Venezuela, Incorporated (Monven) held concessions from the Venezuelan Government for the production of crude oil. In the course of their operations, they supplied crude oil to defendant Amoco Trading Company, an American company that was not actually operating within Venezuela. Interamerican contracted to obtain its crude oil through Amoco and thereafter received three shipments.

As a trading company, Amoco was the middle man between refineries and producers of crude oil in Venezuela and other countries. In the instant case, Amoco loaded the crude oil produced by Supven and Monven into its tankers at Venezuelan ports and then shipped it to Interamerican.

The first shipment originated with Monven, the last two with Supven.

Interamerican planned to place its refined oil on the market at a low price by processing it in a bonded refinery and then exporting it or selling it as ship's bunker--fuel oil that the ship uses itself—in New York harbor, thereby avoiding United States import quota and tariff restrictions. A bonded refinery was permitted to do this under the laws of the United States.

Foreign oil concerns doing business in Venezuela hold their concessions subject to regulation by the government's Ministry of Mines and Hydrocarbons. This ministry supervises and reviews the sales policies of concessionaries and promulgates rules governing the sale of oil produced in Venezuela. Among the sanctions imposed for violating these
rules is the suspension of the right to ship oil out of Venezuela. Pursuant to this authority, after the first shipments to Interamerican, Supven and Monven were called before the Ministry and were instructed that no more Venezuelan oil was to reach Interamerican. The reasons behind these instructions were mixed. They apparently stemmed partly from the personal animosity that certain high Venezuelan Government officials felt toward the chief shareholders of Interamerican and partly from an attempt by the ministry to effectuate certain Venezuelan economic policy objectives.

The two principal economic policy objectives of the Venezuelan Government appeared to be a desire to keep Venezuelan crude oil from going to "unnatural" markets such as Canada and Europe, and a fear of allowing crude oil to go to a bonded refinery, such as Interamerican's, because of the low price at which such oil could be sold on the international market.

After receipt of these instructions, Amoco informed Interamerican that it could no longer supply it with Venezuelan crude oil, since the Venezuelan Government had forbidden either direct or indirect sales to Interamerican. In fact, all of the defendants refused to sell Venezuelan crude to Interamerican unless the Venezuelan Government would lift the ban. As a result of these refusals to deal, Interamerican brought a treble-damage action under section 4 of the Clayton antitrust law claiming that defendants were engaging in an unlawful concerted refusal to deal.

How should United States District Court rule on the questions presented and for what reasons?

Question 4:

The National Blue Cross Association requires its members to implement out-of-hospital prescription drug plans. Virginia Blue Cross chose a plan that it felt would not only provide its subscribers additional coverage but also keep down the cost of drugs to the public.

Blue Cross of Virginia is a non-stock Virginia corporation authorized by statute to conduct a "plan or plans for furnishing prepaid hospital and similar or related services."
Operation of the plan involved two types of contracts. A subscriber could endorse his existing hospital service contract to provide for procurement of prescription drugs upon presentation of his Blue Cross membership card and payment to a pharmacist of a "deductible" charge of up to $1.50, depending on the premium he paid. The second type of contract, which Blue Cross made with individual pharmacies, bound the pharmacies to furnish drugs to subscribers and bound Blue Cross to pay the pharmacies their acquisition costs of drugs plus a fixed dispensing fee of $1.85 for each prescription. Should a subscriber obtain drugs from a pharmacy that had not contracted with Blue Cross (a nonparticipating pharmacy), Blue Cross would refund 75 percent of the usual and customary fee charged for the drugs.

Blue Cross could have adopted a "usual and customary fee" payment plan; instead it chose an "acquisition cost plus fixed fee" plan upon the recommendation of the National Blue Cross Association because of ease in administration and in policing pharmacies' records, and because it believed that a flat fee would eliminate any incentive for pharmacists to dispense higher priced drugs when cheaper drugs would suffice.

The payment features, as well as the amount of the fee, were unilaterally determined by Blue Cross, but the terms were generally approved by the Virginia Pharmaceutical Association, to which 70 percent of Virginia pharmacists belong. 82 percent of the eligible pharmacists had made individual agreements with Blue Cross, and 2,900 subscribers had endorsed their Blue Cross service contracts.

The Virginia State Corporation Commission approved the Blue Cross prescription drug plan, and it went into operation.

Subsequently, non-participating neighborhood pharmacy instituted a treble damage suit under Section 11 of the Clayton Act against the National Blue Cross Association, Blue Cross of Virginia, the Virginia Pharmaceutical Association and a number of participating drug stores. The complaint charged the defendants with violating Section 1 of the Sherman Act. Defendants filed a motion to dismiss the complaint.

Based on the facts stated above and all reasonable inferences that can be drawn thereupon, how should the court rule and for what reasons?
Question 5:

Marjorie Webster Junior College (herein Webster) is a proprietary corporation organized in 1927 for educational purposes under the District of Columbia law (D.C. Code § 29-601, 1967 ed.). All of the stock is held by members of the Webster family. Since incorporation, it has operated in the District of Columbia as a junior college for women with courses in seven departments, including a department of Liberal Arts. It offers both terminal and transfer courses. Most students who take terminal courses seek no additional formal education after graduation. The transfer courses, however, are designed for students who desire to continue their education by transferring with credits earned at Webster to other institutions offering four-year courses. Plaintiff was accredited by the District of Columbia Board of Education pursuant to D.C. Code §31-120 (1967 ed.) in 1947 and has awarded the degree of Associate in Arts to approximately 2,300 graduates who have satisfactorily completed the prescribed course of study.

Middle States Association of Colleges and Secondary Schools, Inc. (herein Middle States) is a nonprofit educational corporation chartered under the laws of the State of New York on May 27, 1966 for the improvement and development of educational institutions, relationships and services. Its predecessor was Middle States Association of Colleges and Secondary Schools, an unincorporated nonprofit association established in 1887. Defendant conducts a program of evaluation and accreditation of institutions of higher and secondary education located in New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, Puerto Rico, the Canal Zone and the Virgin Islands. Middle States, one of six nationally recognized regional accrediting associations, prepares and maintains a list of accredited institutions of higher education which is published and given national distribution by the American Council on Education.

Accreditation is the process by which an association or agency recognizes an institution as having met certain predetermined standards. The process as employed by defendant involves establishment of standards of quality and identification of those institutions which have achieved them. It seeks to determine in broad qualitative terms whether an institution has clearly defined and appropriate objectives, whether it has established conditions under which it can reasonably be expected to attain them and whether it appears to be attaining them and may be able to continue
to do so. The process involves self-evaluation by the institution, evaluation by a visiting team drawn from Middle States' membership, and action upon the report of that team by the Commission on Institutions of Higher Education. Institutions identified as meeting and maintaining announced standards appropriate to the educational activities in which they are engaged are accredited. Membership in Middle States is concomitant with accreditation by the Commission on Institutions of Higher Education or the Commission on Secondary Schools.

Defendant's membership includes 346 nonprofit institutions of higher education (universities, colleges, junior colleges and specialized institutions). Approximately 106 of these institutions are state or municipal universities, colleges or junior colleges; 83 are private non-sectarian institutions, 137 are private church related or controlled universities, seminaries or junior colleges, 15 are specialized institutions with concentrated courses of instruction in music, optometry, pharmacy and textiles, one is a special private institution for the deaf, three are federally sponsored military academies and one is a federally sponsored junior college. The membership also includes certain institutions outside the United States assigned to Middle States by agreement among the regional associations.

In 1964 the Commission on Institutions of Higher Education of Middle States, the Commission on Institutions of Higher Education of the New England Association of Colleges and Secondary Schools, Inc., the Commission on Colleges and Universities of the North Central Association of Colleges and Secondary Schools, Inc., the Commission on Higher Schools of the Northwest Association of Secondary and Higher Schools, the Commission on Colleges of the Southern Association of Colleges and Schools, Inc., and the Accrediting Commission for Senior Colleges and Universities and the Accrediting Commission for Junior Colleges of the Western Association of Schools and Colleges established the Federation of Regional Accrediting Commissions of Higher Education (herein the Federation) to represent the six accrediting agencies in matters of common interest, to establish policies and procedures, and to exchange information, experience, and personnel. At its initial meeting in March 1964 the Federation issued a policy statement on eligibility for accreditation. One of the six eligibility criteria was the requirement that "The institution should be a nonprofit
organization with a governing board representing the public interest."

Plaintiff contends that defendant and its members have formed a combination or conspiracy in restraint of the plaintiff’s trade in the District of Columbia in violation of Section 3 of the Sherman Act. It alleges that this combination or conspiracy results from the combining of the members into an association which has acquired monopoly power over regional accreditation in this area and is unreasonably exercising this power in such manner as to prevent or inhibit competition from proprietary institutions. Plaintiff claims that many accredited senior colleges and universities have rejected and will continue to reject transfer applications and credits from Webster graduates and that it is handicapped in its recruitment of high school graduates because of its lack of Middle States accreditation. Plaintiff contends that it fulfills all the criteria for accreditation and membership except the nonprofit requirement and that defendant’s exclusionary policy is unreasonable per se.

Webster seeks a permanent injunction enjoining defendant, its officers, trustees, agents, and employees and all persons and organizations acting in concert with it from denying plaintiff eligibility for evaluation and accreditation solely because of its proprietary character and ordering Middle States to accept plaintiff’s application for evaluation and to accredit plaintiff if it otherwise qualifies under defendant’s standards.

Middle States admits it has refused to evaluate Webster for accreditation solely on the ground that because of Webster’s proprietary character, it is ineligible accreditation under Middle States eligibility criteria. Middle States filed a motion to dismiss Webster’s complaint on the ground it fails to state a cause of action on which the requested relief could be given, and a motion for summary judgment. What grounds should be assigned for these motions by Middle States’ counsel, how should the court rule thereon and why?

Question 6:

Plaintiff, McKeon Construction, a corporation engaged in the construction of residential properties, brought suit in 1969 against McClatchy Newspapers, which owns and operates newspapers, radio and television stations in the Central Valley area of California, seeking, "equitable relief under the antitrust laws." The first cause of action is instituted **

Defendant filed a motion to dismiss on the ground that each cause of action fails "to state a claim against defendant upon which relief can be granted".

The pertinent portions of the antitrust statutes on which plaintiff's complaint was based read as follows:

Section 4 of the Clayton Act, 15 U.S.C. § 15 provides in part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides ** *

Section 16 of the Clayton Act, 15 U.S.C. § 26 provides in pertinent part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, ** against threatened loss or damage by a violation of the antitrust laws, ** when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity ** ."

Section 7 of the Clayton Act, 15 U.S.C. § 18 provides:

"No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the ** Federal Communications Commission, ** under any statutory provision vesting such power in such Commission ** ."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in part:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal ."

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor ...."

This action grows out of the purchase, by McClatchy Newspapers, in 1965, of television station KOVR-TV. The Federal Communications Commission granted the application to transfer to defendant on July 30, 1964, and renewed the license November 26, 1968, for the term ending December 1, 1971. Both the original application and renewal were granted over protest.

McClatchy owns and operates the following: The Sacramento Bee, a daily (with evening circulation) and Sunday newspaper operating in Sacramento, California; The Fresno Bee, a daily and Sunday paper published in Fresno County; The Modesto Bee, a daily and Sunday paper published in Modesto, California; Sacramento radio stations KFBK-AM and KFBK-FM; Fresno radio stations KMW-AM and KMJ-FM; Modesto stations KBEE-AM and KBEE-FM; Reno, Nevada radio station KOH-AM; Sacramento television station KOVR-TV; and Fresno station KMW-TV.

Plaintiff is engaged in the "business of construction, leasing and selling of residential properties including condominium residences in California and principally in Sacramento County." He alleges he is an advertiser, purchasing considerable advertising in the Sacramento Bee and in a competing newspaper, the Sacramento Union. Plaintiff considers the relevant market as "mass media advertising", which he alleges is controlled and dominated by McClatchy "through its ownership and acquisition of newspapers and radio and television stations strategically located in the more densely populated, commercial areas of the Central Valley". Plaintiff further alleges that independent radio and television stations were the "major competition" to McClatchy, in the area of advertisement space and that the "effect of McClatchy's acquisition of KOVR Broadcasting, therefore, has been to enhance McClatchy's above-described domination over the sale of advertising in daily newspapers and control over daily newspaper advertising rates to the detriment of McKeon and others in that
McClatchy acquired a competitor (KOVR-TV) to increase concentration and decrease competition in a market in which McClatchy is the principal dominant seller and plaintiff is a buyer. The complaint did not allege that plaintiff, McKeon, had sustained any monetary damages as the result of McClatchy's dominant position in the advertising market media in the Central Valley area.

McKeon seeks (1) a declaration that the acquisition by McClatchy of KOVR-TV was a violation of Section 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act, (2) a decree that McClatchy divest itself of the interest in KOVR-TV; and (3) other necessary and appropriate relief.

What grounds should be assigned for the motion to dismiss, how should the Court rule thereon, and why?

Bolling R. Powell