North Carolina Libraries and the Book Price Fixing Suits

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In June, 1969, a number of public libraries and school systems in North Carolina were notified by the clerk of the United States District Court for the Northern District of Illinois, Eastern Division (Chicago), that the School District and city of Philadelphia had filed a class action[1] on behalf of the public schools systems in the United States with an enrollment of 12,000 students or more and all state and local governments which maintain libraries with annual book funds in excess of $10,000. The notice explained that the plaintiffs in the suit were seeking treble damages from certain book publishers and wholesalers[2] who had allegedly conspired to fix the prices of library editions[3] of children's books between 1959 and 1967. The notice advised further that the defendants had denied that any illegal agreement or conspiracy had ever existed and therefore were not liable.

Those libraries receiving the notification were advised by the clerk that they had the option of being excluded from the class and therefore not bound by any judgment entered in the action. If they desired to be included they could be represented by counsel of their choice; otherwise, they would be represented by the attorneys for the Philadelphia plaintiffs. A form was enclosed with the notice to be used to indicate whether the library system wished to participate in the action. The form included a statement to the effect that the libraries which did participate might be requested to provide a list of library editions of children's books purchased during the period from 1959-1967.

Shortly after the receipt of this notice Philip S. Ogilvie, the North Carolina State Librarian, notified the public libraries in the class that the Attorney General of North Carolina would represent the state and local governments in the litigation then pending in Chicago. A similar communication was addressed to the school systems concerned by A. C. Davis, the Controller of the State Board of Education. On July 31, 1969, Jean A. Benoy, a Deputy Attorney General in charge of the Antitrust Division of the North Carolina Attorney General's Office forwarded a notice of appearance to the clerk of the district court in Chicago advising him that he would represent all North Carolina public institutions which were members of the class of plaintiffs.

The School District and City of Philadelphia had commenced this suit in June, 1966 following hearings on alleged price fixing held earlier that year by the Subcommittee on Antitrust and Monopoly of the United States Senate Committee on the Judiciary. The Philadelphia plaintiffs charged that the

defendant book publishers and wholesalers had engaged in a horizontal and vertical price fixing conspiracy with respect to library editions of children's books in violation of the Sherman Antitrust Act.[4]

The term "price fixing" refers to any combination by individuals, corporations, or associations to avoid competitive pricing by charging identical prices or by raising or lowering prices at the same time.[5] A price fixing agreement can be either horizontal, i.e. between manufacturers or it can be vertical, i.e. between a manufacturer and a wholesaler. Because price fixing agreements eliminate one form of competition they are said to be a restraint on trade and therefore illegal *per se*. Evidence of the reasonableness of the prices fixed or that no harm is done or intended, is immaterial. Agreements to fix prices violate section 1 of the Sherman Act which provides that:
"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 hereby declared to be illegal . . ."[6]

The prohibitions of the Sherman Act create criminal offenses punishable by fines and imprisonment and are enforced by the United States Department of Justice. The Act also charges the Department of Justice with the duty of instituting civil proceedings to prevent and restrain violations of the law. The enforcement of the Act does not depend exclusively on government agencies. Section 15 of the Act provides that private persons who suffer damage as a result of its violation may sue offenders and recover threefold the damages sustained as well as attorney's fees. This provision is for the purpose of multiplying the number of agencies which will enforce the law thereby increasing its effectiveness.[7]

Prior to the Senate hearings a number of librarians had been concerned for sometime with the pricing of library editions. At the Midwinter Conference of the American Library Association in January, 1965, this subject was discussed at a meeting of library directors and coordinators of children's work. The matter had been invited to the attention of the Federal Trade Commission, the Department of Justice, and members of Congress by individual librarians. Finally Senator Philip A. Hart (D. Mich.), Chairman of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, scheduled hearings on the subject beginning March 23, 1966. He opened the hearings with an expression of interest in book pricing practices because of the concerted campaigns to increase appropriations for school and public libraries.[8] Of special concern was the question of whether increased appropriations were being absorbed by higher book prices.

During the three days of hearings testimony was presented by librarians, publishers, and wholesalers. The major complaint of the librarians who testified was the difficulty if not impossibility of obtaining competitive bids on publishers' library editions.[9] While discounts of from 30 percent to 40 percent were offered on trade books, no discounts were offered on library editions which were sold at so called "net prices" set by the publisher. This was of special significance in the large library systems which bought numerous copies of books and were normally able to bargain for larger discounts. The testimony also brought out the fact that while these library editions were

more expensive, the bindings varied from poor to excellent in quality. Frequently they did not justify the extra cost. In regard to the complaint about poor bindings it was pointed out by representatives of the publishing industry that the American Library Association had not yet set up performance standards for bindings of library editions.[10]

Another complaint of the librarians was that the publishers were not maintaining adequate inventories of trade editions and that when trade editions were ordered, the higher priced library editions were sent instead. Furthermore, many books on the young adult level were appearing in library editions. There was concern expressed as to whether these books would continue to be available in the trade editions.[11]

Although there was evidence presented that jobbers were under pressure to sell only at the net price,[12] the publishers who testified categorically denied that there were any illegal agreements and insisted that list prices, net prices, and discounts to libraries were suggested prices only.[13] The following explanation of the net pricing system was offered. When publishers began to issue library editions they followed the practice of library prebinders.[14] Library prebinders had always offered their editions to libraries at a net price. Since they did not offer these editions to the general public at retail, there was no "retail" or "list" price from which they could offer libraries a discount. To set up a fictitious retail list price for a book not sold at retail, and to offer libraries a discount instead of quoting a library net price to begin with, would have been deceptive. It was pointed out that almost 80 percent of all children's books are sold to school and public libraries and that buying patterns indicated that librarians overwhelmingly prefered publishers' library editions.[15] The publishers denied that they were making excessive profits. The American Book Publishers Council report for 1964 was cited which showed earnings of only 4.8% on net assets. It was pointed out, in addition, that the price of books had not risen as much as the cost of library buildings, equipment, and librarians' salaries. According to the statistics cited the price of books rose 22.4 percent during the seven year period from mid-1958 to mid-1965, while starting salaries of librarians rose 31.2 percent.[16]

In late 1965 the Antitrust Division of the Department of Justice started an investigation of suspected price fixing in children's books. The inquiry was continued by a grand jury impaneled by the United States District Court for the Northern District of Illinois, Eastern Division (Chicago). The grand jury subpoened documents and heard testimony but did not return an indictment. On the basis of the findings of the grand jury the Department of Justice filed civil suits against eighteen publishers[17] on April 18, 1967. Each was accused of joining unnamed co-conspirators including book wholesalers, in fixing and maintaining prices of library editions of children's books in violation of section 1 of the Sherman Act. The complaints alleged that price competition had been suppressed and that purchasers had been deprived of the benefits of competitive bidding. Relief in the form of a civil judgment forbidding the publishers to fix prices or to use the term "net" in price lists was requested. The court was also asked to enjoin the defendants from suggesting resale prices.[18] None of these cases reached the trial stage. On October 23,

1967, the Department of Justice announced that the terms of a consent decree had been agreed upon by all parties.[19]

In the meantime a number of state and local governmental units had initiated legal actions against the book publishers and wholesalers. These plaintiffs sought to intervene in the consent decree proceedings and to persuade the Department of Justice to accept the consent decree only if it contained at least a limited admission of guilt. Such an admission could be used as prima facie evidence of violation of the law in the private actions and would be of great advantage to the plaintiffs.[20] Such evidence, however, would be subject to rebuttal by the defendants. The plaintiffs also sought access to the grand jury documents which had been collected by the Department of Justice. This request to intervene was denied by the court and the denial was affirmed on appeal to the United States Supreme Court.[21] On November 27, the court approved the terms of the consent decree as first announced thereby making the settlement final. The court did however, order that the documents held by the Department of Justice be impounded subject to discovery upon appropriate order in the private treble damage actions.[22]

The consent decree ordered the defendants to cease and desist from determining the price at which any reseller could resell books to libraries. The decree required the publishers to include a statement in their catalogs to the effect that the wholesaler was free to charge whatever price he chose. The publishers were also required to publish a copy of the decree in *School Library Journal* within two months.[23]

Because of the large number of private antitrust suits initiated by governmental agencies in the United States district courts throughout the country, the Coordinating Committee on Multiple Litigation[24] ordered that hearings be held in Kansas City in April, 1968, to determine the best ways to coordinate the pretrial procedures. These hearings were attended by counsel representing each party and by the district court judges to whom the cases had been assigned. Interrogatories and other discovery procedures similar to those used by the Philadelphia plaintiffs were recommended for adoption. Before the end of April the Coordinating Committee was replaced by the Judicial Panel on Multidistrict Litigation which had just been created by Congress.[26] In August, 1968, the Judicial Panel ordered the transfer of all suits against the publishers and wholesalers to the district court in Chicago for pretrial proceedings on the grounds that this would best serve the convenience of parties

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and witnesses and the just and efficient conduct of the litigation. Provisions had been made earlier to set up a documentary depository in Chicago.[27]

The School District and City of Philadelphia had originally filed their suit as a class action encompassing all public libraries and school systems in the United States. The defendants had successfully contended that this class was so vague that its members were not identifiable and that the class as defined would be unmanageable. It was estimated that such a class would include 60,000 libraries. The plaintiffs then amended their complaint to reduce the class membership to public school systems with enrollments of at least 12 000 students and public libraries with annual book funds of $10,000.00

LIBRARY EDUCATION QUESTIONNAIRE

A consensus of suggestions derived from the reports of the participants at the Workshop on Library Education for North Carolina, held at Pinehurst, February 13-14, indicates that opportunities for continuing education, specifically in the new developments in library science, are among the most important needs of North Carolina librarians.

Therefore, the Committee on Education for Librarianship submits the following questionnaire in an effort to identify the areas in which the needs are greatest.

To this end, may we urge you to fill out this questionnaire and send it to

Miss Helen Hagan, Chairman
Education for Librarianship Committee, NCLA
William Madison Randall Library
University of North Carolina at Wilmington
Wilmington, North Carolina 28401

The results of the questionnaire will be submitted to library education agencies to serve as suggestions in planning workshops, institutes, extension courses, etc. Please answer the following questions:

A. In what areas do you feel the greatest need for continuing education?

B. What types of programs would be most helpful to you?

C. Would you be interested in having an open forum for the discussion of this subject during the October NCLA Conference?

(PLEASE CLIP ALONG DOTTED LINES AND SEND TO ABOVE ADDRESS)

or more. On the basis of statistics available in the *American Library Directory* and the *Education Directory*, published by the United States Office of Education, this class was estimated to include about 1,224 library systems. The district court in Philadelphia refused to permit the plaintiffs to maintain such a class action because in its opinion there were no questions of law and fact common to all members which predominated over questions affecting individual members. It was anticipated also, that because the various library systems had different requirements and methods of purchasing, great difficulties would ensue.[28]

Following the transfer of the action for pre-trial purposes to Chicago, the Philadelphia plaintiffs asked the district court there to reconsider their request for a national class action. They argued that subsequent developments had substantially altered the desirability for such. This time the court determined that the four requisites for a class action were satisfied. These requirements are that the class is so numerous that joinder of all members is impractical; that there are common questions of law and fact common to the class; that the claims or defenses of the repersentative parties are typical of the class; and that the representative parties will fairly and adequately protect the interest of the class.[29] The court also took into consideration the fact that many claims were too small to justify separate law suits and that the one year suspension of the statute of limitations had expired.

The court directed the plaintiffs to prepare a mailing list of all members of the class and to draft a letter of notification to advise them of the pending litigation. The letters were to be mailed on official stationery to avoid the appearance of claim solicitation.[30] At this point the North Carolina library systems became involved in the litigation.

In January, 1970, counsel for the Philadelphia plaintiffs advised the members of the national class they were exploring means of settlement with the defendants. In this connection the court had indicated it would require certain purchase information from class members prior to its consideration of a proposed settlement. Each class member was requested to complete a set of forms specifying actual or estimated expenditures for all library editions of children's books purchased from each defendant for each calendar or fiscal year from 1959 to 1970. Requested also, was an estimate of the percentage of library editions of children's books purchased from each of the defendants during the same period.[31] Earlier, counsel for the Philadelphia plaintiffs had requested certain library systems participating in the suit to furnish figures for their total library book fund or expenditures for the calendar or fiscal year ending in 1966, the year the Department of Justice filed actions against the eighteen publishers. It was explained in this request that although the litigation involved library editions, the total library book fund figures were being utilized because of the difficulties in segregating figures for library editions only.[32]

A settlement was finally negotiated which was satisfactory to all parties. The settlement provided for the award to the plaintiffs of $940,000.00 plus interest from the middle of January, 1970. The interest through August was estimated to amount to about $35,000.00 From this award $35,000.00 was to

be deducted for costs incurred by counsel for expenses incurred in the prosecution of the lawsuit and $195,000.00 was to be awarded for attorneys' fees. Eighty-five percent of the remaining funds was to be apportioned to the public school systems in the class on the basis of their 1964-1965 enrollment. The remaining 15 percent of the funds was to be apportioned to public libraries on the basis of their 1966 total book purchases.[33] This settlement was approved by the court and became final on November 4, 1970, at which time the actions against the publishers and wholesalers were dismissed.[34]

A certified public accounting firm was hired to make a breakdown of the settlement, institution by institution. Figure 1 indicates the amount received by the North Carolina library systems which participatd in the action.[35]*

*The author acknowledges the assistance received from an unpublished research paper written by Susan Cowilich in the fall of 1968 entitled *Alleged Price Fixing by Publishers and Wholesalers*. Miss Cowilich's paper is on file in the University of North Carolina School of Library Science Library.

FIGURE 1

Allocations to North Carolina Library Systems

Albemarle Regional Library	115.14
Craven-Pamlico-Carteret Regional Library	113.54
Gaston County Public Library	632.91
Hyconeeche Regional Library Inc.	118.81
Kinston Public Library-Neuse Regional Library	193.31
Northwestern Regional Library	207.20
North Carolina State Library	324.32
Public Library of Winston-Salem & Forsyth County	586.76
Pack Memorial Public Library	381.56
Stanford L. Warren Public Library	333.86
Wilson County Public Library	168.21
Buncombe County Schools	2,373.44
Charlotte City-Mecklenburg County	8,597.66
Cumberland County Schools	2,676.17
Forsyth County Schools	5,533.99
Greensboro City Schools	3,426.96
Guilford County Schools	2,446.10
Harnett County Schools	1,562.11
High Point City Schools	1,537.89
Johnson County Schools	2,058.59
Nash County Schools	1,598.44
New Hanover County Schools	2,143.36
Onslow County Schools	1,586.33
Robeson County Schools	1,840.63
Rowan County Schools	1,683.20
Wake County Schools	2,664.06
	$44,904.55

FOOTNOTES

1. One or more members of a class may sue or be sued as the representative party on behalf of all members of the class as provided by rule 23 (a) of the Federal Rules of Civil Procedure.
2. The names of the defendants appeared in a list attached as follows: Harper & Row Publishers, Inc., Thomas Y. Crowell Company, The MacMillian Company, Dodd, Mead & Company, Inc., McGraw-Hill Book Company, Bobbs-Merrill Company, Inc., Golden Press, Inc., Holt, Rinehart & Winston, Inc., Harcourt, Brace & World, Inc., Grosset & Dunlap, Inc., Random House, Inc., E. P. Dutton & Company, Inc., Alfred A. Knopf, Inc., William Morrow & Company, Inc., Franklin Watts, Inc., Charles Scribner's Sons, Henry Z. Walck, Inc., A. C. McClurg and Company, Children's Press, Inc., Associated Libraries, Inc., The American News Company, The Central News Company Division, Bookazine Company, Bro-Dart Books, Inc., Rand McNally & Company, Cosmo Book Distributing Company, Campbell & Hall, Inc., Doubleday and Company, Inc., Little, Brown & Co., Houghton-Mifflin Company, C. P. Putnam's Sons, H. R. Huntting Company, Inc., David McKay Co., Inc., Imperial Book Company, Baker & Taylor Co., Prentice-Hall, Inc., The Viking Press, Inc.
3. Library editions are books with reinforced bindings designed especially for use in public and school libraries. They are expected to withstand more wear than trade books, the type books that are sold in book stores.
4. 15 U.S.C. §§ 1-7 (1964).

5. For an analysis of price fixing see A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 32-36 (2d ed. 1970) [hereinafter cited as NEALE].
6. 15 U.S.C. § 1 (1964). Exempt from the provisions of this Act are agreements permitted under state "fair trade" laws, a subject not at issue here.
7. For a discussion of the administration of the antitrust laws see NEALE 373-400.
8. *Alleged Price Fixing of Library Books, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate,* 89th Cong. 2d Sess. 1 (1966) [hereinafter cited as *Alleged Price Fixing*].
9. *Id.* 3-35.
10. *Id.* 44.
11. *Id.* 29.
12. *Id.* 8-9, 18, 100.
13. *Id.* 83, 111, 126.
14. This term refers to certain commercial binders who buy the printed pages from publishers and bind them in sturdy bindings especially for library use. These books are expected to last the life of the sheets. There was testimony at the hearings that fewer titles were being made available to prebinders than heretofore. *Alleged Price Fixing* 95.
15. *Id.* 128-129.
16. *Id.* 113.
17. Defendants in these actions were Bobbs-Merrill Co., Inc., Children's Press, Inc., Dodd, Mead & Co., Thomas Y. Crowell Co., E. P. Dutton & Co., Golden Press, Inc., Grossett & Dunlap, Inc., Holt, Rinehart and Winston, Inc., Harper & Row Publishers, Inc., Little, Brown & Co., Inc., The Macmillan Co., William Morrow & Co., G. P. Putnam's Sons, Random House, Inc., Charles Scribner's Sons, Viking Press, Inc., Franklin Watts, Inc., and Henry Z. Walck, Inc.
18. United States v. Harper & Row Publishers, Inc., NEW U. S. ANTITRUST CASES [1961-1970 Transfer Binder] TRADE REG. REP. cases 1933-1950 (N.D. Ill. 1967).
19. N.Y. Times, Oct. 24, 1967, at 61, col. 2. A consent decree has certain advantages and risks for both sides. It gives the Department of Justice the relief it considers necessary without the expense of a trial. It achieves a quicker result since antitrust litigation can be spread over many years. It has the additional benefit for the defendant in that it avoids the deployment of evidence in open court and the consent decree itself is not admissible in evidence in a private treble-damage suit. The risk for the government is that it may not succeed in its negotiations in obtaining the full relief it regards as necessary. NEALE 380-381.
20. 15 U.S.C. § 16 (1964).
21. City of New York v. Harper & Row Publishers, Inc., 390 U.S. 715 (1968).
22. The defendants sought a reversal of this ruling by the United States Supreme Court. Certiorari, however, was denied. Harper & Row Publishers, Inc. v. Decker, 394 U.S. 944 (1969).
23. United States v. Harper & Row Publishers, Inc., 1967 Trade Cas. para. 72,256 (N.D. Ill 1967). The notice appeared in 14 SCHOOL LIBRARY J. 839 (1967).
24. Following the successful prosecution of the electrical equipment manufacturers for antitrust violations in the early nineteen sixties more than 1,800 separate damage actions were filed in thirty-three district courts. Unless coordinated action was taken it was feared that conflicting pre-trial discovery demands would disrupt the functions of the federal courts. As a result the Judicial Conference of the United States set up the Coordinating Committee to supervise nationwide discovery proceedings.
25. The Federal Rules of Civil Procedure provide various methods for discovery. These rules rest on the basic philosophy that prior to the trial every party is entitled to disclosure of all relevant information in the possession of any person unless the information is privileged. Among these discovery devices are oral depositions, depositions on written questions, interrogatories to parties, and orders to produce documents.
26. 28 U.S.C. § 1407 (Supp. 1965-1969).
27. *In re* Library Editions of Children's Books, 297 F. Supp. 385 (Jud. Panel Mult. Lit. 1968). By this time there were twenty-one private antitrust treble damage suits pending in eight United States district courts.
28. School Dist. of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967).
29. Fed. R. Civ. P. 23 (a).
30. Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969). By this time more than forty suits had been filed against the publishers.
31. Letter from David Berger to all class members, Jan. 27, 1970.
32. Letter from David Berger to all class members, Sept. 30, 1969. The letter indicated that book fund information for some of the library systems had been obtained elsewhere.
33. Notice of Settlement, School Dist. of Philadelphia v. Harper & Row Publishers, Inc. (N.D. Ill. Sept., 1970). The allocations to the Michigan library systems were based on a somewhat different formula.
34. Order Approving Allocation and Distribution of Settlement Funds, School Dist. of Philadelphia v. Harper & Row Publishers, Inc. (N.D. Ill. Nov. 4, 1970).
35. Sixteen North Carolina library systems included in the class chose not to participate in the law suit.