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RECENT DEVELOPMENTS

ANTITRUST LAW — THE PER SE RULE — NAKED HORIZONTAL TERRITORIAL RESTRAINTS HELD TO BE ILLEGAL PER SE.

United States v. Topco Associates, Inc. (U.S. 1972)

The United States brought an action for injunctive relief against Topco Associates, Inc. ("Topco")¹ for violation of section 1 of the Sherman Act (the "Act").² Topco is a cooperative association of approximately 25 small- and medium-sized independent supermarket chains operating in 33 states.³ Its main function is to serve as a cooperative buying organization⁴ which procures and distributes more than 1000 different food and related non-food items exclusively to its member chains, most of which are distributed under brand names owned by Topco.⁵ The members own equal amounts of Topco's common stock (the voting stock), choose its directors, and completely control the association's operations.⁶ Topco's by-laws establish an "exclusive"⁷ category of territorial licenses, under which most licenses are issued; the two other membership categories have also proved to be de facto "exclusive."⁸ Each member, in his designated

1. Topco Associates, Inc., is a corporation organized under the laws of the State of Wisconsin and maintains its principal place of business in Skokie, Illinois. *United States v. Topco Associates, Inc.*, 319 F. Supp. 1031, 1032 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).

2. The Sherman Act provides in pertinent 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

15 U.S.C. § 1 (1970).

3. At present, Topco is actually composed of 23 chains of supermarket retailers and two retailer-owned cooperative wholesalers. Each of the members operates independently of one another. There is no pooling of profits, capital, or advertising efforts, and each member is free to sell what he wishes, buy from whom he pleases, and price his goods as he wishes, including the Topco products. No grocery business is conducted under the Topco name. 319 F. Supp. at 1032.

4. Topco also insures that there is adequate quality control of its purchased products. In addition, it assists members in developing product specifications and in purchasing goods through other sources. *Id.* at 1035.

5. Some examples are Baby Soft, Food Club, Top Spread and Gayla. *Id.* at 1032.

6. *Id.* at 1033-34.

7. Topco's by-laws established three categories of territorial licenses which members may secure from the association:

(a) Exclusive — An exclusive territory is one in which the member is licensed to sell all products bearing specified trademarks of the association to the exclusion of all others.

(b) Non-Exclusive — A non-exclusive territory is one in which a member is licensed to sell all products bearing specified trademarks of the association, but not to the exclusion of others who may also be licensed to sell products bearing the same trademarks of the association in the same territory.

(c) Coextensive — A coextensive territory is one in which two or more members are licensed to sell all products bearing specified trademarks of the Association to the exclusion of all other persons. *Id.* at 1036.

8. *Id.* at 1037.

territory, may sell products bearing the specified trademarks or trade names but is prohibited from selling at wholesale any products supplied by the association, whether trademarked or not, without securing special permission.⁹

Following a trial on the merits, the United States District Court for the Northern District of Illinois entered judgment for Topco.¹⁰ The district court accepted Topco's contention that territorial divisions were essential for maintaining its private label program and for enabling the association members to compete with the larger chains.¹¹ The district court, finding that the association could not exist if the territorial divisions were not exclusive,¹² upheld the restrictive agreement as procompetitive and, therefore, reasonable.

On appeal,¹³ the United States Supreme Court reversed the decision of the district court, *holding* that: (1) the Topco scheme of allocating territories to minimize competition at the retail level was a horizontal restraint of trade constituting a per se violation of section 1 of the Sherman Act, and, therefore, the district court erred in applying a "rule of reason" test to the restrictive practices involved; and (2) Topco's limitations upon reselling at wholesale were for the same reason per se invalid under section 1 of the Sherman Act. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

Literally interpreted, the language of section 1 of the Act would admit to no exception in declaring agreements in restraint of trade to be illegal.¹⁴ However, the Supreme Court has never adopted such a literal interpretation.¹⁵ By using the "rule of reason" test, the Court has tradi-

9. Article IX, section 8, of Topco's by-laws indicates that this permission is generally not granted without the consent of other interested licensees and the member must agree to restrict Topco product sales to a specific area and under certain conditions. *Id.* at 1037-38.

10. *Id.* at 1031.

11. The district court's findings of fact support these conclusions. For example, private label brand merchandising, which is beyond the reach of small independent chains and which depends on exclusivity, permits the merchandiser to offer to the public lower consumer prices on products of high quality and to bargain with national brand manufacturers. By developing a broader supply base of manufacturers, it decreases dependence upon a smaller number of larger national brand manufacturers. Furthermore, private labels allow smaller manufacturers who are unable to develop national brand recognition for their products to benefit from the assurance of a substantial market. *Id.* at 1035.

12. The district court found that many of the Topco members would not continue in the association and many prospective members would not join the association without the assurance of the exclusive use of the Topco private labels in their respective areas since only through exclusivity would this be a financially sound practice. *Id.* at 1036.

13. The United States appealed directly to the Supreme Court pursuant to section 2 of the Expediting Act:

In every civil action brought in any district court of the United States under any of said acts, wherein the United States is a complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

15 U.S.C. § 29 (1970).

14. See note 2 *supra*.

15. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897), Justice Peckham seemed to adopt a literal interpretation of the Sherman Act. Professor Bork, however, contended that Justice Peckham thoroughly understood

tionally construed the Act as not condemning all restraints of trade, but only those "acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade"¹⁶ The Court traditionally has permitted, as justifiable, restraints based upon competitive necessity.¹⁷ In *Standard Oil Co. v. United States*,¹⁸ for example, the Court determined that it was the intent of Congress in passing the Sherman Act to use a "standard of reason" in making a case-by-case determination.¹⁹ In an often-quoted passage from *Chicago Board of Trade v. United States*,²⁰ Mr. Justice Brandeis set forth the "rule of reason":

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant factors.²¹

As this "rule of reason" developed, the courts simultaneously determined that certain specified practices are per se illegal by their inherent nature or necessary effect.²² The per se rule was established primarily for two reasons. The business community desired certainty in this area, and the courts desired to avoid the complexities and delays resulting from prolific records in prolonged trials involving economic factors not easily comprehended. Therefore, the Supreme Court viewed certain restraints as so "pernicious" that no justification or reasonableness would save

the problems in this area and that the literal reading was merely a tactic in Justice Peckham's debate with Chief Justice White (sometimes called the father of the modern rule of reason) over the construction of the new statute. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 785 (1965).

16. *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911).

17. *See United States v. Joint Traffic Ass'n*, 171 U.S. 505, 573-78 (1898), in which 31 railroads formed an association with the purpose of fixing rates, fares, and charges. The Court found this agreement to be in restraint of trade, but implied that some agreements of this nature might be tolerated.

18. 221 U.S. 1 (1911). *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). In *Addyston*, Judge Taft gave a classic discussion of the legitimacy of those restraints which were merely "ancillary" to the main purpose of the agreement. *See also* notes 58-61 and accompanying text *infra*.

19. 221 U.S. at 60.

20. 246 U.S. 231 (1918).

21. *Id.* at 238.

22. *See* notes 26-30 and accompanying text *infra*.

them.²³ Generally, such restraints of trade have been before the Court a number of times with the same finding of illegality being declared repeatedly²⁴ and have a "legal status . . . so certain and well known as to justify the use of the criminal process and sanctions."²⁵ Those practices which have been generally recognized as illegal per se are price-fixing,²⁶ group boycotts,²⁷ tying arrangements,²⁸ monopolistic conduct which is intended to foreclose competition from a substantial market,²⁹ and divisions of the market when coupled with other restraints.³⁰

The Supreme Court in *United States v. Topco Associates, Inc.*,³¹ met head on the problem of a horizontal territorial limitation agreement³² standing alone and declared it illegal per se. Prior to this decision,³³ the cases that pertained to horizontal territorial restraints had invariably involved agreements among parties with substantial and often dominant market power. Additionally, those cases dealt not only with territorial limitations, but also with an aggregation of other restraints.³⁴ Thus, even though horizontal territorial restraints are often included among those practices listed by "authorities" as being per se unlawful,³⁵ until *Topco*

23. In *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958), Mr. Justice Black eloquently explained the need for per se rules:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken.

Id. at 5.

24. See Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964).

25. Bork, *supra* note 15, at 776.

26. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

27. *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 467 (1941).

28. *International Salt Co. v. United States*, 332 U.S. 392, 394 (1947).

29. *American Tobacco Co. v. United States*, 328 U.S. 781, 808-15 (1946).

30. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Although many authorities list "division of market" cases as being per se illegal, such cases invariably involved some other restraint, such as price fixing. See S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS CASES AND COMMENTS* 132 (3d ed. 1968).

31. 405 U.S. 596, 597 (1972).

32. *Horizontal* agreements refer to those made by persons or groups that are on the same level of the distribution scale, such as between two manufacturers. *Vertical* agreements refer to those made at different levels of the distribution scale, such as between a manufacturer and a retailer.

33. Justices Douglas, Brennan, Stewart, and White joined in the opinion written by Justice Marshall. Justice Blackmun filed an opinion concurring in the result, and Chief Justice Burger filed a dissenting opinion. Justices Powell and Rehnquist took no part in the decision.

34. See notes 39-63 and accompanying text *infra*.

35. See generally S. OPPENHEIM & G. WESTON, *supra* note 30; Day, *Exclusive Territorial Arrangements Under the Antitrust Laws — A Reappraisal*, 40 N.C.L. REV. 223 (1962); Jordan, *Exclusive & Restrictive Sales Areas Under the Antitrust Laws*, 9 U.C.L.A.L. REV. 111 (1962); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal*, 37 ABA ANTITRUST L.J. 237 (1968); Stone, *Closed Territorial Distribution: An Open Question in the Sherman Act*, 30 U. CHI. L. REV. 286 (1963).

the Supreme Court had never been presented with a case involving that issue alone.³⁶ Nevertheless, the Court relied on what it felt to be justifying precedent and stated:

This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.'³⁷

It is submitted that this language underplayed the significance of the *Topco* holding, for, of the cases cited, none dealt with a bare "horizontal territorial limitation" agreement. Accordingly, in his dissent, Chief Justice Burger felt that the Court's prior decisions did not justify the *Topco* holding. He believed that the majority had, in effect, created a new per se rule.³⁸

The majority relied heavily on *United States v. Sealy*³⁹ as authority for its decision and concluded that *Topco* "is . . . on all fours with this case."⁴⁰ *Sealy, Inc.*, was a corporation owned almost entirely by its licensees, and like *Topco*, *Sealy* had agreed with its licensees not to license other manufacturers or sellers to sell *Sealy* brand products in a designated territory in exchange for the promises of the licensees not to expand beyond their designated territories. The district court had found that the combined practices of "fixing prices" and "horizontally limiting territories" were per se illegal. Although *Sealy* did not appeal the price-fixing aspect of the district court's findings, the opinion of Justice Fortas, writing for the *Sealy* Court, indicated that price-fixing was unquestionably a determinative factor in the Court's result:

Appellee has not appealed the order of the District Court enjoining continuation of this price-fixing, but the existence and impact of the practice can not be ignored in our appraisal of the territorial limitations [The price-fixing] underlines the horizontal nature of the enterprise [T]his unlawful resale price-fixing activity refutes appellee's claim that the territorial restraints were mere incidents of a lawful program of trademark licensing.⁴¹

It is submitted that this language implies not only that the Court did not decide the case on the narrow issue of territorial limitations, but also that, if the element of price-fixing had not been present, the Court's decision

36. Although the *Topco* arrangement also involved wholesale restrictions, the Court virtually ignored this fact. See note 93 *infra*. For purposes of this discussion, *Topco* will be considered as presenting only an isolated horizontal territorial restriction. See Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 WASH. & LEE L. REV. 457, 465 (1971).

37. 405 U.S. at 608, citing *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

38. 405 U.S. at 619-20.

39. 388 U.S. 350 (1967).

40. 405 U.S. at 609.

41. 388 U.S. at 355-56. An interesting aside in the *Sealy* opinion is Mr. Justice Fortas' noncommittal response to an analogy suggested by *Sealy* that no one would condemn as per se unlawful an arrangement among a number of small grocers to allocate exclusive territories among themselves for the purpose of using a common name and common advertising. *Id.* at 357.

might have been very different.⁴² In any event, the *Topco* Court removed the ambiguity which surrounded this issue when it stated:

To the extent that *Sealy* casts doubt on whether horizontal territorial limitations, unaccompanied by price-fixing, are *per se* violations of the Sherman Act, we remove that doubt today.⁴³

*Serta Association, Inc. v. United States*⁴⁴ was also relied on by the majority as authority for the contention that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition."⁴⁵ Again, however, this case concerned a territorial restraint that *included* price-fixing.⁴⁶ It is interesting to note that Judge Decker, in his memorandum opinion in *Serta*, interpreted *Sealy* as standing for the proposition that a "company's allocation of exclusive territories, when *combined* with its unlawful price-fixing activities and policing, was illegal *per se*."⁴⁷ The *Serta* court also found that *Sealy* and *Serta* "present virtually the same facts; both are essentially horizontal combinations which have conspired to fix prices *and* allocate closed geographical territories."⁴⁸ Therefore, the *Serta* opinion is more properly viewed as being founded upon an aggregation of trade restraints and not simply upon a bare horizontal territorial limitation as was determined by the *Topco* Court.

Similarly, in *White Motor Co. v. United States*,⁴⁹ another case relied on by the majority, there was an aggregation of trade restraints that included territorial limitations, customer allocations, and fixed resale price setting.⁵⁰ It was from the *White* opinion that the *Topco* Court acquired the language that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling competition."⁵¹ However, as accurately noted by Chief Justice Burger, this statement was dictum in *White* and, therefore, should not have been controlling in *Topco*.⁵²

42. *Id.* at 356-57. The language the *Sealy* Court used again shows that courts in the past have looked to an aggregation of restraints in this area to find illegality.

43. 405 U.S. at 609 n.9. It is curious that this point is treated in a footnote by the majority.

44. 296 F. Supp. 1121 (N.D. Ill. 1968), *aff'd*, 393 U.S. 534 (1969).

45. See note 37 and accompanying text *supra*.

46. In *Serta*, the defendant licensed manufacturers of bedding products throughout the country to use the *Serta* name. The consequence of the agreements was that prices were fixed and territories were limited. 296 F. Supp. at 1127-28.

47. *Id.* at 1122 (emphasis added).

48. *Id.* (emphasis added).

49. 372 U.S. 253 (1963).

50. *Id.* at 255-57.

51. *Id.* at 263.

52. 405 U.S. at 615 (Burger, C.J., dissenting). *White* actually involved a *vertical* territorial restraint agreement among White Motor Co. and its distributors and dealers. The agreement not only restricted territorial movement but also restricted persons to whom distributors and dealers were permitted to sell trucks for resale. See 372 U.S. at 256-57. The *White* Court concluded that the district court's summary judgment decision was premature and that the legality of the territorial and customer limitations should be determined only after a trial on the merits. *Id.* at 264.

The *Topco* Court also relied on *United States v. Arnold, Schwinn & Co.*⁵³ The district court's analysis in that case lends some support for the *Topco* Court's conclusion that horizontal territorial limitations without more are illegal per se.⁵⁴ It is significant, however, that no appeal was taken from the territorial restraint conclusion of the district court, and thus, that issue was not before the Supreme Court⁵⁵ in its review of the case.⁵⁶ In fact, the Supreme Court in *Schwinn* applied the "rule of reason" rather than the per se rule in reaching its decision.⁵⁷

Furthermore, the *Topco* majority cited *United States v. Addyston Pipe & Steel Co.*⁵⁸ which, as Chief Justice Burger pointed out, "has generally been recognized — and properly so — as a fully authoritative exposition of antitrust law."⁵⁹ In *Addyston*, Judge Taft, writing for the Sixth Circuit, made an ambitious attempt to provide the Sherman Act with a workable formula.⁶⁰ Although *Addyston* may have "set the groundwork" for a per se rule, it did not establish "that a horizontal division of markets is, without more, a per se violation of the Sherman Act."⁶¹

The majority cited four other cases in support of its holding, but none of the cases dealt solely with horizontal territorial limitations; rather, they all involved an aggregation of restraints.⁶² The Court cited these cases with the full realization that "Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition."⁶³

53. 388 U.S. 365 (1967), *rev'g* 237 F. Supp. 323 (N.D. Ill. 1965).

54. *United States v. Arnold, Schwinn & Co.*, 237 F. Supp. 323, 342-43 (N.D. Ill. 1965).

55. 405 U.S. at 617-18 (Burger, C.J., dissenting).

56. *Schwinn's* retail dealers were franchised only for a designated location or locations and were authorized to purchase only from or through the authorized distributor for their area and to sell only to consumers, not to unfranchised retailers. In turn, the distributors were instructed to sell only in their assigned territories and only to franchised retail dealers therein. The Supreme Court distinguished the case from *Sealy* by noting that the territorial restrictions were *vertical* and not *horizontal*, and that price-fixing was not involved because that aspect had not been appealed. Proclaiming that it was following the *White Motor* decision, the Court looked to the impact of *Schwinn's* restrictions on the general economy to determine if the restraints were reasonable. 388 U.S. at 381.

57. Mr. Justice Fortas, speaking for the majority, stated:

In this Court, the United States has abandoned its contention that the distribution limitations are illegal per se. Instead we are asked to consider these limitations in light of the "rule of reason"

Id. at 368.

58. 175 U.S. 211 (1899), *aff'g* 85 F. 271 (6th Cir. 1898).

59. 405 U.S. at 618 (Burger, C.J., dissenting).

60. *See* note 18 *supra*.

61. 405 U.S. at 619 (Burger, C.J., dissenting).

62. *Id.* at 608. *See United States v. National Lead Co.*, 332 U.S. 319 (1947) (involved a world-wide arrangement for dividing territories, for pooling patents, and for exchanging technological information); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (involved United States, British, and French corporations who allocated trade territories among themselves, fixed product prices sold by one corporation in the territory of another, and participated in cartels to restrict imports to and exports from the United States); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (involved territorial restraints with tying arrangements); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (involved territorial restraints with price-fixing and profit-pooling).

63. 405 U.S. at 606.

The Sherman Act was passed with the intention of advancing the public welfare by promoting free competition and preventing undue restriction of trade and commerce.⁶⁴ The *Topco* Court stated:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.⁶⁵

The Act was initially designed to offset the anti-competitive *results* of certain combinations, not necessarily to attack the *form* of the combination or the means used by the combination.⁶⁶ Still, the *Topco* majority recognized that there are some contracts restricting competition which are unlawful no matter how beneficial they may be and no matter how economically justifiable. In this regard, the Court emphasized that in no case will a group or groups of private citizens be allowed the option of preventing entry into one sector of the economy because they believe "greater competition in a more important sector of the economy" might result.⁶⁷ To dramatize this point, the Court stated:

In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.⁶⁸

The *Topco* restraints conform to such a posture, for as the district court recognized, *Topco's* principle purpose was to provide its members with an effective and cost-competitive private label program essential for genuine competition with the national and large regional supermarket chains.⁶⁹ Therefore, in finding the horizontal territorial limitations in the instant case to be illegal, the Court apparently now construes the antitrust laws to prohibit small grocery stores or chains from forming buying organizations which, although they may reduce *intra-brand* competition, would increase *inter-brand*⁷⁰ competition.⁷¹ Mr. Justice Blackmun succinctly noted this prohibition in his concurring opinion:

The conclusion the Court reaches has its anomalous aspects for surely, as the District Court's findings make clear, today's decision in the Government's favor will tend to stultify *Topco* members' competition with great and larger chains. The bigs, therefore, should

64. *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 970 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944).

65. 405 U.S. at 610.

66. 138 F.2d at 970.

67. 405 U.S. at 610.

68. *Id.*

69. 319 F. Supp. at 1033.

70. Intra-brand competition refers to competition among the same brand names while inter-brand competition refers to competition among different name brands.

71. Private labels are one of the few merchandising elements which place emphasis upon lower cost, guaranteed quality and lower consumer prices and yet which cannot be precisely duplicated by a competitor.

319 F. Supp. at 1036.

find it easier to get bigger and, as a consequence, reality seems at odds with the public interest.⁷²

With the above in mind, the Court noted that “[w]hether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue”⁷³ In making this statement the majority stressed that the *raison d’être* of per se rules was the Court’s “inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector”⁷⁴

Had the Court wished to back away from using these “rigid rules,”⁷⁵ the instant case would have been the ideal vehicle. Instead, the result of the Court solidified further the per se approach. The practical ramifications of using this rule are especially significant for small grocery and supermarket chains,⁷⁶ since the Court chose *not* to make an exception to the per se rule in their situation. As Professor Oppenheimer has observed, in “contrast to the frequent statements in opinions that divisions of markets are unreasonable *per se*, there have been a few cases involving unusual circumstances where courts have departed from this view.”⁷⁷ In *United States v. National Football League*,⁷⁸ for example, the court upheld a National Football League (“NFL”) by-law restricting the telecasting of NFL football games in home territories of other NFL teams on days when those teams were playing at home. The court concluded that “[a]n allocation of marketing territories for purpose of restricting competition is not always illegal” under the Act.⁷⁹ Similarly, in *United States v. Pan American World Airways, Inc.*,⁸⁰ the court held that an agreement between two airlines serving South America not to duplicate each other’s facilities *was* a division of territories but was *not* a per se violation.⁸¹ Thus, even in those practices generally determined to be per se illegal, the courts have attempted to circumvent the application of this

72. 405 U.S. at 612-13. Justice Blackmun believed the per se rule to have been too firmly established to oppose it and that therefore only the legislature could provide relief.

73. *Id.* at 609.

74. *Id.* at 609-10. See Comment, *supra* note 36, at 464, in which two non-economic justifications for the per se rule are indicated: its certainty and its avoidance of protracted and complex litigation.

75. A less strict approach has been suggested for the per se area. See, e.g., Van Cise, *supra* note 24, at 1173.

76. Had the majority used the “rule of reason,” they may or may not have agreed with the district court in its result. This is, of course, now a moot question, since the very purpose of using the per se rule was to avoid “examining difficult economic problems” which the “courts are of a limited utility” to handle. 405 U.S. at 609. For a discussion of the procedure and evidentiary problems in an antitrust case, see A. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 27 (2d ed. 1970).

77. S. OPPENHEIM & G. WESTON, *supra* note 30.

78. 116 F. Supp. 319 (E.D. Pa. 1953).

79. *Id.* at 322.

80. 193 F. Supp. 18 (S.D.N.Y. 1961), *rev’d on other grounds*, 371 U.S. 296 (1963).

81. The court concluded that the agreement was perfectly consistent with the air transportation policy in those formative years when the agreement was made. *Id.* at 32-36.

rule and have not always found such practices to be absolutely illegal in themselves.⁸²

Conspicuously significant in this "exceptional line" is *Sandura Co. v. FTC*,⁸³ a case relied on by the district court in *Topco*.⁸⁴ Like *Topco*, *Sandura* was a relatively small concern competing with, but losing to, the "giants" of the floor covering industry. Also like *Topco*, *Sandura* had imposed territorial limitations upon its distributors. The court found these closed territorial arrangements to be justified:

Forbidding one *Sandura* distributor from selling in the territory of a neighbor *Sandura* distributor restrains competition between them. The assertion or finding of this obvious truth, however, does not by itself make out a case of "unfair methods of competition" foreclosing further inquiry into the legality of such arrangements.⁸⁵

Such examples indicate that territorial limitation restrictions are not always unlawful per se, but rather that some are subject to the application of the "rule of reason."⁸⁶ In essence, these cases represent the application of a "rebuttable presumption" when dealing with per se situations. Courts have often treated per se rules as being premised upon an "inference or presumption" that the only intent underlying the illegal practice has been to achieve an anticompetitive effect. As a practical matter, however, this "inference or presumption" has often been considered to be rebuttable.⁸⁷ In *Topco*, Chief Justice Burger implied that a "rebuttable presumption" approach might be an advisable alternative to a rigid application of the per se rule and concluded that:

82. See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (poor market conditions); *National Ass'n of Window Glass Mfrs. v. United States*, 263 U.S. 403 (1923) (failing industry); *Denise Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 408-10 (5th Cir. 1962) (trademark protection); *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 218-22 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956) (opening new business).

83. 339 F.2d 847 (6th Cir. 1964).

84. 319 F. Supp. at 1041-42.

85. 339 F.2d at 849 (emphasis added). "Given the dependence of *Sandura* on its distributors for much of its advertising program, and given the distributors' unwillingness to cooperate without the quid pro quo of closed territories," the agreement was justified. *Id.* at 857. Significantly, this case was decided under section 5(a) of the Federal Trade Commission Act which reads in pertinent part:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful.

15 U.S.C. § 45(a)(1) (1970). Since its inception the F.T.C. Act has been used as a means of supplementing the Sherman Act. Unfair methods of competition, condemned by section 5(a), are not confined to those condemned by the Sherman Act. Section 5(a) has been given a "flexible" interpretation so as to include conduct which violates the Sherman Act or which constitutes an "incipient" Sherman Act violation. See *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394 (1953). It is particularly noteworthy, then, that the court in *Sandura* did not find a violation of section 5(a), much less a violation of section 1 of the Sherman Act.

86. Professor Bork has stated:

Alongside cases announcing a sweeping per se formulation of the law there has always existed a line of cases refusing to apply it The persistent refusal of courts to honor the literal terms of the per se rules against price-fixing and market division agreements demonstrates a deep seated though somewhat inarticulate sense that those rules, as usually stated, are inadequate.

Bork, *supra* note 15, at 777.

87. See notes 78-85 and accompanying text *supra*.

Although it might well be desirable in a proper case for this Court to formulate a *per se* rule dealing with horizontal territorial limitations, it would not necessarily be appropriate for such a rule to amount to a blanket prohibition against all such limitations.⁸⁸

Therefore, under such a "rebuttable presumption" approach, when the exclusive distributorship does not appear "part and parcel of a scheme to monopolize and [when] effective competition exists at both the seller and the buyer levels," the arrangement presumably would be upheld "as a reasonable [and lawful] restraint of trade."⁸⁹ In the wake of *Topco*, however, this approach has been virtually eliminated.

Thus, the *Topco* Court attributed little value to the district court's determination that "by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains."⁹⁰ The Court believed this to be a fallacious argument since the Sherman Act gave Topco no such authority "to determine the respective values of competition in various sectors of the economy."⁹¹ The rationale asserted by the Court was that the reasonable horizontal territorial limitation of today "may, through economic and business changes, become the unreasonable [horizontal territorial limitation] of tomorrow."⁹² The Court concluded that "[i]f a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, [it] must be made by Congress and not by private forces or by the courts."⁹³

Whether the *Topco* Court enunciated a new rule or merely reiterated an old rule is now, of course, academic. Regardless of the prior status of the *per se* rule in this area and although Chief Justice Burger would disagree as to the propriety of its application in the instant case,⁹⁴ "blanket prohibition" of all horizontal territorial limitations is now the law.

88. 405 U.S. at 622 (Burger, C.J., dissenting).

89. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), in which the agreement of a manufacturer to grant one of its dealers in a city an exclusive franchise and to cancel former dealer's franchise was held not to be an unreasonable restraint of trade.

90. 405 U.S. at 610.

91. *Id.* at 610-11.

92. *Id.* at 611, *citing* *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). This language concedes that many reasonable trade agreements will be struck down — a result perhaps contrary to the purpose of the Sherman Act. *See* note 64 and accompanying text *supra*.

93. 405 U.S. at 611. The Court also struck down a restriction by Topco that prohibited its members from wholesaling goods in some instances, finding that this restriction amounted to a regulation of customers to whom members of Topco could sell Topco brand goods. *Id.* at 612. The *Topco* Court apparently treated this restriction as an afterthought.

94. *Id.* at 622 (Burger, C.J., dissenting). *See* note 89 and accompanying text *supra*. Chief Justice Burger relied on *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958), in which the Court said:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be . . . illegal . . .

Id. at 5. From this statement of the *per se* rule, the Chief Justice concluded:

In formulating a new *per se* rule today, the Court does not tell us what "pernicious effect on competition" the practices here outlawed are perceived to