

proceeding, and the FTC must wait for a consummated acquisition before it can issue a cease and desist order.

This decision, therefore, has created a serious void which should quickly be filled. Some agency must have the responsibility and the power to prevent mergers which will violate the antitrust laws if consummated, especially in view of the economic damage and the often near impossibility of unscrambling companies which have been merged for a substantial period of time. It would appear that an amendment to the ACPA which would allow the Justice Department to investigate proposed mergers may be necessary in order to counteract the decision in the instant case.<sup>30</sup>

It thus appears that the court in this case, by going beyond the issues before it, has done a disservice to the cause of antitrust law enforcement. Despite the court's apprehension, there is no reason to believe that the Justice Department would exercise its power improperly (notwithstanding its attempt in this case) because there are already sufficient safeguards built into the ACPA. A more strict interpretation of "person under investigation" would have solved this case equitably. The fact that every disputed demand will be examined by a court<sup>31</sup> should be a sufficient safeguard so that a court need only pass upon the legality and sufficiency of the demand itself, rather than undertake to narrow or construe the act beyond what is required by the facts before it. A later decision by another court of appeals to remedy the situation and set the ACPA back on an even keel would be most welcome.

LAWRENCE A. MAXHAM

**Constitutional Law—Twenty-first Amendment—Price Regulation—Extra-territorial Effects.—***Joseph E. Seagram & Sons, Inc. v. Hostetter.*<sup>1</sup>—The New York Legislature has amended the state Alcoholic Beverage Control Laws<sup>2</sup> to insure that the wholesale liquor prices in New York are no higher than the lowest wholesale prices charged by brand owners anywhere else in the country. To this end, section 9 of the new law requires that a

<sup>30</sup> A less effective but nevertheless valuable alternative would be for the FTC to make greater use of its rule-making power, 38 Stat. 721 (1914), 15 U.S.C. § 46(g) (1964), to promulgate rules for the guidance of corporations and corporate counsel in evaluating proposed acquisitions or mergers. Although not a method of enforcement, such rules would provide a reliable guide and would be uniform—both distinct improvements over the present situation. In *Permanente Cement Co., Trade Reg. Rep. Tr. Binder*, 1963-1965 F.T.C. Complaints, Orders, Stipulations ¶ 16885 (1964), the FTC indicated it intended to hold public hearings and formulate rules for guidance purposes as authorized by its Rules of Practice, 16 C.F.R. § 1.63 (Supp. 1964). However, since a set of such rules must be confined to a single industry, it will be a long time before a significant portion of American industry will have the use of them. See Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Laws*, 78 Harv. L. Rev. 385 (1964); Note, 40 N.Y.U.L. Rev. 771, 782 (1965).

<sup>31</sup> The demand may be enforced in court by the Government, under 76 Stat. 551 (1962), 15 U.S.C. § 1314(a) (1964); or it may be questioned in court by the demandee, under 76 Stat. 551 (1962), 15 U.S.C. § 1314(b) (1964).

<sup>1</sup> 16 N.Y.2d 47, 209 N.E.2d 701, 262 N.Y.S.2d 75 (1965).

<sup>2</sup> N.Y. Sess. Laws 1964, ch. 531.

brand owner, when filing the monthly schedule of prices, file an affirmation that the prices to wholesalers in New York are "no higher than the lowest price at which such item of liquor"<sup>3</sup> was sold during the previous month to any wholesaler or state agency operating a public liquor enterprise in the country. The foundations for this legislation were the findings and conclusions of a study conducted by the Moreland Commission,<sup>4</sup> namely, that there is very little correlation between prices and consumption and that the New York consumer was therefore being discriminated against by about \$150 million each year because of the high level of resale price maintenance encouraged by the then existing ABC Law.<sup>5</sup> Seagrams and others<sup>6</sup> instituted this action for declaratory and injunctive relief on the grounds, *inter alia*, that the statute was a violation of the due process clause of the fourteenth amendment<sup>7</sup> and the commerce clause<sup>8</sup> of the United States Constitution. The New York Court of Appeals<sup>9</sup> HELD (4-3): The statute is valid under the broad powers given the states by the twenty-first amendment to the United States Constitution and is not an unreasonable interference with interstate commerce.<sup>10</sup> The dissent would strike down the statute as an unjustified exercise of police power since it is not aimed at satisfying any health, safety, or welfare need.

Once again the issue arises as to the scope of the power to control liquor given to the states by the twenty-first amendment. Section 1 of the amendment provides for repeal of the eighteenth amendment,<sup>11</sup> and section 2 provides that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Section 2, despite the clarity of the language used therein, is subject to conflicting interpretations. On the one hand is the interpretation that the section gives the states the power to regulate the liquor industry within its borders only insofar as the regulations tend to promote temperance or to control some evil inherent in the commodity. This interpretation would have section 2 do no more than raise to constitutional dignity the statutory rights that the states had before the amendment was passed.<sup>12</sup> On the other hand is the

<sup>3</sup> N.Y. Sess. Laws 1964, ch. 531, § 9.

<sup>4</sup> The Moreland Commission was appointed by executive order on February 15, 1963, to study the liquor industry and the New York Alcoholic Beverage Law.

<sup>5</sup> N.Y. Sess. Laws 1950, ch. 689, rule 31.

<sup>6</sup> There are a total of 62 plaintiffs in this suit—distillers and wholesalers of alcoholic beverages.

<sup>7</sup> U.S. Const. amend. XIV, § 1.

<sup>8</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>9</sup> Affirming 45 Misc. 2d 956, 258 N.Y.S.2d 442 (Sup. Ct.), *aff'd*, 23 App. Div. 2d 933, 259 N.Y.S.2d 644 (1965).

<sup>10</sup> The Court ruled on other matters; the scope of this note is limited to consideration of the price regulation provision as regards powers of the states relative to the twenty-first amendment.

<sup>11</sup> U.S. Const. amend. XVIII.

<sup>12</sup> The Wilson Act subjected liquor imported into one state from another to the laws of the state even though the imported liquor was still in the "original package." 26 Stat. 313 (1890), 27 U.S.C. § 121 (1964). The Webb-Kenyon Act prohibited the importation of liquor into a state in violation of the laws of that state. 37 Stat. 699 (1913), 27 U.S.C. § 122 (1964).

interpretation that section 2 gives a state the power to prohibit liquor within its borders, and, therefore, a state can regulate the industry in any degree short of prohibition. The liquor industry, having a considerable interest in maintaining its heretofore favored position in New York, finds itself in the paradoxical position of arguing that the former interpretation is correct and that, since a low price does not tend to protect the public from the evils inherent in the commodity which it manufactures and merchandizes, the state cannot insist that the wholesaler, and ultimately the consumer, be charged a low price.

However, the thrust of the arguments on both sides of this case, emphasizing the right of a state or the lack thereof to insist upon low prices, is perhaps misguided. Given the conclusions of the Moreland Commission and other supporting studies,<sup>13</sup> the real issue may well be a state's right to regulate liquor prices *at all*, high or low, within the bounds of a normal price range. The Moreland Commission's studies indicate that there is very little, if any, correlation between price and consumption.<sup>14</sup> This result is explained by two factors: (1) The demand for liquor in general is not very price-sensitive, within the normal price range, and (2) while the prices of individual brands may be changed, the range of prices remains relatively fixed and some brands of liquor are priced at each level within the range, with the result that an individual consumes a relatively fixed quantity of "cheap" or "good" liquor, depending upon where the individual brand prices lay within the industry price range. Thus, the quantity demands for individual brands may change as prices change, but the demand facing the industry will remain about the same. Add to this conclusion the facts that there is a vast difference between consumption and intemperance and that the intemperate drinker is not apt to be deterred to any significant extent by the minor variations in price, the result is that price control affords little, if any, protection against intemperance. Therefore, given these facts, the issue becomes one of a state's right to control prices at all; and if a state does have this right, it has the right to set prices much as it sees fit.

The early cases construing the twenty-first amendment contain language in support of the contention that it gives to the states plenary power over the liquor industry within its borders sufficiently broad to include power to enforce regulations not aimed at temperance. The later cases, upon which the liquor industry relies as restricting the scope of state power, can justifiably be read in such a way as either to sustain the early cases or to deal with entirely different issues.

In *State Bd. v. Young's Mkt.*,<sup>15</sup> the first case construing the twenty-first amendment, a state tax on the importation of beer from another state was challenged. Recognizing that prior to the twenty-first amendment the tax would have been invalid as a burden upon interstate commerce, the Court held that the amendment abrogated the right to tax-free importation

<sup>13</sup> Dunsford, *State Monopoly and Price-Fixing in Retail Liquor Distribution*, 1962 *Wis. L. Rev.* 454.

<sup>14</sup> Moreland Commission Reports on the New York Alcoholic Beverage Control Law, Rep. No. 3, at 19.

<sup>15</sup> 299 U.S. 59 (1936).

from one state into another and that it did not demand that a state impose the same restrictions on a domestic seller as on an importer: "To say that would involve not a construction of the Amendment, but a rewriting of it."<sup>16</sup> The Court refused to say that under the twenty-first amendment a state is freed from all police power restrictions regarding liquor traffic, because under the facts of the case the Court was not required to go that far. However, there is nothing to indicate that the statute was aimed at, or that the Court viewed it as aimed at, any evil inherent in alcohol or at temperance promotion.

The case of *Mahoney v. Joseph Triner Corp.*<sup>17</sup> followed, which concerned a state statute prohibiting the importation into the state of certain liquors unless the brand was registered with the United States Patent Office. Triner claimed that the statute violated the equal protection clause of the fourteenth amendment, whereas the Liquor Control Commissioner contended that the statute was a reasonable regulation and that, in light of the twenty-first amendment, the equal protection clause of the fourteenth amendment did not apply to liquor importation. The Court held that it was not constrained to determine the reasonableness of the regulation since the Commissioner's second contention was valid. The Court said that, under the twenty-first amendment, discrimination was permissible even if not incident to a reasonable regulation, and that the twenty-first amendment is not to be construed to forbid the violation of only reasonable laws. Again, the Court showed no concern as to whether the regulation was aimed at any evil inherent in the trade.

There followed other cases in the same vein. A retaliatory statute, which prohibited the importation of beer from any state that discriminated against beer produced in the enacting state, was upheld.<sup>18</sup> The Court refused to consider whether the statute might have been more properly protective of the domestic producers rather than regulative of the evils of alcohol, "for whatever its character, the law is valid."<sup>19</sup> Shortly thereafter, a state statute was challenged insofar as it precluded any but common carriers from transporting liquor out of the state of manufacture.<sup>20</sup> The Court there said that the twenty-first amendment abrogates the commerce clause regarding liquor; that a state may regulate liquor and may adopt measures reasonably appropriate to effectuate its laws; and that a state could exercise full police power over liquor. While noting that the regulation at issue was part of a comprehensive statute designed to protect citizens from the inherent evils of alcohol and to facilitate the collection of revenue, the Court in no way implied this to be a condition precedent to valid liquor control. Rather, it stated that since a state can prohibit alcohol, it can prescribe the conditions under which alcohol can be sold or do anything else short of prohibition. And in 1958, the Court denied California leave to file a bill of complaint

<sup>16</sup> *Id.* at 62.

<sup>17</sup> 304 U.S. 401 (1938).

<sup>18</sup> *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939). See *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939).

<sup>19</sup> *Indianapolis Brewing Co. v. Liquor Control Comm'n*, *supra* note 18, at 394.

<sup>20</sup> *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939).

contesting the constitutionality of a Washington statute concerning the importation of alcoholic beverages.<sup>21</sup> California claimed the statute was discriminatory; but the Court, denying the petition in a *per curiam* opinion, merely cited the above line of cases in support of its decision.

In 1964 two cases were decided, upon which the industry relies as indicating a trend toward limiting state powers over liquor; but this reliance appears misplaced. In one case<sup>22</sup> the Court refused to uphold the validity of a state tax on liquor imported into the state from Scotland and still in the "original package." It reasoned that the twenty-first amendment did not repeal the import-export clause<sup>23</sup> and that the express power over the taxation of imports given thereby was retained by the federal government. However, although there is by this case at least one area of regulation—taxing international imports—that is closed to a state, the result is not inconsistent with the prior decisions as regards the commerce clause and the fourteenth amendment. The Court relied heavily upon the fact that the federal government is vested with control over taxation of imports by an express provision of the Constitution. In the other case,<sup>24</sup> a more troublesome one, the Court refused to permit a state to deny a dealer the right to sell liquor in a state-owned airport, where the customer received only a stub upon payment and received the merchandise upon arrival in a foreign country.<sup>25</sup> Over a vigorous dissent, the Court treated the transaction as part of the passage of alcohol through the state; and while reaffirming that the power of a state in restricting entry for use, distribution, or consumption within its borders is unconfined by the commerce clause, the Court said that the federal government retained some power under the clause and that a state could not prevent shipment through the state.<sup>26</sup> In so holding, the Court noted that the state was not seeking to prevent an unlawful diversion of the liquor into state commerce, which is permissible apart from the twenty-first amendment.<sup>27</sup> One could justifiably quarrel with the interpretation of the facts of this case in that there was "delivery" to the retailer in New York and the words of the twenty-first amendment are "delivery *or* use" (emphasis added); but

<sup>21</sup> *California v. Washington*, 358 U.S. 64 (1958), rehearing denied, 358 U.S. 923 (1958).

<sup>22</sup> *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

<sup>23</sup> U.S. Const. art. I, § 10, cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. . . ."

<sup>24</sup> *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

<sup>25</sup> The State Liquor Commission attempted to enjoin the operation for failure of the company to conform to certain aspects of its ABC Law pertaining to the physical facilities required of dealers.

<sup>26</sup> This view is consistent with the line of cases holding that a state cannot prevent liquor from being transported through a state since "transportation through" is not "use or distribution" in the state. See *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

<sup>27</sup> The Court has sustained the right of a state to enact statutes regulating the passage of liquor through the state as long as such statutes are reasonable in preventing the liquor from being diverted into the commercial stream of the state. See *Carter v. Virginia*, 321 U.S. 131 (1944); *Duckworth v. Arkansas*, 314 U.S. 390 (1941). The statutes involved in these cases were upheld without recourse to the twenty-first amendment.

given this interpretation of the facts, the result and the wording of the Court are perfectly consistent with, and not limitations upon, the earlier cases. No "warning" can reasonably be gleaned from these cases that the scope of the twenty-first amendment is being restricted, as the industry contends.<sup>28</sup>

Other cases upon which the industry relies are not persuasive in indicating a narrowing of the scope of the twenty-first amendment. They merely state that Congress still has power to control interstate activity in liquor where a state is not attempting to control the use or distribution of liquor within the state; that a state law is effective only within its jurisdiction; and that congressional activity is valid where it is not being used to destroy the policy of a state in the exercise of its power to control liquor within the state.<sup>29</sup>

It would appear, therefore, that the New York statute is well within the grant of the twenty-first amendment insofar as its regulatory effect of keeping prices at a relatively low level is concerned; for the consistent interpretation of the amendment is such as to give a state broad plenary powers, not limited to regulations aimed at promoting temperance. Mr. Justice Black, dissenting in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,<sup>30</sup> indicated that the history of the twenty-first amendment bears this interpretation out and that the Court had theretofore regarded the language of the amendment so clear that it had refused to consider the history. He further stated that the granting of concurrent power, originally section 3 of the proposed amendment,<sup>31</sup> was intentionally stricken because it would have defeated the purpose of restoring to the states the control of their liquor problems. As Senator Blaine said, section 2 restores to the states "absolute control of liquor entering into the state."<sup>32</sup> In the light of the history, wording, and interpretation of the twenty-first amendment, it seems to insure a state's right to regulate price, whether high or low; and, therefore, the statute here involved is valid in terms of its objective of a low price.

Quite apart from the validity of the statute in terms of its objective is the validity of the means by which this objective is to be achieved; for whether a state is acting pursuant to its police power or its power under the twenty-first amendment, it cannot extend its power into another jurisdiction. The statute requires the filing of the affirmation of the "no higher than the lowest elsewhere" level of prices. The question is whether, as the industry

<sup>28</sup> Brief for Appellants, p. 25, *supra* note 1.

<sup>29</sup> *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945); *William Jameson & Co. v. Morganthau*, 307 U.S. 171 (1939). The Frankfort case involved a conspiracy among manufacturers and dealers to fix prices, and the Court upheld a conviction for violation of the Sherman Act. In a concurring opinion, Mr. Justice Frankfurter emphasized the fact that Colorado had remained silent as to liquor pricing and that for this reason only did the commerce clause apply. He noted, however, that under the twenty-first amendment a state may erect any barrier it pleases.

<sup>30</sup> *Supra* note 24, at 334.

<sup>31</sup> See 76 Cong. Rec. 4138 (1933) (Senate debates on the proposed amendment to the Constitution).

<sup>32</sup> 76 Cong. Rec. 4143 (1933).

claims,<sup>33</sup> this provision produces such an effect on the operations in other states as to be invalid as an attempt to extend the enacting state's jurisdiction into another state. The argument is made that, in light of the size of the New York market, a brand owner will have to consider the repercussive effects of any other market price change upon the New York market and that the effects on the New York market may be such as to preclude him, as a practical matter, from lowering his price elsewhere. However, if this were to occur, the effect on interstate commerce and the out-of-state operations would certainly be indirect and self-imposed. The New York statute would in no way be controlling out-of-state activity except insofar as an owner allowed himself to be influenced and guided in his pricing policies in other markets. But undeniably, the statute itself is, in terms of its direct effect, one of purely internal state regulation.

Regarding this point, the Supreme Court has upheld state taxes which condition the amount of tax due upon happenings outside the state. A state chain store tax was upheld, the tax being dependent upon the total number of stores that the taxpayer operated, including stores outside the boundaries of the taxing state.<sup>34</sup> Further,

there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. . . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, . . . such regulation has generally been held to be within state authority.<sup>35</sup>

The Court has also said: "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."<sup>36</sup> And in *Baldwin v. G.A.F. Seelig, Inc.*,<sup>37</sup> it affirmed that a state may use its police power where necessary to protect the health, safety, and welfare of its citizens even though interstate commerce be incidentally affected.

In regard to the extra-territorial effect, it is worthwhile to consider some other aspects of the New York statute. Given the power of a state to regulate prices and to tie a regulation to an event or condition outside the state, the New York Legislature could have selected a particular date and then required the brand owner to affirm that, thereafter, the New York wholesale price is no higher than the lowest wholesale price elsewhere on the selected date.<sup>38</sup> What the legislature did, as opposed to what it could

<sup>33</sup> Brief for Appellants, pp. 16-20, *supra* note 1; Reply Brief for Appellants, p. 25, *supra* note 1.

<sup>34</sup> *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412 (1937).

<sup>35</sup> *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945).

<sup>36</sup> *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).

<sup>37</sup> 294 U.S. 511 (1935).

<sup>38</sup> This necessarily follows because, by selecting a price as of a date in the past, New York could not be charged with interfering with activities in another state, for the current price in another state would be unrelated to the current price in New York. This would be no different from selecting as a price standard the Cost of Living Index, as was suggested in the majority opinion.

have done, in effect reposed in the brand owner a greater amount of flexibility. Further, were New York a "state liquor monopoly" state, having a state agency as wholesaler and buyer from the brand owner, the agency could by force of its economic power or by statute require the same affirmation that the present statute requires, as is done in Pennsylvania.<sup>39</sup> Thus, to declare the statute invalid for reason of the method selected to achieve the desired results would be to penalize the state for granting to the industry more rights and flexibility than it had to give or to penalize the state for not operating its own liquor monopoly. This would put a premium on form and cleverness rather than on substance and straightforwardness.

The Supreme Court has noted jurisdiction.<sup>40</sup> The liquor industry, if it is to prevail, is faced with a formidable task. The industry must convince the Court that the objectives of the statute are not protected by the twenty-first amendment and are an unwarranted exercise of police power<sup>41</sup> or that the method chosen to achieve the objectives is invalid because of the extraterritorial effects that result from the operation of the statute. It is submitted that the statute's objectives are well within the powers granted the states by the twenty-first amendment; that the statute is a valid exercise of police power; and that the indirect extraterritorial effects of the statute are not such as to render the statute unconstitutional.

WILLIAM A. LONG

**Insurance—Direct Action Statutes—Shipowner's Limitation of Liability.**—*In the Matter of Independent Towing Co.*<sup>1</sup>—The claimants brought an action in the federal district court in Louisiana against the owners of the tug Itco III for damages suffered in a maritime accident in Louisiana waters. The tug owners, in turn, filed for a limitation proceeding.<sup>2</sup> An injunction was issued prohibiting all suits against the vessel and owners until determination of the limitation proceeding. The claimants then instituted actions against the vessel's insurer pursuant to Louisiana's direct action statute.<sup>3</sup> The insurers, claiming that no direct action could be brought against them until final determination of the limitation proceeding, sought a stay. They maintained that they could not be found liable until the shipowner's liability had been established, and then only up to the amount that the

<sup>39</sup> Supra note 1, at 57, 209 N.E.2d at 704, 262 N.Y.S.2d at 80.

<sup>40</sup> 34 U.S.L. Week 3182 (U.S. Nov. 23, 1965) (No. 545).

<sup>41</sup> The argument can be persuasively made that the statute is a valid exercise of police power, apart from the twenty-first amendment, under the decision in *Nebbia v. New York*, 291 U.S. 502 (1934), in that a state can protect its citizens from discriminatory pricing. The regulation is valid unless arbitrary, discriminatory, or irrelevant to a policy the legislature is free to adopt. In the present case, the state has enacted a statute aimed at protecting its citizens; the statute can be shown to be neither arbitrary nor discriminatory; and it is sufficiently flexible to allow the industry to adjust prices to a profitable level.

<sup>1</sup> 242 F. Supp. 950 (E.D. La. 1965).

<sup>2</sup> Rev. Stat. § 4283 (1875), 46 U.S.C. § 183 (1964).

<sup>3</sup> La. Rev. Stat. § 22:655 (Supp. 1964).