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THE ANTI-TRUST ACTS AND "MONOPOLISTIC COMPETITION"

A Case Study

JULIUS COHEN

One thing is clear. The steady march towards concentrated economic power has not been stemmed by the anti-trust acts.¹ Whether the Sherman Act was "intended to mean anything save a big noise to gull the gullible"² or was a serious attempt to preserve "free competition", it has neither "disintegrated society into individual atoms"³ nor eliminated the existence of monopolistic control. In the judicial laboratory the anti-trust laws have been distilled to represent mere limitations upon certain competitive tactics.⁴ The safety zone carved out by the *Standard Oil*⁵ and *Tobacco* cases,⁶ the protective cloak placed around the control manifested by the *United States Shoe Machinery Co.* case,⁷ the sanctioning of price leadership in the steel industry,⁸ and the approval of activities of trade associations⁹ and joint sales agencies,¹⁰ converge in the observation that monopolistic power in the economic sense has not been made sterile.¹¹

¹See generally, BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1937); BURNS, *THE DECLINE OF COMPETITION* (1936); CLARK, *SOCIAL CONTROL OF BUSINESS* (1926); FETTER, *THE MASQUERADE OF MONOPOLY* (1931); KEEZER AND MAY, *THE PUBLIC CONTROL OF BUSINESS* (1930); HANDLER (Ed.), *FEDERAL ANTI-TRUST LAWS—A SYMPOSIUM* (1932); Handler, *Industrial Mergers and Anti-Trust Laws* (1932) 32 COL. L. REV. 179; LAIDLER, *CONCENTRATION OF CONTROL IN AMERICAN INDUSTRY* (1931); THORP, *RECENT ECONOMIC CHANGES* (1929); WATKINS, *INDUSTRIAL COMBINATIONS AND PUBLIC POLICY* (1927).

²Beard, *The Trust Problem* (September 21, 1938) 96 NEW REPUBLIC 182.

³Justice Holmes' dissent in *Northern Securities v. United States*, 193 U. S. 197, 411, 24 Sup. Ct. 436 (1904).

⁴McLaughlin, *Legal Control of Competitive Methods* (1936) 21 IOWA L. REV. 280.

⁵*Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1, 31 Sup. Ct. 502 (1911).

⁶*United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632 (1911).

⁷*United States v. United States Shoe Machinery Co.*, 247 U. S. 32, 38 Sup. Ct. 473 (1918).

⁸*United States v. United States Steel Corporation*, 251 U. S. 417, 40 Sup. Ct. 293 (1920).

⁹*Maple Flooring Association v. United States*, 268 U. S. 563, 45 Sup. Ct. 578 (1925); *Cement Manufacturers' Association v. United States*, 268 U. S. 588, 45 Sup. Ct. 586 (1925).

¹⁰*United States v. Appalachian Coals, Inc.*, 288 U. S. 344, 53 Sup. Ct. 471 (1933).

¹¹See Wallace, *Monopolistic Competition and Public Policy* (1936) 26 AM. ECON. REV. SUPP. 77, 79. "It seems to me that in so far as there was any central concept or theme in the interpretation and administration of the anti-trust laws, it was the preservation of freedom to compete. Obviously this did not mean the preservation of what we now call pure competition, or even of anything very nearly resembling it. It meant simply that each firm was to be free to determine its own policies independent of others and that neither the entry of newcomers nor the success of existing firms should be blocked or hampered by oppressive tactics. The anti-trust laws did not, I think, make monopoly illegal. Rather, the thing condemned was monopolism or restraint of trade, both of which seem to have meant achieving or trying to attain nearly complete monopoly in an industry by a course of combination for which no justification in greater efficiency or

The problem confronting those who desire a realistic reform of the anti-trust laws has been no more succinctly stated than by the Attorney-General:

"We should consider whether we are chiefly concerned with the form of competitive practices, or whether the accent is to be placed on the control of the supply and price of the product, with the resulting mastery of the market."¹²

Implicit in this statement is a recognition of the disparity between the legal and economic theories of monopoly. Also implicit is the observation that the laws should be revamped to permit a spotlight on the field of market economics—not on the tortuous chambers of "intent". The thought is not new. Students in the field of economics have for some time re-examined, and re-appraised the concept of monopoly.¹³ Indeed, its reaction is already being felt in legal literature.¹⁴

If "control of the market" is now to be the diagnostic tool for revamping anti-trust policy, it might be well to point out the possibility of such control even in the absence of the usual symptoms—predatory practices and open agreements in "restraint of trade". To take a simple exaggerated example, let us suppose that *X* has control of all the milk in the United States, foreign competition having been entirely eliminated. Even to the lay mind, this would be a case of monopoly, because of the control of price through the control of supply. But suppose that the market is divided between *X* and *Y*, *X* having 55 per cent and *Y* 45 per cent of the milk. The mere presence of another single strong competitor does not necessarily destroy the monopolistic element. *X* and *Y* are aware of each other's productive capacity and power. If a point is reached wherein no drop in price will increase the demand, *X* will normally realize that if he reduces the price of milk, *Y* will also. This

normal expansion could be found; or by destruction or weakening of existing competitors or blocking of potential competition by the use of bludgeoning, harassing, or obstructive tactics rather than competitive methods which measured relative efficiency in production and marketing."

¹²Cummings, *The Unsolved Problem of Monopoly* (1938) 72 U. S. LAW REV. 23.

¹³See, generally, CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1936); PIGOU, *THE ECONOMICS OF WELFARE* (1929); ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933); Galbraith, *Monopoly and Price Rigidities* (1936) 50 Q. J. ECON. 456; Harrod, *Doctrines of Imperfect Competition* (1934) 48 Q. J. ECON. 442; Nichol, *A Re-Appraisal of Cournot's Theory of Duopoly Price* (1934) 42 Q. J. ECON. 80; *A Review of Monopolistic and Imperfect Competition Theories* (1936) 26 AM. ECON. REV. 637; Robinson, *Imperfect Competition and Falling Supply Price* (1932) 42 ECON. JOURNAL, 554; *Round Table on Imperfect Competition* (March, 1934) AM. ECON. REV. SUPP. 21; Shove, *The Imperfection of the Market* (March, 1933) 43 ECON. JOURNAL, 114; *Stackelberg on Monopolistic Competition* (1936) 44 J. POL. ECON. 554; Sraffa, *The Laws of Returns under Competitive Conditions* (Nov., 1926) 36 ECON. JOURNAL, 535; Wallace, *Monopolistic Competition and Public Policy* (1936) 26 AM. ECON. REV. SUPP. 77.

¹⁴A particularly acute examination of the role of market economics is an article by Fly, *Observations on the Anti-Trust Laws, Economic Theories and the Sugar Institute Decisions* (1936) 45 YALE L. J. 1339. See also Mason, *Monopoly in Law and Economics* (1937) 47 YALE L. J. 34.

awareness restrains him from price-cutting, the result being a "monopolistic price". Increase the number of sellers in the market to a point at which the supply of a single seller does not influence the market, and the tendency becomes one in which monopolistic control shifts into a state of more perfect competition.¹⁵

The terms "duopoly" and "oligopoly" have been used to describe this phenomenon when two and more than two competitors respectively maintain a monopolistic price resulting from their size and the awareness of their competitive positions.¹⁶ Both terms, however, are expressive of what Mrs. Robinson has chosen to call "imperfect competition"¹⁷ and Professor Chamberlin, "monopolistic competition".¹⁸

If price uniformity is brought about by an agreement between competitors to report future prices to a trade association, other conditions being present, *e.g.*, limited supply of the commodity, there is a probability that the courts will restrain the association's activities, deeming price uniformity as evidence of restraint of trade.¹⁹ If, however, price uniformity results merely from "following the leader",²⁰ *i.e.*, from following the published prices of the dominant power in an industry, the uniformity escapes legal suspicion. To the economist, however, there may be no difference in result, both situations leading to a probable monopolistic price.²¹

Of course, it may be suggested that an anti-trust policy cannot eradicate

¹⁵"The phrase 'perfect competition' is made to cover so many separable ideas, and is used in so many distinct senses that it has become almost valueless as a means of communication." Robinson, *What is Perfect Competition?* (1934) 49 Q. J. ECON. 104. However, the theory of the neo-classicists in respect to their concept of a competitive equilibrium premises two minimal conditions: (1) The number of firms selling a given product must be so great that the effect on price of the output of each is negligible; (2) the output of the sellers must be homogeneous—not differentiated, so that the buyers have absolutely no reason for preference. Mrs. Robinson classifies these conditions under "perfect" competition; Prof. Chamberlin, "pure" competition.

It is to be noted that with increased competition monopolistic price becomes possible through extensive advertising. A seller may build a trade-name around his product, creating a consumer preference by "distinguishing" this product. By this process an escape is made to a more exclusive plane of competition. See CHAMBERLIN, *MONOPOLISTIC COMPETITION* (1936), ch. IV.

¹⁶See ch. III, "Duopoly and Oligopoly," in CHAMBERLIN, *MONOPOLISTIC COMPETITION* (1936).

¹⁷ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1934).

¹⁸CHAMBERLIN, *MONOPOLISTIC COMPETITION* (1936).

¹⁹*United States v. American Linseed Oil Co. et al.*, 262 U. S. 371, 43 Sup. Ct. 407 (1923). Here there was a limitation of production because of the restricted supply of raw materials.

²⁰This practice was sanctioned by the Court in *United States v. United States Steel Corporation*, 251 U. S. 417, 40 Sup. Ct. 293 (1920), and *United States v. International Harvester Co.*, 274 U. S. 693, 47 Sup. Ct. 748 (1927).

²¹Stackelberg distinguishes three possible situations leading to monopolistic price: (1) The competitors might assume that each is going to behave like a leader and will therefore act as a follower; (2) each will expect the other to become a follower, each becoming a leader; (3) one will act as a follower, expecting the other to be a leader. *Stackelberg on Monopolistic Competition* (1936) 42 J. POL. ECON. 554.

all elements of monopoly in our economic order, for, to put it in Justice Holmes' words, "Every concern monopolizes whatever business it does, . . . a single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge."²² But it is one thing to call attention to the fact that every business has an element of monopoly and another to point to the possibility of monopolistic conditions in huge market areas, which seemingly escape the vigil of the anti-trust laws.

II

In order to show concretely the disparity between "monopoly" according to the anti-trust acts, and "monopoly" in the realm of market economics, the milk distributing industry is offered as a datum.^{22a} Its past history and present status lend themselves to a profitable study. However, knowing full well that the accuracy of data, particularly statistical, is charged with heated controversy and that the selection and analysis of "facts" may be colored by inarticulate value judgments,²³ the evidence will be regarded as being tentative. Whatever arguments may be presented by those who "quarrel with the figures", there is common value in analysis—even in the analysis of a hypothetical case.

The problem of monopoly and competition in the milk industry is by no means a new one. As early as 1914 there was an attempt to apply the Sherman Act to a phase of the milk industry. One of the most important cases was *United States v. Whiting*.²⁴ Here there was an indictment charging first, a conspiracy in restraint of trade in milk throughout New England, and second, a combination to monopolize trade in milk in the same territory. The defendants demurred to both indictments and the cases were argued on the demurrers together. The indictment stated that several defendants bought 86 per cent of the milk sold in various districts in Maine, Vermont, New Hampshire, Connecticut, and Massachusetts for shipment to and sale in Boston and vicinity, and had conferred together and agreed upon uniform prices to be paid by them during each six months period to the producers

²²*Northern Securities Co. v. United States*, 193 U. S. 197, 405, 24 Sup. Ct. 436 (1904).

^{22a}After this had gone to press, thirty-four corporations and sixty-three individuals were indicted by a federal grand jury in Chicago, charged with violating the anti-trust laws in the milk and ice cream industries. *N. Y. Times*, Nov. 16, 1938, p. 1, col. 2.

²³"To determine facts scientifically, however, is a long and baffling enterprise, not only because the facts are so often inaccessible, but because what we ordinarily take for fact is so often full of illusion. Our expectations and prepossessions make us see things which do not in fact happen, and without the proper previous reflection we fail to notice many obvious things which do happen." COHEN, *REASON AND NATURE* (1932) 78. See also COOK, *The Possibilities of Social Study as a Science*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* (1930-1931) 33: "We cannot describe any particular 'given', the 'brute raw event' as such, because the moment we attempt a description we necessarily select from it only certain aspects for consideration; we qualify it by bringing it under some category or other."

²⁴212 Fed. 466 (D. C. Mass. 1914).

of the milk so purchased. The indictment further alleged that as a result of this agreement the prices paid to the producers had been lowered. The court sustained the demurrer to the first indictment, charging conspiracy in restraint of trade, since "it did not allege facts warranting a finding by the jury that the restraint was unreasonable". The demurrer to the first count of the second indictment was overruled since the count alleged facts from which a jury could have found undue, unreasonably extensive and illegal combination in restraint of trade. The demurrer to the second count of the latter indictment charging monopoly was sustained because the facts showed only an agreement to eliminate competition as to price in buying between the defendants and not an attempt to dominate or control the markets in which they sold their milk pursuant to the agreement. It is obvious that the court in the light of present day cases was wrong, for it is perfectly possible to have a monopoly of buyers.²⁵

Further evidence of concentrated control in the milk industry was noted during the War period. In 1921 a Federal Trade Commission report on the status of competition in the evaporated and condensed milk market during the War period disclosed that Borden's produced nearly one-fifth of the total output; that two companies, Borden's and Nestle's, produced approximately one-third; that four companies, Borden's, Nestle's, Caruation and Helvetia, produced over one-half; and that ten companies took care of more than three-fourths of the total output.²⁶ Even though there was a tremendous increase in the production of canned milk from 1914 to 1919, production remained in the same hands.

At the end of the War period, one writer summed up the general viewpoint as follows:

"In the large cities there has grown up an industry which largely monopolizes the milk supply and which until lately was powerful enough to dictate prices and conditions both for producers and consumers."²⁷

Further, he wrote:

"It should not be forgotten, however, that while the much abused middlemen in times past have been able to dictate terms and prices and have often abused the privilege, they have at the same time used their influence and power to improve the milk supply. As the supply of oil and gasoline has been perfected and cheapened by the all-powerful Standard Oil Company as a monopoly crushing all competition, so the 'Milk Trust' has improved the distribution of milk and has built up magnificent sanitary plants in which milk is handled, pasteurized, bot-

²⁵The Poultry Dealers' Protective Ass'n v. United States, 4 F. (2d) 840 (C. C. A. 2d 1924).

²⁶Report of the Federal Trade Commission on Milk and Milk Products 1914-1918 (Government Printing Office, 1921) 56-58.

²⁷FREDERICKSEN, THE STORY OF MILK (1919) 39-40.

tled and distributed in a way that might not have been possible without a monopoly. It has served a good purpose, but has at the same time acquired such power that official control has become necessary for the protection of producer and consumer alike, and the time may be near when these two classes will combine and take the matter into their own hands so that the distribution may be done at actual cost."²⁸

The Food Administration had, of course, come to an end. The cry of "business affected with a public interest" was beginning to be heard, as especially applied to the milk industry.²⁹ The main development towards integration came from technical processes, new machinery, better business methods, advertising, sanitation, etc.³⁰ Small companies grew into large ones. Cooperatives were on the rise. The concept of collective bargaining as a method of fixing prices and quantity of milk handled developed from a theory to a practice. Tariffs even helped the business to boom.³¹

In 1926 the problem of monopoly in the milk distributing industry again came to the surface when the United States brought suit against the National Food Products Corporation. A petition was filed in the United States District Court for the Southern District of New York, to prevent and restrain violations of Section 7 of the Clayton Act through acquisitions of stock in competing chain groceries and other companies engaged in the transportation of milk and milk products.³² A consent decree was entered March 4, 1926, granting the relief sought.

In 1934 more attention was brought to the possibility of monopoly in the milk distributing industry by the adoption of a House Resolution which read as follows:

"That the Federal Trade Commission is authorized and directed to investigate the conditions with respect to the sale and distribution of milk and other dairy products within the territorial limits of the United States by any person, partnership, association, cooperative or corporation, with a view to determining particularly whether any such person, partnership, association, cooperative or corporation is operating within any milkshed of the United States in such a manner as to substantially lessen competition or to tend to create a monopoly in the sale and distribution of such dairy products, or is a party to any conspiracy in restraint of trade or commerce within the United States or any part thereof, or is using any unfair method of competition in connection with the sale or distribution of any such dairy products, or is in any way operating to depress the price of milk sold by producers."³³

²⁸*Id.* at 40-41.

²⁹ERDMAN, *THE MARKETING OF WHOLE MILK* (1921) 13.

³⁰ROSS, *Some Factors Affecting the Demand for Milk and Cream in the Metropolitan Area*, U. S. Dept. of Agriculture, Technical Bulletin No. 73 (1928).

³¹LININGER, *DAIRY PRODUCTS UNDER THE AGRICULTURAL ADJUSTMENT ADMINISTRATION* (1934) 6.

³²*THE FEDERAL ANTI-TRUST LAWS WITH AMENDMENTS* (U. S. Government Printing Office, 1931) 195.

³³This part of the House Concurrent Resolution No. 32, 73d Congress, 2d Session, is

III

The Federal Trade Commission investigation disclosed the Borden Company and the National Dairy Products Corporation as the two largest distributors of milk and milk products in the country. During 1932, findings of both the Department of Agriculture and the Federal Trade Commission disclosed that the Borden Company and its subsidiaries purchased 3,479,055,735 pounds of milk, representing 10.3 per cent of the total milk sold in the wholesale market in the United States during the year.

The total wholesale fluid milk sales during 1932 in the states supplying New York and Philadelphia amounted to 9,656,000,000 pounds. The Borden Company and its subsidiaries purchased 1,563,181,502 pounds, or 16.2 per cent of the total. In the Connecticut milkshed the Borden Company purchased 18.67 per cent of the total in 1932. By one of its subsidiaries having combined with the Wieland Dairy Company of Chicago, in June, 1933, the Borden-Wieland Company distributed 21 per cent of the total milk sold in the Chicago sales area. During 1935 Borden's Farm Products, Inc., sold 385,035,529 quarts of fluid milk in New York metropolitan area. This was equivalent to 30.1 per cent of the estimated total.

To convey a sense of size, one might point out that when Gail Borden first organized the company, the authorized capital stock was \$20,000,000. By 1927, the authorized capital stock was \$50,000,000. From 1930 on to 1935 there were additions of \$8,000,000 for each respective year. During the years 1928-31 the company issued approximately 2,000,000 shares of its capital stock directly applying to the acquisition of either stock or assets of 124 companies. The business of the Borden Company was originally confined to the manufacture and sale of condensed milk. It has expanded, however, from time to time and now includes in its lists of products manufactured and sold, condensed milk, evaporated milk, dried milk, malted milk, cheese of all kinds, fluid milk, cream, ice cream, butter, and many other milk products. At the end of 1927 the Borden Company owned and operated three fluid distributing companies, and seven manufacturing and selling companies. There were also twenty-five parent subsidiaries operating under the parent company at the end of 1927. Beginning with 1928 the Borden Company initiated and pursued a policy of expansion, in which a large number of companies were acquired. From 1928 to 1932 the company acquired, either directly or indirectly through its subsidiaries, approximately two hundred companies engaged in some branch of the dairy industry, including fluid milk, cream, ice cream, butter, cheese and other dairy products.³⁴

contained in *Summary Report of Conditions with Respect to the Sale and Distribution of Milk and Dairy Products* (1937) H. R. Doc. No. 94, 75th Cong., 1st Sess., pp. 1-2.

³⁴*Report of the Federal Trade Commission on the Sale and Distribution of Milk and*

Investigation further revealed the National Dairy Products Corporation as strictly a holding company, owning stocks of subsidiaries engaged in practically every branch of the dairy industry.³⁵ During 1934 this corporation and its subsidiaries purchased 7,177,041,000 quarts of milk, which was equal to 9.4 per cent of the total commercial milk produced in the United States in that year. This corporation was built up through acquisition and consolidation of milk and dairy products companies. As a part of its original organization it acquired the Hydrox Corporation, operating ice-cream plants in Chicago and vicinity, and the Rieck-McJunkin Dairy Company, operating in western Pennsylvania and northeastern Ohio. In addition to acquiring capital stock, it has acquired the assets of outstanding dairy, cheese, and ice cream companies, to be turned over immediately to newly formed subsidiaries. Among the more important acquisitions by the corporation since its organization in 1923 were Sheffield Farms, Kraft-Phenix Cheese Corporation, General Ice Cream Corporation, and Breyer Ice Cream Company, including their subsidiaries and related interests. The acquisition of assets of the Kraft-Phenix Cheese Corporation carried with it control of about fifty separate corporate entities, the capital stock of which was purchased as a part of the assets of the Kraft Company. About forty separate corporations were acquired directly through the acquisition of the General Ice Cream Corporation. In 1934 the purchases of the National Dairy Products Corporation were equivalent to 19.1 per cent of all the milk sold at wholesale by producers in Vermont, Connecticut, New York, New Jersey, and Pennsylvania. These figures do not include purchases by the Rieck Company, or by the Breyer Ice Cream Company. Sheffield Farms Company, acquired in 1934, purchased from producers in 1934 in New York State alone, 1,031,198,995 pounds of milk, equivalent to 18.9 per cent of all milk sold at wholesale by producers in the state except that retailed by farmers. Supplee-Wills Jones Milk Company is the largest in the Philadelphia area; General Ice Cream Corporation operates New Haven Dairies in Connecticut and R. G. Miller and Sons distributes milk in Hartford. National Dairy during June, 1934, handled 39.3 per cent of the total milk sold in Hartford, 30.5 per cent of the milk sold in New Haven, and 14.7 per cent of the total milk sold in the State of Connecticut. It also holds the unique position of distributing approximately 55 per cent of all the fluid milk in the Baltimore area. The acquisition of Breakstone Bros., Inc. and of Kraft-Phenix Cheese Corporation gave National Dairy approximately one-third of the cheese business of the United States. C. A. Straubel, a subsidiary of Kraft-Phenix Cheese Corporation, is one of the few

Milk Products in the New York Area (1937) H. R. Doc. No. 95, 75th Cong., 1st Sess., pp. 56-62.

³⁵For the history and organization of the National Dairy Products Corporation, see *id.* at 77-91.

active members of the Wisconsin Cheese Exchange at Plymouth, Wisconsin, whose activities fix the basis for the price of cheese throughout the United States. During 1934 this corporation through its subsidiaries manufactured ice cream equal to 21.38 per cent of the total quantity of ice cream manufactured for sale in the United States. In 1932 the total business of its ice cream subsidiaries ranged from 2 per cent in Montana to more than 52 per cent in Connecticut.³⁶

IV

What is the relationship between the concentration of the business of milk distribution and the market?³⁷ Evidence points to three criteria:

A. *Price Leadership*

In the New York metropolitan area, the Attorney General's Report of March, 1938, points out that "in the retail trade . . . competition for all intents and purposes is practically non-existent . . ." and that "announcements of price increase have invariably been made simultaneously, and the trade discounts and rebates which accompany competition in the wholesale trade are not present".³⁸ It was found that the existence of "peddlers",

³⁶Summary Report of Conditions with Respect to the Sale and Distribution of Milk and Dairy Products (1937) H. R. Doc. No. 94, 75th Cong., 1st Sess., 1.

³⁷It is assumed, of course, that there have been no agreements of the type condemned by the anti-trust acts.

³⁸REPORT OF THE ATTORNEY GENERAL ON THE MILK INDUSTRY OF THE STATE OF NEW YORK (March 8, 1938) 16. This will be subsequently referred to as the "Attorney General's Report."

See for instance New York Times, Sept. 4, 1936, p. 1, col. 5, indicating a simultaneous increase of one cent per quart of milk announced by Borden and Sheffield; "while the meetings were held simultaneously, there was no connection in the conclusions reached by the separate companies, officials indicated." For similar instances of price uniformity see New York Times, Sept. 10, 1936, p. 24, col. 7; July 1, 1937, p. 29, col. 8; Aug. 24, 1937, p. 23, col. 1.

It is interesting to note in the following table contained in the ATTORNEY GENERAL'S REPORT, 91, that substantial price uniformity existed even after the era of state milk control.

RETAIL PRICES AT DOOR—GRADE "B" MILK QUARTS
1937

Distributors	March	April	May	June	July	Aug. 1-24	Aug. 25 Sept. 30	Oct. 1 Nov. 1-6	Nov. 7-30	Dec.
P	13	12-11	11	11	12	12	13	13	14	
A	13	12-11	11	11	12	12	13	13	14	14
R		10.8	10.2	9.8	10.8	10.9	11.8	11.8	12.5	
M	13-12	12-11	12-11	12-11	12	13	13	13	14	14
B B	13	12-11	11	11	12	12	13	13	14	14
C C	13	12-11	11	11	12	12	13	13	14	14
E 3	13	12-11	11	11	12	12	13	13	14	14
D	13	12-11	11	11	12	12	13	13	14	14
B 1	13	12	11	11	12	12	13	13	14	14
B 2	13	12-11	11	11	12	12	13	13	14	14
F 2	13	12-11	11	11	12	12	13	13	14	14
G	13	11.4	10.6	10.8	11.78	11.77	12.72	12.68	13.7	13.3
S	13	12-11	11	11	12	12	13	13	14	14
D D	12	11	10	10	10.5	11	11	12	12.5	
F 1	13	12	11	11	12	12	13	13	14	14

whose price-cutting had been one of the prime reasons for passing the New York Milk Control Act of 1933, did not have sufficient control of the supply to affect the retail market;³⁹ and that the retail prices increased or decreased with the prices announced by only two or three of the distributing companies, particularly Borden and Sheffield, who controlled 76 per cent of the retail trade in the metropolitan area in 1936.⁴⁰ Surprisingly enough, the retail prices set by the advertised brands of the leaders were even followed by the non-advertised brands. In the wholesale field, however, price uniformity was noticed only as between the advertised brands,⁴¹ the non-advertised brands being subjected to "severe and cut-throat competition".⁴²

B. Profits

Professor Spencer reported that in 1927 the profits of Borden, National, Beatrice, Golden State, and Western Dairy Products were at a somewhat higher rate than those of 1400 manufacturing and trading corporations for which the data were compiled by the National City Bank. In 1931 when deflation was well under way, the profits of the dairy corporations fell off very little, while those of the manufacturing and trading corporations had a net deficit for the year. In 1933, the profits of the dairy corporations showed a further moderate decline to about 4.2 per cent of the net worth. On the other hand, profits of the manufacturing and trading corporations recovered from a deficit to a profit of 2.7 per cent of the investment.⁴³

"In general, we might conclude that the large dairy companies were making very satisfactory profits for some years previous to the depression, and that their profits were maintained during the early stages of the depression much better than those of most industrial enterprises. We would expect this because the dairy companies are supplying the public with necessary foods, the purchase of which is curtailed only under extreme necessity. *It is probable too that the dairy industry is organized in such a way that it has been better able to resist the downward trend in retail prices.*"⁴⁴

An audit made by the Agricultural Adjustment Administration revealed that from 1928 to 1933 the net profits of the distributors in the Philadelphia milkshed were 30.76 per cent; in Boston, 22.45 per cent; in St. Louis, 14.64 per cent; and in Chicago, 25.84 per cent. During this same period it was shown that the wholesale price of milk sold by farmers declined 50 per cent, result-

³⁹ATTORNEY GENERAL'S REPORT, *supra* note 38, at 17.

⁴⁰*Id.* at 18.

⁴¹*Id.* at 18.

⁴²*Id.* at 15.

⁴³Spencer, *The Spread Between Farm and Retail Prices for Milk* (1935) AMERICAN COOPERATION 491.

⁴⁴*Ibid.* (italics supplied).

ing in severe hardships and suffering to milk producers throughout the United States and causing violence throughout many sections of the country.⁴⁵

In the New York area, Professor Spencer reported:

"From 1929 to 1932 the retail price of milk in New York city dropped from sixteen cents a quart to twelve cents, or 25 per cent. The dealer's spread on retail milk during the same period was reduced one-half cent per quart, or about 6 per cent. Although the entire weight of the deflation fell upon the farmer, whose class I price was reduced three and one-half cents per quart, or nearly fifty per cent. . . ."⁴⁶

In the Philadelphia milkshed it was reported there was a four cent per quart drop in the price of milk between December, 1930, and January, 1933.⁴⁷ Of this four cents, the farmer was obliged to absorb 3.3 cents and the distributor, .7 cent. A view was sponsored that the dealer's margins are to be regarded in normal times, at least, as fixed and unalterable charges. At a federal hearing held in Boston, December, 1933, Joseph A. Willman, Sr., of the Whiting Milk Company maintained that the price problem was no concern of the distributors but that it was rather an issue between the producers and consumers themselves.⁴⁸

More recently, the Attorney General's Report on the milk industry for the New York metropolitan area reveals that "the profit on milk sold at the door at the established prices and at the store prices is substantial. . . . at the present prices, the percentages of profit on sales are as follows: grade B milk at retail 13 per cent; advertised brands of grade B milk at wholesale 16 per cent; grade A milk at retail 21 per cent; and grade A-vitamin D milk at retail 27 per cent."⁴⁹ This, of course, does not take into consideration the profits made by the same companies on the sale of milk products manufactured from surplus milk, which, because of their interrelation, cannot be divorced from an analysis of the problem.⁵⁰ For instance, of the ten examined companies which were exclusively engaged in the manufacture of milk

⁴⁵*Supra* note 36, p. 1.

⁴⁶*Supra* note 43, p. 489.

"The farmer [as distinguished from the distributor], on the other hand, has no one to whom he may pass on a reduction of price." ATTORNEY GENERAL'S REPORT, p. 54.

A study in forty cities in the central and north central states revealed that from 1929 to 1933, the percentage of price decline suffered by the farmers was greater than the percentage of reductions suffered by the distributors: ". . . . In 1931, 1932, and 1933 prices paid to farmers for milk declined with considerable rapidity. During this last three year period, distributors' margins per quart dropped somewhat, but not by anything like the same percentage as did prices to farmers. . ." Mortensen, *Distribution of Milk under Public Utility Regulation* (1936) 26 AM. ECON. REV. 23.

⁴⁷Harris, *Battle of the Milksheds* (Nov. 1933) CURRENT HISTORY 197.

⁴⁸CASSELS, A STUDY OF MILK PRICES (1937) 118.

⁴⁹ATTORNEY GENERAL'S REPORT, 98.

⁵⁰As will be seen later, *infra* note 66, it is the large companies with manufacturing affiliates which benefit greatly from the purchase of "surplus" milk, supposedly used for the production of manufactured products. Unfortunately, the Attorney General's Report did not examine the incidents of this relationship.

products, the Attorney General reported one to have made 108.66 per cent profit on net tangible assets in 1936, with the high probability of repetition in 1937.⁵¹

The two major distributors seem to have taken issue with the charge of "substantial profits". In December, 1937, the Borden Farm Products Division of the Borden Company issued a statement to the press indicating that for the six months ending September 30, 1937, they lost 1.02 cents for every dollar spent for Borden's milk. Sheffield Farms Company, a subsidiary of National Dairy Products Corporation, reported that for the year 1936 its profit averaged less than $\frac{1}{8}$ of 1 per cent "on all milk handled".⁵² The Attorney General's Report, however, attempts to show that when analyzed the press statements of the two concerns may be misleading. The Sheffield statement, for example, is based upon "all milk handled". But part of the milk "handled" included 111,000,000 quarts to affiliated companies in 1936, and 63,000,000 quarts in 1937, sold at an average price of 3.5 cents per quart. This shows a "loss" to the Sheffield Farms Company, but it must be borne in mind that another affiliate of the National Dairy Company profited correspondingly.⁵³ Likewise, the Report suggests that the Borden statement has not been broken down to show the intercompany transactions and the transmission of profits to the affiliates.⁵⁴

The Attorney General's Report further suggests that it is safe to assume that both the Borden and Sheffield statements are based upon "milk equivalent" and not milk or milk products taken separately.⁵⁵ That "milk equivalent" is an improper basis for estimating profit on fluid milk is readily appreciated.⁵⁶

⁵¹ATTORNEY GENERAL'S REPORT, 116.

⁵²ATTORNEY GENERAL'S REPORT, 99.

⁵³Note, for instance, the profit of 68 per cent on the net tangible assets after payment of taxes in 1936 on the part of the Sheffield Condensed Milk Company, to whom the Sheffield Farms Company sold milk below the market price. *Id.* at 100.

⁵⁴*Id.* at 101.

⁵⁵*Id.* at 106.

⁵⁶For the purpose of computing this 'milk equivalent', all milk, cream and milk products are reduced to a common denominator. The common denominator is butter fat content. On the basis of butter fat content, a quart of milk with a butter fat content of 3.6% would not be comparable to a quart of cream containing 36% butter fat. If the butter fat content is used as a common denominator, the quart of cream with 36% of butter fat is considered to be the equivalent of ten quarts of milk. Thus one quart of milk and one quart of cream would be computed as eleven quarts of 'milk equivalent'. If the return received from a quart of milk were 14 cents and the return received from the quart of cream was 76½ cents, ½ cent of which would be the return from the skim milk resulting from separation, the total return would be 90½ cents, but the total return per quart of 'milk equivalent' would be 8 $\frac{2}{11}$ cents (eleven quarts of milk equivalent divided into 90½ cents, the total return). Some comparable methods are used to compute the 'milk equivalent' of cheese, condensed milk, ice cream, and other manufactured milk products. The 'milk equivalent' basis renders it impossible to determine the return on different grades of milk, and the conclusions drawn from the experience of 'milk equivalent' are completely unenlightening. It must be remembered that the interest of the public lies not in so-called luxury products but in milk alone. If the profit in milk is exorbitant that should not be nullified by the fact that the profit on other items

The Ernst and Ernst audit of fourteen distributing companies, including the affiliates of both Borden and Sheffield, as well as three independent companies and the Dairymen's League, revealed that for the year ending December 31, 1936, there was an average profit of 11.06 per cent made on net tangible assets and \$.00464 per quart of milk. For the first nine months of 1937, the profit on assets was 5.11 per cent and the profit per quart was \$.0028.⁵⁷ The audit further revealed that the average gross spread on milk, representing the difference between what the farmer and the distributor received, was "about" 5.5 cents.⁵⁸ Compared to the findings of the Attorney General, profits in milk distribution seem exceedingly small.⁵⁹ However, it has been pointed out in criticism of the audit that the findings do not take into consideration the difference in profits between milk and milk products⁶⁰—that the results are based not on a quart of A milk or a quart of B milk, but a hypothetical quart of milk called "milk equivalent", which is a composite of milk, cream, butter, cheese, ice cream, etc.⁶¹ The entire question of the dealer's spread in the purchase and sale of fluid milk alone is so inextricably intertwined with the handling of surplus milk, that it has been deemed to be practically impossible to reach any satisfactory conclusion as a result of the audit.⁶²

C. *Advantage over Producers and Consumers*

Under the normal scheme of things, the price that the farmer gets for his milk depends usually on what the distributor can do with it. If the farmer presents the distributor with 100 gallons of milk, and the distributor bottles it and sells it to consumers, the farmer usually gets the highest price for it, known as class I price. If only fifty gallons are sold for immediate consumption purposes, the farmer will receive class I prices only for the fifty gallons, and if the distributor can sell all of the cream in the other fifty gallons of milk after he separates it, the farmer will receive a class II, or lower price for the fifty gallons. If the distributor can only sell the cream in ten gallons of milk, the farmer will receive the class II price for the ten gallons and a class III price for the forty gallons, which may be used for the manufacture of butter. Or it still may be broken down to class IV purposes for ice cream

because of widespread competition is considerably lower." ATTORNEY GENERAL'S REPORT, 104.

⁵⁷*Report of Commissioner of Agriculture and Markets Regarding the Audit of Milk Dealers and Cooperative Associations*, N. Y. LEG. DOC. (1938) No. 100, p. 5. This will hereafter be cited as the "Ernst and Ernst Report."

⁵⁸*Ibid.*

⁵⁹The Attorney General reported that from November, 1937 to January 15, 1938, there was a profit of 1½ cents per quart of B milk in December, 1937, a profit of 2.8 cents per quart of grade A milk and a profit of 3.7 cents per quart of Grade A Vitamin D milk, all sold at retail. ATTORNEY GENERAL'S REPORT, 98.

⁶⁰Letter of Holton V. Noyes, New York Commissioner of Agriculture and Markets, in *Ernst and Ernst Report*, *supra* note 57, at 11.

⁶¹See statement of Commissioner Noyes in New York Times, Feb. 8, 1938, p. 1, col. 6.

⁶²*Ibid.*

or cheese, in which the price of the milk sold is still lower. To repeat, this is in a normal market, without any governmental regulation. Suppose the distributor has the upper hand? Who is to determine whether the milk sold to the distributor actually goes into class I, II, III, or IV use? Who knows how much of class III or IV milk the distributor uses for class I purposes? Producers of milk have not always been fortified adequately with this information.⁶³ Two distributors, during 1932 and the first six months of 1933, paid surplus milk prices for 2,392,369 quarts of milk which they had sold in bottles.⁶⁴ One large St. Louis distributor put cream made from milk paid for at class III prices into storage during May, June and August, 1935. Some of this cream was taken out of storage during October, 1935 and January, 1936, and was reported used for class II sales.⁶⁵ Huge corporations with subsidiaries in all of the principal lines of products in the industry and with country receiving plants as well as manufacturing plants and processing plants are in strategic positions for the purchase of milk. Subsidiaries located in areas where production is high and prices low may purchase milk, transfer and ship to subsidiaries in areas where production is low, milk scarce and prices high. These corporations take advantage of the interstate character of the milk industry, and in order to gain price ends can threaten the producer by buying elsewhere if the price is not satisfactory. Thus size, geographic position, and financial power have left the producer subject to the whip of the large distributors.⁶⁶

When New York State attempted through its Milk Control Law to stem this practice by equalizing the price of milk coming into the state from foreign channels, the Supreme Court in *Baldwin v. G. A. Seelig, Inc.*,⁶⁷ declared the

⁶³In New York, there has been no check upon the disposition of the milk sold by the Dairymen's League to the Borden Company. ATTORNEY GENERAL'S REPORT, 38. The same is true in respect to the relation between the Sheffield Producers Cooperative Association and the Sheffield Farms Company. *Id.* at 43.

⁶⁴*Summary Report of Conditions with Respect to the Sale and Distribution of Milk and Dairy Products (1937)* H. R. Doc. No. 94, 75th Cong., 1st Sess., 4.

⁶⁵*Supra* note 64, p. 5.

⁶⁶The corporation is in a position to take advantage of the interstate character of the milk industry and thus defeat the efforts of State control boards to maintain fixed prices to producers within the State by importing milk from other States where fixed prices are lower or where there is no price control. With its large capital and vast facilities for assembling, processing, and storing milk and cream, the corporation can purchase milk in flush seasons when it is plentiful and prices low and store it for use in the manufacture of many dairy products in low-production season when milk is scarce and prices high." *Report of the Federal Trade Commission on the Sale and Distribution of Milk and Milk Products in the New York Milk Area, (1937)* H. R. Doc. No. 95, 75th Cong., 1st Sess., 87. See also ATTORNEY GENERAL'S REPORT, 46.

⁶⁷294 U. S. 511, 55 Sup. Ct. 497 (1935). One of the devices used to temper the effects of *Baldwin v. Seelig* is the marketing agreement which the Secretary of Agriculture under the Agricultural Adjustment Act has been empowered to promulgate, provided the concurrence of a designated percentage of the producers and handlers is obtained. See 7 U. S. C. A. §§ 608-b, 608-c (1), (2), (5), (8), (18). As yet, the validity of these sections has not been tested by the Supreme Court. However, in the lower federal

regulation invalid, thus reinforcing what had already been the practice of the larger distributors.

In New York, the Rogers-Allen Act⁶⁸ of May 19, 1937, inaugurated a newer technique in the regulation of milk marketing. Instead of an administrative commission regulating minimum and maximum prices, the plan provides for the organization of producers and distributors into "bargaining agencies" for the purpose of making marketing agreements with each other for the sale of milk in metropolitan areas. An agreement between the producer's and the distributor's bargaining groups must be approved by the Commissioner of Agriculture and Markets. If, subsequent to his approval, 75 per cent or more of the producers also approve, the Commissioner may issue an order making the terms of the agreement effective. When, however, 35 per cent or more of the producers oppose it, it must be rescinded. There is an express provision in the Act exempting the bargaining agencies from the provisions of the state Anti-Trust Act. This technique follows the theory of such projects as the NRA codes, Agricultural Adjustment Act, and more recently, the Guffey-Vinson Coal Act, in which industry is given permission, through organization and agreement, to solve many of its own tangled problems.

Already, the charge of domination has been made against the producers' bargaining agency, known as the Metropolitan Milk Producer's Bargaining Agency. The Attorney General's Report suggests,

"There can be no question but that both the Dairymen's League and Sheffield Producers Cooperative Association, Inc., if and when acting in concert, can control the Metropolitan Milk Producers Bargaining Agency."⁶⁹

The membership of the distributors' bargaining group, known as the New York Metropolitan Milk Distributors' Bargaining Agency, is limited to milk dealers who deliver milk to stores or consumers in the metropolitan area. The Attorney General's Report indicates that the members of this agency sell in excess of 85 per cent of all the milk sold in the metropolitan area, and

courts, difficulties seem to be encountered on two issues, (1) whether such agreements constitute a regulation of intrastate commerce and (2) granted interstate commerce, whether there is an unwarranted regulation of production. On the first point see *Berdie v. Kurtz*, 75 F. (2d) 898 (1935); *Darger v. Hill*, 76 F. (2d) 198 (1935); *Royal Farms Dairy v. Wallace*, 8 F. Supp. 975 (1934); and *United States v. Shissler*, 7 F. Supp. 123 (1934). On the second point see *United States v. David Buttrick Co.*, 91 F. (2d) 66 (1937); *United States v. Seven Oaks Dairy Co.*, 10 F. Supp. 995 (1935); *Columbus Milk Producers' Co-operative Association v. Wallace*, 8 F. Supp. 1014 (1934); and *Edgewater Dairy Co. v. Wallace*, 7 F. Supp. 121 (1934). See also note, *Milk Regulation in New York* (1937) 46 YALE L. J. 1364 and TOBEY, FEDERAL AND STATE CONTROL OF MILK PRICES (1937) 1-10.

⁶⁸LAWS 1937, c. 383; AGRICULTURE AND MARKETS LAW §§ 258-k, 258-l, 258-m, 258-n.

⁶⁹ATTORNEY GENERAL'S REPORT, 54.

that the combined "volume vote" of Sheffield and Borden would be in excess of $66\frac{2}{3}$ per cent.⁷⁰

It would normally be assumed that the producers, now organized, would reap much benefit in a rising market, and that in a declining market the advantage would be with the organized distributors. The Attorney General's Report has pointed out, however, that when the market is the "producer's market", the distributors are not necessarily adversely affected. For example, when there was an increase in the price given to the producers from July to December, 1937, the distributors merely passed the increase on to the consumers in the form of higher prices.⁷¹

Often the distributors found themselves able not only to pass on the increased cost of milk to the consumer, but to make a substantial profit above the increase. For instance, it was reported that from June 30, 1937, to December 2, 1937, the class I milk price paid to the producers was increased to a total of 98 cents per hundredweight, while the price to consumers was simultaneously increased by the distributors to a total of \$1.41 per hundredweight.⁷² Of course, this can be explained only by the fact that the consumers are not effectively organized to resist price advances,⁷³ and that the demand for milk, despite small fluctuations, is relatively inelastic.⁷⁴

V

If monopolistic competition as a result of the size of the leaders in the milk distributing industry is manifested by such characteristics as uniformity of price through "price leadership", buoyancy of profits, power to maintain the upper hand in the bargaining process be it with the producer or consumer, wherein does such power elude the meshwork of the Anti-Trust Acts?

In the main, the dominating size of both the Borden and the National Dairy has been reached by the acquisition of non-competing concerns. Two techniques chiefly have been used, one, the complementary type of merger, and the second, the chain store type.⁷⁵ At the time the Clayton Act and the Federal Trade Commission were under discussion, the complementary type of merger was little known. Since its aim is to bring together non-competing

⁷⁰*Id.* at 56.

⁷¹ATTORNEY GENERAL'S REPORT, 53.

⁷²See a statement to this effect by Commissioner Noyes in New York Times, Dec. 2 1937, p. 2, col. 2. New York Times, Nov. 7, 1937, p. 19, col. 1, contains a similar statement by Mayor LaGuardia: "This increase is not justified. A breakdown of figures indicates that the distributors are paying farmers 28 cents additional while their charge to the consumer is 47 cents for forty-seven quarts."

⁷³An exception is the recent Milk Consumers' Protective League of New York which is making a serious attempt to make the consumer conscious of his power.

⁷⁴Cassels, *The Fluid Milk Program of the Agricultural Adjustment Administration* (1936) 43 J. OF POL. ECON. 486.

⁷⁵TIPPETS AND LIVERMORE, *BUSINESS ORGANIZATION AND CONTROL* (1932) 465.

companies, a merger of this sort is not subject to prosecution for restraint of trade. The theory under which it operates is that products sold to the same group or general class of consumers can be profitably handled together. A current example is that of the General Foods Corporation.⁷⁶ The National Dairy Products Corporation and the Borden Company operate somewhat in the same manner. Their list of products now includes condensed milk, dried milk, malted milk, cheese of all kinds, fluid milk, cream, ice cream, butter, mayonnaise, and other milk products.⁷⁷

The chain type of merger has been described as an "addition of units" rather than a real merger.⁷⁸ The difference is really one of degree, dependent upon the intensity and extensity of the acquisitions. The fact that such units are open to competition from other local concerns frees this type of "merger" from the danger of anti-trust prosecution, just as the typical complementary type of merger is immune from attack.⁷⁹ This plan, in the main, sponsors non-competing units engaged in making and selling exactly the same product, and joined under one control. A brief examination of the acquisitions of both the National Dairy Products Corporation and the Borden Company will reveal an expansion along this line, having built a group of dairy and dairy products companies operating, in the main, in non-competing territories, and still subject to local competition.⁸⁰

To the extent that the National Dairy Products Corporation and the Borden Company integrate the process of manufacturing milk products they have followed the vertical scheme of mergers, perhaps one of the most successful of which is the Ford Company.

Both organizations as yet have avoided the pitfalls of the horizontal merger

⁷⁶This organization controls such an array of products as Postum, Jello, Swansdown Cake Flour, Minute Tapioca, Walter Baker Chocolate, Franklin Baker Coconut Products, Log Cabin Syrup, Maxwell House Coffee, Calumet Baking Powder, Certo, Richard Hellman Salad Dressing, La France Starch, and Diamond Salt.

⁷⁷A list of commodities handled by both companies may be found in the *Report of the Federal Trade Commission*, *supra* note 66, pp. 120-137.

⁷⁸*Supra* note 75.

⁷⁹In *United States v. United States Steel Corporation*, 251 U. S. 417, 447 (1920), the Court emphasized the fact that there could be no monopoly if there was competition after the merger.

⁸⁰The "chain-store" type of expansion of both Borden and National Dairy is revealed in the *Report of the Federal Trade Commission*, *supra* note 66, pp. 120-136. According to the report, it would seem that the greatest control of any single distributor in a single market is in the Baltimore area, in which a subsidiary of the National Dairy was reported to have 55 per cent of the distribution of fluid milk to its credit. *Summary Report of Conditions with Respect to the Sale and Distribution of Milk and Dairy Products* (1937) H. R. Doc. No. 94, 75 Cong., 1st Sess., 15. There seems to be no evidence available as to whether this control was obtained through merger.

Other examples of this type of "merger" are the Sears and Ward chains; the Macy units in New York, Newark, Columbus and Atlanta; the National Department Stores; and McKesson and Robbins, the latter constituting a combination of wholesale drug concerns in non-competing areas, in order to compete more adequately with such chains as Liggetts.

which thus far has been most vulnerable to anti-trust attacks.⁸¹ This type of merger constitutes the simple consolidation of companies making the same product, located at the same stage in a given industrial process. It was originally conceived as the control of a strategic point in such a process, so located that the raw material or supply producers on one hand and the consumers on the other would both pay tribute to the successful merger of this type. One of the best examples has been that of the old American Sugar Refining Company.

Further evidence of the inability of the Anti-Trust Acts to limit the size of the distributors is revealed by a commentary on Section 7 of the Clayton Act, made by the Federal Trade Commission.⁸² The Commission recently reported its inability, under this section, to restrain the acquisition of assets of competitors. This inability is the result of Supreme Court holdings to the effect that where the assets have been acquired before the Commission filed its complaint, the order cannot require their disposition, even though the assets were acquired as a result of an illegal transaction.⁸³ That Section 7 was intended to apply only to the acquisitions of stock is indicated by the fact that several amendments were introduced in Congress which would have made the section applicable to other methods of control and all the amendments were rejected by Congress.⁸⁴ The courts have not been sympathetic towards this section. They have held that the two companies which were combined must have been in substantial competition with each other, that such competition is substantially lessened by the acquisition of stock, that competition in the industry at large is restrained, and that there is a tendency towards a monopoly.⁸⁵ In the face of the complementary and chain-store types of merger utilized by the National Dairy Products and the Borden Company, it would seem that Section 7 would be quite impotent.

To add to the aforesaid analysis, the additional difficulty presented by the problem of interstate commerce would indeed further complicate the effectiveness of the Sherman and Clayton Acts. Despite the fact that both the Borden Company and the National Dairy Products Company operate in many states, it is arguable that a good share of their business, *e.g.*, purchase and distribu-

⁸¹United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632 (1911); United States v. Standard Oil Company of New Jersey, 221 U. S. 1, 31 Sup. Ct. 502 (1911); United States v. Eastman Kodak Co., 226 Fed. 522 (W. D. N. Y. 1915). For a general summary, see McLAUGHLIN, CASES ON FEDERAL ANTI-TRUST LAWS (1933) 214 *et seq.*, n. 51.

⁸²*Supra* note 64, p. 37.

⁸³Federal Trade Commission v. Western Meat Company, 272 U. S. 554, 47 Sup. Ct. 175, 71 L. ed. 405 (1926); Arrow-Hart & Hegeman Electric Company v. Federal Trade Commission, 291 U. S. 587, 54 Sup. Ct. 532, 78 L. ed. 1007 (1934).

⁸⁴Irvine, *The Uncertainties of Section 7 of the Clayton Act* (1928) 14 CORNELL L. Q. 28, 35.

⁸⁵Handler, *Industrial Mergers and the Anti-Trust Laws* (1932) 32 COL. L. REV. 179, 264.

tion of milk, is purely intrastate, and therefore without the pale of these Acts. How much is intrastate is a matter of evidence, not within the purview of this paper. However, as a matter of observation, the mere operation of many units in many states is not *per se* an interstate process. It is questionable, even in the light of the NLRB cases,⁸⁶ whether the mere *effect* upon the interstate market of the practices of the large dealers would permit subsumption under the interstate commerce powers of Congress.

Even if competing distributors combine in order to maintain a united bargaining front as against the producers, a plan which in essence is sponsored by the Rogers-Allen Act in New York, it is doubtful whether the Sherman Act would be any more operative. In the *Appalachian Coals* case,⁸⁷ the Supreme Court took pains to point out that even though there is an agreement among producers to cooperate in the joint sale of coal, there is no monopoly in the Sherman Act sense because the "developed and potential capacity of other producers will afford effective competition". Using this argument, the larger distributors can show one source of potential competition in the small distributors, often called "peddlers", who swarm into the competitive market during periods of overproduction. This is what happened in New York State and finally led the state to sponsor milk control regulation through administrative tribunals. The Pitcher Committee report described a situation in which the small distributors were able to buy milk for fluid purposes at class III prices, and that the big distributors were not flexible enough to avoid the evils of the surplus market with the same degree of success. The large distributors had to pay fluid milk prices for some milk, and surplus milk prices for others. The small distributors were flexible enough to purchase only at surplus prices, and to undersell the larger competitors⁸⁸ It was comparatively inexpensive to venture into the distributive market. A delivery wagon, or truck, and a few friends constituting a route was all that was necessary. The overhead was small, the cost low. This

⁸⁶National Labor Relations Board v. Jones and Laughlin, 301 U. S. 1, 57 Sup. Ct. 615 (1937); National Labor Relations Board v. Friedman-Harry Marks Co., 301 U. S. 58, 57 Sup. Ct. 645 (1937); Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 58 Sup. Ct. 656 (1938).

⁸⁷288 U. S. 344, 53 Sup. Ct. 471 (1933).

⁸⁸Report of the Joint Legislative Committee to Investigate the Milk Industry, LEG. Doc. (1933) No. 114, p. 16:

"The fact that the larger distributors find it necessary to carry large quantities of surplus milk while smaller distributors do not, leads to price cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributors can contract for minimum requirements and depend upon emergency purchases when threatened with a shortage. The large distributors cannot do this, since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of the situation is that the smaller distributors who take no responsibility for the surplus by purchasing their milk on the basis of the blended prices paid by the larger organizations, are in a position to undersell the larger distributors in the cities."

same condition precipitated the marketing agreements under the Agriculture Adjustment Act.⁸⁹ From 1930 to 1933 there was a very wide spread between fluid and surplus milk prices, and with a huge oversupply small dealers grew up overnight.⁹⁰ These "peddlers" usually arise during hard times, when people are satisfied with meagre profits. The marketing agreements in 1933 were attempts to stabilize milk production so that the evils resulting from surplus milk, *i.e.*, price depreciation and the influx of small dealers, could be checked. Even under the marketing agreements, the larger distributors have expressed some concern over the fact that the act does not openly sponsor the control of resale prices, unless such control is manifested in the marketing agreements themselves. On one occasion milk distributors refused to sign the marketing agreements that would bind them to pay fixed prices to producers without protecting them from price-cutting from competitors.⁹¹ The competitors in this case most likely consisted in the smaller distributors who were content with a smaller margin of profit.

A second potential threat to the position of the distributors in the milk industry lies in the creation of producer-distributor cooperatives, *i.e.*, organizations of farmers who unite not only to pool their production, but also to distribute and market the product, thereby eliminating the middleman. It is a real threat, for the producers can, if organized, withhold supply and eliminate the independent distributors from their marketing functions. That this threat is more actual than potential is evidenced by the existence of such powerful organizations as the Land O' Lakes Cooperative and the Dairy-men's League in the distributive field.⁹²

A third threat is the existence of chain grocery stores. The sale of milk in chain stores does not necessarily depend on the profitable spread between cost and selling price. A chain organization can well afford to sell milk as a loss-leader, because it is only a single item in the store's make-up, profit being computed on the basis of total sales, and not necessarily on the basis of individual items.⁹³

The existence of potential competition is summed up tersely by Professor Spencer:

"The situation is complicated by the existence of certain types of dealers that apparently can survive indefinitely, even though the spread between fixed producer's prices and competitive resale prices is insuffi-

⁸⁹BLACK, *THE DAIRY INDUSTRY UNDER THE A.A.A.* (1935) 83.

⁹⁰HORACK and COHEN, *After the Nebbia Case: The Administration of Price Regulation* (1934) 8 U. OF CIN. L. REV. 219.

⁹¹*Supra* note 89, p. 56.

⁹²For a list of cooperative associations, see HANNA, *COOPERATIVE MARKETING ASSOCIATIONS* (1931) 11-15. See also *New York Times*, Jan. 11, 1938, p. 25, col. 6, for an account of the creation of a "consumer-farmer cooperative".

⁹³Spencer, *The Future of Milk Control*. Address at Farm and Home Week, New York State College of Agriculture, Ithaca, N. Y., February 17, 1935.

cient to sustain other very efficient dealers. For example, chain stores are affected only slightly by the spread on milk and cream, because these items constitute only a small proportion of their business. There are other milk dealers who derive a large share of their income from ice cream, or from sales outside the territory affected by the license. In some markets, too, large milk distribution enterprises are operated by farmers' cooperative associations. It has been the policy of such associations to return to their members the net proceeds of sales after deducting the expenses of operation. If this policy is continued, the cooperatives are not placed on an equal footing with distributors who are subject to fixed purchase prices under the licenses."⁹⁴

However, the threat of competition from chain stores, small distributors and cooperatives is more an argument on the legal plane of discourse than on the economic. The competitive element presented by chain stores is somewhat tempered by the fact that the large distributors offer a different *service*, *i.e.*, delivery, the demand for which is not necessarily abolished by the existence of lower chain-store prices. Furthermore, as to the threat of competition from small distributors, the threat is also too readily overemphasized. Granted the existence of the surplus market, the competition between the large distributor and the small distributor has not been devastating. If the small distributors lower the price of milk, the tendency is to shift the competitive burden on to the producer, who is usually forced to bear it in the form of lower prices. There is substantial evidence supporting the theory that the large distributors have kept an adequate margin of profit, despite the low prices which the producer receives for his product.⁹⁵ Furthermore, huge distributors can, with the advantages of large capital, soften the attacks of the small distributor's lower prices, by advertising the "superiority" of their products,⁹⁶ by stressing their superior sanitation equipment, and by displaying more attractive delivery trucks to the public eye.

Perhaps the greatest threat comes from producer-distributor cooperatives. In those markets in which they exist, their competition with the distributors will become quite marked. But most of the milk markets have not yet been penetrated by these cooperatives. Until they do penetrate the market, dominance on the part of the large distributors still remains a probability.

VI

The Supreme Court has gone quite far in sanctioning open, conscious agreements in a field in which there was no danger of "monopoly". Such

⁹⁴*Supra* note 93.

⁹⁵*Supra* notes 46, 47, 48, 72 and 73.

⁹⁶This was recognized by the Supreme Court in *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, 56 Sup. Ct. 453 (1936). See also CHAMBERLIN, *MONOPOLISTIC COMPETITION* (1936), ch. IV, "The Differentiation of the Product: Monopolistic Competition".

was the *Appalachian Coal* situation.⁹⁷ It has gone far in sanctioning, within certain limits, such open price structures as in the *Sugar Institute* case,⁹⁸ in which danger of "monopoly" was even more apparent.⁹⁹ It has even upheld a combination in which potential competition was virtually impossible.¹⁰⁰ *A fortiori*, a situation in which there are no open agreements to control selling price, and in which the field is competitive, though dominated by a few, would be beyond the pale of our existing anti-trust laws.

If one agrees with Mr. Justice Brandeis that "the essence of restraint is power", and that "power may arise merely out of position",¹⁰¹ it becomes necessary for those suggesting reform of our outmoded legal tools to re-appraise the meaning of "monopoly" and "restraint of trade". Only by realizing that modern business has developed new techniques to reach an old goal may one appreciate that the revaluation must not be in terms of "the philosophical problem of the state of mind at the time",¹⁰² but in terms of cold, market economics.

⁹⁷288 U. S. 344, 53 Sup. Ct. 471 (1933).

⁹⁸297 U. S. 553, 56 Sup. Ct. 629 (1936).

⁹⁹Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions* (1936) 45 YALE L. J. 1339.

¹⁰⁰United States v. United States Shoe Machinery Co., 247 U. S. 32, 38 Sup. Ct. 473 (1918).

¹⁰¹Dissent in *American Column and Lumber Co. v. United States*, 257 U. S. 377, 42 Sup. Ct. 114 (1921).

¹⁰²ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 227.