# Perspectives
## on current developments

### Blowing Bubbles at EPA

It has been vaunted as an "important experiment" and the "first major alternative to the . . . inflexibility" of traditional approaches to air pollution control (William Drayton, assistant administrator of the Environmental Protection Agency). It has been linked to "regulatory market strategies . . . designed to give both industries and local government marketplace incentives which will both speed up pollution reduction and lower its costs" (Barbara Blum, EPA deputy administrator). And it has been noted on the business pages of newspapers around the country as an indication of the Carter administration's new cost consciousness on regulatory policy. On closer inspection, however, EPA's new "bubble" policy, announced on December 21, appears to be a much less dramatic departure from old ways than the publicity suggests.

Under the 1970 Clean Air Act (as amended most recently in 1977) EPA is responsible for ensuring that each state enforces at least the "ambient air quality" (air pollution level) standards set out in the statute. The approach generally adopted in state implementation plans until now has been to specify precise limits on the amount of pollutants that may be discharged by each smoke stack, vent, port or other "stationary emission source" in an industrial or municipal plant. The "bubble" concept would instead set overall limits on pollutants (by various chemical categories) for an entire plant, allowing plant managers to determine the most appropriate mix of controls on individual emission sources within the plant. So long as the discharge level for a particular pollutant did not exceed the authorized level within this imaginary "bubble" over the whole plant, managers would be free, for example, to install additional (but relatively cheap) controls on some of their operations in order to reduce the need for costlier controls in another area. In principle, then, the "bubble" approach could allow substantial savings to industry without relaxing mandated reductions in air pollution.

While EPA's December statement marked the agency's first public endorsement of this approach, the agency's regulations have never forbidden it and some states have already negotiated similar arrangements with individual firms without objections from EPA. The statement was designed "to encourage [states] to consider" the bubble approach in the new round of state implementation plans which, under the 1977 Clean Air Act Amendments, must be submitted for EPA approval this spring. But the statement also sought to clarify the legal limitations on the bubble approach, and these turn out to be quite substantial.

The crucial limitation is that the bubble will essentially not be allowed for new plant construction. Under the 1977 amendments, areas that cannot show they will meet mandated ambient air standards by 1982 (which may turn out to include most of the country's larger cities) must require "the lowest achievable emission rate" from *every* emission source in *every* new facility. What is more, the amendments require new plants in the rest of the country to adopt the "best available control technology" for every emission source, a requirement that obviously allows far less flexibility than promised by the bubble concept. But EPA made no effort to dissuade Congress from enacting these rigid requirements in 1977, nor does it have any present plans to propose modifications to the new Congress.

The insistence on technology requirements for new construction has been characteristic of clean air legislation and EPA regulation from the beginning and the new "bubble" policy does not change it. It can be said in defense of the technology requirements that they help relieve regulators of the burden of determining the precise levels of "safe" or "acceptable" pol-

lution for each kind of pollutant and that they ease the administrative burdens of enforcement. (It is obviously much simpler to check the installation and operation of required equipment on the ground than to carry out continuous monitoring of discharge levels in the air.) Significant as these advantages may be, however, they give little consideration to the costs involved.

In any event, the enforcement emphasis that underlies the technology requirements for new plants can be plainly discerned in the limitations EPA has announced for bubble arrangements within existing plants. The bubble will be available only to individual plants, because the discharge totals from a larger bubble (covering two or more neighboring plants, for example) would be harder to monitor. Moreover, a separate bubble will be required for each category of pollutant: there will, for example, be no trading of sulfur dioxide emissions for hydrocarbon emissions because the equivalents are too difficult for EPA to calculate. Nor will plants be permitted to trade readily measurable emission levels against emissions from less readily measured sources under the bubble. There is no question that EPA must take precautions to ensure that bubble plans do not actually wind up producing more pollution or more dangerous forms of pollution than the present system of individual source controls. But an extremely strict approach to trade-offs would significantly limit the cost-savings that are supposed to be the bubble's main attraction.

In fact, the seventeen-page statement of December 21 does not provide much detail about how these pollution trade-offs will be judged by EPA and the resulting ambiguities may—because of time pressures—limit use of the bubble approach still further. Under the 1977 Clean Air Act Amendments, states without implementation plans approved by July 1, 1979, will be forbidden to authorize any new construction and states may well fear dangerous delays in securing EPA approval if they misinterpret what can come in under the bubble. State regulatory agencies may thus find it safer and easier to refuse to consider bubble proposals from industry for the time being, as EPA officials privately concede. Unfortunately, while the states are free to propose changes in their implementation plans after the July deadline, plants must be held to the original scheduling of control requirements until changes are accepted—even if the company is drafting a bubble proposal for later on. There may be little time to develop the kind of imaginative engineering plans the bubble is supposed to encourage before such alternatives are preempted by the investments required under the original control schedule.

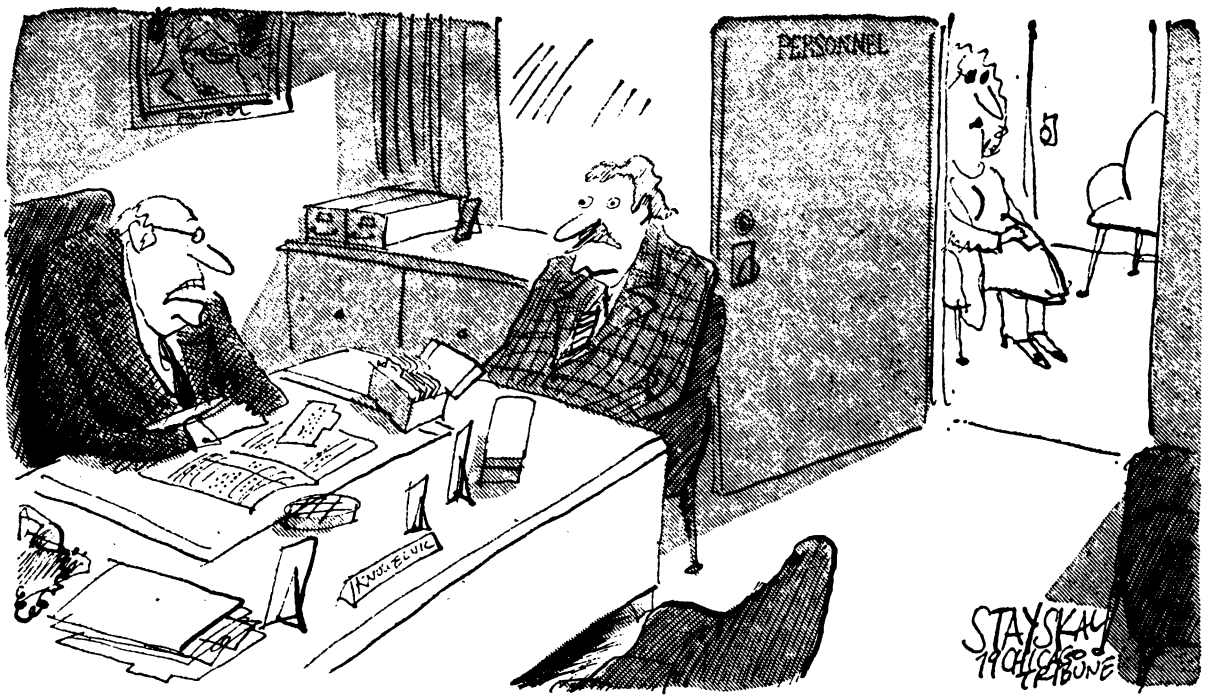
Plants with large and diverse operations (steel plants are a commonly noted example) may well be able to save substantial sums under the new policy, if they can apply sufficient pressure on state authorities for quick and sympathetic action. But it will be several years before the real impact of the policy can be assessed and much will depend on the degree of flexibility EPA displays in working out practical details. In the meantime, EPA may regard its endorsement of the bubble as a step toward "marketplace type incentives," but it seems fair to add that the step is neither swift nor sure—nor long.

## The Sears Catalog of Litigation

Sears, Roebuck and Company, which annually pushes the equivalent of 1 percent of the GNP through its network of retail stores, is certainly accustomed to vast undertakings by now. But the suit launched by the company against ten federal agencies on January 24 is of staggering dimensions even for Sears.

Press accounts of the suit have focused on the fact that a successful outcome would forestall charges pending against the company in the Equal Employment Opportunity Commission. But this ambitious litigation certainly provides massive overkill if it is simply aimed at deflecting the EEOC charges. The complaint was prepared for Sears by Charles Morgan, former Washington national director of the American Civil Liberties Union and has, in fact, all the earmarks of the political suits we have come to expect from "public interest" law firms or traditional civil rights organizations—except that it is *more* ambitious in scope.

The charges voted by the EEOC in April 1977 were based on statistical disparities between the racial/ethnic/sexual composition of Sears's work force and what the commission




*"You're well qualified for the job, Mr. Wimbish, but seeing our company doesn't discriminate by sex in hiring we're looking for a woman to fill it."*

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judged to be the relevant categories in the national labor market. Sears argues that the EEOC has proceeded on the basis of unreliable or unrealistic statistics and, more important, that past action or inaction by the federal government itself has contributed to the underrepresentation of women and minorities in upper-level employment positions. Sears then requests a court order declaring that, "to the extent that government action or inaction created an unbalanced workforce," no federal agency should be allowed to use "statistical disparities to prove non-compliance with anti-discrimination statutes."

The audacity of the suit, though, is that it goes beyond seeking such restraint of the EEOC and requests a whole range of court orders against nine other federal agencies to bring about the circumstances which, in Sears's view, would make continuation of EEOC's statistical enforcement policies legitimate. Thus it requests an injunction requiring the Department of Commerce, the Bureau of the Census, and the Federal Agency Council on the 1980 Census to arrange among themselves to collect appropriate statistics "to enable Sears" and other retailers "to comply with the anti-discrimination statutes" by providing more reliable figures on the number of minorities and women at various levels of skill within reasonable commuting distance of a Sears store or facility. And it demands more vigorous enforcement of existing laws so as to make a more "balanced workforce" available to private employers. Specifically, Sears seeks court orders citing deficient or improper enforcement of:

—Title VI of the Civil Rights Act of 1964 (forbidding recipients of federal financial assistance, including schools and colleges, to practice discrimination on the basis of race or national origin),

—Title IX of the Education Amendments of 1972 (forbidding educational institutions receiving federal financial assistance from practicing discrimination on the basis of sex),

—Title VII of the Civil Rights Act of 1964 (banning racial or sexual discrimination in private employment),

—the Housing and Community Development Act of 1974,

—Title VII of the Civil Rights Act of 1968 (banning racial discrimination in housing),

—the Comprehensive Employment and Training Act,

## CATALOG OF COMPLAINTS

In the course of its thirty-two page formal complaint, Sears points a finger at numerous failings and irregularities in federal civil rights enforcement. Here are some of the background charges that did not find their way into Sears's particular requests for relief.

- Many federal agencies, including several charged with enforcing civil rights measures, have themselves been found guilty of race and sex discrimination. In 1976 alone, the Civil Service Commission issued 300 findings of employment discrimination involving federal departments and agencies. The chairman of the EEOC has stated that private employers "have been held to higher standards" than the federal government in nondiscrimination requirements.
- While the EEOC has charged the retail industry with employing a disproportionate number of women in part-time jobs, the percentage of women in part-time jobs is substantially higher in federal service jobs than at Sears or in private (nonagricultural) employment as a whole. In 1978 Congress actually enacted legislation *encouraging* federal agencies to increase part-time job opportunities, on the finding that, among other things, part-time employment "provides parents opportunities to balance family responsibilities with the need for additional income."
- In 1972 Congress established the Equal Employment Opportunity Coordinating Council to resolve conflicts and inconsistencies among the five agencies with primary civil rights responsibilities, whose heads would compose the council. Guidelines on Employee Selection Procedures were finally promulgated by the council in 1976, but two of the five agencies represented on the council refused to accept all provisions of the guidelines in their own policy statements and regulations. New Uniform Guidelines on Employee Selection Procedures were endorsed by four of the five agencies in 1978, but the uniform guidelines make no mention of present antidiscrimination statutes on behalf of the handicapped, disabled veterans, and the aged.
- The number of unresolved discrimination complaints pending before the EEOC rose from under 25,000 in 1970 to 130,000 in mid-1977. Internal audits of EEOC operations have pointed up destruction and falsification of files, employees performing work for which they had not been properly trained, and continuing friction between district and regional offices of the agency. Meanwhile, although government contractors have been required by executive order to take special "affirmative action" on behalf of minority employment ever since 1965, the agencies charged with enforcing this requirement have still not developed a reliable method for identifying companies that have government contracts. And a 1977 study found that the Department of Labor provided such inadequate guidance concerning the requirements of the 1963 Equal Pay Act that "it has effectively prevented employers from complying. . . ."
- The Bureau of the Census has admitted that the 1970 Census undercounted the total population, but undercounted blacks at a rate almost three times as high as whites and undercounted Hispanics at an unknown but even higher rate than blacks. The count of Hispanics was based on five different identification standards rather than a single, uniform definition.

—the Equal Pay Act of 1963,
—Executive Order 11,246 (requiring companies that have government contracts to take affirmative action to expand employment opportunities for women and minorities), and
—the Age Discrimination Act of 1975.

Sears does not specify what it wants the courts to do about this situation, although (as the company's complaint notes) courts have already imposed extensive procedural requirements on HEW's Office for Civil Rights in response to earlier suits charging inadequate enforcement. The complaint is even less clear about what it expects the court to do about its allegation that the preponderance of white males in upper-level positions in the economy, as at Sears, can be attributed in part to past government policies (notably the G.I. Bill of Rights, veterans preference laws and the selective service system, coupled with traditional restrictions on the number of women and

blacks in the armed forces). The only specific request in this regard seeks an exemption for all retailers from the 1978 amendment to the Age Discrimination Act, so that employees may be forced to retire before age seventy to make room for minority hiring and promotion.

All of this adds up to an extremely tall order for the courts. The suit not only asks them to settle conflicts and ambiguities reaching to the highest level of national employment policy, but also invites them to make basic management decisions for more than half a dozen federal agencies. What this amounts to, in fact, is a plea for the courts to reduce what Sears considers the present chaos in federal regulation of employment practices to a coherent and effective enforcement operation.

Past judicial forays into detailed governmental administration (in cases dealing with schools, prisons, and hospitals, for example) have not been so well received that the courts can feel comfortable taking on the entire system of federal regulation of employment practices. If a more modest assessment of their own place in the scheme of things does not cause the courts to decline Sears's invitation to broad intervention, they may well be scared off in any case for the same reason that Congress and the executive branch have allowed so much conflict and confusion to accumulate in this area to begin with: it is a political minefield. Judicial intervention here will almost certainly engage political passions on the same scale as *Bakke,* with much less prospect of success. It is probable, therefore, that any relief the courts provide will focus upon protecting Sears from unrealistic hiring quotas, rather than upon eliminating government actions that contribute to making quotas unrealistic. Even this more narrow issue, however, may easily be avoided by a judicial determination that Sears has no "standing" to complain until some agency takes compulsory or punitive action against it.

Lawyers for Sears have insisted that a complete vindication of their claims would eventually bring great benefits to minorities and women, even if it temporarily disrupts the operations of the EEOC. They argue that the suit should actually make the government's performance more acceptable both to business and to civil rights activists. That may well be. It will still leave the government's performance unacceptable, however, to individuals such as Allan Bakke and Brian Weber who claim to be the casualties of government-imposed or government-induced affirmative action quotas. In placing the Sears case within the context of the current minority-employment controversy, the most significant factor is that Sears, like the other institutions involved in the recent landmark cases—the University of California in *Bakke,* and Kaiser Aluminum in *Weber*—is defending the quota system. Its pleas for relief include a court order shielding its present system of hiring quotas from "reverse discrimination" suits. Indeed, its entire complaint can be regarded as a plea for such changes in the government's policies and practices as are necessary to enable the quota system to work.

Sears has at least performed a valuable service in highlighting the disarray in federal civil rights and employment regulation (see box). It remains to be seen whether the wider public service that this ambitious suit seeks to perform will be accomplished or—if accomplished—welcomed. And one may wonder whether the courts are really the appropriate arena in which to carry on such public service activities.

## Sour Lemons at the FTC

The Federal Trade Commission's newest monopoly decision illustrates an old problem and raises some new concerns. The old problem is time—how relevant is a decision based on facts over four years old? The new concern is the FTC's notion that monopolists should not be allowed to engage in price competition.

In July 1974, the FTC charged Borden with "unlawfully maintaining monopoly power . . . in the production, distribution and sale of reconstituted lemon juice," through sales of its ReaLemon brand. Hearings began almost a year later and continued—off and on—until February 1976. On August 19, 1976, an administrative law judge held against Borden and ordered what many viewed as drastic relief—that the ReaLemon trademark be licensed to all comers for the next ten years. More than two years later, on November 7, 1978, the FTC agreed that Borden had violated the antitrust laws but found the proposed remedy "unnecessary." Instead, the commission enjoined Borden from a

variety of specific activities, including charging "unreasonably low prices."

From the beginning, this was a strange case. The processed lemon juice market (finally determined to be the appropriate relevant market) was very small, with only about $25 million in total sales, thus making it an unusual target for concern about monopoly. In addition, while ReaLemon was the first product of its kind and had (presumably as a result) dominated the market since its introduction in the 1930s, its market share had fallen rapidly in the years immediately preceding the FTC's original complaint—roughly from 89 percent in 1969 to 75 percent in 1974. The primary complainant itself had made significant inroads—acquiring approximately 15 percent of the national market in only four years—even though it "routinely" (according to the FTC) adulterated its product. In addition, in the two years between the administrative law judge's decision and the FTC's final opinion, Minute Maid (a subsidiary of Coca Cola) introduced a wholly new variant —frozen fresh lemon juice—and acquired over 8 percent of the national market.

Thus, by the time the FTC concluded that Borden's "continued domination of the market" was the result of "manipulation . . . of a strong consumer franchise . . . that enabled it to exert a 'magnetic pull' on the consumer," Borden was already fighting a stiff commercial battle against a price-cutting competitor and an innovative new entrant, neither of whom were apparently aware that Borden had "the power to control prices or exclude competition."

The FTC based its findings of monopoly power not so much on Borden's market share as on its trademark. The ReaLemon mark, said the FTC, had become so well known and accepted that it gave Borden an unfair advantage over other actual and potential competitors. Because the trademark was so well known, Borden could charge higher prices than its competitors. When new competition appeared, Borden thus had the power to respond with a substantial price cut. Since any other brand would have to sell for substantially less than ReaLemon in order to compete with the trademark, the new competitor would have to lower price below cost and eventually go out of business. This process, said the FTC, allowed Borden to exclude equally efficient competitors simply because they did not have the advantage of a well-known trademark.

In the context of this analytical framework, the FTC found Borden guilty of "selective price cuts . . . aimed at reducing the price spread between Borden and its competitors . . . with the specific intent of recapturing market share. . . ." In other words, to the FTC, Borden's monopoly market share was not "economically inevitable" since Borden was under no compulsion to respond to new competition. Borden had thus maintained its monopoly, and in so doing, violated the law.

The FTC has been a strong supporter of legislation to create a new, "no-fault" monopoly offense, eliminating the "bad conduct" requirement in the current law. If the commission's decision in this case stands on appeal, there will be little need for such legislation, since the Federal Trade Commission Act will for all practical purposes already include the offense. After all, the FTC charged Borden not with *creating* an unlawful monopoly, but merely with unlawfully *maintaining* a (presumably legally obtained) monopoly. And it did not charge that any of Borden's actions, standing alone, was illegal or that Borden's conduct was "bad" in any normal sense of the word.

This opinion is bound to fuel the sort of charges that led the *Washington Post* to label the FTC our "National Nanny." FTC Chairman Pertschuk, for example, pointed out that consumers are obviously confused "to the extent that [they] perceive ReaLemon to be objectively superior to other brands. . . ." The fact that people prefer ReaLemon was traced by the commission to "spurious product differentiation" that exerts a "magnetic pull on the consumer." No one mentioned the possibility—despite the adulteration by ReaLemon's leading competitor—that people might know and trust the ReaLemon brand and be willing to pay a few cents more on an infrequent purchase for this familiarity and reliability.

Some have questioned whether the FTC, in this opinion, is protecting competition—or competitors. Its order enjoined Borden from (1) charging different prices in different regions of the country and (2) selling at "unreasonably low prices." The first injunction will make it more difficult for Borden to respond to local or regional competition. If Borden wants to lower price in Philadelphia in response

# In Brief–

**Ungoofing.** It is common for critics to charge that Congress imposes costly new regulatory requirements before really considering their need. It is less common for Congress to respond in time to avoid the damage. But that is what Congress has done in repealing a particularly costly section of the Right to Financial Privacy Act of 1978.

Section 1104(d) of the act required all financial institutions to notify *all* their customers of all their rights of recourse in case a government authority should ask the institution for the customer's records. The notification was to take place not when there was such a request but "promptly" upon the act's becoming effective (March 10, 1979).

The banking industry estimated it would cost $922 million to carry out the requirements of section 1104(d), more than half of that ($515 million) being for manual retrieval of inactive accounts. Pressure was put on the Congress to retrieve the situation before the act went into effect. Curiously, the legislative history of the bill does not mention the offending provision, so it is hard to say why Congress thought it was needed in the first place. But the significance of the repeal, passed by both houses this February, is clear enough. The repeal is, as Republican Thomas Evans of Delaware put it, to be "the first in a long series of measures which will remove costly and unnecessary federal requirements."

Customers will be notified of their rights of recourse when the government wants to look, is looking, or (in the case of a search warrant) has looked at their records, but there will be no blanket notification. The banking industry will be spared the expense of retrieving dead accounts. And Congress will have saved itself a scolding on at least one goof.

**Snail Darter Lives On!** When last heard from in these pages, the snail darter was holding its own against the multi-million dollar dam that threatened its "critical habitat" (see *Regulation,* January/February). Now the three-inch fish has triumphed for good.

Readers will recall that the Supreme Court barred completion of the Tellico Dam on a literal reading of the Endangered Species Act, and that the Congress reacted by authorizing a cabinet-level Endangered Species Committee to grant exemptions to the rigid provisions of the act. Meeting on January 23, the committee voted unanimously against exempting the Tellico Dam. It not only found that alternatives to the dam were feasible but also that one alternative would be more cost effective than completing the dam.

It was lucky for the snail darter. The staff report prepared for the committee by the Interior Department strained without much success to establish a larger significance for the tiny fish. "Knowledge of the snail darter's highly selective food habits and habitat choice makes the species interesting and gives esthetic pleasure to some people," observed the report. With an equally straight face, it offered a plea for the darter's historical value: "We can assume that the present controversy will eventually have significant historical value. Some of this value may accrue to a preserved snail darter by virtue of the species central role in the controversy."

**Too Much Civic Spirit?** The Federal Trade Commission is considering a rule that would require used-car dealers to notify customers of the mechanical deficiencies in each car sold. According to the commission's staff, consumers generally cannot judge engine condition and frequently wind up making purchase decisions on the basis of more visible but less reliable indications of value, like body condition. The staff report makes a credible case that the disclosure requirements would correct for this market imperfection at little cost, allowing consumers to pay for engine quality, not surface glitter.

But the report embellishes its case with an argument that may distress advocates of corporate social responsibility. It seems that car buyers often rely on a dealer's reputation. Not content with pointing out that reputations may be misleading indicators of car values, the report warns that "reliance on reputation can lead to resource misallocation. Dealers who might otherwise invest more in vehicle quality or lower prices instead must compete in 'reputation.' Thus, for example, numerous dealers who testified at the hearings made a point to list their extensive involvement in civic affairs." Presumably the FTC's used-car rule would avoid this waste. Whoever said the FTC was too fascinated by fuzzy-headed "social considerations" to take a hard view of the requirements for competition?

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to localized competition there, it will have to lower price everywhere unless it can show that the different price is cost-justified, not just competition-justified. This can be expected to discourage Borden from lowering price anywhere. The second injunction will offset the power of the trademark and limit *all* responses to new competition—as Commissioner Pitofsky put it—to a "restrained and moderate price cut ... perhaps down to average full cost, since this would give the challenger time to become established in the market, at which time the two could fight it out on the merits."

While it is not at all clear what the FTC means by "fight it out on the merits," it certainly means bad news for consumers. Any rule that prohibits a response to competitive price-cutting inevitably means higher prices. Borden's

new bureaucratic straitjacket prevents it from fighting anything out with inefficient producers, who will be allowed to gain market share until Borden is no longer a monopolist. By then Borden will presumably be free to reduce its price closer to marginal cost and regain its market share, thereby (eventually) benefiting the long-suffering consumer. The FTC has taken what appears to be a competitive monopolist and turned it into an "easy life" monopolist by requiring it to hold a pricing umbrella over inefficient competitors. In the process, the FTC has taken onto itself the job of deciding what prices are "reasonable" in the processed lemon juice market—the kind of thing it continually urges the Interstate Commerce Commission and other regulatory agencies to stop doing, and the kind of thing the Supreme Court has consistently declined to do on the grounds that it is impossible.

If this is an example of the kind of result that a "no-fault" monopoly statute would produce, such a statute would indeed be against the consumers' best interests. If using a trademark is monopolistic—if building up brand loyalty can be deemed contrary to consumer interests—then any process by which consumers are informed can be challenged. When the FTC decides that it knows best for consumers (even in the absence of fraud or deception) simply because it is more sophisticated, and is able to enforce its prescriptions under an antitrust banner, we have moved a very long way indeed from Senator Sherman—and certainly not in the right direction.

## No Confidence in Old Trusts

The National Commission for the Review of Antitrust Laws and Procedures, which issued its final report to President Carter and Attorney General Bell on January 24, 1979, may prove to have more impact on federal regulatory reform than anyone anticipated when the panel was assembled last June. The bulk of the report is taken up with recommendations for improving antitrust trial procedures and for amending the Sherman Antitrust Act to help speed up "big cases" like the Justice Department's action against IBM, now in its eleventh year. (See Sims, "The President's Commission on Antitrust," page 25.) But the report also devotes considerable attention to the possibility of removing antitrust exemptions from several regulated industries—thus allowing the clumsy and ineffectual regulatory structures in these industries to be removed at the same time. Its recommendations would in any case allow the Justice Department to enforce true competition in industries where, with the help of government regulation, it has often been notably lacking.

The commission was drawn into these questions of regulatory policy through one element of its original charge—that it examine "the desirability of retaining the various exemptions and immunities from the antitrust laws. . . ." Because most of these exemptions are connected with larger regulatory schemes —usually putting the particular industry under the tutelage of a specialized regulatory agency —the commission quite early decided it would have to consider the "entire economic regulatory system" in each case in order to evaluate the antitrust immunity involved. It examined five industries and relied heavily on previous critiques of these regulatory programs, notably the Ford Administration's Task Force on Antitrust Immunities (which issued extensive reports on three of the five industries in 1975). The commission's findings are not startlingly new, but the prestige of its membership (which included key members of Congress, high regulatory officials in the Carter administration, and legal scholars and practitioners) and their near unanimity on most points should give a significant new impetus to the reform proposals.

*Surface transportation.* The report's recommendations here were the most sweeping. They urge a total dismantling of the Interstate Commerce Commission's regulation of trucking, and unconditional repeal of the antitrust immunity for joint rate-setting by truckers and by railroads provided in the Reed-Bulwinkle Act of 1949. In expressing general sympathy for deregulation of railroads, however, the report does include some caveats about the risks of wholesale abandonment of existing lines in a completely unregulated environment.

*Insurance.* Much state regulation of insurance is made possible by the antitrust exemp-

tion for the insurance industry contained in the 1949 McCarran-Ferguson Act. Here the commission's report goes even further than the Ford task force (which had proposed consideration of an alternative federal regulatory scheme). The commission found "a general consensus that most segments of the industry are competitively structured" and therefore that existing state regulations simply increase costs. The report acknowledges the concerns expressed by some commission members that a free market in insurance might put onerous burdens on those least able to pay and most in need of insurance. But it does not go beyond suggesting further study of this problem, and its recommendation for repeal of existing antitrust exemptions is plainly premised on the emergence of an essentially free market in insurance. The report does, however, note the need for a statute "affirming the lawfulness of a limited number of essential collective activities" relating to data collection and computation of actuarial statistics.

*Agriculture.* With surprisingly little controversy, the commission concluded that the 1922 Capper-Volstead Act's antitrust exemption for agricultural cooperatives is not adequately balanced by the secretary of agriculture's present authority to act against "undue price enhancement"—an authority that has never once been exercised. The report urges (with only one dissent) that cooperatives should generally be subject to antitrust constraints but that their initial formation not be considered a per se violation of the antitrust laws. This would allow small farmers to pool their output for marketing purposes while prohibiting cooperative mergers or intercooperative agreements when their effect may be a substantial lessening of competition in some relevant market. For all its obvious appeal, this compromise may be difficult to express in effective legislative language or to enforce in practice.

*Ocean shipping.* The commission recognized the large economic costs imposed by the present regulatory framework in this area—essentially self-regulation by carriers with loose oversight by the Federal Maritime Commission. The report does not quite call for wholesale antitrust action against the existing system of shipping conferences (which establish common rate structures among shipping companies with parallel routes). But the commission did express considerable doubt about the two principal arguments for the conference system: that international comity considerations preclude the United States from unilaterally changing its regulatory policy and that national defense considerations require protection of U.S. flag carriers from low-cost competition. The commission had no hesitation, at any rate, in recommending that the existing antitrust immunities provided in the Shipping Act of 1916 ought to be significantly narrowed (as the Ford task force had earlier recommended). For one thing, its report urges that conferences be restrained from efforts to prevent independent action by member companies. The report also recommends that conferences be forbidden from entering dual rate agreements, rate agreements with independent lines, or pooling agreements with other conferences.

*Export associations.* The report asks Congress to rethink the desirability of the Webb-Pomerene Act of 1918, which provides antitrust exemption for export associations. The commission took this position despite warnings from the Commerce Department and the commission's own business advisory panel that enforcement of antitrust laws could hamper U.S. companies in international competition. Acknowledging these concerns, the commission did not urge outright repeal of the present exemption but did recommend that Congress narrow the antitrust immunity of export associations by making it contingent on a showing of need in each situation.

*The proposed Competition Improvements Act.* The commission endorsed the competition improvements bill proposed by Senator Kennedy and introduced in the last Congress as S. 2625. The measure would require regulatory agencies to study each new decision's potential effects on competition and to ensure that decisions are structured to keep burdens on free competition to a minimum. Though the proposal has been around for some time, it has been held up by concern that it would increase the cost and delay of regulatory decision-making, as the requirement for environmental impact statements has done.