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Antitrust Law

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ANTITRUST LAW

RECENT DEVELOPMENTS IN ANTITRUST LAW: 1958-1959 by Milton Handler. 59 Colum. L. Rev. 844 (June 1959)

The important contribution of this article is a careful analysis of the significant antitrust decisions handed down by the various federal courts and the FTC during the year ending in June 1959. Professor Handler finds them rich in antitrust development, extending the frontiers of knowledge in the areas of markets, mergers, boycotts, orderly marketing, and indirect sanctions.

The major part of the article concerns itself with § 7 of the Clayton Act. For the first time since the amendment of that section in 1950, the number of merger decisions has achieved a sufficient volume for the contours of the law to begin to take shape. After an exhaustive examination and analysis of the merger and Sherman Act decisions dealing with issues of market determination and the legality of mergers, the application of existing rules to this area of the law are revealed. The doctrine of reasonable interchangeability, formulated in the famous *Cellophane* case to determine the relevant market in Sherman Act cases, has been extended to § 7 cases by both the courts and the FTC to such an extent as to lead to the conclusion that market issues are decided upon the same principles in both Sherman and Clayton Act cases. Further, a review of the merger decisions shows both the courts and the FTC in opposition to the use of simple formulae to resolve complex economic issues, and there is a definite rejection of quantitative substantiality as the confining test in evaluating the legality of a merger.

In the remainder of the article, the development of the law in the area of group boycotts is traced, in which is shown the Supreme Court, in a unanimous decision, rather bluntly and emphatically informing the lower courts that when in the past it proclaimed the per se unlawfulness of group boycotts, it meant precisely what it said. The prohibition was absolute and no rule of reason is applicable. In the area of orderly marketing, the FTC seems slowly coming to a recognition of an economic need for some control by the manufacturer over the channels of distribution of his goods. Orderly marketing must encompass exclusive distributorships granted by the seller, territorial limitations imposed upon the buyer, and restrictions on the use and disposition of the purchased product.

The article concludes with a discussion of the development of the law in reference to indirect sanctions in which is pointed out that the Supreme Court has finally stated that such defense is available only in the very

narrow situations where the court's own judgment is itself the vehicle by which the unlawful conduct is carried out. Thus the distinction between collateral and inherent illegality, formerly the traditional principle, has been rejected.

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CORPORATION LAW

SETTING THE PRICE IN A CLOSE CORPORATION BUY-SELL AGREEMENT by David Keith Page, 57 Mich. L. Rev. 655 (March 1959)

A synthesis of law review articles dealing with agreements restrictive of the sale of stock of close corporations, insofar as they purport to fix the value of the stock, reveals the merits and weaknesses of the most commonly used price-fixing methods, and emphasizes the desirability, in most cases, of arriving as closely as possible at the true fair value of the stock.

Thought-provoking problems face the draftsman of a buy-sell agreement in his selection of a method for the fixing of the price. The book value method of valuation is not as flexible as a formula or fixed price method, and its simplicity and apparent accuracy are likely to be illusory. Accuracy in producing a truly fair price will vary with the nature of the business and the corporate accounting practices. Extreme care must be used in setting out the method and the terms must be meticulously defined or litigation may be provoked.

The capitalization of earnings and other formula methods are needlessly cumbersome in most cases, and generally not advisable for small unestablished corporations. However, a formula may be the best device to determine value for a large corporation. Appraisal and arbitration methods have drawbacks in that appraisal is expensive and arbitration agreements not enforceable in many jurisdictions.

All in all the most satisfactory method for arriving simply and inexpensively at a fair price is by the use of a fixed price method whereby a fixed value is set on the shares with closely spaced periods of revaluation, a provision being made for a responsible third party's adjustment of the last price in case extraordinary events affect the value of the shares after the last valuation. The agreement using this method should further specify, as should every buy-sell agreement, all the factors, including good will, which are to be taken into consideration in arriving at the price, in order to facilitate acceptance of the valuation by the Commissioner of Internal Revenue for estate tax purposes.

A discussion is had of tax considerations bearing on the choice of the price fixing mechanism, the most important of which is the estate tax valuation. The problem is to devise a plan that will provide a valuation figure that will be conclusive for estate tax purposes. The two methods under