tion" of §7 or that the acquisition caused anticompetitive effects under the actual potential competition and entrenchment theories, either standing alone or as bolstered by the horizontal aspects of the merger. In re Heublein, Inc., 10/7/80. 986 ATRR A-2.

Attorneys

Fees. Apparently a case of first impression, the U.S. District Court for the Southern District of New York decides that the attorneys' fees provision of the Freedom of Information Act allows courts to make "interim" awards "in appropriate circumstances." Section 552(a)(4)(E) of the FOIA merely provides that a court may award "reasonable attorneys fees and other litigation costs reasonably incurred" in suits under the Act in which the complainant has "substantially prevailed." While noting that neither the literal language nor the legislative history mentions the possibility of an interim award in protracted litigation, the court finds that §552(a)(4)(E)'s policy of encouraging private persons to advance the goal of open government supports interim fees awards. But, because of the inefficiency of such a procedure, the court recommends that interim awards "be made only in those cases in which it is necessary to the continuance of litigation which has proven to be meritorious at the time of the application." Biberman v. FBI, 9/25/80.

Lawyer Advertising. Advertising by lawyers is reducing the cost of legal services to the consumer for routine legal matters, according to a study by the American Bar Association. The study, "Birth of a Salesman — Lawyer Advertising and Solicitation," by Lori Andrews, former staff director for the ABA Commission on Advertising, is the first nationwide analysis of the effect of advertising since the U.S. Supreme Court ruled in Bates v. State Bar of Arizona, 433 U.S. 350, 45 LW 4895 (1977), that lawyers could promote their services. The study reveals that the increased work load generated by lawyers' ads allows them to keep their legal fees at a minimum. In addition, consumers are "shopping around" more and now have the choice of buying at a lower price, the report states. 1980 Daily Report for Executives 204, A-5.

Civil Rights

Actionable Wrongs. A panel of the U.S. Court of Appeals for the Fifth Circuit recently held that the refusal of oil drillers to hire individuals who have filed personal injury claims in federal court against other companies in their industry gives rise to a damages action under 42 USC 1985(2) for redress of a conspiracy to injure parties for having "attended" or "testified" in federal court, 49 LW 2160. The en banc court has now vacated the panel opinion and granted rehearing on briefs without oral argument. Kimble v. McDuffy, 10/17/80.

Criminal Law and Procedure

Exclusionary Rule. Refusing to countenance a fraud on the courts, the U.S. Court of Appeals for the Seventh Circuit invokes its supervisory power to suppress illegally seized evidence, despite the defendants' failure to prove that the seizure violated their privacy expectations. In applying for a warrant for the search, an FBI agent deliberately misrepresented the strength of his probable cause; without these misrepresentations there was an insufficient basis for issuing the warrant. Franks v. Delaware, 438 U.S. 154, 46 LW 4869 (1978), requires the suppression of evidence seized pursuant to such a defective warrant, the court says, and the recent case of U.S. v. Payner, 48 LW 4829 (U.S. June 23, 1980), does not, in the present situation, stand in the way of an exercise of the court's supervisory power. While Payner overturned an exercise of the supervisory power to suppress evidence seized from a third party who was not before the court, the defendants in this case, while they did not prove violations of their individual privacy expectations, were nonetheless victims: the seized evidence was taken from the offices where they were employed. Suppression in this instance, the court says, serves to protect judicial integrity, an important function of the exclusionary rule, which is directly implicated by the fraudulent obtaining of a search warrant. U.S. v. Cortina, 9/11/80. 28 Criminal Law Reporter 2073.

Double Jeopardy. A state criminal defendant whose rampage took him through two counties persuades the U.S. District Court for the District of Delaware that his insanity-based acquittal by a jury in one of the counties barred his later trial by the other county on charges stemming from the same incident. The defendant assaulted and kidnapped his sister-in-law in New Castle County and raped her in Kent County, where a jury subsequently acquitted him of crimes occurring there. The collateral estoppel principles enunciated in Ashe v. Swenson, 397 U.S. 436 (1970), lead the court to hold that the Double Jeopardy Clause barred the New Castle trial. Ashe makes clear that a state may not try a defendant a second time once an ultimate fact — here insanity — has been resolved in his favor. Taylor v. Redman, 9/12/80. 28 CrL 2083.

Search and Seizure. As it condemns the warrantless search of a car incident to the arrest of its driver, the New Jersey Supreme Court sets forth guidelines strictly limiting such searches to the area of the car within the driver's immediate control at the time of his arrest. Courts should consider such factors as the number of police officers at the scene, their position and that of the arrestee in relation to the car, and whether the arrestee is under some form of restraint. These factors should help answer the central questions raised by the search of a car incident to its driver's arrest: "What places the person under arrest presently could reach at the time the arrest is undertaken and how likely it is he would attempt resistance or escape or destruction of evidence?" State v. Welch, 9/18/80. 28 CrL 2061.

Employment Discrimination

No Federal Preemption under ERISA. An employer seeking a declaratory judgment that the preemption by the Employee Retirement Income Security Act (ERISA) of all state laws relating to employee benefit plans precludes a union from suing the employer in state court over pregnancy disability benefits that allegedly violate state FEP laws has not stated a case of actual controversy, the U.S. District Court for the Eastern District of Michigan holds. The state statutes that were allegedly violated deal with civil rights principles that cannot be considered state laws relating to any employee benefit plan, the court says. Furthermore, although the employer is defending the state court action with its ERISA plan, the suit itself does not mention ERISA, the court points out. A declaratory judgment is also inappropriate under the enforcement provision of ERISA, the court says, since the employer is not seeking to enjoin an act or practice that violates the Act, but only to enjoin maintenance of the state court proceeding. General Motors Corp. v. UAW, 10/2/80. 23 Fair Employment Practice Cases 1769.

Counting Employees Under Title VII. A subsidiary corporation that is a separate entity from its two parent corporations will not be consolidated with them in order to meet the prerequisite of 15 employees of Title VII of the 1964 Civil Rights Act, the U.S. District Court for the Eastern District of Michigan holds. The subsidiary is not a sham corporation actually controlled by the parent corporations, it says. Congress intended the term "employer" to have its common dictionary meaning, the court notes, and employees generally consider their employer to be the company that owns and operates the physical plant and that manages the people and products.

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