SIGNIFICANT LAW REVIEW ARTICLES

ANTITRUST LAW

BID DEPOSITORIES, by George H. Schueller, 58 Mich. Law Rev. 497 (February 1960).

This article examines the extent to which bid depository arrangements may inhibit bid peddling and bid shopping without violating federal antitrust laws.

A bid depository is a facility, which may be a trade organization or some independent agency, which collects bids addressed by subcontractors to general contractors, and keeps them closed and confidential until immediately prior to the bid opening time of the general contract, purportedly to inhibit bid peddling and bid shopping practices. These practices, although condemned as unethical by the canons of some trade organizations, are in fact forms of vigorous price competition, and as such, supported by national antitrust policies and statutes. The author points out that in every instance in which the Department of Justice has instituted antitrust proceedings against participants, the bid deposits have had further anti-competitive purposes or effects. Such depository plans have included per se violations of the Sherman Act involving such things as price-fixing and group boycotts. They have also included arrangements with labor or other groups for the enforcement of the depository rules. Where depositories organize groups to foreclose others from competing for business, there can be no doubt that they violate the law. The same can not be clearly said with respect to depositories who, without violating the Sherman Act per se, seek merely to prevent bid peddling and shopping by the participants. The type of restrictive depository rule regarded as encroaching upon freedom in business conduct to such an extent as to unreasonably restrain trade, is considered in *United States v. Bakersfield Associated Plumbing Contractors Inc.*, a case equally significant for its development of the kind of equitable relief which can be afforded in such a situation.

The scope of inquiry of the article is primarily directed towards an evaluation of this decision in terms of its likely impact in the bid depository area—in view of the history of attempts to resolve the problem arising out of bid depositories—on the Congress, the Department of Justice, and the federal courts. The article contains a table of all antitrust cases, civil and criminal, dealing with bid depositories prosecuted by the Department of Justice under the Sherman Act. The tabulation indicates the various types of violations involved and the specific kind of court action taken.

The author, an assistant chief in the trial section of the Antitrust Division, points out that the Department of Justice has taken a stern but not inflexible position in regard to depositories. Before legal action is commenced, consideration is given to the particular attending circumstances and equities. Bid shopping and peddling is not all bad, it being recognized that under some circumstances this type of dealing is beneficial or even necessary. The burden is placed upon the adherents to show that it is a reasonable depository plan designed to discourage irresponsible bargaining techniques.

The *Bakersfield* decision has aroused considerable renewed interest in, discussion of, and activity concerning bid depositories, as is evidenced by recent expressions of the trade press and inquiries reaching the Antitrust Division. While there was appreciable action and interest in this area commencing with the demise of the NRA codes and during the pre-war years, the institution, immediately prior to the war, of numerous antitrust actions involving bid depositories stifled enthusiasm for this device. The question now raised is whether this will be changed by virtue of the *Bakersfield* decision.

DENNIS L. DITELBERG
Index Editor

THE EVISCERATION OF SECTION 5 OF THE CLAYTON ACT, by Russell Hardy, Sr., 49 Geo. L. J. 44 (Fall 1960).

The former Special Assistant to the Attorney General in antitrust cases inquires into the difference in policy between Section 5 of the Clayton Act and the doctrine of estoppel by judgment, the principles of which, incorporated in Section 5, determine those matters of fact involved in government judgments in antitrust litigation, civil or criminal, which are to be given prima facie effect as evidence in a subsequent private suit. After analyzing those decisions in which private parties have attempted to employ government judgments, consideration is given to the effect of the resulting rules on the usefulness of Section 5 as an implement of antitrust policy.

Despite the treble-damage provision of the Sherman Act, the history of antitrust litigation prior to the enactment of Section 5 of the Clayton Act reveals a paucity of successful litigation by private parties, due, in large part, to the great difference in resources between a private victim and the defendant, usually an inordinately powerful business combination. A valuable addition to the arsenal of the plaintiff in a private suit was provided by Section 5 under which a government judgment or decree in a civil or criminal antitrust action is ". . . prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said (antitrust) laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

The article carefully points out that Section 5 is not an estoppel statute but a rule of evidence. The policy behind estoppel by judgment is the necessity of finality in litigation while that behind Section 5 is the suppression of restraints and monopolies. The principles and purpose of estoppel, the author urges, should not be followed when to do so would dilute the strength of Section 5 as a bulwark against antitrust infringement.

The principles of estoppel by judgment are discussed for a clearer insight into the method of determining what matters in the government litigation may be used in evidence in the private suit and the difficulties attending such a determination. The determination of the facts upon which the judgment was founded is the task of the trial judge in the private suit. This necessitates an examination not only of the record, proceedings, and evidence in the case but also of extrinsic evidence and other appropriate material.

In analyzing the cases decided since the enactment of the Clayton Act, the author finds that trial and appellate courts have established such erroneous and disastrous limitations on the force of the statute as: (1) a judgment for the government may not be used in support of a private claim not precisely coincident in time with matters in the government action; (2) a judgment, while proving the existence of an antitrust conspiracy, gives rise to no presumption in favor of the private plaintiff that the conspiracy is continuing, but, on the contrary, to a presumption favorable to the defendants that the conspiracy ended upon entry of judgment, even though compliance therewith has not occurred and is, by the terms of the judgment, postponed until some later date; (3) a judgment may not be used in a private suit based on matters occurring at a place other than that to which the judgment specifically refers; (4) a judgment based on findings of a nationwide violation is not prima facie evidence that any part of the violation occurred at a particular place; (5) a judgment may not be used unless the private and government suits are based on the same subject matter; and (6) no inference may be drawn in favor of a private litigant from any facts proven by such a judgment.

The judicial justification for each of the rules is weighed in the balance and found wanting, the author concluding that these rules—which result from an inappropriate application of principles of estoppel in the construction of the statute, and the hostility of some judges to antitrust cases, especially treble-damage and injunction suits—if left uncorrected, will render Section 5 useless as an instrument for the enforcement of the antitrust laws.

KENNETH F. JOYCE
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ARBITRATION

JUDICIAL REVIEW OF ARBITRATION: THE JUDICIAL ATTITUDE, by Frances T. Freeman Jolet, 45 Cornell L. Q. 519 (Spring 1960).

The author, a member of the New York State Law Revision Commission, inquires in this article into the recurring criticism that judicial review has resulted in undue interference with the arbitration process. Her conclusion is that the charge of judicial intolerance is somewhat unjustified, and the judicial role, in its limited