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Supreme Court Ruling of Sherman Act Violations Given Limited Application on Remand

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human experience, that is aimed at by this bill, and not the lawful and useful combination

Chief Justice Burger argued Senator Sherman's this address

indicated that the legislature intended the 'rule of reason' doctrine to apply to each case, especially when an argument can be made that the arrangement under question promoted competition.

In conclusion, despite Chief

Justice Burger's dissent, the Court ruled in favor of the Government in holding that any horizontal restraint of competition constitutes a violation per se of the Sherman Act, regardless of the intended effect on overall competition.

Supreme Court ruling of Sherman Act violations given limited application on remand

by Erin Quinlan

On remand from the Supreme Court, Judge Will modified his original opinion in *U.S. v. Topco Associates, Inc.*, 405 U.S. 596 (1976), to conform to the Supreme Court's holding, but in a way which preserved the substance of his original decision. *U.S. v. Topco Associates, Inc.*, No. 68 C 76, 1972 WL 669 (N.D. Ill. Sept. 26, 1972).

Judge Will limited the Supreme Court's finding of a violation of Section 1 of the Sherman Act to those Topco arrangements which promoted exclusivity. Judge Will concluded that the Court only addressed Topco's arrangements which prevented other members and nonmember small chains from selling Topco brand products in certain regional territories. Judge Will found that the Supreme Court held this containment to be noncompetitive behavior.

Conversely, Judge Will viewed these arrangements as a way for small and local chains to compete with the national chains. According to Judge Will, limiting the sale of the generic Topco brands allowed the local stores and smaller chains to compete with the national chains, thus, producing economic efficiencies. Judge Will concluded that eliminating Topco's arrangement would hurt consumers by forcing them to purchase only national store brand products.

In his final judgment, Judge Will followed the Supreme Court's holding, but wanted to ensure that his

ruling would not completely eliminate what he believed to be economically efficient arrangements. Furthermore, Judge Will felt that the arrangements were beneficial in promoting competition between the national and local and smaller chains, so long as they were not misused. Therefore, Judge Will included a paragraph in the opinion permitting exclusive arrangements in certain instances.

To ensure that these arrangements could still exist but not be misused, Judge Will implemented regulatory procedures in his final judgment. These regulations required Topco to file a report with the government every year for ten years setting forth the steps it undertook during the prior year in advising its officers, directors and employees of their obligations under this judgment.

In addition, the final judgment granted the Department of Justice, upon written request from the Attorney General, access to Topco's files, records, and ledgers, relating to any matters addressed in the final judgment. The Department was also given the right to interview any of Topco's officers and employees regarding such matters. The final judgment further stated that the Department must give Topco reasonable notice if it intends to exercise these procedures.

These regulatory guidelines threaten to infringe upon Topco's right to privacy and confidentiality. The final

judgment states, however, that the regulatory procedures *are* subject to "any legally recognized privilege." Presumably, Topco may elude compliance with the judgment by claiming certain legal privileges. The Court's effort to prevent Topco and others from misusing exclusive arrangements may be unsuccessful as long as these companies can use the condition of privilege to evade the regulations.

Although Judge Will's reasoning was intended to preserve an economically efficient exclusive arrange-

ment, the decision may have the unintended effect of creating a loophole in the per se rule established by the Supreme Court. Judge Will's decision tells us that these types of arrangements, even when they are economically efficient, are suspect. The opinion implicitly acknowledges this problem through the invasive conditions set upon the continuance of the Topco agreement. In the end, this opinion and the Topco litigation stands for the wisdom of a strictly enforced per se rule against horizontal price fixing agreements.