

ANTITRUST FINAL

FALL, 1989

PR ESSOR MATTO

QUESTION #1 - 20 Points

BELOW IS A SET OF FACTS FROM A RECENT ANTITRUST OPINION.

PLEASE IDENTIFY THE ISSUES PRESENT IN THE CASE AND THE FACTS, IF ANY, RELATING TO EACH ISSUE. ASSUMING YOU REPRESENT THE PLAINTIFF, WHAT ADDITIONAL TYPES OF FACTS WOULD YOU WANT TO KNOW ABOUT, IF ANY?

Rochester Telephone Corporation ("RTC") provides telephone service to Rochester, New York and to its surrounding communities. In connection with providing this service, the Public Service Commission ("PSC") requires RTC to publish an alphabetical directory of its telephone subscribers. This directory is the white pages directory, and contains both business and residential listings.

Acting through a publishing company, RTC also compiles and publishes a yellow pages directory.¹ RTC distributes this directory to every household and business that has a telephone, as part of the service for which telephone subscribers pay:

¹ Until 1986, L.M. Berry & Co. was RTC's representative publishing company in this regard; currently, GTE Directory Sales Corp. performs this function.

White Directory Publishers, Inc. ("White") is an independent publisher of telephone directories in various cities, including Erie, Pennsylvania and Buffalo, Niagara Falls, and Lockport, New York. In September 1988, White announced its intention to enter the Rochester market, and to publish a directory with an alphabetical list of Rochester businesses and a yellow pages classified advertising section.

White followed the same procedure in entering the Rochester market that it had followed in entering other markets. (In each market, White first spoke with potential advertisers about their reactions to the idea of a second yellow pages directory and visited the Chamber of Commerce for information on the area.) White rented office space in the Rochester area, arranged for tele-

phone service, hired and trained a sales and office staff, planned a sales campaign, found a printer, and found someone to distribute the directory and prepare "cut cards" for use as sales leads. (These cut cards are ads cut from the existing RTC yellow pages directory and pasted on index cards, to be used in soliciting advertisement.)

In its other markets, White has traditionally relied on the telephone companies' published directories rather than obtaining listing information directly from the telephone company. In 1986, however, White licensed listing information from New York Telephone Company for use in publishing its Buffalo directory. White verifies each listing, from whatever source, before entry in its directories.

In late November of 1988, White in a letter to RTC requested a license to purchase certain listing information, contained in a database, which includes the names, addresses, and telephone numbers of all current residential and business subscribers to RTC's telephone service.

On December 12, 1988, RTC refused White's request, citing a long-time RTC policy not to disclose listing information. White's other efforts to secure this information from RTC proving unsuccessful, White filed this action only against RTC, pursuant to § 2 of the Sherman Act, 15 U.S.C. § 2.

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QUESTION #2 - 20 Points

BELOW IS A SET OF FACTS FROM A RECENT ANTITRUST OPINION. PLEASE IDENTIFY THE ISSUES PRESENT AND THE FACTS, IF ANY, RELATING TO EACH ISSUE. ASSUMING YOU ARE THE JUDGE, HOW WOULD YOU RULE ON EACH ISSUE, AND WHY.

Appellants Parkway Gallery Furniture, Inc., and Rose Furniture Company are retail furniture dealers in North Carolina. Appellee Kittinger/Pennsylvania House Group, Inc., manufactures furniture and supplies it to appellants and other furniture dealers for retail sales. In response to complaints by various dealers of sales lost to stores, such as Parkway and Rose, that sell at discounts and fill mail or telephone orders from outside their local trading areas, Pennsylvania House prohibited its dealers from soliciting or selling its furniture by mail or by telephone to consumers residing outside specified areas of retail responsibility.

Rose and Parkway brought these actions in the district court charging that Pennsylvania House violated section 1 of the Sherman Act, 15 U.S.C. § 1,

They demanded money damages and injunctive relief. Pennsylvania House moved for partial summary judgment on the Sherman Act claims

Pennsylvania House, a division of General Mills, Inc., is headquartered in Lewisburg, Pennsylvania. It manufactures American traditional furniture which is sold to consumers through 450 independent retail dealers. It has annual sales of approximately \$85,000,000 and employs about 1,200 people. Having no company-owned dealers, Pennsylvania House relies wholly upon independent dealers for retail sales. Since 1975, Pennsylvania House has placed two specific contractual duties on its dealers. First, they must dedicate floor space to display its furniture and are urged to arrange the furniture in a room-like setting in order to establish a Pennsylvania House "gallery." Second, dealers must participate in Pennsylvania House's promotional programs and invest in local tabloids to advertise Pennsylvania House lines.

Rose and Parkway are full-service retail furniture stores in High Point and Boone, North Carolina, respectively. In 1986, Rose purchased more furniture from Pennsylvania House than did any other dealer. Rose, a "deep discounter," sells at discounts of from 30% to 40% or more off manufacturer's suggested retail prices and operates over a large portion of the country with retail sales of about \$27 million per year. Rose averages walk-in traffic of 400 to 500 customers per weekday and 550 to 600 customers on Saturday at its showroom and averages 1100 to 1300 telephone inquiries per day. Parkway, also a discounter, receives about 100 customers a day and devotes much of its floor space to Pennsylvania House. Both Rose and Parkway fully comply with Pennsylvania House's requirements concerning dedicated floor space and promotional programs.

[Competitor Complaints]

Over the past several years, other dealers throughout the country have complained to Pennsylvania House that they were losing sales to discount dealers. Specifically, a marketing survey conducted by Pennsylvania House indicated that dealers were upset that consumers visited their stores for shopping, display, and sales assistance but then ordered furniture from Parkway and Rose at discount. Many dealers resisted promoting Pennsylvania House furniture only to see the sales go to discounters. Pennsylvania House responded by revising its Retail Marketing Policy to prohibit dealers from soliciting or selling its furniture by mail or telephone order to consumers residing outside specified sales areas.¹ Before promulgating the new policy, Pennsylvania House discussed with its dealers other manufacturers' similar policies. Former Pennsylvania House regional sales manager Walter Litchfield testified that the new policy constituted a very clear, concise pledge to its dealer network regarding the North Carolina discounters. Ed Roberts, Pennsylvania House President, and once its Marketing Vice-President, testified that Pennsylvania House and a

great number of its dealers were in agreement with the aims and purposes of the policy.

Pennsylvania House surveyed the reaction to its new retail marketing policy and obtained favorable feedback from very many of its dealers. With respect to North Carolina dealers, Pennsylvania House National Sales Manager Terry Martina reported that one dealer "totally agrees" with the policy and "will abide totally."² Ed Roberts testified that some North Carolina dealers had indicated that they were willing to "come around" and abide by the ban. Other dealers informed Parkway customers of Pennsylvania House's new policy, and one dealer notified Pennsylvania House of a violation and sought enforcement.

[Conspiracy]

Parkway and Rose contend that these actions of Pennsylvania House and its dealers constituted a conspiracy to fix prices and are therefore a "per se" violation of the Sherman Act. Alternatively, they contend that Pennsylvania House and some dealers engaged in a conspiracy in restraint of trade. Pennsylvania House contends that it and the dealers acted independently to correct faults in marketing and to protect their businesses, respectively, so that their actions did not constitute either a per se violation of the Sherman Act or a violation under the "rule-of-reason" analysis.

¹ The Retail Marketing Policy, revised as of June 1, 1986, provided:

"1. *Area of Retail Responsibility.* The Retailer shall conduct its solicitation and sale of Pennsylvania House furniture within a designated geographic area, as defined from time to time by Pennsylvania House in its sole discretion.

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"2. *Solicitation or Sale to Consumers Outside the Area of Retail Responsibility by Mail Order, Telephone Order or Advertising.* The Retailer acknowledges that the sale of

Pennsylvania House furniture only through authorized retail dealers who effectively advertise, promote, display and service Pennsylvania House furniture in their respective areas of retail responsibility benefits the consumer and the Pennsylvania House distribution system by enhancing the ability of authorized Pennsylvania House retail dealers to compete in the fiercely competitive market for furniture. Accordingly, the Retailer shall not engage in the solicitation or sale of authorized products to consumers outside the Retailer's area of retail responsibility through mail order, telephone order or advertising."

SHORT ANSWER QUESTIONS - 3 Points Each

Please give short, concise answers to the following questions. Please answer the question thoroughly but do not "ramble" or try to impress the teacher with all of your knowledge on all antitrust topics whether pertinent or not to the answer. (Write Answers in your Blue Book, not on this sheet.)

1. Explain when the exchange of data (such as information regarding prices, production, discounts, market estimates, estimates of number of customers) can raise antitrust concerns.
2. What are the potential antitrust concerns in a situation where a group of doctors develop a proposed fee schedule through their medical association and use this fee schedule to negotiate payment schedules with insurance companies.
3. What types of relief may an injured private party be entitled to sue for under the antitrust laws?
4. Explain the potential antitrust risks when a group of competitors enter into a joint venture.
5. What is the purpose for determining the "market" and "market power" in monopolization cases?
6. Explain the "rule of reason" test.
7. Under what circumstances can a competitor challenge a merger?

8. What is the test for standing for a private plaintiff in an antitrust case?
9. A standard-setting organization should be aware of what type of antitrust risks?
10. What elements of proof are necessary to show an illegal tying arrangement?
11. Explain, generally, the contents of the Department of Justice's 1984 Merger Guidelines.
12. When is the "rule of reason" test applied to a horizontal group boycott situation?
13. What is meant by "pre-merger notification"?
14. Explain the state action exemption.
15. How is the "antitrust portion" of Section 5 of the FTC Act interpreted in comparison with the Sherman Act and does a private party have rights under Section 5 of the FTC Act (Section 5 reads in pertinent part "Unfair methods of competition in or affecting commerce")?
16. The Department of Justice has a policy as to what type of conduct it will challenge criminally. Please identify those types of conduct.

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17. What is meant by "conscious parallelism"?

18. What is the test for determining whether an exclusive contract to purchase one's entire supply of raw materials is valid under the antitrust laws?

19. Explain what is meant by "agreement" under Section 1 of the Sherman Act.

20. What elements must a plaintiff prove in an attempt to monopolize case.

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