Under the statute, the landloard is forbidden to attempt to get the tenant to waive its provisions.[96]

In addition to adopting the trust concept, New York has provided further limits on the landlord—he must, in many instances pay interest on the deposits. Wherever the deposit is for property which has six or more units, the landlord must deposit the tenant's money in an interest-bearing bank account for the tenant.[97] The landlord is, however, permitted to deduct a sum equal to one per cent of the security deposit per annum for administrative costs.[98]

A plan similar to that adopted by New York would eliminate the current problem of the security deposit amounting to an interest-free source of capital. It would also preserve the original purpose of the deposit—security. Also, the tenant would be guaranteed additional safety for his deposit. In addition, the deposit could be productive for the tenant if placed in an interest-bearing account.

Some form of legislation is needed in Iowa—now. The seemingly unlimited source of capital must be terminated. Unless some guidelines are established, neither the landlord nor the tenant can be sure of his rights and duties.

V. Conclusion

Presented here has been discussion of three areas of contemporary interest in the field of landlord-tenant law. The Iowa supreme court has placed Iowa among the most progressive states in the nation in so far as protecting the tenant is concerned. The court accomplished this through the recognition of an implied warranty of habitability in housing leases. Also presented was an attempt to bring about a realization of the importance of similar progressive action in the area of rental security deposits. Hopefully, the Iowa court's decision in *Mease* is only an introduction of things to come in the area of landlord-tenant law in Iowa.

Ted L. Hansen

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96 N.Y. Gen. Obligations Law § 7-103-3 (McKinney Supp. 1972-73).
97 *Id.* § 7-103-2-a.
98 *Id.* § 7-103-2.

Case Notes

ANTITRUST—EXCLUSIVE TERRITORIAL ALLOCATIONS BY A COOPERATIVE ASSOCIATION TO THE MEMBER GROCERY RETAILING CHAINS FOR THE SALE OF PRIVATE LABEL, TRADEMARKED PRODUCTS, HELD PER SE VIOLATION OF THE SHERMAN ACT.—*United States v. Topco Associates, Inc.* (U.S. Sup. Ct. 1972).

Topco Associates is a cooperative association formed for the purpose of enabling its members to procure trademarked, private label products for sale in their grocery operations. Topco is wholly owned by its membership which consists of about twenty-five small and medium-sized independent regional supermarket chains. The total sales of these chains in 1967 were exceeded only by the nation's three largest national grocery chains. Intrinsic to Topco's bylaws and operations were grants of exclusive territories for retailing and wholesaling of Topco label products. The government charged that the Topco scheme of dividing markets violated the Sherman Act. The United States District Court for the Northern District of Illinois found no violation.[1] Upon direct appeal[2] the United States Supreme Court *Held*, reversed, Chief Justice Burger dissenting. The Topco scheme of exclusive marketing territories was a *per se* violation of Section 1 of the Sherman Act.[3] *United States v. Topco Associates, Inc.*, 405 U.S. 597 (1972).

Section 1 of the Sherman Act states, in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal. . . ."[4] The earliest cases under this act appeared to hold[5] that Section 1 condemned every substantial restraint upon competition.[6] However, in *Standard Oil Co. v. United States*,[7] the United States Supreme Court announced that it considered itself bound by a "rule of reason"[8] in its application of the

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[1] United States v. Topco Associates, Inc., 319 F. Supp. 1031 (N.D. Ill. 1970); *noted at* 28 WASH. & LEE L. REV. 457 (1971); 47 IND. L.J. 157 (1971).

[2] The appeal from the district court's determination was directly to the United States Supreme Court pursuant to 15 U.S.C. § 29 (1970).

[3] 15 U.S.C. § 1 (1970).

[4] *Id.*

[5] *See* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). *See also* J.W. BURNS, A STUDY OF THE ANTITRUST LAWS 39 (1958).

[6] *Contra* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 785 (1965).

[7] 221 U.S. 1 (1910).

[8] The Court found that the Sherman Act was to be construed in consonance with prior common law rules concerning restraints of trade. *Id.* at 49.

Sherman Act. The "rule of reason" required that only unreasonable restraints be declared illegal.[9] A corollary doctrine shortly thereafter began to develop.[10] This doctrine stated that certain restraints were so inherently unreasonable that no possible justification for them could be heard. Such restraints are now called *per se* violations.[11] The modern definition was enunciated by Justice Black in *Northern Pacific Ry. v. United States*:[12] "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[13] Such "agreements" and "practices" are *per se* violations, and they now include vertical[14] and horizontal[15] price fixing, collective refusals to deal,[16] and tying arrangements.[17] The Court in *Topco* found the exclusive marketing arrangements to be horizontal territorial restraints, and declared them to be *per se* violations. Relying, without further explanation, upon a list of cases[18] to establish a *prior* determination of the existence of a *per se* rule against horizontal territorial restraints, the Court refused to examine the economic issues raised.

Prior to *Topco*, four cases were generally regarded as establishing the *per se* rule against horizontal restrictions. The first case involving divisions of territories by competitors was *Addyston Pipe & Steel Co. v. United States*.[19] Among the practices outlawed was an allocation of territories among apparent competitors. The allocation allowed the favored company to make the low "bid" for pipe supply contracts.[20] This practice was outlawed without regard to any

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[9] *Id.* at 87 (Harlan, J., concurring).

[10] *See* A.D. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 27 (2d ed. 1970).

[11] For a complete discussion of *per se* concepts see von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569 (1964).

[12] 356 U.S. 1 (1958).

[13] *Id.* at 5.

[14] *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[15] *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[16] *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966); Silver v. New York Stock Exch., 373 U.S. 341 (1963); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators Guild of America, Inc. v. F.T.C., 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

[17] *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); United States v. Loew's, Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947).

[18] The list consisted of: White Motor Co. v. United States, 372 U.S. 253, 263 (1963); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899), *aff'g* 85 F. 271 (6th Cir. 1898); United States v. National Lead Co., 332 U.S. 319 (1947); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967); Serta Associates, Inc. v. United States, 393 U.S. 534 (1969), *aff'g* 296 F. Supp. 1121, 1128 (N.D. Ill. 1968). 405 U.S. at 597.

[19] 175 U.S. 211 (1899).

[20] The Court in *Addyston* found it significant that the allocated territories were called "pay territories" by the conspirators. *Id.* at 236.

possible business justification, making it the genesis of the *per se* rule against territorial allocations. *United States v. National Lead Co.*[21] involved a division of world markets for titanium pigments, accomplished through the mechanism of mutual patent licensing agreements. The Court refused to examine the contention that the agreements stimulated technical development without restraining the beneficial effects normally associated with free competition[22] and found that there could be no possible justification for the agreements under the Sherman Act. *Timken Roller Bearing Co. v. United States*[23] also concerned divisions of international markets, through a complex system of patent and trademark licensing and agreements with subsidiaries. The ostensible goal of promoting international trade was ignored, and the Court again found an unjustifiable violation of the Sherman Act. *United States v. Sealy, Inc.*,[24] involved a company wholly owned by its own licensee-manufacturers. Sealy licensed independent local manufacturers to produce and market mattresses under its nationally advertised label, and allocated each an exclusive and limited territory. This situation, somewhat factually similar to the Topco arrangement, was found to be essentially horizontal. The Court further pronounced that such arrangements were *per se* violations.[25]

Mr. Justice Burger, in his dissent,[26] found inadequate precedent for a *per se* ruling in the case. Distinguishing the above cases, he stated that prior to any determination of a new *per se* rule, the Court was under an obligation to assess its economic impact. This analysis, though likely correct, failed to articulate fully the single element that completely distinguishes *Topco* from the above cases. That element is price fixing. All of the above cases involved territorial limitations which enhanced the ability to fix prices. In *Topco* there was no such enhancement. The *Addyston* case clearly states that the territorial restrictions were illegal because they had the effect "to compel the public to pay an increase over what the price would have been if fixed by competition."[27] In *National Lead* the territorial restraints were part of a scheme of "domination and control" over the market.[28] Such a situation obviously implies the enhancement of the ability to fix prices. *Timken* involved an "aggregation of trade restraints"[29] of which the territorial restraints were just one type. Here again the element of price fixing is present. In *Sealy* a system of price fixing was a pervasive part of the outlawed distribution scheme. Although the district court's price-fixing determination was not appealed,[30] the Supreme Court

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21 332 U.S. 319 (1947).

22 It was asserted by the defense that output had risen and prices had fallen, precisely the effects expected from free competition. United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945).

23 341 U.S. 593 (1951).

24 388 U.S. 350 (1967).

25 *Id.* at 357.

26 405 U.S. at 613.

27 175 U.S. 211, 237 (1899).

28 332 U.S. 319, 327 (1947).

29 341 U.S. 593, 598 (1951).

30 388 U.S. 350, 351 (1967).

recognized that the "territorial restraints were a part of the unlawful price fixing and policing,"[31] and seemed to limit its holding to cases where that element was present.[32] It is clear therefore that the cases establishing the *per se* rule for horizontal territorial restraints were all concerned with a resultant increase in the ability to fix prices. The facts in *Topco* reveal this factor to be totally absent.

The arrangements in *Topco* had the effect of granting each member a local monopoly in Topco brand goods. However, this monopoly could not confer the usual ability to fix prices. The prices of Topco brands are effectively set by the prices of national and local brands, and by the competition of other local retailers. With an average local market share of 5.87 per cent,[33] no Topco member could transcend local competition and set his own prices by virtue of being the sole distributor of Topco brands. The maintenance of a noncompetitive price would require collusion by the other local retailers of essentially interchangeable goods.[34] The total absence of price fixing ability would therefore seem to be a viable distinction from prior precedent.

Although, as outlined above, a different result could have been reached within the framework of prior *per se* precedents, *Topco* illustrates two basic problems inherent in the *per se* doctrine. First, *per se* doctrines have been incrementally extended from case to case without any examination of possible justifications for such extensions. Second, no provision is made in current *per se* doctrines for reasonable exceptions when necessary.

Topco is a case of territorial division which has no elements of price fixing. The prior cases, however, all involved divisions incident to an enhancement of the ability to fix prices. Therefore, *Topco* represents a significant extension of the prior doctrine. This extension was made upon an examination of the relevant precedent, but absent a careful scrutiny of possible reasons for such an extension. Similar extensions have been made in other *per se* areas. The tying cases reveal an analogous pattern. It was first held that the tying of sales of unpatented items to sales of patented items[35] constituted an unjustifiable violation of the antitrust laws.[36] The decision was based both on Section

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[31] *Id.* at 356.

[32] Pointing out the presence of price fixing the Court further stated: "It is argued, for example, that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements, and that this sort of venture would be welcomed in the interests of competition and should not be condemned as *per se* unlawful. But condemnation of appellee's territorial arrangements certainly does not require us to go so far as to condemn that quite different situation whatever might be the result if it were presented to us for decision." *Id.* at 357.

[33] United States v. Topco Associates, Inc., 319 F. Supp. 1031, 1033 (N.D. Ill. 1970).

[34] *See, e.g.*, Mueller, *Effects of Antitrust Enforcement in the Retail Food Industry: Price Fixing and Merger Policy*, 2 ANT. L. & ECON. REV. 83 (1969).

[35] Such requirements are called tying arrangements with the patented item being the tying good and the unpatented item being the tied good. P. AREEDA, ANTITRUST ANALYSIS, § 526 (1967).

[36] International Salt Co. v. United States, 332 U.S. 392 (1947).

1 of the Sherman Act and Section 3 of the Clayton Act.[37] Later it was made clear that Sherman Act violations arose only where there existed monopoly power over the tying item.[38] In *Northern Pacific Ry. v. United States,*[39] however, this limitation was overruled, extending the *per se* doctrine for tying arrangements. The Court specifically recognized *Northern Pacific* as an extension of the tying rule.[40] However, it still failed to formulate or examine possible economic justifications for an extension.

This failure, and the similar failure in *Topco* illustrate a common error in the analysis of *per se* cases. Since no justification of *per se* violations may be heard, it is thereby inferred that no justification for *per se* rules must be made. The important distinction between *per se* violations and *per se* rules is ignored. This results in judicially created rules that may never be fully examined in the light of their economic impact. The correct approach would recognize that *per se* rules are inflexibly applied and that a finding of a violation of a *per se* rule effectively ends all economic inquiry. This recognition would require that any extension of *per se* rules be accompanied by a careful examination of its justification and economic impact.

Such an examination in *Topco* would have indicated that no extension of the *per se* rule was advisable. *Topco* itself indicates that the impact of the *per se* rule therein announced can be contrary to the generally accepted purposes of the antitrust laws. Two such purposes are commonly accepted. First is the promotion of economic efficiency through the maintenance of competitively fixed prices.[41] Since the *Topco* arrangement had no effect on prices, this policy was not advanced by the Court's decision. Another policy is the protection of the smaller competitors within our economic system.[42] The district court found that the ability of the regional chains to compete with the national giants would be somewhat impaired by an adverse decision.[43] The result in *Topco* is therefore the antithesis of an important *raison d'etre* of antitrust.

It is possible, however, that the Court was unwilling to limit the *per se* rule against horizontal territorial limitations by refusing to apply or extend it. Current *per se* doctrines make no provisions for exceptions to broad *per se* rules. Faced with such considerations, the Court may feel compelled to reach a decision which is not completely consonant with antitrust goals. This was apparently the result in *Topco*. Narrow, well-defined exceptions to broad *per se* rules may be found to be desirable in cases such as *Topco*. If such exceptions are relatively unusual and fairly observable when they do occur, they will not undermine the predictability and certainty of the *per se* rules themselves.[44]

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[37] 15 U.S.C. § 14 (1970).
[38] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).
[39] 356 U.S. 1 (1958).
[40] *Id.* at 11.
[41] Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965).
[42] Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382 (1965).
[43] United States v. Topco Associates, Inc., 319 F. Supp. 1031, 1043 (N.D. Ill. 1970).
[44] Suggested by P. AREEDA, *supra* note 38, at 364.

Topco, where small competitors have legitimately joined to enhance their competitiveness, could be such an exception.[45] The exception could be defined to encompass only those cases in which no conceivable price fixing was possible and where small ventures enhance their competitiveness against larger concerns.

Antitrust policy represents, to a certain extent, the result of balancing two generally conflicting goals. The desire for efficient large business opposes the "Jeffersonian wish to preserve small business".[46] *Topco* represents the fulfillment of both desires, small businesses gaining economies of scale. *Per se* rules occupy a beneficial place in the structure of antitrust. *Topco*, however, strongly indicates a need for greater flexibility in their formulation.

RICHARD A. MALM

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[45] *Cf.* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

[46] P. AREEDA, *supra* note 38, at 106.

CONSTITUTIONAL LAW—THE USE OF UNCOUNSELED PRIOR CONVICTIONS TO IMPEACH DEFENDANT'S CREDIBILITY DEPRIVES DEFENDANT OF DUE PROCESS OF LAW WHERE SUCH USE MIGHT INFLUENCE THE OUTCOME OF THE CASE.—*Loper v. Beto* (U.S. Sup. Ct. 1972).

The defendant was brought to trial in 1947, upon a charge of statutory rape in a Texas criminal court. The sole prosecution witness was the victim, the eight-year-old stepdaughter of the defendant, who identified him as the perpetrator. Defendant, the only witness for the defense, took the stand in his own behalf, denying the assault. The prosecution was permitted to cross-examine defendant about his prior criminal record to impeach his credibility. The defendant responded, admitting four previous felony convictions between the years 1931-40, none committed within Texas. Following a one-day trial, the jury found defendant guilty and sentenced him to fifty years in prison. On application for writ of habeas corpus to the United States District Court for the Southern District of Texas in 1969, the court denied relief,[1] holding that the question of the constitutional invalidity of the prior convictions was not of constitutional stature nor subject to collateral attack. The Court of Appeals for the Fifth Circuit affirmed,[2] noting that the use for impeachment is not as serious as the use for enhancement of punishment. The United States Supreme Court *Held*, reversed and remanded, four justices dissenting. The use of uncounseled convictions for impeaching the testimony of a defendant is a violation of due process of law. *Loper v. Beto*, 405 U.S. 473 (1972).

The majority, considering the question presented, applied the rule announced in *Gideon v. Wainwright*,[3] and its sequels.[4] The dissent declared that while the *Gideon* rule retroactively[5] applies to uncounseled felony convictions decided in the past rendering them invalid for all *future* purposes, it does not affect such prior invalid convictions used for impeachment *before* the *Gideon* decision.[6] The dissent seemed to be assuming *Gideon* was a radical holding that prevented retroactive application to reverse the lower court holding in *Loper*.[7] An explanation of the decisions leading up to *Gideon* and an examination of the *Gideon* rule applied to subsequent decisions will show the error of the dissent's assumption.

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1 The memorandum and order of the District Court are unreported.

2 Loper v. Beto, 440 F.2d 934 (5th Cir. 1971).

3 372 U.S. 335 (1963): "In the absence of waiver, a felony conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer." Loper v. Beto, 405 U.S. 473, 481 (1972).

4 Burgett v. Texas, 389 U.S. 109 (1967); United States v. Tucker, 404 U.S. 443 (1972).

5 The *Gideon* case was declared retroactive in *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963); *accord*, Kitchens v. Smith, 401 U.S. 847 (1971).

6 405 U.S. 473, 491 (1972).

7 Loper v. Beto, 440 F.2d 934 (5th Cir. 1971).